

# What Democracy Looks Like

**A blueprint for an accountable,  
inclusive and ethical government**



CITIZENS FOR  
RESPONSIBILITY &  
ETHICS IN WASHINGTON

December 2020

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December 2020



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## Acknowledgements

We are extremely fortunate to work with outstanding colleagues who made enormous contributions to this report.

First and foremost, we would like to thank our policy intern, Elliot Raskin, who pitched in from start to finish, and without whose help we would never have completed a draft, much less a final report. We also wish to thank Chase Knechtel, Brian Zupruk, and Ourania Yancopoulos for their significant contributions to the project.

We are fortunate to have drawn on the work of a much larger brain trust at CREW, including Noah Bookbinder, Donald Sherman, Adam Rappaport, Robert Maguire, Matt Corley, Stuart McPhail, Laura Beckerman, and Nikhel Sus. This report would not have been possible without their substantive work and thoughtful comments.

We also drew on the ideas of many fantastic partners in the good government community as well as draft legislation that members of Congress and their staff have worked on for years. For each issue we discuss, we include a list of resources that we recommend consulting.

We are also deeply indebted to CREW's research team for fact checking this report. We would especially like to thank Robert Maguire, Walker Davis, Meredith Lerner, Eli Lee, Rebecca Jacobs, and Caitlin Moniz for their tireless efforts to ensure the accuracy of our work.

Last but not least, we would like to thank CREW's extraordinary communications team for their immeasurable contributions, especially Jordan Libowitz, Linnaea Honl-Stuenkel, and Miru Osuga. Without their remarkable work, dear reader, this report would not have found its way to you.

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**WELCOME *to* WHAT DEMOCRACY LOOKS LIKE**

# Introduction

**We need an accountable, inclusive, and ethical government in Washington. This report, *What Democracy Looks Like*, is CREW's blueprint for getting there.**

Our nation has arrived at a moment of enormous consequence. We have the opportunity to reimagine our democracy, to establish new expectations for public officials, to remake the institutions that preserve government by the people and for the people.

Opportunities like this are rare. Five decades have passed since our nation last engaged in a wholesale effort to ensure that our federal government acts in the public interest, better reflects the interests of the electorate, and restrains the worst impulses of our polity and our politicians.

Meaningful reform begins with a sober assessment of what we have gotten wrong. For the last four years we have witnessed the unraveling of government as we knew it. We now know that the norms of ethical and effective governance that were built up over the decades since President Richard Nixon were far weaker than we expected. We witnessed a systematic effort to use the powers of government to advance private interests. We witnessed abuses of power including the obstruction of investigations critical to our national security and efforts to leverage the government for electoral advantage.

But the imperative to repair our democracy is not merely a reaction to the last four years. It is the product of a decades-long corrosion of the guardrails of our democracy, and also of the systematic exclusion of many voices that has plagued our democracy since its founding. The last four years have demonstrated how corruption not only undermines the integrity of the executive, but also effectively blunts the intricate system of checks and balances that is the beating heart of our constitutional structure. As we engage in the hard work of repairing weak institutions, ensuring that our laws are enforceable, and addressing the enormous power imbalances between the branches of government, we must embrace collective responsibility for our government's flaws. We must also be guided by the core principle that government

exists to serve all of the people, not just the wealthy and powerful. To engage in the hard work of repairing our laws, norms, and institutions is not to relitigate the past—it is to fight for our collective future.

We reject the cynic's view that meaningful reform cannot occur in a time of partisan rancor or divided government. Delivering accountable, inclusive, and ethical government is not a partisan endeavor. There is no more opportune time than the end of one administration and the beginning of the next to acknowledge and address the need for change. The last time the United States engaged in a wholesale effort to restore our democracy was the fallout of President Nixon's criminal and corrupt administration. Yes, the post-Watergate reforms were premised on the acknowledgement that Nixon's administration had exposed weaknesses in our anticorruption and recordkeeping laws. But the impact of those laws was to constrain Nixon's successors, not Nixon himself.

We believe that government can be a force for good in the lives of Americans, as it has been many times in the past. Despite the overwhelming problems we have experienced in recent years, we believe it is our duty to rebuild the checks and balances, institutions, and legal regimes that allow government to work fairly and effectively for all Americans. We know that creating a government that uses public resources for the public good, that identifies potential conflicts of interests and proactively avoids them, that holds its officials accountable for unethical and unlawful behavior, and that operates transparently is no small task. The changes required to achieve those ends are both structural and specific, and they are needed in all three branches of our government.

The reforms we propose would be nothing short of transformative for our democracy. We begin in section 1 with a unique challenge in our constitutional system: reestablishing presidential accountability. That begins with reinforcing the core principle of our ethics system: wherever possible, we prevent public officials from even being in a position to make compromised decisions. Presidents must align their financial interests with the public interest. Presidential candidates must disclose detailed financial information, including tax returns, and if elected, they must divest assets that could lead to conflicts of interest. Financial interests are crucial, but personal and political motives can also corrupt a president's decisions: we need to replace norms with enforceable rules to prevent nepotism and misusing law enforcement for personal, political ends. We also need to ensure that the mechanisms for investigating potential criminal conduct by the president are harder for the president and his political allies to manipulate.

In section 2, we shift focus to bolstering external checks on executive power to ensure that it is not abused. Congress and the courts need to adjust to a world in which the executive branch adopts a maximalist approach to its prerogatives. We propose a series of reforms that would restore Congress's ability to conduct meaningful oversight, punish executive branch noncompliance with congressional investigations, and vindicate exercise of congressional prerogatives expeditiously in federal court. The goal of these proposals is not to embroil the president and Congress in endless conflict but rather to shift the balance of power back to a world in which the executive branch has serious incentives to cooperate with congressional requests rather than engage in obfuscation and delay until a new Congress is elected.

In section 3, we address a threat to our democracy that long predates President Donald Trump: the role of secret and corrupting influences in our government. A truly representative government requires the voices of our communities to be heard in elections and in the halls of power, not drowned out by wealthy special interests. We recommend changes that would reduce the corrupting influence of money in politics, including by imposing guardrails on



those types of campaign spending that are particularly likely to lead to corruption and by resurrecting the system that would enforce these rules, which has largely ceased to function. We propose to increase the influence of regular Americans and create a more inclusive donor class by multiplying the impact of small donors, diluting the influence of special interests. Similarly, we recommend adding teeth to lobbying rules that lack a real enforcement mechanism and leave another opening for monied interests to undermine the will of the people.

In section 4, we explore how to restore the executive branch ethics regime. We propose strengthening the institutions charged with establishing and enforcing ethics rules. We propose rebuilding the nonpartisan civil service, and enhancing protections for whistleblowers. And, critically, we propose that our government adopt a divestiture regime to ensure agency heads cannot use their public offices for private gain.

In section 5, we recognize the critical role of transparency and records preservation in bolstering executive branch accountability and rebuilding the public trust. We propose reforming our public information access laws by expanding the scope of records that agencies must proactively disclose. We propose bolstering mechanisms for enforcing federal recordkeeping laws. And we propose restricting the government's abuse of exemptions and privilege to withhold from public scrutiny information that could be politically harmful or embarrassing.

In section 6, we advocate that Congress establish a comprehensive ethics regime for itself. We propose sweeping improvements, such as creating an independent Senate ethics office, requiring members to divest assets that are likely to create conflicts of interest, and precluding members holding outside positions that could create conflicts. We propose subjecting Congress to recordkeeping and transparency requirements, including a requirement that they proactively disclose who is seeking to influence members and their staffs.

In section 7, we call for significant reforms to judicial ethics. We propose creating a single judicial ethics body that is charged with promulgating and enforcing judicial ethics requirements, expanding the disclosures that jurists must make about potential conflicts of interest, and applying ethics rules to every federal court—including the Supreme Court. And we propose bolstering public access to court proceedings and documents.

In section 8, we take a different tack. Acknowledging that the reforms laid out in sections 1 through 7 could prove insufficient to fully achieve an accountable, inclusive, and ethical government, we propose several structural reforms that could deliver lasting benefits to the strength of our institutions and to the vitality of our democracy. We address fundamental threats: our failure to ensure that every American can fully participate in our democracy; the anti-democratic way that votes translate to power; the crisis of legitimacy facing the judiciary; and decades of Supreme Court decisions that imperiled Congress's ability to combat public corruption.

This package of reforms is undoubtedly ambitious, but its scale is proportionate to the need and congruous with the historical moment. Like generations before us, we have an opportunity to build a more perfect union. It is time to get to work.

**This is What Democracy Looks Like.**

## SECTION 1 *of* WHAT DEMOCRACY LOOKS LIKE

# Holding Presidents Accountable

**In recent years, the executive branch has grown more powerful and less accountable than ever before.** This unprecedented shift in the balance distribution between the branches of government has suppressed the ability to check that power. In this section we identify specific areas of executive overreach, and provide suggestions for measures that would mitigate that overreach.

In many cases, the overreach represents a failure of self-restraint; before the Trump Administration, many norms—or behavioral expectations—had largely, if imperfectly, held executive power in check. But these same norms have spectacularly failed throughout the Trump Administration, exposing their weakness. Although it is neither possible nor desirable to convert every norm into law, we believe that key weaknesses must be addressed.

The issues we have identified fall within five main categories of failures to ensure presidential accountability: the system fails to prevent presidential financial conflicts of interest, it fails to prevent excessive presidential interference in impartial law enforcement, it fails to prevent nepotism, it fails to hold the president accountable for clear misconduct, and it fails to prevent the president from undermining the judicial system.

Our solutions will ensure the White House is staffed with well-suited professionals who protect our nation's interests; that personal financial interests are prevented from undermining the American people; and that presidential interference cannot unduly influence enforcement of law and the judicial process. These changes will improve both public confidence and internal mechanisms that hold presidents accountable for serious misconduct.

We acknowledge that these changes alone are not sufficient; other branches must have the capability to act as a check, and the reforms described here alone will not ensure that. Independent, smoothly-functioning courts and a capable, ethical Congress are also necessary steps towards this goal; we address additional checks on executive power in section 2 of this report.

## Issue 1: Nondisclosure of financial interests and tax returns

Without a clear understanding of a person's financial interests, it is impossible to know what conflicts those interests might present. For this reason, presidential and vice-presidential candidates, like others seeking federal office, [are required](#) to file summary public financial disclosures. This is also one reason why [every major party presidential candidate](#) since President Richard Nixon has released at least some tax return information. President Donald Trump ended this tradition, refusing to release his tax return information; this proved to be the first in [a number of steps](#) he would take to fight the release of any financial records beyond his required summary financial disclosure. This has left the public unable to know whether decisions he makes as president are in the public interest or in his own financial interest.

Investigative journalists have tried to fill in these gaps. In 2020, the New York Times [obtained](#) several decades' worth of Trump's tax information, including his personal returns and those of the businesses he owns. One example of the need for both the required summary financial disclosures and tax returns is clear from the Times's reporting: "[i]n 2018, for example, Mr. Trump announced in his disclosure that he had made at least \$434.9 million. The tax records deliver a very different portrait of his bottom line: \$47.4 million in losses." The Times's reporting also put a price tag on President Trump's income from foreign countries; in his first two years in office, he received \$73 million of his income from overseas. According to the Times, some of that money "came from licensing deals in countries with authoritarian-leaning leaders or thorny geopolitics—for example, \$3 million from the Philippines, \$2.3 million from India and \$1 million from Turkey." When Trump [tried to intervene](#) to prevent a Turkish bank from being charged by the Department of Justice for illegally lending to Iran, was he motivated by the country's national interest or his own financial interest? If we didn't know about his personal financial interest, we might not even know to ask.

Trump has demonstrated that financial interests are not just things one possesses, like stocks or business interests; owing money can also be a potential conflict of interest. A president's required summary financial disclosure does not necessarily tell the full story of debts and other financial obligations. Forbes, for example, identified [two loans](#) that did not appear on Trump's summary financial disclosure at all, and estimated their value at \$447 million. When he took office, Trump owed more than [\\$350 million dollars](#) to [Deutsche Bank](#), which holds the mortgages of several Trump properties, including his Trump International Hotel in Washington, DC. Deutsche Bank has failed to monitor and report suspicious financial activity in President Trump's and his son-in-law Jared Kushner's accounts, resulting in [federal investigations](#) of the bank. But Trump, as the president of the United States, has power over how his administration regulates a bank that he does business with. And in this case, Deutsche Bank has so far consistently refused to hand over documents about [President Trump's finances](#).

### Solutions

- **Congress should require presidential and vice presidential candidates to release more comprehensive financial disclosures, including tax returns.** The public must be able to see a true picture of the candidate's financial situation; this should be done by requiring disclosure of tax returns and by modifying candidate financial disclosure forms. In addition to requiring greater specificity in amounts for information currently

disclosed, the financial disclosure forms must require beneficial ownership information for business partners and information about the actual holders of debt and terms of repayment.

- **Congress should require presidential and vice presidential candidates to disclose a detailed plan to address actual and potential financial conflicts of interest if elected.** The plan should include how they plan to divest from conflicting assets. If candidates intend to use a blind trust mechanism, they must be required to obtain preliminary approval from the Office of Government Ethics of the proposed trust instrument within 30 days of accepting their party's nomination.
- **Congress should close loopholes in disclosure requirements for elected candidates.** Once in office, the president and vice president must be required to demonstrate they have followed through on their plans. A loophole in current law could permit a president or vice president to wait more than a calendar year to file another financial disclosure form; although recent officeholders, including President Trump, have voluntarily filed sooner—that loophole should be closed.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 8011 et seq. (116th Congress, 2019).

Rep. Gallego's [CORRUPT Act](#), H.R.1524 (116th Congress, 2019).

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

Sen. Warren's [Presidential Conflicts of Interest Act of 2019](#), S. 882 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

[Testimony of Noah Bookbinder](#), *House Committee on Ways & Means: Oversight Subcommittee*, February 7, 2020.

## Issue 2: Failures to divest financial interests that create conflicts of interest

The goal of federal conflict-of-interest laws and regulations is to prevent federal employees' personal financial interests from impacting their official duties. Most of these federal laws are applicable to all executive branch employees except the president and vice president. This exemption has recently come to a head as President Donald Trump is the first president in modern history to retain full ownership of businesses while in office. He has failed to align his personal financial interests with the public interest, and in doing so, has highlighted the urgency for reform and enforcement.

The main federal conflict-of-interest law, [18 U.S.C. § 208\(a\)](#), legally bars all other federal employees from participating in government work that may substantially and directly affect their financial interests—including those of their spouses. Federal employees and officers have complied with the law in one of three ways: (1) recusing themselves from a part of their government work, (2) obtaining a waiver to work on a conflicting matter from ethics officials within their agency, or (3) divesting the financial interest responsible for the conflict.

For obvious reasons, presidents and vice presidents are unable to recuse themselves from a part of their work or obtain a waiver from an ethics officer. But [modern presidents](#) of both parties have voluntarily adhered to ethical norms and traditions by selling or divesting their financial interests that presented risks of corruption, and then limiting their holdings to non-conflicting assets like U.S. Treasuries and diversified mutual funds.

President Trump's decision to not divest from his business interests created [thousands](#) of conflicts of interest. Some of these include the Trump Organization's lease with the federal government to [operate a hotel](#) in the Old Post Office building in Washington, DC, [business dealings](#) in Panama and other countries, [foreign trademarks](#), [debt obligations](#), and [temporary visas](#) for foreign persons to work at Trump-owned properties and companies. These conflicts create a twofold problem. One, the government that Trump heads can enact policies that can [benefit his own bottom line](#), and two, outsiders—including [foreign countries](#) and [special interests](#)—can use these conflicts to buy influence.

This outcome was made possible by a lack of legislation or oversight, and the absence of an ethics agency with enforcement capabilities. It is time to require presidents and vice presidents to divest from conflicting assets and to strengthen the Office of Government Ethics (OGE) so that it can inform Congress if a president or vice president fails to sufficiently avoid financial conflicts of interest.

### Solutions

- **Congress should require presidents and vice presidents to divest all assets that might present a conflict of interest within 30 days of taking the oath of office, whether by placing the assets in a blind trust to be sold by an independent trustee, or by some other mechanism such as an arms length transaction.** Presidents and vice presidents must align their financial interests with those of the country. Funds that are independently managed, widely held, and either publicly traded or available, or

widely diversified, are appropriate investments, among other things like U.S. Treasuries and non-commercial real estate.

- **Congress should empower the Office of Government Ethics to oversee the divestment process.** The OGE, which is experienced in ensuring that other executive branch officials address financial conflicts of interest, including via divestiture, should oversee the process. All candidates for president and vice president are already required by law to publish a plan for how they will address their financial conflicts of interest; the OGE can help ensure that the plan is sufficient and properly implemented.
- **Congress should empower the Office of Government Ethics to ensure the president and vice president's compliance with divestiture.** Ultimately, our system of checks and balances requires that Congress play an active role in ensuring that presidents and vice presidents comply with this requirement. In the beginning of an administration, the OGE should report to Congress regarding whether the president and vice president have complied; similarly, when the president and vice president file annual financial disclosures during their terms, the OGE should report to Congress whether the president and vice president remain in compliance.

## Resources

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

Sen. Warren's [Presidential Conflicts of Interest Act of 2019](#), S. 882 (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.

## Issue 3: Inability to enforce the Emoluments Clauses

By continuing to own his businesses while in office and, through them, accepting payments from foreign and domestic governments, President Donald Trump has violated the Foreign and Domestic Emoluments Clauses. Particularly if presidents are not forced by law to divest these types of financial interests in the future (though we recommend they be), President Trump's continued violations of the Constitution have demonstrated a need for a more robust system to enforce these key [anti-corruption](#) provisions.

The Framers included the Emoluments Clauses in the Constitution to keep the president's loyalty with the American people by preventing him from being improperly influenced by foreign and domestic governments. The Foreign Emoluments Clause [prohibits](#) federal officers from accepting any benefit, gain, or advantage from any foreign power or official without congressional approval. The Domestic Emoluments Clause [prohibits](#) the president from accepting any benefit, gain, or advantage (other than the pre-set salary and benefits) from the federal or state governments. Both clauses are intended to foreclose improper efforts to influence the president (and, in the case of the Foreign Emoluments Clause, other federal officials).

President Trump's failure to divest from his businesses has resulted in his unconstitutional acceptance of foreign and domestic emoluments. For example, in the first three months of 2018, revenue from room rentals at the Trump International Hotel and Tower in New York City went up 13 percent [thanks to](#) "a last-minute visit to New York by the Crown Prince of Saudi Arabia," whose entourage stayed at the hotel. Their spending put the hotel in the black for the quarter, after two years of decline. Recent [reporting](#) from the Washington Post also reveals that Trump's properties, where he often chooses to host events, have billed taxpayers at least \$2.5 million.

Efforts to enforce the Foreign and Domestic Emoluments clauses via lawsuits—including two in which CREW represents the plaintiffs—have moved through the courts, but are unlikely to be resolved in time to prevent substantial harm from Trump's acceptance of unconstitutional emoluments. Congress needs to institute proactive measures to prevent violations of the Emoluments Clauses from occurring and to increase the likelihood of sanctions if they do.

### Solutions

- **Congress should require presidents and vice presidents to divest all assets that might present a conflict of interest within 30 days of taking the oath of office, whether by placing the assets in a blind trust to be sold by an independent trustee, or by some other mechanism such as sale through an arms length transaction.** The best way to prevent unconstitutional emoluments is for the president to divest financial holdings that could be vehicles for the receipt of emoluments before entering office. Domestic and foreign governments seeking influence in American politics will inevitably try to patronize businesses from which the president and vice president continue to profit. Divestiture is the best form of protection against that dynamic.
- **Congress should create a cause of action that would permit entities who may have standing, such as the United States attorney general, state attorneys general, a**



**house of Congress, and private citizens to enforce the divestiture requirement and Emoluments Clauses in federal court.** An explicit cause of action available to a diverse set of prospective litigants can increase the potential for enforcement and will help deter unlawful action by the president or vice president, even in circumstances where Congress is controlled by the same party as the White House. An extended statute of limitations for such causes of action would also be useful.

- **Congress should amend 18 U.S.C. § 431 to void contracts between federal agencies and the president, vice president, senior White House staff, and cabinet members as well as businesses they control.** Existing law already voids contracts between federal agencies and members of Congress. That law should be expanded to include senior executive branch officials and to include businesses that either members of Congress or executive branch officials control—another strong incentive for officials to divest.

## Resources

Sen. Warren and Rep. Jayapal's [Anti-Corruption and Public Integrity Act](#), S. 3357, § 112 et seq. (115th Congress, 2018).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 301 et seq. (116th Congress, 2020).

[Trump Proofing the Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

Norman L. Eisen, et al., [The Emoluments Clause: Its Text, Meaning, And Application to Donald J. Trump](#), *Governance Studies at Brookings*, December 16, 2016.

Richard Painter, [Good Governance Paper No. 15: Enforcing the Emoluments Clauses](#), *Just Security*, October 30, 2020.

Karl A. Racine and Elizabeth Wilkins, [Enforcing the Anti-Corruption Provisions of the Constitution](#), *Harvard Law & Policy Review*.



## Issue 4: Corrupt attempts to influence federal law enforcement

Politicization—or, in extreme cases, personal control—of law enforcement is a hallmark of authoritarian regimes. Presidents of both parties have historically recognized that protecting even handed enforcement is critical to the rule of law and democracy. As a result, past presidents have exercised self-restraint while adopting procedural guard rails to reinforce their own restraint. In general, these guard rails have taken the form of “contacts policies” that (1) limit communications between the White House and law enforcement officials to certain approved topics; (2) route those communications generally through senior lawyers on both sides, to avoid improper influence or the appearance of a thumb on the scale; and (3) limit public comments about ongoing investigations or cases. The weakness in these policies is obvious: they rely largely on self-enforcement.

President Donald Trump’s conduct in office has demonstrated that he and his administration are not committed to these forms of self-restraint. For example, less than a month after taking office, then-White House Chief of Staff Reince Priebus reportedly [directly requested](#) that then-Federal Bureau of Investigation (FBI) Deputy Director Andrew McCabe and then-FBI Director James Comey publicly disavow reporting about Trump campaign officials’ contacts with Russia. When the FBI refused, the Trump Administration [persuaded officials from the intelligence community](#) to tell reporters off the record that previously reported contacts were not “frequent” but instead “sporadic.” These unprecedented efforts from the early days of the Trump Administration—three months before Special Counsel Robert Mueller was appointed—demonstrate how easily self-restraint fails in the absence of procedural guardrails.

President Trump has also consistently used his public platform, including White House press availabilities, media interviews, and social media, to make statements about pending investigations, cases, witnesses, judges and jurors, particularly when the matters involve him or his associates. For example, the Department of Justice (DOJ) recently sought an unprecedented [dismissal](#) of criminal charges against former National Security Advisor Michael Flynn, after he [pleaded guilty](#) to lying to federal investigators; this move comes after a [torrent](#) of public statements by Trump criticizing the investigators who worked on Flynn’s case. Trump also publicly [criticized](#) the recommendation of career DOJ prosecutors in the case of his associate Roger Stone; at the eleventh hour, Attorney General William Barr [overruled](#) this recommendation, leading the career prosecutors to withdraw from the case. Trump then [praised](#) Barr, closing the corrupt loop.

In some cases, Trump’s statements have merely been inappropriate given his position and authority; in other cases, they may have crossed the line into criminal witness tampering or other types of obstruction of justice.

The risk of politicization of law enforcement will not spontaneously evaporate without reform. Preventing this in our system can be challenging because the executive power vested in the president includes important law enforcement functions, including appointing senior law enforcement officers with the consent of the Senate. That dynamic, combined with President Trump’s actions, necessitates change now more than ever.

## Solutions

- **The White House should set rules for who can discuss specific cases with agencies like the Department of Justice, and publish them.** While measures that would limit the exercise of the president's authority as head of the executive branch would be unwise, the public should know what steps the White House and executive branch agencies are taking to prevent improper political pressure.
- **Congress should require law enforcement agencies to log enforcement-related communications with any White House officials or members of Congress.** Each agency's inspector general should periodically review those logs and report potentially problematic interactions to Congress.
- **Presidents should speak with care and avoid public statements that appear to denigrate or interfere with the justice system.** Presidents should avail themselves of a communications team that can help them avoid unintentional issuance of such statements, and put in place internal policies to facilitate this practice.

## Resources

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 601 et seq. (116th Congress, 2020).

Sen. Whitehouse and Rep. Jeffries' [Security from Political Interference in Justice Act of 2019](#), S. 1915 (116th Congress, 2019).

[The Security From Political Interference In Justice Act of 2007](#), S. Rept. 110-203 (110th Congress, 2007).

Justin Florence, [On the Importance of Limiting White House-DOJ Contacts: It's Not Just About Obstruction](#), *Lawfare*, May 22, 2017.

Barry H. Berke, et al., [Presidential Obstruction of Justice: The Case of Donald J. Trump: 2nd Edition](#), *Governance Studies at Brookings*, August 22, 2018.

Preet Bharara, et al., [Proposals for Reform](#), *Brennan Center for Justice: National Task Force on Rule of Law & Democracy*, October 2, 2018.

[In His Own Words: The President's Attacks on the Courts](#), *Brennan Center for Justice*, February 14, 2020.

James E. Baker, [Good Governance Paper No. 21: Obedience to Orders, Lawful Orders, and the Military's Constitutional Compact](#), *Just Security*, November 2, 2020.

## Issue 5: Department of Justice participation in the president's personal legal cases

The rule of law is threatened when a president injects personal or political imperatives into the Department of Justice's (DOJ) neutral enforcement of the law. Even more, the rule of law is threatened when the DOJ is drawn into a president's personal legal issues; the DOJ risks becoming more the president's personal law firm than the American people's legal representatives. Not every instance of DOJ involvement in a case involving the president's personal conduct is necessarily problematic; the DOJ has traditionally had a role in some of these legal proceedings when a case also involves the president's official conduct or when it genuinely threatens the president's ability to fulfill his constitutional responsibilities.

The extent of the involvement and the relationship of the involvement to the president's official duties are key factors. Recent cases are instructive: in [two cases](#) involving subpoenas to outside parties seeking information regarding President Donald Trump's personal financial and business dealings, President Trump was represented by personal attorneys, but the DOJ participated as an "[amicus](#)," filing briefs in the cases expressing the views of the DOJ. In one of these two cases, in fact, the court [requested](#) the DOJ's participation. Contrast this with the DOJ's approach in another case, a civil suit filed by E. Jean Carroll alleging defamation by President Trump. In that case, the DOJ attempted to intervene to take over the case from the private attorneys representing President Trump. Federal law permits the DOJ to defend federal officials when they are sued for actions taken in the scope of their employment; however, in the Carroll case the judge [rejected](#) the DOJ's [assertion](#) that the statement in question (denying a rape that allegedly occurred decades before he took office) is in fact within the scope of President Trump's employment. Also troubling is the [timing](#) of the DOJ's decision to intervene (only after the judge in the case had ordered discovery to begin, and in the runup to the 2020 presidential election).

### Solutions

- **If the Department of Justice is considering voluntarily intervening in a civil suit on behalf of the president or vice president, it should appoint a special counsel to make that determination.** The special counsel process allows for increased oversight of decisions that could be improperly influenced by political considerations.
- **The Department of Justice should retain all records of contact with the White House and the president or vice president's outside counsel in such matters, if any.** Effective oversight of decisions that could be improperly influenced by political considerations requires scrupulous recordkeeping, and the DOJ should ensure that its policies are sufficient to permit oversight in these types of cases.

### Resources

Carlos Manuel Vázquez and Stephen I. Vladeck, [State Law, the Westfall Act, and the Nature of the Bivens Question](#), *Georgetown University Law Center*, 2013.

Daphna Renan, [Mazars, Vance and the President's Two Bodies](#), *Lawfare*, July 22, 2020.

Chiméne Keitner and Steve Vladeck, [All the President's Lawsuits: Fraud, Defamation, and the Westfall Act](#), *Just Security*, September 25, 2020.

## Issue 6: Nepotism in the White House

Congress's enactment of the federal anti-nepotism statute, [5 U.S.C. § 3110](#), represented an effort to eliminate executive branch members' ability to hire close relatives in official positions. Presidents John Adams, Woodrow Wilson, Ulysses Grant, and others had hired [relatives](#) in their administrations, which led to ethics and accountability problems. Notably, President Grant hired more than 40 relatives, many of whom directly profited from their positions, yet remained in office due to the protection of Grant.

The appointment of family members in an administration is problematic for [several reasons](#): they may not be held to the standards of other employees because they will be seen as unfireable, they may be unqualified for the job or given responsibilities outside of their qualifications or authority, and they can undermine management structures because they have a special relationship with the president.

Since its enactment, the anti-nepotism statute has rarely been defied [until Donald Trump's presidency](#). President Trump explicitly ignored the anti-nepotism law by appointing his daughter Ivanka Trump and his son-in-law Jared Kushner as White House advisers. Although the anti-nepotism statute explicitly uses the president as an example of a public official and specifically defines "son-in-law" and "daughter" as relatives, the Department of Justice's (DOJ) Office of Legal Counsel (OLC) nevertheless [concluded](#) that President Trump could hire both of them. OLC contradicted its own prior opinions and determined that the President has constitutional authority to fill White House positions "without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

President Trump's circumvention of the anti-nepotism statute has proven to be an ethics nightmare. Ivanka Trump and Jared Kushner have had free reign to ignore rules and restraints that ordinary executive branch employees would have to follow—the precise outcome that anti-nepotism laws are [intended](#) to prevent. For example, although ethics officials [concluded](#) that it was necessary for Kushner to divest a financial interest in order to do his job at the White House, he does not [appear](#) to have done so. Ivanka Trump [participated](#) in the implementation of a new tax law that directly benefited her and Kushner financially.

Kushner is also a prime example of the risk that nepotism hiring gives jobs to unqualified people who, predictably, do not succeed. In 2020, Kushner [reportedly](#) set up a "shadow task force" to address aspects of the federal government's response to the COVID-19 pandemic. However, the efforts were reportedly undermined by [inexperience](#), [partisan political concerns](#), and [incompetence](#), leaving the country's pandemic response to the largely uncoordinated efforts of state and local officials.

To protect against corruption and the other implications of nepotism in democracy, it has become evident that the anti-nepotism statute must be updated in order to remove the ambiguity entirely.

### Solutions

- **Congress should amend nepotism laws to make clear that they apply to the**

**president and vice president.** Qualifications, not family connections, should determine who serves in important government roles. Presidents and vice presidents should be held to the same standards as all other executive branch officials—they should not be able to hire close family members. Until the statute is clarified, presidents and vice presidents should choose not to violate it, and the DOJ should rescind its contrary legal opinion.

- **Federal procurement law should be amended to ensure that immediate family members of the president or vice president cannot hold or benefit from any government contract.** This is an important backstop against the president or vice president profiting from their office, as it can be implemented and enforced even if the president and vice president and their families refuse to distance themselves from government business.

## Resources

Rep. Speier’s [RIGHT Act of 2019](#), H.R. 1028 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan For Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

[Nepotism and Conflicts of Interest — Jared Kushner and Ivanka Trump](#), *CREW*, April 25, 2017.

Daniel L. Koffsky, [Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office](#), *Department of Justice: Office of Legal Counsel*, January 20, 2017.

## Issue 7: Security vulnerabilities of incoming officials

The circumstances of a presidential transition place unique strains on the vetting process. The handling of sensitive matters addressed at the highest levels of the executive branch need to be handed off to an entirely new set of senior advisors and other officials without delay. And yet, we need to ensure that those who are given access to the nation's most sensitive information do not pose national security risks.

The beginning of the Trump Administration demonstrated some of these challenges. For example, a year after President Donald Trump was elected, [“more than 130 political appointees working in the Executive Office of the President did not have permanent security clearances,”](#) and were instead still operating under “interim” clearances based on only minimal investigations. Of those political appointees, 34 had been working at the White House since day one. The group included very senior officials, such as then-White House Counsel Don McGahn, and 10 of the 24 individuals who worked on the National Security Council.

Even more troubling is the case of Michael Flynn, President Trump's first national security adviser. Less than a month after President Trump took office, Flynn [resigned](#) after it was reported that he lied about a phone conversation he had in December 2016 with Russia's ambassador to the United States. Ultimately, he [pleaded guilty](#) to lying to the Federal Bureau of Investigation about this call, although the Department of Justice (DOJ) is now seeking to [dismiss](#) the case before he is sentenced (the dismissal appears to be politically motivated and implicates political interference in the DOJ). In that same case, he also [pleaded guilty](#) to falsifying disclosures to the DOJ to cover up the fact that he was doing work on behalf of the Turkish government in the fall of 2016, including publishing an op-ed under his own name that was in fact directed by the Turkish government.

While a new president needs to be able to quickly put together a staff to advise him, particularly in the national security realm, basic security protocols to protect classified information are a minimum guardrail.

### Solutions

- **Congress should require the White House to provide concrete updates about the status of interim security clearances and about the frequency with which the president overrules career staff recommendations to grant a security clearance.** Interim security clearances cannot be an effective substitute for permanent security clearances for White House officials. The White House should regularly report to appropriate congressional committees on the status of security clearances for those who need them so that Congress can ensure the interim status is not being abused. Similarly, career staff determine that a White House official should not receive a security clearance, and the president overrules this decision, the White House should notify Congress.
- **Congress should preclude special treatment of the president's family; security clearance determinations should not be affected by nepotism.** The law defining security clearances, 50 U.S.C. § 3341, should clarify that immediate family members

of the president should not gain interim or full security clearance if not otherwise qualified.

## Resources

Rep. Lieu's [CLEARANCES Act](#), H.R. 538 (116th Congress, 2019).

Rep. Espaillat's [JARED Security Clearance Act of 2019](#), H.R. 1187 (116th Congress, 2019).

Sen. Warren and Rep Cummings's [Transition Team Ethics Improvement Act](#), S. 338 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018.

Samantha Vinograd, [Why the White House "System" for Security Clearances is an Intelligence Emergency](#), *Just Security*, February 12, 2018.

Dakota S. Rudesill and Rolf Mowatt-Larsen, [Good Governance Paper No. 22: Preventing Politicization of the Security Clearance System](#), *Just Security*, November 2, 2020.



## Issue 8: Weakness of the Department of Justice's special counsel regulations

After President Donald Trump fired Federal Bureau of Investigation Director James Comey in May 2017, Special Counsel Robert Mueller was [appointed](#) to lead the investigation into potential Russian coordination with the Trump campaign, foreign interference in the 2016 election, and obstruction of justice.

In the ensuing months, the investigation was dogged by [repeated presidential](#) interference attempts. On multiple occasions, President Trump pressured Attorney General Jeff Sessions to revoke his recusal from the investigation or asked his subordinates to fire or curtail Special Counsel Mueller's authority. President Trump ultimately fired Sessions and later appointed William Barr, who had penned a detailed [memorandum](#) arguing that the obstruction of justice case against President Trump was flawed and shared it with Trump's personal lawyers and White House Counsel as well as Department of Justice (DOJ) officials.

After his appointment, Barr assumed responsibility for overseeing Special Counsel Mueller's investigation despite previously expressing views about the case. When Special Counsel Mueller submitted a report detailing his prosecution and declination decisions, Attorney General Barr subverted that work by issuing a four-page [letter](#) purporting to disclose Mueller's principal findings. However, Special Counsel Mueller [wrote](#) three days later that Barr's letter "did not fully capture the context, nature, and substance" of the report and led to "public confusion about critical aspects of the results" of the investigation, which "threaten[ed] to undermine a central purpose for which the Department appointed the Special Counsel: to assure full public confidence in the outcome of the investigations." Attorney General Barr eventually released a redacted version of the report that contained [damning evidence](#) that President Trump had obstructed justice and [likely would have been indicted](#) were he not protected by a DOJ opinion that sitting presidents cannot be indicted.

Special counsel regulations must be strengthened to eliminate opportunities for interference in investigations like the kind of habitual obstruction of justice carried out by the Trump Administration. The American public deserves to receive unaltered, thorough information from an independent special counsel.

### Solutions

- **Congress should codify the special counsel's authority so that it cannot be changed mid-course by an attorney general.** The legal authority governing the special counsel, 28 C.F.R. § 600.1 et seq., is a DOJ regulation that could be altered or withdrawn by the attorney general. Congress should enshrine the special counsel's authority in statute to protect that authority from being withdrawn or changed during an investigation.
- **Congress should require that credible allegations of criminal conduct involving the president, vice president, and their campaigns be investigated by a special counsel.** Section 600.1 of the existing special counsel regulation lays out vague grounds for appointing a special counsel: when a criminal investigation of a person or matter is warranted and that investigation "would present a conflict of interest

for the Department or other extraordinary circumstances” and “[t]hat under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.” Because those circumstances exist whenever the DOJ investigates potential criminal conduct by presidents, vice presidents, and their campaigns, the new statute should require appointment of a special counsel to handle those investigations. If the attorney general receives a referral from Congress alleging criminal conduct by the president, vice president, their campaign, cabinet members, or senior White House officials, but does not appoint a special counsel (for example, because he decides no criminal investigation is warranted), he should be required to explain the basis for this decision in writing to the referring member or members and to the judiciary committees of the House and the Senate.

- **Congress should establish a process for expedited judicial review of any firing of the special counsel by the president or a political appointee and provide for the continuity of the special counsel office while that review is pending.** A president and his political appointees should not be permitted to terminate the special counsel for reasons other than those laid out in 28 C.F.R. § 600.7: “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.” The United States District Court for the District of Columbia should be given jurisdiction to hear an expedited legal challenge to a special counsel’s termination, and the United States Supreme Court should be given jurisdiction to hear a direct appeal.
- **Congress should provide the special counsel with authority to disclose to Congress a report on the prosecution and declination decisions without the prior approval of the attorney general, including the results of any investigation into persons that the Department of Justice has determined cannot be indicted while they are in office.** In cases where the DOJ has determined an individual cannot be indicted while in office, impeachment by Congress is the only available check on that person’s abuse of power. For those reasons, the special counsel should be entitled to disclose the results of an investigation of presidential misconduct to Congress without the prior approval of the attorney general.
- **Congress should ensure that it has access to the special counsel’s investigative findings.** Congress must be able to use the work of the special counsel in its oversight of the executive branch. Notwithstanding any DOJ policy, the special counsel statute should explicitly authorize the special counsel to brief House and Senate Judiciary committees in closed session about any pending matter. It also should require the special counsel to testify before Congress in closed or open session with respect to any matter in which the special counsel has reached a prosecution or non-prosecution decision.

## Resources

Sen. Graham and Rep. Nadler’s [Special Counsel Independence and Integrity Act](#), S. 2644 (115th Congress, 2018).

Sen. Blumenthal and Rep. Doggett’s [Special Counsel Transparency Act](#), S. 236 (116th Congress, 2019).

Andrew Weissmann, [Good Governance Paper No. 3: Investigating a President, Just Security](#), October 15, 2020.

## Issue 9: A sitting president's immunity from prosecution under Department of Justice policy

The Department of Justice (DOJ) has a longstanding [policy](#) that presidents may not be indicted while in office. The DOJ believes that prosecuting a president would impermissibly interfere with the president's ability to execute official duties. While there are constitutional and prudential grounds to question such an assertion, the DOJ would still be unlikely to indict a sitting president even without a written policy. Such a prosecution might be perceived by a president's supporters as an effort to supplant voters' preferences. Accordingly, it is important to examine the consequences of such a policy—whether written or unwritten—and to mitigate its negative consequences as much as possible.

Special Counsel Robert Mueller's investigation of Russian interference in the 2016 election and of President Donald Trump's obstruction of the matter demonstrates the substantial effects of such a policy on investigations themselves. For example, while Special Counsel Mueller asked [written questions](#) of President Trump during his investigation, he did not follow up on the answers that were not fully responsive or even those that appeared to have contained misstatements. In no other circumstance would an investigator simply accept statements like this from the subject of a criminal investigation.

When it came time to issue a report, Special Counsel Mueller was unable to present the investigation's findings in a way that made clear to the public what happened—because to do so would mean stating that President Trump likely obstructed justice, which Mueller felt he could not say because he could not indict the President while in office.

Additionally, if a president may not be indicted while in office because it would interfere with his or her duties, that reasoning would not extend to prohibit indictment after he or she leaves office. However, if the statute of limitations on the offenses continue to run while the president is in office, the DOJ's policy could mean that a prosecution afterwards would be too late.

### Solutions

- **In circumstances where the rule against indicting a president plays a role in any prosecutorial or investigative decision, all relevant information must be available to Congress.** While considerations such as grand jury secrecy and potential harm to other ongoing investigations may necessitate limits on public access to this information, they should pose no bar to congressional access in these situations. The need for Congress to have this information in its role as the exclusive holder of impeachment authority outweighs the need for secrecy, and the law must say so clearly.
- **If called as a witness in an impeachment inquiry or an impeachment trial, a special counsel who investigated a relevant matter must be permitted to opine publicly on whether the person being impeached committed a crime.** While there are good reasons for the DOJ's strict policy against making these kinds of public statements when it is not bringing charges in ordinary cases, the circumstances of an impeachment are unique. Due to the nature of an impeachment, the matter will be significant, the person being impeached will have an opportunity to respond formally

and the matter will be resolved in a timely way. In these circumstances, Congress and the public must have access to the considered views of the special counsel, whatever they may be.

- **Congress should provide that statutes of limitations stop running while a president is in office, as the current Department of Justice policy allows presidents to run out the clock on criminal liability.** Regardless of whether the conduct occurred before or during a president's term in office, the president should not be able to avoid prosecution entirely simply because the statute of limitations expires while in office. Similar to a situation in which a person skips out on bail, the statute of limitations should stop running (be "tolled") for the duration of the president's term in office.

## Resources

Sen. Blumenthal and Rep. Nadler's [No President is Above the Law Act](#), S. 1756 (116th Congress, 2019).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 202 et seq. (116th Congress, 2020).

Amanda Lineberry and Chuck Rosenberg, [Equitable Tolling and the Prosecution of a President](#), *Lawfare*, April 17, 2019.

Joshua A. Geltzer, [How Do We Keep a Criminal President From Running Out the Clock? One Possible Solution.](#), *Slate*, May 14, 2019.

Andrew Weissmann, [Good Governance Paper No. 3: Investigating a President](#), *Just Security*, October 15, 2020.

## Issue 10: Successful obstruction of criminal investigations

In 1974, the Supreme Court [required](#) President Richard Nixon to turn over tapes and documents in Congress's impeachment investigation. In 1998, the Supreme Court [required](#) President Bill Clinton to testify in a civil case; in so doing, the Court emphasized that sitting presidents have often responded to court orders for information back to the early 1800s. In that same year, Independent Counsel Kenneth Starr issued a subpoena to President Clinton in the Whitewater investigation, which led to President Clinton [agreeing](#) to an interview; that interview was ultimately a critical part of his impeachment.

Special Counsel Robert Mueller's team took a different approach to seeking information from President Donald Trump in its investigation. After a reportedly long period of negotiations, Special Counsel Mueller submitted written questions to President Trump's legal team, and President Trump [responded in writing](#). However, Special Counsel Mueller's team, citing "[the inadequacy of the written format](#)" and the lack of specificity in Trump's answers, asked for a follow up interview. A brief review of the questions and answers, which are reproduced in Special Counsel Mueller's report, makes the inadequacy of these answers abundantly clear. For example, the last question:

Prior to January 20, 2017, did you talk to Steve Bannon, Jared Kushner, or any other individual associated with the transition regarding establishing an unofficial line of communication with Russia? If yes, describe who you spoke with, when, the substance of the discussion(s), and what you understood was the purpose of such an unofficial line of communication.

TRUMP:

(No answer provided.)

Notwithstanding this, Special Counsel Mueller did not issue a subpoena to President Trump. Andrew Weissmann, one member of the Special Counsel's team, [said](#) this was because "Mr. Mueller was determined to avoid 'any public disagreements' with [Deputy Attorney General Rod Rosenstein, who was overseeing the case within the Department of Justice (DOJ)]." Under the current special counsel regulations, any time Special Counsel Mueller was overruled by DOJ, he would have to report that decision to Congress—so, Weissmann [says](#), Special Counsel Mueller "never actually proposed subpoenaing Mr. Trump, instead coyly asking what Mr. Rosenstein's reaction would be. Mr. Rosenstein just kept demurring." Ultimately, President Trump avoided true questioning by Special Counsel's Mueller altogether.

## Solutions

- **Congress should provide the special counsel with authority to disclose to the House and Senate Judiciary committees a report on the prosecution and declination decisions, including the results of any investigation into persons that the Department of Justice has determined cannot be indicted while they are in office.** In cases where the DOJ has determined an individual cannot be indicted while in office, impeachment by Congress is the only available check on that person's abuse of

power. For those reasons, the special counsel should be entitled to disclose the results of an investigation of presidential misconduct to Congress without the prior approval of the attorney general.

- **Congress should provide the special counsel with separate authority to disclose to Congress any behavior by the president that obstructs the investigation even before the investigation is complete.** While there are good reasons for the special counsel to decline invitations from Congress to provide information prior to the completion of an investigation, the special counsel should have the authority to disclose evidence of obstruction. That option would raise the stakes for acts of presidential obstruction and make possible more timely action by Congress to hold the president accountable for such acts.

## Resources

Steve Vladeck and Benjamin Wittes, [Can the Presidency Trump a Special Counsel Subpoena?](#), *Just Security*, May 2, 2018.

Andrew Weissmann, [Good Governance Paper No. 3: Investigating a President](#), *Just Security*, October 15, 2020.

## Issue 11: Abuses of the pardon power

Article II, Section 2 of the U.S. Constitution provides that the president “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Presidential pardons have often been controversial, particularly when the recipients are connected to the president.

In the last four years, President Donald Trump has engaged in an unprecedented use and [dangling of pardons](#) to relieve some of his personal and political allies from judicial accountability. His public statements about pardons appeared to influence the actions of several associates who were under investigation: Roger Stone, Paul Manafort, Michael Flynn, and Michael Cohen. Each was convicted of or admitted to federal crimes, and in each case, the possibility of a pardon appears to have influenced the person’s willingness to cooperate with investigators.

More broadly, a Washington Post [analysis](#) from February of 2020 concluded that “[m]ost” pardons issued by President Trump “have gone to well-connected offenders who had not filed petitions with the [Department of Justice’s (DOJ)] pardon office or did not meet its requirements.” Instead, “[m]oney and access have proved to be far more valuable under Trump.” Exercising the pardon power in this way dramatically increases the odds that it will be abused; this abuse is compounded by the frequency of issuance at the end of presidential terms, where review is all but impossible.

There is a clear and distinct difference between a legitimate use of the pardon power and abusing it to interfere with ongoing investigations. The former is rooted in a legitimate need for a safety valve where the interests of justice are served by relief from punishment. The latter is a perversion of law enforcement and democracy.

No president has ever issued a self pardon, so there is no definitive answer about what would happen if a president tried to do so. President Trump has [expressed the view](#) that he possesses the authority to pardon himself, but the only known DOJ opinion on this issue, from 1974, takes the opposite view. The memo [states](#) that “[u]nder the fundamental rule that no one may be a judge in his own case, it would seem that the question [of whether a president may pardon himself] should be answered in the negative.” However, because the DOJ’s Office of Legal Counsel does not release all opinions publicly, we do not know whether a subsequent opinion has taken a different view.

### Solutions

- **Congress should require that all pardons be transparent.** The name, date, and full text of any and all pardons should be made public.
- **Pardons given to close relatives of the president should automatically receive close scrutiny by Congress and the Department of Justice.** If the pardon is granted to a close relative of the president, the DOJ should share its investigative files with Congress so it can conduct proper oversight.



- **Pardons for offenses involving contempt of court or of Congress should also receive close scrutiny by Congress.** Because contempt of court is one way the judicial branch ensures it can function independently, the DOJ should also share its records in such cases with Congress.
- **Congress should pass legislation or a constitutional amendment prohibiting self pardons.** A president who can pardon himself is functionally above the law. Neither the courts nor Congress can permit this power to be used in a manner that is fundamentally corrupt.

## Resources

Rep. Krishnamoorthi's [Presidential Pardon Transparency Act of 2019](#), H.R.1348 (116th Congress, 2019).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 101 et seq. (116th Congress, 2020).

Noah Bookbinder, et al., [Why President Trump Can't Pardon His Way Out of the Special Counsel and Cohen Investigations](#), *American Constitution Society and CREW*, May 10, 2018.

Barry H. Berke, et al., [Presidential Obstruction of Justice: The Case of Donald J. Trump](#), *Governance Studies at Brookings*, August 22, 2018.

## Issue 12: Misuse of legal expense funds

All types of government officials may at some point need legal representation due to their position; for example, individuals who are interviewed by investigators or law enforcement often need their own representation to protect themselves, even if they are not a target of the investigation. Legal expense funds exist to allow others to pay all or part of the legal fees that are necessary for such circumstances. However, these funds can create problematic conflicts of interest: individuals who are paying the legal expenses of officials might exert influence over the person's behavior, including skewing their response to an investigation.

Such funds for executive branch officials are at least partially regulated by the Office of Government Ethics (OGE), which handles most potential financial conflicts of interest for the executive branch. However, many of the limits on previous legal expense funds have been voluntarily adopted. In 2018, allies of President Donald Trump and his legal team [established an unprecedented legal expense fund](#), called the Patriot Legal Expense Fund Trust, LLC, [designed](#) to pay the legal bills of campaign aides and executive branch personnel related to the investigation of Russian interference in the 2016 elections. In a radical departure from past practice in the executive branch, the Patriot Fund was established not as a trust but as a limited liability company that is structured to qualify for tax treatment as a political organization. Whereas a trustee has a fiduciary obligation to the beneficiary of a trust, the officer of an LLC has no such obligation to individuals whom a fund assists—a change that makes possible the use of funds as a form of leverage over those who receive assistance.

It is clear that concerns over legal expense funds such as the Patriot Fund are not unfounded. John Dowd, former legal advisor to President Trump, reportedly sought to give money for legal expenses to Rick Gates, who was cooperating with the Special Counsel's investigation of Russian interference in the 2016 campaign, because he [“believed such a fund would help prevent Messrs. Manafort and Gates ... from pleading guilty and potentially cooperating against the president.”](#) While this use of funds was ultimately stopped, it is an indication that stronger controls must be established to ensure legal expense funds are not used for improper purposes.

### Solutions

- **Legal expense funds should have strict limits.** Congress should impose a contribution limit of \$5,000 per donor per year, excluding immediate family members; require that donations only come from individuals, not corporations, unions or other organizational entities; and prohibit donations from lobbyists, foreign agents, and persons who have business pending before the official or the official's agency. The funds should be structured as trusts for the benefit of one and only one government employee.
- **Legal expense funds should be fully disclosed.** Congress should require full disclosure to the OGE of the sources and expenditures of funds on a quarterly basis, to be filed electronically and posted on the Internet in a searchable, sortable and downloadable database. Employees who file public financial disclosures should be required to disclose the true source of any funds from a legal expense fund.
- **Employees should be required to recuse from any matters involving a donor to**

**a fund from which they receive money.** Congress and the OGE should establish a recusal requirement for recipient officers from participating in particular matters involving specific parties in which a donor to the legal defense fund is a party or represents a party for a period of four years.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 8015 (116th Congress, 2019).

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

Noah Bookbinder, [Comment of Citizens for Responsibility and Ethics in Washington in on Legal Expense Fund Regulation](#), *CREW*, May 15, 2019.

Craig Holman and Lisa Gilbert, [Comment of Public Citizen on Proposed "Legal Expense Fund Regulation"](#), *Public Citizen*, June 14, 2019.

## Issue 13: Gift loopholes for inaugural committees and presidential libraries

“Celebrations” of presidents—in the form of inaugurations on their way into office and presidential libraries on their way out of office—have the potential to become vectors for buying favors with an administration. While fundraising has long been a part of each of these traditions, the current framework permits their use to circumvent existing limits on a president’s ability to receive gifts while in office.

Corporations and individuals have often contributed checks of six or seven figures to [inaugural committees](#) in thinly veiled attempts to ingratiate themselves to the incoming administration. While [President Barack Obama](#) set a \$50,000 cap on individual donations for his first inauguration and released information about donors, his second inauguration collected unlimited corporate cash and disclosed less about donors. President Donald Trump’s inauguration, fueled by [secretive donors](#), spent more than both of [President Obama’s inaugurations combined](#). Rick Gates, a high-level Trump inauguration official, admitted that he siphoned off some of the committee’s money for personal use. Lobbyist Samuel Patten admitted to arranging for a prominent Ukrainian to purchase \$50,000 in tickets to Trump inaugural events through his own straw company.

Laws surrounding [presidential library donations](#) are much more flexible and grant presidents the ability to raise unlimited amounts of money from all sources—including foreign governments. During the last three years of his presidency, President Bill Clinton [received \\$450,000 from the former wife of fugitive Marc Rich](#) for his library fund. President Clinton [pardoned](#) Rich in the final moments of his presidency. In the final year of George W. Bush’s presidency, a U.S. lobbyist and major Republican fundraiser [offered](#) a Kazakh politician meetings with Vice President Dick Cheney, Secretary of State Condoleezza Rice, and other senior Bush Administration officials in exchange for a \$250,000 contribution towards the Bush presidential library.

These examples demonstrate the risk of corruption inherent to fundraising opportunities and projects that “celebrate” presidents anytime in their career. Such donations must be strictly controlled to prevent their becoming loopholes in the executive branch ethics regime.

### Solutions

- **Congress should set limits on outside fundraising for official inaugural events.** Contribution limits for inaugural committees should be in line with those covering individual contributions to federal candidates. Inaugural committees should be required to either return unspent money on a pro-rata basis to contributors or donate it to charities that have no connection to the president, president-elect, or individuals affiliated with the inaugural committee.
- **Congress should preclude fundraising for presidential libraries until the president leaves office.** The National Archives and Records Administration should be sufficiently funded to play its role in preserving presidential records, and any other functions that a library might serve can wait until after a president leaves office.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 4701 et seq. (116th Congress, 2019).

Rep. Schrader's [Presidential Inaugural Committee Oversight Act](#), H.R. 210 (116th Congress, 2019).

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

Rep. Cummings's [Presidential Library Donation Reform Act of 2019](#), H.R. 1063 (116th Congress, 2019).

Rep. Scanlon's [Inaugural Fund Integrity Act](#), H.R. 1382 (116th Congress, 2019).

Sen. Cortez Masto's [Inaugural Committee Transparency Act of 2019](#), S. 484 (116th Congress, 2019).

[Trump-Proofing The Presidency: A Plan for Executive Branch Ethics Reform](#), *Public Citizen and CREW*, October 2, 2018

## SECTION 2 *of* WHAT DEMOCRACY LOOKS LIKE

# Restoring Checks on Executive Power

**One of the elementary features of our Constitution is its division of the federal government into three separate co-equal branches—executive, legislative, and judicial—each of which is designed to serve as a check on the others.** But the fact that the basic powers of government are bestowed on the three branches does not mean that each has an exclusive, unencumbered right to that power. To the contrary, as the Supreme Court recognized in *United States v. Nixon*, “[i]n designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.” By giving the three branches overlapping and competing responsibilities, the Framers sought to ensure that they would limit and constrain each other.

In recent years, Congress’s ability to serve as a check on executive power has diminished. The executive branch has successfully stonewalled congressional requests and subpoenas and disregarded laws requiring advance notice of intelligence activities and covert action to members of Congress. President Donald Trump has disregarded his constitutional obligation to refrain from accepting any foreign emoluments without first obtaining congressional approval. To bypass the Senate’s role in providing advice and consent on executive branch appointments, President Trump has relied on an unprecedented number of acting executive branch officials. He has co-opted Congress’s power to control appropriation of funds by reappropriating money for new purposes or by abusing rules that are intended to allow the president flexibility in true emergencies.

At the same time that President Trump has adopted these strongman tactics, Congress has grown weaker. Congress’s rules and structures prevent it from conducting rigorous oversight and constrain its ability to legislate. Failures to increase member and staff pay have made Congress more susceptible to outside influence and less able to take on responsibilities that have been increasing for decades. Unless Congress ensures that it has the rules, structures,

The judiciary has also ceded power to the executive branch. In many cases, court proceedings are too protracted to serve as a sufficient check on the executive. Even if relief is obtained, it arrives too late—a dynamic that benefits administrations that test or bypass legal constraints. In other settings, courts have imposed such strict limits on what cases they will entertain that even clear violations of federal law are unenforceable. That dynamic also suits the executive, especially when Congress is either unwilling or unable to check executive overreach without assistance from the courts.

Finally, both Congress and the courts have institutional weaknesses that hamper their ability to compete with an executive that is asserting broad powers. If the executive is trying to maximize its authority vis-a-vis Congress and the courts, those branches have to ensure that they are better equipped to fight back.

## Issue 1: Unenforceable congressional subpoenas and requests

The United States Constitution vests Congress with legislative and investigative prerogatives, including the ability to obtain information by issuing subpoenas and document requests. The Trump Administration has engaged in unprecedented stonewalling of Congress's constitution right to obtain information from the executive branch. For instance, Congress's impeachment inquiry of President Donald Trump and its investigation into potentially improper political motivations behind adding a citizenship question on the census were both met with outright refusals to cooperate. In the impeachment inquiry, key witnesses—including Mick Mulvaney, Rudy Giuliani, and Mike Pompeo—[defied](#) subpoenas to appear before Congress or provide documents. In the examination of the reasoning behind certain census questions, Commerce Secretary Wilbur Ross and Attorney General William Barr [refused](#) to surrender critical documents to Congress. As a result of this refusal, the House found both Ross and Barr to be in [criminal contempt of Congress](#).

Congress lacks adequate mechanisms to punish these forms of obstruction. For starters, Congress has no [authority](#) to prosecute criminal contempt of Congress. While Congress has enacted [criminal statutes](#) permitting prosecution of individuals for contempt of Congress by the Department of Justice (DOJ), the agency has resisted prosecuting congressional referral, and categorically refused to enforce congressional subpoenas of executive branch offices. The DOJ has even [asserted](#) that it may exercise its own [prosecutorial judgment](#) in deciding whether to pursue such cases. In addition, the Office of Legal Counsel issued a [memorandum](#) asserting that Congress's oversight powers did not extend to individual members of Congress. In many cases, the executive branch justified its noncompliance with Congress with spurious and extreme theories of executive power.

Uncooperative witnesses have forced Congress to seek judicial enforcement of its [subpoenas](#), leading to significant delays in Congress obtaining the information it needs. For example, the House Judiciary Committee initially subpoenaed former White House Counsel [Don McGahn](#) in [April 2019](#) and filed a [lawsuit](#) in August 2019 to compel him to comply with that subpoena. But at the time of this report's publication—over a year later—the case was still [working](#) its way through the courts. A congressional subpoena of [Mazars USA](#), in an attempt to gain access to President Trump's tax returns, faced similar challenges. Congressional efforts to obtain those returns began in early 2019 as well, but the [case](#) is still in the courts. In these and other cases, Congress has been unable to obtain timely access to the information it needs.

The inability to enforce subpoenas and pursue contempt charges places Congress in an untenable position. Simply put, Congress cannot fulfill its constitutional duties. Congress is powerless to investigate executive branch misconduct, to pursue accountability for that misconduct, or to demonstrate to the public the extent of that misconduct. To restore the legislative branch as a balance and check on executive power, Congress must have access to enforcement mechanisms that are less reliant on the courts.



## Solutions

- **The House and Senate should modify their rules to establish financial penalties for agency officials who refuse to comply with congressional subpoenas and information-sharing requirements.** Congress could impose fines for agency heads who personally or whose subordinates flout congressional subpoenas unless they properly assert a facially applicable executive privilege. Alternatively, Congress could provide that agencies that cooperate with congressional budget requests receive a bonus percentage of funding in a fiscal year or that pay for agency officials who do not comply with oversight requests can be withheld. In either case, the goal is to encourage compliance by using penalties or incentives that do not involve the resources and potential drama created by criminal or civil litigation.
- **The House and Senate should establish a new independent counsel office with narrow, limited authority to investigate and prosecute senior executive branch officials for criminal contempt or obstruction of Congress.** The DOJ has proven largely uninterested in pursuing congressional contempt or obstruction cases involving current officials for obvious reasons: those cases would almost always require the prosecution of DOJ leaders' political allies who serve or have served in the same administration. In other words, there is an inherent conflict of interest. The predicate for appointment of an independent counsel should be limited to cases in which a congressional committee is investigating potential criminal or impeachable conduct or some other gross abuses of power by the president, vice president, agency head, acting agency head, first assistant, or acting first assistant.
- **The president should issue an executive order instructing executive branch officers to accommodate all facially valid congressional requests for documents, including from individual members, as well as subpoenas for documents or testimony.** Part of the current crisis facing congressional oversight is that executive departments have adopted an aggressive, maximalist approach to inter-branch conflict, reducing opportunities for disputes with Congress to reach a negotiated conclusion. This does not have to be so. While it is important that Congress act to bolster mechanisms for enforcing subpoenas and other document requests, negotiation is more likely to lead to an efficient and responsible outcome. Indeed, if Congress has access to more enforcement mechanisms, a negotiated resolution seems more likely, because the executive branch is more likely to suffer real consequences for stonewalling a committee.

## Resources

Rep. Lieu's [Congressional Inherent Contempt Resolution](#), H.Res. 1029 (116th Congress, 2020).

Rep. Dean's [Congressional Subpoena Compliance and Enforcement Act of 2020](#), H.R. 8335 (116th Congress, 2020).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 401 et seq. (116th Congress, 2020).

Josh Chafetz, [Executive Branch Contempt of Congress](#), 76 *The University of Chicago Law School Review* 1083, 2009.

Andrew McCanse Wright, [Constitutional Conflict and Congressional Oversight](#), 98 *Marquette Law Review* 881, 2014.

[Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure](#), *Congressional Research Service*, May 12, 2017.

Mort Rosenberg, [Reasserting Congress' Investigative Authority](#), *R Street*, July, 2017.

Todd Garvey, [Congressional Subpoenas: Enforcing Executive Branch Compliance](#), *Congressional Research Service*, March 27, 2019.

Kia Rahnama, [Can Congress Fine Federal Officials Under Its Contempt Power?](#), *Lawfare*, June 11, 2019.

Dylan Hedtler-Gaudette, [The Purse Is Mightier than the Sword. Now Congress Needs to Use It.](#), *Project On Government Oversight*, April 16, 2020.

Emily Berman, [Good Governance Paper No. 2: The Congressional Subpoena Power](#), *Just Security*, October 14, 2020.

[Inherent Contempt Fines Rule](#), *Good Government Now*.

## Issue 2: Slow judicial enforcement of congressional prerogatives

Congress is increasingly unable to effectively and expeditiously enforce its constitutional prerogatives, even in cases where its jurisdiction and the law are clear. In recent years, and particularly during the Trump Administration, the executive branch has rebuffed the implied powers of Congress to seek and obtain information towards its constitutional mandates. This stonewalling has been exemplified by the recent McGahn and Mazar subpoena cases.

As discussed in issue 1 of this section, in April 2019, former White House Counsel Don McGahn was subpoenaed to testify before Congress. He refused, and Congress sued to compel him to appear. At the time of publication of this report, the case was [still](#) being litigated. Similarly, Mazars USA is a firm used by President Donald Trump for financial accounting of his personal assets. In April 2019, the House Committee on Oversight and Reform subpoenaed the organization while investigating possible conflicts of interest. Trump filed a civil case attempting to block the subpoena. At the time of publication of this report, this [case](#) was also still being litigated.

The delays Congress faces in enforcing its constitutional prerogative to gather information needed to legislate and hold the executive branch accountable are detrimental to democracy. They have the effect of making the executive branch immune from congressional scrutiny for the two-year term of a Congress. For these reasons, Congress should [ensure](#) that the judiciary can expeditiously resolve disputes concerning congressional prerogatives.

### Solutions

- **Create a fast-track procedure and cause of action for Congress to enforce its constitutional prerogatives in federal court.** Congress should amend 28 U.S.C. § 1365 to provide a randomly selected three-judge panel of the United States District Court for the District of Columbia with original, exclusive jurisdiction to hear cases involving the enforcement of congressional prerogatives. That jurisdiction should include efforts by Congress to assert its investigative powers, authority to disapprove foreign emoluments, and control over the budget. Congress should also provide for direct appeal to the Supreme Court in such cases. Congress has employed this framework in other contexts, including civil rights and congressional redistricting laws, so it is not a novel procedure. By reducing the maximum number of judicial review levels from three to two, this process reduces the steps between the filing of a case and the entering of final judgment. Limiting jurisdiction to the United States District Court for the District of Columbia would also limit forum-shopping by parties hoping to stymie congressional enforcement.
- **Establish strict time limits for cases implicating Congressional powers.** Disputes regarding congressional prerogatives are profoundly important to our constitutional order and need to be resolved expeditiously. Congress should establish reasonable time limits, including during briefing and judgment in the district court, on appeal, in the Supreme Court. Extensions should be available in limited circumstances, such as by mutual agreement of the parties or in circumstances where statutory deadlines would impose an exceptional burden on judicial resources.

- **Make additional resources available to the House Office of General Counsel and Senate Legal Counsel to ensure that congressional committees are equipped to engage in litigation to enforce the House and Senate’s constitutional powers.** The House and Senate should be better prepared to litigate in cases involving conflict with the executive branch. To help fund these efforts, Congress could consider imposing fines or litigation costs on agencies whose officers fail to comply with subpoenas.

## Resources

Rep. Dean’s [Congressional Subpoena Compliance and Enforcement Act of 2020](#), H.R. 8335 (116th Congress, 2020).

Nikhel Sus, [Congress Needs a “Rocket Docket” for Its Disputes With the President](#), *Just Security*, March 2, 2020.

Todd Garvey, [Congressional Subpoenas: Enforcing Executive Branch Compliance](#), *Congressional Research Service*, March 27, 2019.

Emily Berman, [Good Governance Paper No. 2: The Congressional Subpoena Power](#), *Just Security*, October 14, 2020.

## Issue 3: Weak oversight procedures and institutions

Congress's ability to conduct effective oversight has deteriorated. Congressional oversight hearings [have continuously decreased](#) since their 1978 peak. Congress [spends](#) more time hearing one-sided opinions on issues, and less time learning about potential solutions to legislative problems and potential executive branch abuses.

The structure of oversight hearings is part of the problem: Large portions of hearings are spent on member statements and off-topic or leading questioning of witnesses. Rules that give many members short stretches of time to ask questions are [not conducive](#) to establishing basic facts or following up with a witness whose testimony is incomplete, evasive, or contradictory. As a result, oversight hearings fail to establish basic facts needed to highlight abuses of power or other misconduct.

Since its 1970 reorganization, Congress [has also failed to adapt](#) its oversight procedures to keep up with the expansion and reorganization of the executive branch—such as the [creation of the Department of Homeland Security](#). Despite efforts to ensure that congressional oversight was built into the economic relief package Congress passed in 2020 contained serious oversight [measures](#), the Trump Administration all too easily [circumvented](#) those controls.

Congress needs to bolster its ability to conduct oversight so that it can once again hold the executive branch accountable.

### Solutions

- **Increase the budget of the Government Accountability Office and give it expanded investigatory and subpoena authority.** Require agencies to respond to requests for information from the Government Accountability Office and authorize the Comptroller General to litigate those requests in the United States District Court for the District of Columbia.
- **Create a Senate whistleblower ombudsman office to establish best practices and provide training for Senate staff on handling whistleblowers.** The House of Representatives established a whistleblower ombudsman officer in 2019 to help House staff handle whistleblowers, but the Senate has no equivalent. Best practices and training help to ensure that Congress protects whistleblowers.
- **Establish and employ committee rules that make investigatory hearings more effective.** During the 116th Congress, the House Intelligence Committee and House Judiciary Committee established rules permitting the chair and ranking member to designate a member or staffer to conduct longer rounds of questioning. Congressional committees should ensure that this option is available when the committee is using a hearing to gather evidence or information from a witness.

- **Require the heads of federal agencies to publish congressionally mandated reports on their website in an open format, along with supporting documentation, data, and other materials.** Congress requires agencies to report all kinds of information to Congress, but it is not always easily accessible. Congress should establish minimum requirements for reports and data and require that they be made available by each agency in a single, searchable database.

## Resources

Sen. Portman and Rep. Quigley's [Access to Congressionally Mandated Reports Act](#), S. 195 (116th Congress, 2019).

Kevin R. Kosar, [How to Strengthen Congress](#), *National Affairs*, Fall, 2015.

G. Edward DeSeve, et al., [Oversight Matters: What's Next for Inspectors General](#), *Bipartisan Policy Center Task Force on Oversight and Inspectors General*, July, 2018.

Peter Tyler, [House of Representatives Adopts Whistleblower and Ethics Reforms for Itself](#), *Project on Government Oversight*, January 11, 2019.

Andrew Cohen, [Real Congressional Oversight Means Sacrificing Egos for Answers](#), *Brennan Center for Justice*, February 21, 2019.

Molly E. Reynolds, [Improving congressional capacity to address problems and oversee the executive branch](#), *Brookings Institution*, December 4, 2019.

Jim Townsend and Elise Bean, [Good Governance Paper No. 8: How to Strengthen Oversight by Congress](#), *Just Security*, October 23, 2020.

[Roadmap for Renewal: Strengthen Congress's Capacity to Fulfill its Constitutional Role, Protect Democracy.](#)

## Issue 4: Unique oversight challenges involving the intelligence community

Congress is responsible for the oversight of the intelligence and national security apparatuses of the executive branch, but oversight of notoriously secretive executive agencies is rife with difficulty. Congress's power to legislate, appropriate, and conduct related oversight is at times in conflict with the president's constitutional powers as commander-in-chief, the president's statutory power to classify records, and the need for secrecy. Although these issues have been the subject of scrutiny before—including in the wake of the 9/11 terrorist attacks—they merit renewed attention in light of efforts by the Trump Administration to avoid congressional scrutiny of intelligence and covert activities.

Congressional oversight was [very informal and ineffective](#) until the 1970s when congressional intelligence committees came into existence. Unfortunately, these new intelligence committees have often been limited in terms of effectiveness and [continue to be “dysfunctional.”](#) There are countless atrocities that effective congressional oversight could have prevented. For example, the war on terror and the Senate investigation of the Central Intelligence Agency's (CIA) clandestine torture operation exposed [severe shortcomings](#) in Congress's oversight capabilities. While this juncture could have been a pivotal moment for [rethinking congressional oversight](#), the “Torture Report” was anything but. Instead of attempting to discuss broader issues of corrupt leadership and crucial policy reforms within the CIA, it focused on the effectiveness of enhanced interrogation techniques and CIA deception.

Lapses in congressional oversight of the intelligence community were even more pronounced during the Trump Administration. President Donald Trump breached protocol by failing to inform members of Congress in advance of a planned [military strike](#) on Iran Quds Force commander Qasem Soleimani. Similarly, a few months prior, congressional leadership was not informed when ISIS leader [Abu Bakr al-Baghdadi was killed](#). In both situations, President Trump held [after-the-fact briefings](#) that many members of Congress found unsatisfactory.

During his time as chair of the House Permanent Select Committee on Intelligence, [Congressman Devin Nunes](#) utilized his position—with support from other Republicans—to issue misleading findings of political value to the White House, including by selectively releasing documents without context, rather than engaging in serious oversight of the intelligence community. Representative [Nunes pushed President Trump's agenda](#) by releasing a [memo](#) claiming a conspiracy against Trump by the Democrats, the Federal Bureau of Investigation, the Department of Justice, and the intelligence community. Representative Nunes' abuses of power are tremendously dangerous to national security and highlight some of the most difficult issues within congressional oversight of the intelligence community. The need for congressional oversight of the intelligence community must be balanced with protections against abuse of oversight power by members of Congress.



## Solutions

- **Restructure congressional oversight of the intelligence community.** Congress should adopt the 9/11 commission proposal to create a depoliticized Joint Permanent Select Committee on Intelligence that is endowed with subpoena and appropriations power or, alternatively, restructure the House Permanent Select Committee on Intelligence. The Joint Permanent Select Committee on Intelligence should have a code of conduct that forbids members from undermining the committee's independence and purpose, including by coordinating with the executive branch on oversight matters. The code of conduct should also encourage bipartisan action by the committee.
- **Congress should equip all members with the information and staff they need to conduct oversight of the intelligence and national security community.** Every member of Congress should have funds available to hire at least one staff member who has a security clearance that permits him or her to work on classified matters.
- **The Department of Justice should withdraw from the 1988 Office of Legal Counsel [Opinion](#) claiming that the Government Accountability Office's investigations of intelligence community matters violate executive privileges.** Lack of transparency about intelligence community activities has not produced better outcomes. The executive branch should welcome appropriate congressional scrutiny of covert and intelligence matters rather than falling back on a blanket refusal to cooperate with the Government Accountability Office.
- **Congress and the House and Senate intelligence committees should amend their rules to require an arms-length relationship with the executive branch on intelligence matters.** Specifically, Congress should require that members who receive classified intelligence materials directly from the White House disclose those materials to both majority and minority members of the relevant intelligence committees and the Joint Permanent Select Committee.

## Resources

Sen. Feingold's [A resolution to improve congressional oversight of the intelligence activities](#), S.Res. 164 (111th Congress, 2009).

Rep. Thompson's [Intelligence Oversight and Accountability Act of 2013](#), H.R. 3103 (113th Congress, 2013).

Sen. Wyden's [Intelligence Oversight and Surveillance Reform Act](#), S. 1551 (113th Congress, 2013).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 711 et seq. (116th Congress, 2020).

Michael German, [Strengthening Intelligence Oversight](#), *Brennan Center for Justice*, January 27, 2015.

[Strengthening Congressional Oversight of the Intelligence Community](#), *Demand Progress, R Street Institute, Electronic Frontier Foundation, and FreedomWorks*, September 13, 2016.



Mandy Smithberger, [Congress Must Strengthen National Security Oversight](#), *Project on Government Oversight*, April 2, 2019.

Michael E. DeVine, [Covert Action and Clandestine Activities of the Intelligence Community: Selected Congressional Notification Requirements in Brief](#), *Congressional Research Service*, July 2, 2019.

Katrina Mulligan, [Good Governance Paper No. 4: Oversight of the Intelligence Community](#), *Just Security*, October 16, 2020.

## Issue 5: Legislative gridlock in the Senate

It is not easy to enact a law under the U.S. Constitution. Legislation requires concurrence from the House, Senate, and president, or a congressional supermajority to override a veto from the president. Legislation also faces an additional senatorial hurdle: under [Senate Rule XXII](#), [three-fifths](#) of senators must vote affirmatively on a cloture motion to end debate of a bill and proceed to a floor vote. The rule was originally intended to set outer boundaries on the longtime senatorial norm of debating an issue before voting. It has recently evolved into a supermajority requirement that hampers the legislative ability of Congress.

The practice of protracting debate on an issue has morphed the Senate from a chamber where legislation is carefully considered to a place where debate is stifled and ideas go to die. The filibuster has not only affected what bills are passed into law, but also what bills are even discussed or considered. As legislative discussion—and lawmaking itself—have become more difficult, presidents and agencies have increasingly resorted to executive actions in lieu of legislative remedies. And because Congress rarely revisits old statutes, judicial interpretations have tremendous staying power. These changes together severely weaken Congress's power relative to that of the executive and the judiciary.

Data show this to be true. Between 1970 and 2000, [the Senate averaged](#) 17 cloture votes per year. Between 2000 and 2018, that same figure grew to 53 per year. In the 2013-2014 legislative session, the Senate reached a record 218 clotures. As the use of the filibuster has sharply risen, the passing rate of congressional legislation has correspondingly decreased. Between the 109th Congress and the 113th Congress there was a [66 percent decrease](#) in the percent of bills passed in the chamber. And between George W. Bush's presidency and Donald Trump's presidency, motions to invoke cloture have [more than doubled](#). This culminated in the labeling of the 2018-2019 Senate as [more dysfunctional than ever](#). The stonewalling of the majority party's legislative agenda has become a problematic norm.

Amending the legislative filibuster will undoubtedly have costs. When a single party controls the White House and both chambers of Congress, the filibuster has been an important tool for the minority party to stand in the way of legislation that is particularly controversial. It is possible that the filibuster has brought stability to our system by preventing one Congress from taking action that would have been reversed two or more years later. Rules that encourage Congress to strive for enduring change are from that perspective a feature—not a bug.

On balance, though, the costs of eliminating the filibuster are warranted if doing so is necessary to restore functioning government. And there is good reason to suspect it will be. Many of the reforms discussed in this report may not garner 60 votes in the Senate. If the Senate faces a choice between preserving the filibuster and reestablishing ethical, responsible, and accountable government, then the filibuster must go.

## Solutions

- **Amend Senate Rule XXII to eliminate the legislative filibuster.** The Senate is too easily taken hostage by 41 members, who can halt consideration of a bill by voting against cloture (ending debate). In practice, this stops many bills from being considered by the full Senate because the credible threat of a filibuster is sufficient to kill a bill. The Senate should restore its ability to consider, debate, and vote on legislation by requiring only a simple majority to limit further debate on legislation.
- **Alternatively, amend Senate Rule XXII to require in-person filibusters from a larger number of senators to continue debate on legislation.** Instead of eliminating the legislative filibuster entirely, the Senate could consider rule changes to make its use much more rare by requiring more senators to support continuing debate (for example 45 members instead of 41), and imposing greater costs on members who filibuster by requiring them to vote in person to continue debate. Such a change would preserve the power of the minority party to delay action on extremely divisive matters but would likely curtail excessive use of the filibuster.

## Resources

Sen. Udall's [A resolution to improve the debate and consideration of legislative matters and nominations in the Senate](#), S.Res. 10 (112th Congress, 2011).

Sen. Merkley's [A resolution modifying extended debate in the Senate to improve the legislative process](#), S.Res. 725 (115th Congress, 2018).

Sen. Merkley's [A resolution amending rule XV of the Standing Rules of the Senate to provide for consideration of a minimum number of amendments](#), S.Res. 729 (115th Congress, 2018).

Catherine Fisk and Erwin Chemerinsky, [The Filibuster](#), 49 *Stanford Law Review* 181, January, 1997.

Martin B. Gold and Dimple Gupta, [The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster](#), 28 *Harvard Journal of Law and Public Policy* 205, 2004.

Sen. Tom Udall, [The Constitutional Option: Reforming the Rules of the Senate to Restore Accountability and Reduce Gridlock](#), 5 *Harvard Law and Policy Review* 115, 2011.

Mimi Marziani, et al., [Curbing Filibuster Abuse](#), *Brennan Center For Justice at New York University School of Law*, November 16, 2012.

Sen. Jeanne Shaheen, [Gridlock Rules: Why We Need Filibuster Reform in the U.S. Senate](#), 50 *Harvard Journal on Legislation* 1, September 17, 2013.

Alex Tausanovitch and Sam Berger, [The Impact of the Filibuster on Federal Policymaking](#), *Center for American Progress*, December 5, 2019.

Norm Ornstein, [The Smart Way to Fix the Filibuster](#), *The Atlantic*, September 3, 2020.

## Issue 6: Congress's failure to control the purse

The Congressional Budget and Impoundment Control Act of 1974 (ICA) was enacted after President Richard Nixon withheld billions of dollars appropriated by Congress to programs he disliked. The ICA requires the president to spend as Congress directs unless the president notifies Congress about the deferral or rescission of certain discretionary appropriations. While Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton used the [ICA rescission process](#) with relative frequency, neither Presidents George W. Bush nor Barack Obama [initiated](#) a single formal rescission through the ICA.

The Trump Administration has taken a Nixonian approach to congressional appropriations in contravention of the Constitution and the ICA. In August 2018, the Trump Administration attempted to cut \$3.5 billion in foreign aid and \$15 billion in domestic spending just weeks prior to the end of the fiscal year. This attempt failed but [put Congress on notice that the ICA was under threat](#). Then during the summer of 2019, the Office of Management and Budget (OMB), at the behest of President Donald Trump, [delayed on nine separate occasions the disbursement of approximately \\$214 million](#) in aid that Congress explicitly authorized in the [John S. McCain National Defense Authorization Act for Fiscal Year 2019](#) to be designated for urgent military aid to Ukraine. President Trump [saw](#) this congressionally approved aid as a bargaining chip to extract political favors from the Ukrainian government. In an apparent attempt to hide the aid deferrals from congressional view, Trump's OMB avoided obligating the Ukraine funds through a series of [vague footnotes](#) in apportionment schedules stating that the aid was paused "to allow for an interagency process to determine the best use of such funds."

The Government Accountability Office (GAO) investigated the withholding of aid to Ukraine and issued a scathing [report](#) in January 2020 concluding that the OMB had unequivocally violated the ICA. The GAO found the OMB's justification completely insufficient, concluding that "the ICA does not permit deferrals for policy reasons" and that delaying the Ukraine funding on policy grounds was unlawful under the ICA.

The ICA is largely reliant on a presumption of adherence to democratic norms and enforcement through the application of political pressure—mechanisms that have proven insufficient. President Trump's exploitation of the ICA to serve his personal political purposes has made one thing quite clear: ICA loopholes must be addressed. Congress must take back its power to control the purse.

### Solutions

- **Require the Office of Management and Budget to release authorized funding to agencies for obligation at least 90 days before funding expires.** Congress should eliminate the rescission-by-omission loophole by requiring the OMB to release funding sufficiently far ahead of the statutory deadline to allow agencies to spend funds Congress has appropriated. The additional time also gives Congress more of a chance to intervene if the OMB does not release funds on schedule.

- **Require the Office of Management and Budget and the Office of Legal Counsel to disclose to Congress apportionment schedules and related legal advice intended to effectuate any delay in funding.** The executive branch should be made to be more transparent when it delays the release of appropriated funds to agencies so that Congress and the American people can understand how and why the executive branch is proposing to use those funds.
- **Ensure that the comptroller general has sufficient resources and staffing to bring enforcement actions under [2 U.S.C. § 687](#) against federal agencies to make budget authority available for obligation.** Congress should ensure that it can check executive usurpation of the spending power. Existing law permits the comptroller general to file a lawsuit in the United States District Court of the District of Columbia to enforce Congress's power of the purse; however, this provision has only been used [once](#) since its enactment in 1975. Congress should ensure that the GAO's appropriations law division is fully funded and staffed so that it can monitor compliance with congressional appropriations.

## Resources

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 501 et seq. (116th Congress, 2020).

Sen. Leahy and Rep. Yarmuth's [Congressional Power of the Purse Act](#), S. 3889 (116th Congress, 2020).

[Rescission Actions Since 1974: Review and Assessment of the Record](#), *Congressional Research Service*, May 26, 2010.

[The Impoundment Control Act of 1974: What Is it? Why Does It Matter?](#), *House Committee on the Budget*, October 23, 2019.

[Office of Management and Budget—Withholding of Ukraine Security Assistance](#), *U.S. Government Accountability Office*, January 16, 2020.

[Van Hollen, Leahy Introduce Legislation to Defend Congress's Power of the Purse](#), *Office of Senator Van Hollen*, June 3, 2020.

Sean M. Stiff, [Congress's Power Over Appropriations: Constitutional and Statutory Provisions](#), *Congressional Research Service*, June 16, 2020.

## Issue 7: Expansive emergency powers

Presidents since Abraham Lincoln have exercised the power to unilaterally declare national emergencies in response to wars, natural disasters, public health crises, and severe economic turbulence. Over the century following [President Lincoln's emergency declaration](#) during the Civil War, declarations ran the gamut from the 1933 banking crisis to a 1970 postal workers strike. As the 20th century progressed, presidential emergency authority steadily grew as powers were transferred from Congress to the president. In the wake of President Richard Nixon's brazen abuses of executive power, and the [two](#) national emergencies he declared in 1970 and 1971, Congress became concerned with both the scope of emergency powers [potentially available for the president](#) and the number of national emergencies that seemed to linger for decades without explicit termination, such as President Harry Truman's emergency declaration regarding the Korean War.

The result of this congressional concern was the [National Emergencies Act](#) (NEA) of 1976. The NEA empowered presidents to deploy additional powers during crises but codified certain procedural invocation formalities and established explicit congressional termination authority. There are [136 statutory powers](#) available to the president related to national emergencies. Congress also enacted the 1977 [International Emergency Economic Powers Act](#) (IEEPA) to allow the government to freeze assets and confiscate property in response to an "unusual and extraordinary" outside threat to the country. Between the NEA's codification and the publication of this report, presidents from both parties have [declared](#) 68 national emergencies, 39 of which are still in effect. And, as of [July 1, 2020](#), there have been 59 national emergencies under the IEEPA, with 33 still in effect.

For his part, President Donald Trump has declared [12 national emergencies](#) under the NEA, all of which remain active (as of November 2020). One is of particular importance: [Declaring a National Emergency Concerning the Southern Border of the United States](#), enacted February 2019. This declaration [diverted approximately](#) \$3.6 billion from congressionally-appropriated funds for military projects to construct Trump's promised wall on the United States-Mexico border.

President Trump twice [vetoed attempts](#) by Congress to end a presidentially declared national emergency. In July 2020, [the Supreme Court](#) upheld President Trump's assertion of emergency powers to use funds to build the border wall.

It is time to address the NEA's shortcomings. Among other things, Congress did not anticipate that a president would redirect funds on an emergency basis and then repeatedly veto congressional bills ending the associated emergency. As it stands, presidential emergency powers allow the executive to redirect vast swathes of discretionary funding with little to no oversight. Congress must act to tighten controls on emergency powers and reestablish its appropriations authority.

## Solutions

- **End all long-standing national emergencies and reauthorize emergency declarations if necessary.** There are more than two dozen standing emergencies. Congress should preemptively end all of them. Then, Congress should convene a formal review of each (as required by law every six months) and reinstate emergency declarations that remain necessary. Congress should also [repeal laws](#) that are obsolete or unnecessary. For those emergencies still deemed appropriate, language should be amended to remove potential avenues for abuse. Congressional approval should be required for any sanctions program within a certain time period.
- **Rein in presidential emergency spending powers.** Congress should create a statutory definition for national emergency, and invert the emergency declaration process. Instead of the current system which requires Congress to affirmatively vote to end an emergency, Congress should make all emergency declarations automatically expire absent an affirmative decision to extend the emergency. In addition, Congress should issue new criteria for emergency declarations, and specifically require a connection between an emergency and the powers invoked.

## Resources

Sen. Lee's [Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act](#), S. 764 (116th Congress, 2019).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 531 et seq. (116th Congress, 2020).

[Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency](#), *United States Senate: Special Committee on the Termination of National Emergency*, November 19, 1973.

Harold C. Relyea, [National Emergency Powers: A Brief Overview of Presidential Suspensions of the Habeas Corpus Privilege and Invocations of Martial Law](#), *Presidential Studies Quarterly* Vol. 7, No. 4, Fall, 1977.

Elizabeth Goitein, [The Alarming Scope of the President's Emergency Powers](#), *The Atlantic*, 2019.

L. Elaine Halchin, [National Emergency Powers](#), *Congressional Research Service*, March 23, 2020.

Christopher A. Casey, et al., [The International Emergency Economic Powers Act: Origins, Evolution, and Use](#), *Congressional Research Service*, July 14, 2020.

[Declared National Emergencies Under the National Emergencies Act](#), *Brennan Center for Justice*, September, 2020.

Elizabeth Goitein, [Good Governance Paper No. 18: Reforming Emergency Powers](#), *Just Security*, October 31, 2020.



## Issue 8: Misuse of acting officials

Presidential administrations have historically used loopholes in the Federal Vacancies Reform Act (FVRA) to sidestep the Senate confirmation process. These loopholes have become glaringly obvious through the Trump Administration's [unprecedented reliance](#) on this practice. President Donald Trump has abused the authority granted to him by installing agency officials in contravention of the limits imposed by the FVRA.

These practices have subverted the Senate's important [constitutional power](#) to provide "advice and consent" to nominations of executive officers or to delegate the authority when deemed proper. Congress enacted the FVRA to preserve continuity of agency leadership in the event of a death or resignation by allowing presidents to temporarily fill vacancies with acting officials. The FVRA permits an acting official to serve for 210 days after the vacancy occurs or, "once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate."

The Trump Administration has [abused the FVRA](#) and sidestepped the Senate to give power to individuals who would likely be the subject of difficult confirmation processes. For example, Ken Cuccinelli was appointed to a role [created](#) just for him—principal deputy director of the U.S. Citizenship and Immigration Services—and immediately granted authority over the agency. In March 2020, a federal judge [ruled](#) that his appointment to the role was unlawful under both the FVRA and the Appointments Clause.

Other violations have gone unchecked. For instance, President Trump appointed two acting directors of national intelligence after Dan Coats resigned effective August 2019 and used those appointments as leverage to nominate and [confirm](#) Representative John Ratcliffe, a political ally with little previous intelligence experience. Similarly, after securing the resignation of Attorney General Jeff Sessions, President Trump installed Sessions's Chief of Staff, Matt Whitaker, as acting attorney general even though the Department of Justice has a specific [statutory](#) line of succession. Whitaker's appointment as acting attorney general rather than his formal nomination [prevented](#) the Senate from engaging and probing his serious ethics issues, including his role in overseeing Special Counsel Mueller's investigation after Whitaker had made potentially prejudicial statements about it. Such practices have upended the Senate's critical role in confirming nominees, the legislative-executive balance of power, and, ultimately, our constitutional order.

It has been over two decades since presidential abuse resulted in urgent reform of the FVRA. In the 1990s, President Bill Clinton utilized the FVRA to appoint an acting assistant attorney general after his nominee was not approved by the Senate. The Trump Administration has bypassed the Senate confirmation process on a much larger scale and demonstrated a need for FVRA reform.



## Solutions

- Reduce the period of time that acting officials can serve and add enforcement mechanisms.** The simplest way to curb abuses of the FVRA is to reduce the length of time that acting officials may serve. While the FVRA should continue to permit the president to fill positions with acting officials while they search for an individual to nominate, that process should be completed expeditiously. If an individual is appointed outside of the normal line of succession and serves beyond the date the FVRA authorizes, then Congress should provide that they may not draw a salary or otherwise use federal resources. An exception to this rule is appropriate for individuals who serve in an acting capacity during or after a presidential transition.
- Require the president to select acting officials who have some experience at the agency and require first assistants to serve at least a month or two prior to becoming an acting official.** The FVRA is fundamentally a mechanism to provide continuity in agency leadership. Requiring acting leadership to come from within an agency would provide an important safeguard against the installation of someone with no experience in agency affairs.
- Require agencies to identify by rule or regulation what position is first assistant.** This requirement protects against the agency's creation of positions that can be filled with someone who is subsequently promoted to serve in an acting capacity.
- Clarify that agency-specific statutory lines-of-succession are the exclusive means by which agency vacancies should be filled unless those positions are also vacant or filled by acting officials.** This change would restore the FVRA to its proper function: serving as an option of last resort for the president to fill unexpected vacancies. Where, however, the agency has already laid out in specific detail who will serve as the acting official in case of a vacancy, that law should control.
- Require acting officials to testify before Senate and House appropriations subcommittees within 60 days of their appointment as acting official.** The requirement that acting officials testify promptly adds a measure of accountability and gives Congress and the American people an opportunity to hear from individuals who temporarily serve as acting officials. Representative Porter's [Accountability for Acting Officials Act](#) includes such a requirement and permits each committee to waive this provision with mutual assent of the chair ranking member.
- Bolster reporting of vacancies, either by directing the Government Accountability Office or agency heads to provide notice of vacancies and/or the end of a term of an acting officer.** More accurate information about agency vacancies would aid Congress in its oversight efforts. Agencies or the Government Accountability Office should be required to make public a list of agency positions for which there is a vacancy or an individual serving in an acting capacity.

- **Permit putative acting officials and those impacted by their decisions to seek judicial review of their authority.** The FVRA must be enforceable for it to deter presidential misconduct. For that reason, individuals who believe they are entitled to serve in an acting capacity should be permitted to challenge an unlawful appointment in court. Those impacted by an unlawful appointment should be able to do the same. Congress should vest the United States District Court for the District of Columbia with jurisdiction over such cases and permit direct appeal to the Supreme Court.

## Resources

Rep. Porter's [Accountability for Acting Officials Act](#), H.R. 6689 (116th Congress, 2020).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 901 et seq. (116th Congress, 2020).

[Amicus Brief of Citizens for Responsibility and Ethics in Washington and Former Government Ethics Officials, \*Maryland v. United States\*](#), No. 18-cv-2849 (D. Md. November 26, 2018).

Steve Vladeck, [Trump is Abusing His Authority to Name "Acting Secretaries." Here's How Congress Can Stop Him.](#), *Slate*, April 9, 2019.

Rebecca Jones, [The Dangers of Chronic Federal Vacancies](#), *Project on Government Oversight*, August 6, 2019.

[The Vacancies Act: A Legal Overview](#), *Congressional Research Service*, May 28, 2020.

Margaret Taylor, [Is It Time to Reform the Federal Vacancies Act?](#), *Lawfare*, March 10, 2020.

Brianne J. Gorod and Becca Damante, [How the Trump Administration is Evading Senate Advice and Consent](#), *Constitutional Accountability Center*, April 10, 2020.

Steve Vladeck, [Good Governance Paper No. 7: Executive Branch Vacancies](#), *Just Security*, October 22, 2020.

[Federal Vacancies Reform Act](#), *Protect Democracy*.

## Issue 9: Broken confirmation processes

The Senate has a constitutional responsibility to provide advice and consent to judicial and executive branch nominees. In recent years, both parties have taken steps to reduce the derailing role that the filibuster plays in this congressional responsibility. During the Obama Administration, the Senate [changed](#) its rules so that federal judicial nominees for lower courts and executive-office nominees could advance to confirmation votes by a simple majority of senators. And during the Trump Administration, this rule was [extended](#) to Supreme Court justices.

Consideration of executive branch nominees [lasts](#) five times as long as it did 40 years ago.

This timeframe risks leaving open executive positions and tacitly encourages presidents to sidestep the Senate confirmation process—[flaws the Trump Administration has capitalized upon](#) (as discussed in issue 8 of this section).

And yet, this influx of time fails to yield any net benefit or a more investigative confirmation process. No independent senatorial investigative mechanisms exist besides the subpoena, which cannot be enforced without the assistance of the Department of Justice. The result is a system that is not capable of properly vetting individuals who have been nominated for powerful positions in our government.

### Solutions

- **Establish a standard form, procedure, and timeline for consideration of executive branch nominees.** Those procedures should establish circumstances in which the consideration of a nominee can be delayed to investigate credible and substantiated accusations of unethical or unlawful conduct.
- **Establish a non-partisan congressional office to conduct all background investigations of judicial nominees.** Congress should not rely on executive branch agencies to conduct fact finding inquiries about judicial nominees. Instead, the Senate should establish a non-partisan congressional office to handle referrals or requests for more information about a nominee's alleged unethical or unlawful conduct.

### Resources

Sen. Specter's [A resolution providing for protocol for nonpartisan confirmation of judicial nominees](#), S.Res. 327 (108th Congress, 2004).

Barry J. McMillion, [Length of Time from Nomination to Confirmation for U.S. Circuit and District Court Nominees: Overview and Policy Options to Shorten the Process](#), *Congressional Research Service*, November 20, 2013.

Alicia Bannon, [Obstruction of the Senate and the Future of Rules Reform on Nominations](#), *BNA Reports*, August 19, 2014.

Senator John C. Danforth, [How to Fix the Supreme Court Confirmation Mess](#), *Time*, November 11, 2018.

Rudy Mehrbani, et al., [Proposals for Reform: Volume II](#), *Brennan Center For Justice at New York University School of Law: National Task Force on Rule of Law & Democracy*, October 3, 2019.

## Issue 10: Inadequate Senate impeachment rules

President Donald Trump's impeachment by the House of Representatives on December 18, 2019 and acquittal by the Senate on February 5, 2020 exposed flaws in the process of impeachment. During President Trump's trial, Senate Republicans declined to subpoena [any](#) witnesses who could have provided testimony about the President's misconduct. The deliberate effort not to hear and consider evidence that would have substantiated the counts of impeachment against President Trump defied Senate precedent. In every previous [impeachment trial](#) in the Senate's history, the Senate heard from witnesses who did not offer testimony before the House of Representatives.

Other aspects of Senate trial procedure should be updated so that ambiguities in the rules do not sidetrack future impeachment proceedings. Senate rules [require](#) each senator to swear an oath to do impartial justice, but a senator's ethical obligations at trial are not delineated in further detail. No clear standards for a senator's recusal are set forth in Senate rules or precedent. Instead the standing impeachment [rules](#) contemplate a senator both providing testimony and voting on the articles themselves.

In addition, the [authority](#) of the presiding officer at a trial should be spelled out in greater detail. There are convincing reasons for the Chief Justice of the United States to play a more active role in determining questions of relevance and other evidentiary issues, including the chief justice's relative familiarity with [neutral principles](#) that could be applied to resolve those questions.

### Solutions

- **Amend the Senate impeachment trial rules to permit the House managers to issue up to five subpoenas for testimony and five subpoenas for documents unless a majority of senators present oppose their issuance.** The House of Representatives should be entitled to present their case to the Senate. Regardless of whether the House obtained testimony or records in its proceedings, the Senate rules should empower them to present a full case to the Senate so that the senators can fulfill their responsibility to do impartial justice. The Senate should also retain the power to approve additional subpoenas sought by the House or the defense.
- **Amend the Senate impeachment rules to clarify the role of the chief justice in Senate trials of the president.** Require the chief justice of the Supreme Court, in his or her capacity as president of the Senate sitting as a court of impeachment, to make an initial ruling on all questions of admissibility. Permit the chief justice to cast a tie-breaking vote on other procedural questions that end in a tie vote of the senators assembled.

- **Amend the Senate impeachment trial rules to require the recusal of any senator who is a fact witness to or participant in the course of conduct relating to an article of impeachment.** The Constitution does not require every senator to be present during an impeachment trial and explicitly permits conviction and removal from office to be decided by members present. A conflict of interest is an appropriate reason for a senator not to be present at an impeachment trial, and Senate rules should spell out more clearly when a senator should recuse.

## Resources

[The case for a Trump impeachment inquiry](#), *CREW*, July 24, 2019.

[Senate impeachment trial procedure](#), *Public Citizen and CREW*, November 7, 2019.

Conor Shaw, [The Senate Must Conduct an Impeachment Trial that Is Serious and Fair](#), *Just Security*, December 19, 2019.

Gabe Lezra, [There Is No Reason to Exclude Evidence in an Impeachment Trial on Grounds of Hearsay](#), *Just Security*, January 28, 2020.

## Issue 11: Poor compensation for members of Congress and staff

Congressional staff are the backbone of the legislative branch. They draft legislation, conduct investigations, work with constituents and interest groups, and perform countless other critical tasks ranging from top-secret intelligence gathering to ensuring members have water before a hearing. Despite these essential functions, they are [vastly underpaid](#) and overworked.

Average chief of staff salaries are estimated to be [40 percent](#) lower than comparable private sector salaries; similar analyses have [shown](#) that pay gaps for other senior staff like legislative directors and counsels reach up to 65 and 145 percent. Lower level staff are [equally underpaid](#): staff assistants in the private sector can make 20 percent more than their congressional counterparts, and legislative correspondents can command over 35 percent more.

These monetary discrepancies are compounded because younger staff just beginning their careers are often saddled with immense student debt. The Washington, DC metropolitan area, where many staffers reside, has become one of the more expensive places to live in the country. The cost of living in DC is [39 percent above](#) the national average. Cost of living concerns are even more pronounced for congressional interns, many of whom are unpaid. These financial realities also make it more likely that congressional staff will leave their government work to pursue more lucrative opportunities in lobbying or the private sector which creates a brain drain on Capitol Hill and raises potential ethics concerns about the revolving door between government and industry.

Low pay is also a barrier to a more inclusive workforce. If working in Congress requires an individual to draw on their savings or financial support from their family and connections, then the congressional workforce will disproportionately be composed of individuals who have access to those kinds of resources. Although people of color comprise 38 percent of the U.S. population, they [comprise](#) less than 14 percent of top House staff. Many individuals from less affluent backgrounds cannot afford to work for below-market wages on Capitol Hill and thus cannot live in one of the nation's most expensive housing and childcare markets. The end result is a staff that is not representative of the country.

Congressional staff are also asked to do increasingly more work as office budgets shrink and jobs are cut, leaving staff more vulnerable to outside influence. Smaller staff sizes with fewer institutionally knowledgeable employees also make members of Congress more reliant on help from outside sources that may be offering assistance so that they can influence Congress's legislative or oversight activities. A typical legislative assistant's portfolio may now include a half dozen separate issues or more, which will necessarily lead to issue triage and staff burnout. These [staffing problems](#), including the uncomfortable fact that [no staff position](#) has a median tenure beyond four years, may lead Congress to address fewer pressing issues, take more time to address the issues they do decide to undertake, and waste time re-learning information with which more tenured staff potentially has experience.

Although members of Congress are paid more than staff, their salaries should also be increased for similar reasons. Serving in Congress is demanding, and former members of Congress can often [secure](#) more lucrative lobbying positions when they retire. Increasing congressional pay reduces the financial incentive to retire, helps promote diversity within the legislative branch, and insulates Congress from corrupting influences by those who might employ members after they leave.

Congress cannot increase its own pay with immediate effect. The Twenty-Seventh Amendment [provides](#) that “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” Congress provided for automatic adjustments to member salaries in the Ethics Reform Act of 1989; however, Congress has [frozen](#) pay increases for members every year since 2009. As a result, member salaries have [decreased](#) by approximately 17 percent over the last 11 years when adjusted for inflation.

## Solutions

- **Lift the pay freeze on member salary adjustments and increase salaries for the 118th Congress to compensate for eleven years of skipped pay increases.** Congress should return to automatic increases in member salaries and increase salaries for the next Congress by 17 percent.
- **Increase member and committee staff budgets.** Members and committees should have more resources to address issues of complexity and to reduce their reliance on lobbyists and outside groups for expertise.
- **Raise staff salaries, and eliminate the unpaid intern program.** The budgets for member and committee staff budgets should be increased to support larger and better compensated staff. In addition, staff salaries should be increased to better reflect local cost of living and the experience and expertise of congressional employees. Staff salaries should also be indexed to inflation to ensure that they continue to increase with the cost of living. Congress should also standardize paid family and medical leave as well as minimum vacation requirements.
- **Pay transition staffers for newly elected members of Congress.** Newly elected members of Congress should have resources to put together a team in the two months between the general election and the beginning of a new Congress.

## Resources

Rep. Kilmer’s [Moving Our Democracy and Congressional Operations Towards Modernization Resolution](#), H.Res. 756 (116th Congress, 2019).

Sen. Warren and Rep. Jayapal’s [Anti-Corruption and Public Integrity Act](#), S. 3357, § 209 (115th Congress, 2018).

Casey Burgat and Ryan Dukeman, [Human Capital and Institutional Decline in Congressional Appropriations Committees](#), *R Street Institute*, December 14, 2018.



Kathryn Pearson, et al., [Report from the Subcommittee on Staffing Diversity and Retention](#), *APSA Task Force on Congressional Reform*, June 20, 2019.

[State of the Congressional Workplace: 2019 Annual Report: A Report on Workplace Rights, Safety and Health, and Accessibility under the Congressional Accountability Act](#), *Office of Congressional Workplace Rights*, 2019.

R. Eric Petersen, [Staff Pay Levels for Selected Positions in House Member Offices, 2001-2019](#), *Congressional Research Service*, September 11, 2020.

## Issue 12: An overburdened and unrepresentative federal judiciary

Judges hold immense power in our government. They serve as checks and balances for the legislative and executive branches, and help to ensure that the Constitution and laws are adhered to throughout the country. Additionally, as federal judges serve for life, their potential influence stretches across multiple generations. In recent years, the judicial overburden of litigation in many districts across the country has become overwhelmingly evident.

There are limitations to the amount of work that judges can get done. Rises in the population and/or case filings heighten the importance of increasing judgeships around the country to ensure the judicial system manages its caseload properly. The Judicial Conference [recommended](#) (amongst other proposals) that 73 new judgeships be created in the U.S. district courts to alleviate [the demanding workloads](#) of judges and courts in many of the most populous districts. In many districts, case filings [have drastically increased and require](#) immediate action. While others are not quite as overburdened, the establishment of more judgeships would ensure that other districts do not find themselves in similarly pressing situations.

Although neither the United States District Court for the District of Columbia and the D.C. Circuit Court of Appeals are [identified](#) as targets for additional judgeships by the Judicial Conference on the basis of their comparative workload, judgeships should nonetheless be added on those courts to ensure important cases involving the federal government are resolved expeditiously. Critical Freedom of Information Act, Administrative Procedure Act, campaign finance, and constitutional cases are routinely decided in these courts. Ensuring that these important cases can be resolved as efficiently as possible is advantageous both to the federal government and to litigants who wish to challenge its policies, decisions, and conduct.

The judiciary is not only limited in its capacity, but also in diversity. In order to function effectively and be regarded with legitimacy, judges should have respect and mutual trust with the public that they make fair and reasonable decisions. When judges do not reflect the populations they are making decisions for, it is difficult to establish that all-important trust and legitimacy. The majority of federal judges are white and/or men. Since taking office, [President Donald Trump has not prioritized](#) nominating judges of diverse backgrounds. Instead, the majority of nominees and appointees continue to be white men.

Overall, the judiciary has significant influence on our democracy; it ensures accountability in our legislative and executive branches. It is imperative that the judiciary has the capacity and makeup to carry out its necessary functions and the makeup to reflect the population, and reinforce public trust and legitimacy.

### Solutions

- **Establish the five new circuit court judgeships and 73 new district court judgeships requested by the Judicial Conference of the United States in 2020.** This should include five new judgeships for the Ninth Circuit Court of Appeals, 65 new judgeships in 24 district courts, and the conversion of eight existing temporary judgeships to permanent status.

- **Establish additional judgeships in the United States District Court for the District of Columbia and the D.C. Circuit Court of Appeals to expedite resolution of cases involving matters of consequence to the operation of the United States government.** Cases that are crucial to the functioning of our democracy should not move at an average pace—they should move at an accelerated one. Time is often of the essence for litigation in these courts, and they should have additional judges to ensure cases are resolved expeditiously.
- **Prioritize increasing the diversity of the federal judiciary.** When considering judicial candidates, the president and the Senate should give explicit consideration to ensuring that more women and people of color are appointed to federal judgeships.

## Resources

[Joint Statement of Judge Lawrence F. Stengel, Judge Roslynn Mauskopf, and Judge Dana M. Sabraw, June 21, 2018.](#)

Barry J. McMillion, [Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis](#), *Congressional Research Service*, September 3, 2019.

Danielle Root, et al., [Building a More Inclusive Federal Judiciary](#), *Center for American Progress*, October 3, 2019. [Statement of the Honorable Brian Stacy Miller on Behalf of the Judicial Conference of the United States](#), June 30, 2020.

Vincent M. Southerland, [Good Governance Paper No. 19: The Criminal Legal System — Towards a Paradigm Shift](#), *Just Security*, November 1, 2020.

## SECTION 3 *of* WHAT DEMOCRACY LOOKS LIKE

# Limiting Secret Money in Politics

**In a government that is of the people, by the people, and for the people, the most sacred tenet of civic participation is the ability of the people to elect a government that represents them.** In its idealized form, the democratic process is a marketplace of ideas in which the American people choose representatives who best reflect the views of the electorate.

But that ideal is not reality. The marketplace is broken. Our elections have become a competition for money—not just for votes. Once elected, representatives give unparalleled access to donors and professional lobbyists and have strong incentives to value the input of monied interests over the views of their constituents.

Our system of laws and regulations governing campaign fundraising and spending is failing. Building on earlier laws, Congress laid the groundwork for a system that would protect against political corruption through unchecked campaign contributions with the Federal Election Campaign Act of 1971 (FECA). Shortly thereafter, following the disclosure of campaign finance abuses in the 1972 elections, Congress bolstered the FECA by creating an independent body—the Federal Election Commission (FEC)—to enforce federal campaign finance laws, and established a system for the public financing of presidential elections.

Since then, the Supreme Court has systematically dismantled federal campaign finance law by ruling unconstitutional major components of the FECA and subsequent bipartisan congressional efforts to impose rational and fair limits on the influence of money in politics. The Court struck down limits on campaign and independent expenditures and made it possible for corporations, unions and wealthy individuals to spend millions of dollars influencing voters without disclosing who is behind those messages. The Court also struck down aggregate limits on contributions to all candidates in a single cycle. As a result, voters have been robbed of the opportunity to judge the credibility of political advertising and the integrity of their federal candidates by knowing the identities of the people and institutions behind those messages.

On top of this, the FEC—tasked with ensuring compliance with campaign finance laws and creating regulations to protect the integrity of our elections—is broken. In its current state, it has effectively worked against transparency and disclosure through inaction.

Laws intended to reduce the outsized influence of paid lobbying on officials once they have been elected to office have also proven too weak. While some transparency exists, loopholes in disclosure laws allow lobbyists to effectively conceal the beneficiaries of their efforts as they move easily through the halls of power. As a result, we do not know the extent to which federal agencies and Congress are captured by powerful interests.

In this section, we lay out a roadmap of solutions to begin to pick up the pieces in a post-*Citizens United* landscape. Our proposals are designed to address major issues in campaign finance that can be implemented even if the Supreme Court's restrictive decisions remain in place, though in section 8 of this report, we also advocate for a constitutional amendment to reestablish Congress's authority to regulate campaign finance. We support a federal small-dollar matching program to reduce the outsized role of big money in politics; efforts to close disclosure gaps that corporations, shell companies, and others have exploited; regulations on microtargeted online political advertising; disclosure of expenditures spent on judicial nomination and confirmation fights; as well as reforms to the perpetually gridlocked FEC. We also support efforts to prevent nonprofits from circumventing limits on political activities and affirmative disclosure obligations on executive and legislative officials who have contacts with paid lobbyists.

## Issue 1: Limitless, undisclosed political spending

The Supreme Court has reasoned that the corrupting influence of limitless election spending by individuals, corporations, and unions can be addressed with disclosure requirements and a prohibition on the coordination of these expenditures with political campaigns. In [Buckley v. Valeo](#) (1976), the Supreme Court ignored compelling anti-corruption concerns and invalidated limits on independent expenditures by individuals, reasoning that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” In 2010, the Court doubled down on this logic in [Citizens United v. Federal Election Commission](#) when it invalidated limits on corporate and union spending in elections. In addressing concerns about corruption or even the appearance of corruption associated with unlimited political spending, the *Citizens United* Court reasoned that “[t]he absence of prearrangement and coordination [with candidates]. . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”

The Court could not have been more wrong. The disclosure laws are not working as intended. In effect, the voting public is subjected to (and bombarded with) political advocacy with no real ability to discern its source, and thus, its credibility. This setup is an invitation for the creation of shell companies and the abuse of nonprofit rules to create dark money groups, often referred to as 501(c)(4)s or social welfare organizations, for the sole purpose of hiding the identity of political donors.

Although the identities of those funding these activities are not known to the public, they are almost certainly known to the candidates receiving support. Election expenditures are therefore a valuable, secret means of obtaining influence—presenting the precise danger of a *quid pro quo* that the Supreme Court dismissed in *Citizens United*. Funders can spend vast sums on public influence campaigns without voters understanding that the ad may also have the effect of indebting the candidate to the special interests of the corporation, wealthy individual, or union who actually funded it.

The Federal Election Commission (FEC) has rendered some existing disclosure requirements functionally useless. For example, the [Bipartisan Campaign Reform Act of 2001](#) (BCRA) requires that all persons making a disbursement of \$1,000 or more for the creation or airing of an [electioneering communication](#) disclose the names and addresses of every donor who contributed to the \$1,000 disbursement. Republican commissioners of the FEC have chosen to exempt from this requirement corporate “persons” by only requiring them to disclose the names of donors who earmark contributions for the specific electioneering communication (i.e. political ad) in question. This amounts to another enormous loophole that allows individuals and corporations to spend unlimited amounts of money to influence our elections without disclosing their identities. Other ways to evade disclosure—like the use of “[pop-up super political action committees \(PACs\)](#)” that time their appearance on the scene to avoid reporting who funded them until after the election—further undermine the ability of disclosure to perform the anti-corruption function the Supreme Court has relied on.

Political spending by corporations also goes unchecked in another regard: corporate shareholders are often left in the dark regarding political spending, further increasing the risk that such spending can become a vector for corruption inside and outside the corporation. The lack of fairness in this approach has not gone unnoticed. In response to significant [advocacy](#), some public companies have voluntarily set [policies](#) disclosing political spending information to shareholders; however, there is no law or rule requiring them to do so.

The failure to rein in undisclosed political spending has led to the dilution of everyday citizens' voices in our elections—an unacceptable result that is antithetical to our “by the people, for the people” democratic process.

## Solutions

- Congress should pass the [DISCLOSE Act](#).** The DISCLOSE Act was introduced in response to *Citizens United* and would amend the Federal Election Campaign Act of 1971 to require near real-time disclosure of the identity of donors who contribute \$10,000 or more in an election cycle via super PACs or 501(c)(4) organizations that spend significant money in elections. The bill also requires companies spending money in elections to disclose their true owners, preventing the abuse of shell companies to circumvent election spending requirements. Together, these requirements narrow the transparency loopholes used by donors who use the two most common forms of dark money to hide their identities—501(c)(4) organizations and shell corporations.
- Congress should pass the [Stand By Every Ad Act](#).** The Stand By Every Ad Act requires meaningful transparency of political ads by requiring the ads to also include links to the top five donors funding the ad and requiring those funding entities to disclose the name and title of their highest-ranking official. These requirements reduce the ability of wealthy donors to hide their true identities behind corporate entities that provide the voter with no timely information that would allow them to assess the credibility of the ad.
- Congress should pass legislation that requires publicly traded companies to disclose political expenditures to their shareholders.** Two existing legislative proposals worth noting include the [Corporate Political Disclosure Act of 2019](#), which requires publicly traded corporations to disclose their political spending to shareholders by creating a uniform reporting requirement through the Securities and Exchange Commission (SEC), and the [Shareholder Protection Act of 2019](#), which covers electioneering communications and independent expenditures and requires shareholders to authorize, on an annual basis, the company's political activities budget while also requiring that public companies disclose (online, to shareholders, and to the SEC) individual board member votes and the details of each approved expenditure.

- **Congress should ensure that big political spenders, like large dark money groups, can't use their size to evade disclosure requirements.** Many disclosure requirements are premised on whether political spending constitutes a certain percentage of the money a group spends overall. But this can be manipulated by very large groups to inject substantial amounts of money into elections by keeping their political spending just under 50 percent of their total spending. Congress should set a monetary baseline to require disclosures by groups that spend a certain amount regardless of the percentage that amount represents, strengthen and clarify the definition of what gets included in the percentage of spending that is considered “political”, or both. This will curb the ability of organizations to inject substantial amounts of money into elections while avoiding disclosure.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 4001 et seq. (116th Congress, 2019).

Sen. Whitehouse and Rep. Cicilline's [DISCLOSE Act of 2019](#), S. 1147 (116th Congress, 2019).

Sen. Warren and Rep. Lujan's [Accountable Capitalism Act](#), S. 3215 (116th Congress, 2020).

Stuart McPhail, [Citizens United allowed money in politics to explode. It's up to us to stop it](#), CREW, January 21, 2020.

Stuart McPhail, [Remembering Buckley's mistakes](#), CREW, January 30, 2018.

[Dark Money Basics](#), Open Secrets Center for Responsive Politics.

Tim Lau, [Citizens United Explained](#), Brennan Center for Justice, December 12, 2019.

[Mystery Money: How a loophole could allow foreign money to flow into super PACs through secretive shell companies](#), Issue One, July 2020.

[Comments on REG 2018-03, Definition of Contribution](#), Public Citizen, March 4, 2019.



## Issue 2: The outsized role of big money in politics

The Supreme Court's decision in *Citizens United* (2010) ushered in a new era of money in politics. By eliminating prohibitions on corporate independent expenditures and electioneering communications, the Court opened the door to an infusion of corporate funds in federal campaigns. Since 2010, outside spending on political campaigns more than [tripled](#), and subsequent cases have helped large individual donors massively increase the total amount they can give—in 2010, the largest individual donor gave around \$7 million, whereas in 2018, the largest individual donors gave \$123 million.

Small dollar matching programs are one way to restore balance to campaign finance. By multiplying the impact of small donations from citizens, matching programs create an incentive for politicians to court real people who live in their districts rather than corporations and those who control them. For example, candidates who participated in New York City's small donor matching program have [indicated](#) that “by pumping up the value of small contributions, the New York City system gives them an incentive to reach out to their own constituents rather than focusing all their attention on wealthy out-of-district donors, leading them to attract more diverse donors into the political process.” After implementing small dollar matching in [Connecticut](#), the number of individual donors that gave to candidates increased. And in places like Arizona and Maine, matching resulted in a [decrease](#) in overall time spent fundraising. Less time fundraising allows more time for doing the actual work of elected office—including legislating or meeting with constituents.

These programs also have the benefit of resting on solid legal ground. While the Supreme Court has ruled that many forms of campaign finance regulations are unconstitutional, it has upheld matching programs. At least [14 states](#) utilize different versions of small dollar matching options for candidates, and in several jurisdictions, matching programs have enhanced equitable participation in campaign fundraising.

In addition to restoring balance, it is important to ensure that the legal guardrails on political spending are properly enforced. The use of “straw donors” and illegally coordinated expenditures are two of the more common ways that money that should not be in the political system, even under the current rules, can get in. A straw donor scheme is essentially one person giving political money but reporting it as being from someone else - the “straw donor.” Often in order to execute this kind of scheme, insiders like campaign staff or contractors will play a critical role, for example in falsifying the paperwork. Under current law, though, these insiders are not themselves accountable for the illegal donations they've helped make happen, so they can continue this conduct elsewhere even if it is detected in one instance. Another way that campaign insiders can facilitate illegal spending is by coordinating with supposedly independent groups. Although such coordination is illegal, the rules are [easily evaded](#).

## Solutions

- **Congress should create an opt-in small-dollar matching program for federal elections.** Donations of up to \$200 would be considered small-dollar donations and would be subject to a matching system with a 6-1 ratio. Public financing would apply to candidates who actively choose to only accept small dollar contributions and meet the threshold for participation. Participating candidates and campaigns would agree to lower contribution limits.
- **Congress should close loopholes in the rules that prohibit coordination between candidates and outside groups.** Even if spending is disclosed, it can still lead to corruption, particularly if it is used for expenditures that are coordinated with candidates. In these circumstances, an outside group can effectively become an arm of a campaign, undermining any donation limits that do exist and risking corruption. Congress should strengthen the definition of what constitutes improper coordination of spending between outside groups and candidates in order to ensure that these groups are truly independent from candidates.
- **Congress should strengthen the rules against contributions illegally made via “straw donors” by also making it illegal to direct or assist someone else in executing this type of scheme.** Contributions made in the name of another person are illegal, and often setting up a system to make them without detection requires insiders, like lawyers or political consultants, who know the rules and how to evade them. These participants should themselves be able to be held accountable for the improper contributions they facilitate.

## Resources

Rep. Sarbanes’ [For the People Act of 2019](#), H.R. 1, § 5111 et seq. (116th Congress, 2019).

Rep. Rice’s [Political Accountability and Transparency Act](#), H.R. 679 (116th Congress, 2019).

Rep. Boyle’s [Clean Money Act of 2019](#), H.R. 3834 (116th Congress, 2019).

Sen. Durbin’s [Fair Elections Now Act of 2019](#), S. 2257 (116th Congress, 2019).

[Alex Tausanovitch](#) and James Lagasse, [The Small Donor Antidote to Big-Donor Politics](#), *Center for American Progress*, June 11, 2018.

[Legislative Recommendations of the Federal Election Commission](#), December 2018.

[Public Financing of Campaigns: Overview](#), National Conference of State Legislatures, February 8, 2019.

Nirali Vyas, Chisun Lee, Joanna Zdanys, [The Constituent Engagement Effect of Small Donor Public Financing](#), September 8, 2019.

Gareth Fowler and Daniel I. Weiner, [Understanding H.R.1’s Public Financing Provisions](#), *Brennan Center for Justice*, September 20, 2019.

Michael J. Malbin and Brendan Glavin, [Small Donor Public Finance in the State of New York - major Innovations, with a Catch](#), *National Institute on Money in Politics*, January 15, 2020.

[State and Local Public Financing Programs Are Leading the Way - Now It's Time for Congress to Follow with H.R. 1](#), *Campaign Legal Center*, February 14, 2020.

## Issue 3: Inadequate protections against pay-to-play in federal contracting

One type of corporation stands out amongst the proliferation of post-*Citizens United* corporate influencers: federal contractors. Federal law prohibits the actual contracting entities from making direct contributions to political candidates or parties. Nothing, however, prevents those who stand to make millions of dollars from these entities' federal contracts (i.e., officers, directors, controlling shareholders) from making direct donations to candidates and parties, nor is there anything stopping these individuals or corporate-affiliated political action committees (PACs) from making *unlimited* contributions to [dark money](#) groups that allow them to hide their identities and escape scrutiny for potential pay-to-play corruption.

By definition, federal contractors are paid with taxpayer money. From 2000 to 2014, taxpayers have paid the top ten federal contractors approximately [\\$1.5 trillion](#). In fiscal year 2019 alone, federal contractors were paid [\\$597 billion](#). Of the \$597 billion paid to federal contractors in 2019, approximately [\\$173 billion](#) went to the top ten contractors, including five mainstays on this list: Lockheed Martin Corp. (\$48.3 billion), Boeing Co. (\$28.1 billion), General Dynamics Corp. (\$21 billion), Northrop Grumman (\$16.4 billion), and Raytheon (\$15.9 billion). Comparing these five mainstays to the list of the [top five federal contractor-affiliated political donations for the 2018 midterm elections](#), it may not be surprising to find that the companies are identical: Northrop Grumman (\$3.6 million), Boeing (\$2.893 million), Lockheed Martin (\$2.8 million), General Dynamics (\$2 million), and Raytheon (\$1.9 million). With the government's expenditure of taxpayer money comes the responsibility of ensuring that the decision to spend the money is driven by the best interest of the people. Even the appearance of any other consideration undermines the people's confidence in government.

The prohibition on federal contractors making direct donations to political campaigns is insufficient in the era of super PACs and dark money. We need to ensure that federal contractors disclose all of their political activity so that pay-to-play schemes cannot go undetected and so that the American people have confidence that federal contracts are being awarded on the basis of merit, not favors. It is entirely appropriate for the federal government to condition receipt of federal contracts on disclosure of political activity. After all, getting business from the government is not a right—it is a privilege, and it can come with conditions intended to stave off corruption.

### Solutions

- **Federal contractors should be required to publicly disclose their political spending, including money given through dark money groups and super political action committees.** Congress should enact this requirement by statute or, alternatively, repeal an existing budget rider prohibiting the president from requiring entities applying for federal contracts to disclose their political spending in federal elections.

- **Congress should pass the DISCLOSE Act.** The DISCLOSE Act would, among other things, amend the Federal Election Campaign Act of 1971 to include a requirement that companies spending money in elections disclose their owners. This could help ensure that federal contractors are not evading limits by using shell companies to hide their spending.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 4601 (116th Congress, 2019).

Sen. Whitehouse and Rep. Cicilline's [DISCLOSE Act of 2019](#), S. 1147 (116th Congress, 2019).

Matt Corley, [Hensel Phelps donations to pro-Buck dark money group finally revealed](#), CREW, November 19, 2019.

Ciara Torres-Spelliscy, [The Fight for Corporations to Reveal Political Spending](#), Brennan Center for Justice, February 14, 2018.

Tim Lau, [Citizens United Explained](#), Brennan Center for Justice, December 12, 2019.

[Dark Money Basics](#), Open Secrets Center for Responsive Politics.

## Issue 4: Anonymous and microtargeted online political ads

[Current campaign finance law](#) requires that anyone who pays for a political ad on television or radio must be identified in the ad, and the broadcaster must keep a list of all political ad purchases and make this information publicly available. Further, foreign nationals are prohibited from purchasing ads that even mention a political candidate's name within a specified time leading up to an election. These transparency rules were implemented as part of the robust [Bipartisan Campaign Reform Act of 2001](#) (BCRA), commonly referenced as "McCain-Feingold."

The BCRA was the first major update to campaign finance laws since the Federal Election Campaign Act of 1971 was amended in the 1970s. During the period in which the BCRA was negotiated and ultimately signed into law, Google's search engine was just beginning to attract a following, and Facebook had not yet been founded. Since then, there have been rapid digital innovations that transformed the ways in which everyday Americans interact with the internet. These advances are reflected in the exponential growth in online political ad spending: there was a [260 percent increase](#) in digital political ad spending between the 2014 and 2018 midterms, and some [estimates](#) place online political ad spending over \$1.4 billion in the 2016 election cycle alone. Federal campaign finance laws have not kept up with this reality. While the BCRA's transparency provisions continue to apply to television, broadcast, and satellite communications, these rules have yet to be expanded to recognize the current digital landscape and critical role of social media in election influence.

This loophole was exploited by Russia in the 2016 election. In Volume I of the [Report On The Investigation Into Russian Interference In The 2016 Presidential Election](#), Special Counsel Robert Mueller plainly and unequivocally concluded that "[t]he Russian government interfered in the 2016 presidential election in sweeping and systematic fashion." One way this interference was accomplished was targeted disinformation campaigns carried out on digital media platforms and facilitated through the purchase of online political ads.

Compounding the vulnerabilities created by largely unregulated digital communities is the ability of online ad purchasers to microtarget their ads. Unlike a TV broadcast in which individuals in the same market receive the same message, online ads can be narrowly tailored to target demographic criteria. This capability allows campaigns and entities placing online ads to manipulate public discourse in a way that is damaging to our democracy. Instead of a marketplace of ideas, Americans are exposed to a slew of ads that talk past each other and prevent people from engaging on the same issues. Microtargeted online ads have also proven to be particularly virulent tools for spreading disinformation, and social media organizations have struggled to police intentional efforts to spread lies or distrust about the election.

## Solutions

- **Congress should update campaign finance laws by passing the Honest Ads Act.** The Honest Ads Act closes the loophole that treats internet ads differently from television and other ads, requires digital platforms to make reasonable efforts to prevent foreign nationals from buying ads on their platforms, and increases online ad transparency through measures such as requiring platforms to maintain a public database of all online political ad purchases and requiring ad purchasers to disclose in the ad its financial sponsor.
- **The Federal Election Commission should update its regulations to take into account that many political ads are now on the internet.** Since 2011, the Federal Election Commission (FEC) has been considering a rulemaking that would provide guidelines for digital ad disclaimers and clearly apply existing rules to communications over the internet that are produced for a fee or placed or promoted for a fee on another person's website or digital device, application, service, or platform, and are then shared by or to a website or digital device, application, service, or platform. This guidance is long overdue.
- **Congress should pass the Banning Microtargeted Political Ads Act.** The Banning Microtargeted Political Ads Act prohibits online platforms, including social media, ad networks, and streaming services, from targeting political ads based on the demographic or behavioral data of users. A carve-out is included for targeting ads to broad geographies—states, municipalities, and congressional districts. To ensure functional avenues for enforcement, the bill also includes a private right of action (in addition to a FEC enforcement regime).

## Resources

Sen. Klobuchar and Rep. Kilmer's [Honest Ads Act, S. 1989 \(115th Congress, 2017\)](#).

Sen. Klobuchar's [Stopping Harmful Interference in Elections for a Lasting Democracy Act, S. 2669 \(116th Congress, 2019\)](#).

Rep. Eshoo's [Banning Microtargeted Political Ads Act, H.R. 7014 \(116th Congress, 2020\)](#).

[FAQ on the BCRA and Other New Rules, FEC, February, 2005.](#)

U.S. Senate Select Committee on Intelligence, [Report: Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Volume 2: Russia's Use of Social Media](#), October 8, 2019.

Tim Lau, [The Honest Ads Act Explained](#), *Brennan Center for Justice*, January 17, 2020.

Joshua Geltzer, [Good Governance Paper No. 10: Addressing Foreign Election Interference—An Overdue To-Do List](#), *Just Security*, October 27, 2020.



## Issue 5: Abuse of tax-exempt status by dark money nonprofits

Nonprofit organizations play a uniquely important role in our society, such as providing food and shelter to our most vulnerable citizens, promoting civic engagement and education, and other charitable missions. Congress provides that these organizations are entitled to special privileges—namely the ability to receive income exempt from taxation. Because these entities are exempt from tax, all other taxpayers essentially subsidize their activities. In exchange for this special taxpayer subsidy, Congress has placed certain limits on the purpose and activities of these organizations. In the case of section 501(c)(4), the organization must be organized for social welfare purposes and is limited, in practice, to having no more than 50 percent of their activity be political. Similar rules apply to labor organizations (section 501(c)(5)) and business leagues (section 501(c)(6)). Section 501(c)(3) organizations, which receive an additional benefit because the law allows donations made to the organization to be tax-deductible to the donor, must be organized exclusively for a charitable, religious, or educational purpose, and no part of their activities may be political. Organizations that violate the limits imposed by Congress can have their tax-exempt status revoked.

Under Internal Revenue Service (IRS) guidance, section 501(c)(4) organizations, known as “social welfare organizations,” are permitted to engage in a limited amount of political activity while retaining their privileged tax status, as long as politics do not become what the IRS considers a primary activity. Although Congress has said such groups’ activities should be “exclusively” for social welfare, the IRS enforces this rule only if more than 50 percent of the group’s spending is political.

Over the past decade, the IRS has largely abandoned enforcing the statutory requirements that limit the political activities of 501(c) organizations. There are four shortcomings in the IRS’s enforcement scheme. First, the enforcement budget was drastically cut (with the division overseeing nonprofits [reportedly](#) shrinking by almost half from 2010 to 2018). Second, career IRS civil servants fear political retribution for enforcement, in large part because many of their colleagues suffered fallout from the Republican-led [multi-year investigation](#) into the “Tea Party scandal” regarding whether inappropriate criteria were used to trigger review of applicants for 501(c)(4) status in the early 2010s. Third, Republican members of Congress have stripped the IRS of rule-making authority to clarify when a 501(c)(4) crosses the line into an inappropriate level of political activity. A 2015 budget rider prohibited the IRS from using funds “to issue, revise, or finalize any regulation, revenue ruling, or other guidance ... to determine whether a [501(c)(4)] organization is operated exclusively for the promotion of social welfare.” Finally, the IRS has made its own job harder by loosening reporting requirements. In 2018, the Trump Administration [withdrew](#) a requirement that 501(c)(4)s disclose to the IRS donors who contributed more than \$5,000—further limiting the ability of the agency to scrutinize 501(c)(4)s.



The defunding, politicization, and gutting of the IRS enforcement regime has had enormous consequences. A 2019 ProPublica [report](#) recently revealed the extent of the IRS enforcement regime's deterioration: Since 2015, thousands of complaints alleging that 501(c)(4)s were abusing the rules were filed by citizens, public interest groups, and even IRS agents, but the agency did not strip a single organization of its tax-exempt status during that period. In fact, as one IRS employee reported to ProPublica, there were at least 2,000 complaints that merited attention from the internal IRS oversight committee, but none of those complaints were actually reviewed by the committee during the relevant time frame.

## Solutions

- Congress should fully fund the Internal Revenue Service, including its exempt organizations division.** Enforcement of the basic conditions for nonprofit status needs to become a priority for the IRS. That priority needs to be reflected in a commitment to increasing the capacity of the enforcement division in the agency's budget.
- Congress should pass the Spotlight Act.** The Spotlight Act requires tax-exempt organizations that fall under sections 501(c)(4), 501(c)(5), and 501(c)(6) of the Internal Revenue Code (e.g., social welfare organizations, labor organizations, business leagues) to disclose the names and addresses of all substantial contributors on their returns. While this would not extinguish the problem of lack of oversight and enforcement, it would ensure the IRS has the information it needs to investigate and, if necessary, enforce tax law.
- Congress should pass legislation that requires 501(c)(4)s to publicly report political expenses on a quarterly basis.** This disclosure should also include their overall spending for the quarter. This will shift some of the burden of IRS investigation to the applicable organizations, increasing oversight efficiency.
- The Internal Revenue Service should revise its regulations to comport with the law's requirement that 501(c)(4)s operate "exclusively" for non-political purposes. If it does not, Congress should pass more detailed restrictions on the political activities of 501(c)(4)s.** The "primary activity" threshold, which has come to be interpreted as an entity spending less than 50 percent of its budget on political activities, is not restrictive enough. To secure the tax benefits associated with 501(c)(4) status, nonprofits should be obligated to spend a greater percentage of their budget on social welfare activities, which do not include political activities, than the IRS currently requires. If there is a specific monetary threshold, it should be well below 50 percent, and the law or rule should also specify what activities are considered political, so that the IRS can effectively enforce the law. If Congress is not going to legislate on this matter, it must at least eliminate the budget rider that in recent years has prevented the IRS from acting on this issue.

- **The Internal Revenue Service should publish timely, complete, machine-readable nonprofit data.** The IRS still provides certain information about nonprofits on DVDs it sends in the mail. This and other extremely outdated mechanisms for receiving information on nonprofit organizations is unacceptable. While the IRS has a search that includes some information on some groups, it has no universal search for public Form 990 tax returns, Form 1024 application materials, and tax-exempt determination letters, leaving the public and accountability groups to try to cobble together what they can from e-file data and other information. To remedy this, Congress should mandate the creation of a public database for nonprofit data and other public materials, akin to the one the agency already manages for section 527 political groups. In addition, Congress should add Form 9976 notifications to the list of materials to be made public under section 6104 of the tax code.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 4401 et seq. (116th Congress, 2019).

Rep. Crow's [End Dark Money Act](#), H.R. 868 (116th Congress, 2019).

Rep. Golden's [Crack Down on Dark Money Act](#), H.R. 7525 (116th Congress, 2019).

Sen. Tester and Rep. Price's [Spotlight Act](#), S. 276 (116th Congress, 2019).

Adam Rappaport, [The Dark Money Debate: Responses to Arguments Against Reforming IRS Treatment of 501\(c\) Groups](#), CREW, January, 2014.

Julie Patel, [IRS Rarely Audits Nonprofits for Politicking](#), *Center for Public Integrity*, January 22, 2015.

Maya Miller, [How the IRS Gave Up Fighting Political Dark Money Groups](#), *ProPublica*, April 18, 2019.

## Issue 6: Use of shell companies to conceal federal election spending

The use of shell corporations in election financing poses a threat to our democracy because they are used to hide the source of election-related spending. Although the Federal Election Campaign Act of 1971 requires corporations that make independent expenditures or electioneering communications to disclose their donors, the actual source of funds can be hidden if donors give to an intermediary—such as a shell corporation. The entity that engaged in campaign spending then only has to disclose the shell company as a donor—not the individuals or entities that are actually giving money.

Nor are there alternative sources for understanding who owns or contributes to these entities. Corporate licensing and registration in the United States has traditionally been a matter of state and tribal law, and few of those jurisdictions gather and disclose who actually owns or controls corporations. The true ownership or control of a corporation—that is, the person or entity at the very top of the pyramid—is commonly described as “beneficial ownership,” and, to the extent this information exists within government systems, it is distributed throughout the states and numerous agencies in the federal government. This information is not generally made available to the public.

An example of how donors and special interests use shell corporations to obscure their involvement in election spending is instructive: Prior to the 2018 midterm elections, Wayne and Monica Hoovestol and Andy Lucht, ostensibly under-the-radar Iowa Republican business owners, apparently created a limited liability company named [DRT, LLC](#) in Carter Lake, Iowa. This LLC made a \$250,000 contribution to pro-Trump super political action committee (PAC) [America First Action](#) in April 2018, and a \$10,000 contribution to the Mitch McConnell-aligned [Senate Leadership Fund](#) two weeks before election day in November 2018. The only way eagle-eyed dark money investigators managed to trace this money was because DRT, LLC’s registered address happened to be the same as Lone Mountain Truck Leasing, a company owned by Wayne Hoovestol and whose CFO is Andy Lucht. Many of Wayne Hoovestol’s businesses use the same Iowa address. And there is good reason to think this tactic is more broadly used; CREW has filed [legal complaints](#) against several such entities and the donors who seek to use them to hide their political spending.

This kind of scheme may well be just the tip of the iceberg. The reality is that neither the Federal Election Commission (FEC) nor campaign finance watchdogs have the resources to undertake extensive, time- and financially-consuming investigations and litigation to understand the extent to which political donations flow through shell companies. At the same time, the federal government is not powerless to address this issue. Congress can require corporations that engage in interstate commerce to disclose more information about their election-related activities and their beneficial owners.

## Solutions

- Congress should amend current disclosure requirements to ensure that true sources of large political spending are publicly disclosed.** Super PACs and some other groups that spend on politics are in theory already required to disclose the “true source” when reporting on funds they receive, but the use of shell companies can make this disclosure requirement ineffective. To address this in the case of large sources of funds, groups that report contributions to the FEC should be required to disclose the beneficial owners of contributors who contribute \$10,000 or more in an election cycle. For the purposes of this disclosure, a beneficial owner should include anyone who (1) exercises substantial control over a corporation or limited liability company, (2) owns 25 percent or more of the interest in a corporation or limited liability company, or (3) receives substantial economic benefits from the assets of a corporation or limited liability company.
- Congress should require all corporations and limited liability companies (not just those that engage in political activity) to disclose their beneficial owners to the Department of the Treasury.** For the purposes of this disclosure, a beneficial owner should include anyone who (1) exercises substantial control over a corporation or limited liability company, (2) owns 25 percent or more of the interest in a corporation or limited liability company, or (3) receives substantial economic benefits from the assets of a corporation or limited liability company. The regime should also require foreign corporations to disclose U.S. beneficial owners. Failure to comply or intentionally providing inaccurate information would be punishable by civil and criminal penalties.
- Companies applying for employer identification numbers should be required to disclose usable beneficial ownership information.** Currently, the employer identification number (EIN) numbering system does not lead to usable beneficial ownership information. Congress should require that companies that apply for EINs disclose such information on their paperwork to the Internal Revenue Service and the Department of Treasury.

## Resources

Sen. Whitehouse and Rep. Doggett’s [Stop Tax Haven Abuse Act](#), S.779 (116th Congress, 2019).

Sen. Wyden and Rep. Maloney’s [Corporate Transparency Act of 2019](#), S. 1978 (116th Congress, 2019).

Sen. Warner’s [ILLICIT CASH Act](#), S. 2563 (116th Congress, 2019).

[PACs, Super PACs, and Dark Money--What’s The Difference?](#), CLC Advancing Democracy Through Law, June 20, 2018.

[Dark Money Basics](#), *Open Secrets Center for Responsive Politics*.

## Issue 7: A gridlocked and dysfunctional Federal Election Commission

The Federal Election Commission (FEC) is an independent federal regulatory agency that was created by Congress to enforce and adjudicate campaign finance laws. Sadly, the FEC is a broken institution, and in the last few years has become [more dysfunctional than ever](#). The FEC's decline stems predominantly from a well-intended framework that enables stonewalling and gridlock.

The FEC was designed to promote bipartisanship and prevent one-party control. It is governed by six commissioners, no more than three of whom can be from the same party. Four commissioners—a bipartisan majority—must agree to investigate potential campaign finance violations, to pass regulations, and take other major agency actions. While the partisan balance of commissioners might seem reasonable, the commission has increasingly [succumbed to a destructive](#) impasse in which the commission rarely has four votes to take important action. In 2006, [FEC commissioners deadlocked](#) at a mere 2.9 percent of substantive enforcement votes, but by 2016, 30 percent of all substantive enforcement votes resulted in deadlock.

The commission has also experienced [a string of vacancies](#) that has deprived it of a quorum (four commissioners) for long stretches of time. Combined with new resignations, this has pushed the FEC down to three commissioners during much of the 2020 federal election cycle—below the necessary quorum to conduct activity. Without a quorum, the FEC is powerless to take action on any complaints it receives, no matter how meritorious they are.

As a result of partisan deadlock and the frequent absence of a quorum, the FEC has become powerless to police even the most blatant violations of federal campaign finance laws.

### Solutions

- **Congress should bolster and expand the citizen-suit provisions of the Federal Election Campaign Act of 1971.** If the FEC can not agree on corrective action in a certain amount of time, the default should not be that nothing happens. Instead, parties that have filed campaign finance complaints should be permitted to pursue them in court if the FEC fails to do so. Specifically, Congress should address procedural issues like waiting periods, attorney fees, and statutes of limitations, but also substantive issues like imposing limits on the FEC's ability to undermine these suits by claiming "prosecutorial discretion" over the outcome and requiring minimum standards if the FEC wants to settle a matter to keep it out of court.
- **Congress should provide that career staff at the Federal Election Commission have authority to begin investigations.** Under the current rules, FEC staff cannot even begin to investigate a potential violation without the Commission's approval. Congress should change the law to permit career FEC staff to investigate potential violations they think could have merit; the Commission would then determine whether there is reason to believe a violation has occurred.

- **The composition of the commission itself should be changed to facilitate a move away from gridlock.** The number of commissioners and the way in which they are selected can have a significant impact on the effectiveness of the agency. No single change of this kind alone will address the issue of gridlock, however, and this cannot be a substitute for the other changes we suggest.
- **Congress should ensure that the Federal Election Commission is sufficiently funded.** A functioning, effective FEC also requires sufficient funding, and Congress should ensure that the FEC's resources are sufficient to fulfill the mission that Congress sets for it.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 6001 et seq. (116th Congress, 2019).

R. Sam Garrett, [The Federal Election Commission: Overview and Selected Issues for Congress](#), *Congressional Research Service*, December 22, 2015.

Ann M. Ravel, [Dysfunction and Deadlock at the Federal Election Commission](#), *New York Times*, February 20, 2017.

[Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining of the Swamp](#), *Office of Commissioner Ann M. Ravel, Federal Election Commission*, February 2017.

Tim Lau, [How Congress Can Help Fix the Federal Election Commission](#), Brennan Center for Justice, April 30, 2019.

Daniel I. Weiner, [Fixing the FEC: An Agenda for Reform](#), Brennan Center for Justice, April 30, 2019.

Anna Massoglia and Karl Evers-Hillstrom, [Court says it can't rescue FEC from partisan deadlock ... again](#), *Open Secrets Center for Responsive Politics*, May 14, 2019.

Sarah Frostenson, [What Happens When The FEC Can't Do Its Job?](#), *FiveThirtyEight*, September 4, 2019.

## Issue 8: Anonymously funded judicial nominations campaigns

In recent years, anonymous donors have [spent](#) millions of dollars to influence federal judicial nomination and confirmation fights. This spending is not subject to any disclosure requirements. Federal election laws only regulate contributions and expenditures relating to electoral politics; thus, expenditures, contributions, and advocacy efforts for federal judgeships are not covered under the Federal Election Campaign Act of 1971.

The lack of any disclosure requirements imperils the judicial objectives of independence and impartiality. Individuals and organizations surreptitiously spending vast sums of money for a specific lifetime appointment may receive preferential treatment from the judge once confirmed. And litigants cannot access needed information to seek a judge's recusal if warranted.

The scale of this spending is profound. Outside groups [spent](#) more than \$10 million on television to advocate for or against the confirmation of Supreme Court Justice Brett Kavanaugh, for example. The Center for Responsive Politics conducted a review of online and TV spending on the Kavanaugh nomination and [concluded](#) that only a fraction of advocacy-related spending was disclosed.

The influence of dark money on the judiciary is even more [pronounced](#) in states that conduct judicial elections. In those jurisdictions, anonymous spending by outside groups accounts for a large share of the total. Several organizations that spend money on federal judicial nominations also spend money on state judicial elections.

The consequences of unchecked judicial influence are severe—particularly for federal judges. Unlike a president or a member of Congress, a federal judge cannot simply be voted out of office at the next opportunity. This means, barring impeachment, a judge who has been “captured” by outside spending is entitled to serve for life.

### Solutions:

- **Congress should establish disclosure requirements for groups and individuals that spend significant money on federal judicial nominations.**

Groups that spend more than \$50,000 in a calendar year on advocacy related to federal judicial nominations should be required to disclose donors who have given more than \$5,000 to the group during that year and the preceding year.

Groups or individuals who spend money on advocacy related to a judicial nomination should be required to disclose information about each advertisement related to a judicial nomination including the name of the nominee the advertisement is about.

Establish a requirement that advertisements related to a judicial nomination identify the group funding the advertisement.



- **Congress should prohibit foreign nationals, foreign corporations, and wholly owned subsidiaries of foreign corporations from funding advertisements related to a judicial nomination.** Just as foreign entities are not permitted to spend to influence U.S. elections, they should not be permitted to spend to influence U.S. judicial nominations.

## Resources

Sen. Feinstein and Rep. Lofgren's [Judicial Ads Act](#), S. 4183 (116th Congress, 2020).

Sen. Sheldon Whitehouse, [Dark Money and the US Courts: The Problem and Solutions](#), 57 *Harvard Journal on Legislation* 273, 2020.



## Issue 9: Weak lobbying disclosure laws

In 2019, total reported special-interest lobbying spending reached a [record-high of \\$3.51 billion](#). These lobbyists move easily through the halls of power, funneling money directly to candidates while effectively concealing the beneficiaries of their efforts and leaving the public wondering whether their elected leaders are acting on behalf of the people or the powerful interests that fund their campaigns. Our government institutions cannot continue to bear the strain these opaque powerful interests place on their legitimacy—especially as we are currently nearing [record lows](#) in public trust of government.

In 1995, Congress passed the Lobbying Disclosure Act (LDA) to [counter](#) “the perception that Congress in particular is beholden to special interests and that ordinary people cannot rise above the din of lobbyists having special access to and currying favor from members of Congress or top officials in the executive branch.” The [law](#) imposes a requirement that lobbying entities file with the Secretary of the Senate and the Clerk of the House of Representatives identifying information for the entity and clients (if the lobbying entity is acting on behalf of outside clients), a general description of issues addressed during lobbying contacts, and the identity of any organizations providing more than \$5,000 to fund lobbying efforts when these donors also play a major supervisory role. Additionally, under the 2007 amendments to the LDA (the [Honest Leadership and Open Government Act of 2007](#)), lobbyists are required to file a semi-annual [report](#) listing any campaign contributions to federal candidates and expenses related to events that honor members of Congress, and the Act requires that registration and disclosure statements be provided in a searchable and sortable format online for public inspection.

While these disclosure requirements provide a baseline of transparency, weaknesses in the definitions and disclosure thresholds have created loopholes for lobbyists to exploit. The current laws only capture a fraction of the lobbying that takes place in Washington, DC, leaving the rest of these influencing activities to take place in the [dark](#). The problems posed by the immense power of these opaque influences demands immediate action and immense political courage. Congress must act immediately to bring sunshine into its halls and to restore public confidence that the government works for the people, not against them.

### Solutions

- **Congressional and executive branch offices should be required to proactively disclose contacts with lobbyists and lobbying materials.** Require these offices to not only disclose the contact itself, but also any materials provided to these offices by lobbyists. This information should be centralized and made available to the public in a searchable, sortable, downloadable online format and updated quarterly.
- **Congress should pass the For the People Act, which includes provisions to bolster lobbying transparency.** It includes requiring the online linking of Federal Election Commission reports and LDA reports, and clarifying that counseling in support of lobbying contacts is considered lobbying under the LDA and therefore triggers registration.

## Resources

Sen. Warren and Rep. Jayapal's [Anti Corruption and Public Integrity Act](#), S. 3357, § 611 (115th Congress, 2018).

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 7201 et seq. (116th Congress, 2019).

Rep. Phillips's [Lobbying Disclosure Reform Act of 2020](#), H.R. 8022 (116th Congress, 2020).

[Lobbying Law in the Spotlight: Challenges and Proposed Improvements, Report of the Task Force on Federal Lobbying Laws Section of Administrative Law and Regulatory Practice](#), American Bar Association, January 3, 2011.

## Issue 10: The revolving door between paid advocacy and government work

The revolving door between both high-profile and mid-level federal government jobs and outside advocacy organizations has, for decades, been a critical driver of corporate and big-money influence in our nation's policy priorities. Many political actors and policymakers move freely between policy-making positions in government and policy-influencing positions with immensely wealthy corporations, industry groups, and other special interests. [Dozens](#) of former members of Congress, including immensely powerful members like former Representatives [Dick Armey](#) and [Joe Crowley](#), former Senator [Tom Daschle](#), and former Senator and Attorney General [John Ashcroft](#), now receive large salaries from corporations and special interests as they attempt to influence the government in which they used to serve.

And this influence operation goes both ways. During Donald Trump's presidency, a total of [225 individuals](#) were either lobbyists prior to joining the Administration, or became lobbyists after departing. Moreover, President Trump has named [seven](#) former lobbyists to his cabinet, including former Chamber of Commerce lobbyist Eugene Scalia to lead the Department of Labor.

This seemingly never-ending cycle of policymakers moving between immense corporate interests and the federal government leaves the public to wonder whether they are even represented by their government. And this looming question is neither idle nor easy to dismiss given the current corporate capture of our government. President Dwight Eisenhower's powerful warning about the "unwarranted influence by the military-industrial complex" is being fully realized in our own time, as corporations have wildly [benefited](#) from their spending on lobbyists, federal elections, and new revolving door hires. In fact, according to a [2012 Harvard study](#), half of the senators and 42 percent of House members who left Congress between 1998 and 2004 became lobbyists, as did 310 former appointees of President George W. Bush and 283 of President Bill Clinton.

The problems posed by the revolving door present a substantial threat to our democracy. While administrations of both parties have taken steps, especially in recent years, to self-impose some limits via presidential executive orders and ethics pledges, these solutions are not durable, transparent or enforceable. It is time for Congress to step up and codify into law these basic safeguards.

### Solutions

- **Congress should put statutory limits on people joining the government and working on specific issues that would affect their former employer or client.** Congress should prohibit all appointees, for two years after appointment, from participating personally and substantially in any particular matter in which the appointee's former employer or client has a financial interest.
- **Congress should put statutory limits on former government employees' lobbying after they leave the government.**

Prohibit all appointees from lobbying (including lobbying activities): their former executive branch departments or agencies for a period of five years after leaving government service; and any executive branch department or agency for a period of two years after leaving government service.

Prohibit very senior appointees from lobbying (including lobbying activities) any part of the executive branch or Congress for a period of at least two years after leaving government service.

Enact a five year cooling off period for lobbying by former presidents, vice presidents, members of Congress, and federal judges.

## Resources

Sen. Warren and Rep. Jayapal's [Anti Corruption and Public Integrity Act](#), S. 3357, § 101 et seq. (115th Congress, 2018).

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 8061 et seq. (116th Congress, 2019).

Virginia Canter, [The Trump Ethics Pledge: Explained](#), *CREW*, January 30, 2017.

## Issue 11: Failures to regulate foreign influence in politics and policy

During the Trump Administration, we learned a great deal about the extent to which foreign countries seek to influence American politics and policy. In 2016, the Russian government perpetrated an unprecedented attack on American democracy. Among other tactics, Russian agents [posed](#) as Americans on social media accounts to sow discord, promote the candidacy of Donald Trump and denigrate his rival Hillary Clinton. The investigation of Russia's attack on our democracy revealed other shadow influence campaigns by foreign powers, prompting renewed focus on the [Foreign Agents Registration Act of 1938](#) (FARA), which [requires](#) people who on behalf of a foreign entity conduct the kinds of activities that can influence policy, such as lobbying, public relations, fundraising, and some types of legal representation, to register with the Department of Justice (DOJ) and to disclose information about those activities. The DOJ uses this information to ["identify foreign influence in the United States and address threats to national security."](#) The DOJ also makes FARA registrant information [available to the public](#) so that the American people and our elected representatives know when someone is representing foreign interests. Russian agents operating in the United States were charged with FARA violations, and several close associates of President Trump, including Paul Manafort, Rick Gates, and Michael Flynn, [pleaded guilty to FARA charges or admitted violations](#).

In addition, the prohibition on foreign campaign expenditures and contributions in United States elections also has received renewed attention in recent years. Lev Parnas and Igor Fruman, close associates of President Trump and his attorney Rudy Giuliani, were recently [charged](#) in a multi-count indictment that included criminal violations of the Federal Election Campaign Act of 1971's (FECA) prohibition on foreign expenditures or contributions.

In 2016, the DOJ inspector general released the results of a comprehensive [audit](#) of the enforcement of the FARA, and among other conclusions described "the lack of a comprehensive FARA enforcement strategy" and serious issues with the existing disclosure system. It is also unclear whether the DOJ will have success trying to enforce the FARA with criminal prosecutions. In 2019, attorney and former White House Counsel Greg Craig was [acquitted](#) by a jury of FARA charges uncovered during the Special Counsel Mueller's investigation.

The Special Counsel investigation of Russian interference in the 2016 election also revealed an apparent gap in the regime that seeks to regulate foreign influence in elections: in the Special Counsel's view, it is not clear whether voluntarily provided "opposition research" can [constitute](#) "a thing of value that could amount to a contribution under campaign-finance law." In addition, FECA violations are only criminal if they involve at least \$2,000 in a calendar year (the threshold for a misdemeanor) or at least \$25,000 in a calendar year (for a felony). While [legal](#) commenters disagreed with the Special Counsel's analysis of the FECA, the DOJ's reluctance to pursue charges in such a high profile and important case suggest that the FECA may not deter foreign efforts to make in-kind campaign contributions or expenditures.

## Solutions

- **Congress should amend criminal statutes prohibiting foreign campaign contributions and expenditures to specify that certain types of information, including opposition research, hacked or stolen data, polling, or information about voters constitutes a “thing of value.”** A knowing and willful violation of the ban involving a thing of value—including information—should be sufficient for the DOJ to pursue criminal FECA charges for unlawful foreign campaign contributions and expenditures.
- **Senior administration officials and members of Congress should have a long cooling-off period before lobbying for foreign governments.** One tried and true method for avoiding undue influence is to prohibit government officials from exiting the revolving door and immediately starting to influence their former colleagues. A five-year cooling-off period for senior administration officials and members of Congress when it comes to leveraging their influence for foreign governments would be appropriate.
- **Lobbyists and public relations consultants should be required to do basic due diligence on their clients, just as banks and financial institutions must.** Congress should acknowledge that foreign influence is now deployed in the United States not largely via propaganda, but by a sophisticated industry with powerful firms. Congress should require basic due diligence by those who seek to deploy influence on behalf of foreign governments; anti-money laundering laws and regulations can be a model for these requirements.
- **Loopholes in the existing Foreign Agents Registration Act disclosure system should be eliminated, and civil enforcement should play a larger part in ensuring compliance.** Investigations like the DOJ inspector general’s [audit](#) have identified a number of loopholes in the existing FARA disclosure regime (a major one being that FARA exempts lobbyists who have disclosed under a separate system, the Lobbying Disclosure Act, even though the information required in each is different). Loopholes such as these undermine the efficacy of the system and should be closed. Exemptions such as those for commercial activity and for activity not “directed” by a foreign government should also be clarified, perhaps by directing the DOJ to issue regulations to provide notice and an opportunity to comment to the regulated community. An effective enforcement regime that places greater emphasis on reasonable civil measures, such as fines, would also be appropriate.
- **The Foreign Agents Registration Act disclosure system should be modernized to permit public analysis of required information.** Information should be submitted in an electronic structured data format and published in a digitized, machine-readable format.

## Resources

Rep. Sarbanes’ [For the People Act of 2019](#), H.R. 1, § 7101 et seq. (116th Congress, 2019).

Rep. Buck’s [FARM Act of 2019](#), H.R. 5122 (116th Congress, 2019).

Rep. Schiff's [Protecting Our Democracy Act](#), H.R. 8363, § 1101 et seq. (116th Congress, 2020).

[Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act](#), *U.S. Department of Justice Office of the Inspector General*, September, 2016.

Lydia Dennett, [Comparing Current Foreign Influence Reform Legislation](#), *POGO*, August 9, 2018.

Nick Robinson, 'Foreign Agents' in an Interconnected World: FARA and the [Weaponization of Transparency](#), *69 Duke Law Journal* 1075 (2020), February 4, 2019.

Bob Bauer and Jack Goldsmith, [The Senate Russia Report and the Imperative of Legal Reform](#), *Lawfare*, August 19, 2020.

[Limiting Foreign Meddling in U.S. Campaigns: Key Policy Recommendations](#), *Brennan Center for Justice*.

## 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.



## SECTION 5 *of* WHAT DEMOCRACY LOOKS LIKE

# Restoring Executive Branch Transparency

**Federal transparency and recordkeeping laws are the bedrock of accountability.** When our government makes influential or controversial decisions, transparency laws give the American people the important ability to scrutinize and challenge those decisions. The governmental obligation to record agency business is equally necessary for public scrutiny of executive branch actions, and for attempts by inspectors general and Congress to understand how decisions were made.

Recordkeeping obligations are also a critical component of our living history. Without a historical record, the American people cannot expect to understand the decisions we have made as a people or to make better ones in the future.

In practice, federal transparency and recordkeeping laws fall well short of their promise. Agency and presidential obligations to create records are often unenforceable. The executive branch has grown more aggressive in claiming that entire categories of records are beyond the reach of the Freedom of Information Act (FOIA), including Secret Service records of visits to the White House and the Department of Justice memoranda that establish legal policies for the executive branch. And the obligation of federal agencies to respond to FOIA requests expeditiously, as the law requires, is undermined by severe backlogs caused by poor administration and inadequate resources, as well as improper interference by political appointees.

In this section, we lay out a vision for renewing the executive branch's commitment to transparency. We propose reforms to the FOIA to expand the classes of records that agencies must affirmatively disclose. We propose methods for agencies to process records more expeditiously. We propose legislation that would address efforts by the executive branch to circumvent transparency requirements, including establishing an affirmative obligation to produce White House visitor logs and scaling back the overclassification of executive branch records. And we propose enhancing the enforcement mechanisms to ensure that public litigants can challenge recordkeeping failures under the Federal Records Act and Presidential Records Act.

## Issue 1: Systemic recordkeeping failures

The Federal Records Act (FRA) imposes an obligation on federal agencies to create records that document agency actions and decisions, and it prescribes whether and how records may be destroyed if or when no longer needed. Similar to the FRA, the Presidential Records Act (PRA) imposes an affirmative obligation on the president, vice president, and White House officials to create records that document virtually everything done in office, and it dictates the process a president must follow to destroy presidential records.

In both cases, records are made available to the American people via the Freedom of Information Act (FOIA). Members of the public can utilize the FOIA to request and obtain agency records unless they are subject to specific exemptions, such as an ongoing law enforcement interest in their confidentiality. Presidential records are not immediately available to the public; instead, they can be obtained through FOIA requests starting five years after the end of an administration. Both are meaningless, however, without a guarantee that records in the public interest will be responsibly created, maintained, and destroyed.

Both the FRA and the PRA have taken on increased importance under the Trump Administration. White House officials [reportedly use](#) messaging applications that automatically delete messages, and [agencies intentionally fail to create records](#) that would hold them accountable. The Trump Administration's failure to create records necessary to reunite children with their families following the "zero tolerance" family separation policy is an egregious example of how recordkeeping failures can have a profound impact on the lives of those impacted by government action.

Even where courts have [recognized](#) these recordkeeping failures, however, the absence of clear enforcement measures in the FRA and the PRA have left the public with little relief for violation of the governing records laws. In many cases, the public depends on litigation or the threat of it to compel the government to abide by its recordkeeping, ethics, and procedural obligations. The absence of a cause of action for citizen suits in both the [PRA](#) and the [FRA](#) are enormous obstacles to compelling compliance—even with clear evidence of a recordkeeping violation.

As a result, individuals and public interest groups must rely on causes of action that lie in other statutes—namely, the [Administrative Procedures Act \(APA\)](#), or the [Mandamus Act](#)—to challenge government violations of the FRA and the PRA. Both causes of action severely limit the scope of claims that can be brought. As a preliminary matter, the [APA](#) does not apply to the president, so it cannot be used to challenge violations of the PRA. Additionally, the APA can only be used to [challenge agency actions](#) that are final and for which there are no other adequate remedies. And a court entertaining an APA challenge is [limited](#) in what it can review.

Mandamus [jurisdiction](#) is even more restricted. It is unavailable when a litigant has an alternative remedy, and can only be used to compel officials to perform non-discretionary duties that are clearly established. And even when those conditions are met, a court can decide, in its discretion, not to issue the requested relief. In practice, mandamus relief is extremely difficult to secure, and is only available to enforce the most straightforward, ministerial obligations that a statute imposes.

Absent adequate enforcement measures, federal agencies, presidents, vice presidents, and White House officials may continue to frustrate efforts to hold them accountable by circumventing recordkeeping requirements.

## Solutions

- **Congress should establish an express right of action in the Federal Records Act through a constructive exhaustion provision.** This provision should be one that allows private citizens to file suit for violation of the law's recordkeeping requirements:

Should an agency head decline to initiate an action through the archivist upon becoming aware of the actual, impending, or threatened unlawful removal of destruction of records, or failure to create records; or

In the event that the archivist initiates action through the attorney general either in response to an agency head request or on its own and the attorney general declines to act within a prescribed period of time.

- **Congress should establish a cause of action under the Presidential Records Act that is tailored to preempt constitutional concerns.** The cause of action should have the following components:

A simple exhaustion process requiring a prospective litigant to issue a warning letter to the White House and a sixty day warning period in which the White House can respond or take corrective action; and

Differentiated causes of action based on different types of conduct that make it easier to challenge categorization decisions (i.e. determination that certain records are personal records, presidential records, or agency records) and record destruction issues, which do not interfere with executive branch functions. Actions challenging the failure to create records could be limited to knowing or willful violations. Actions challenging the facial adequacy of the White House's recordkeeping policies and guidelines should also be permitted, as these types of claims are already reviewable in the FRA context.

- **Congress should amend the Presidential Records Act and the Federal Records Act to effectively ban the use of auto-deleting messaging apps.** Require the establishment of records management controls to capture, manage, and preserve electronic messages and ensure that electronic messages are readily accessible for retrieval through electronic searches.
- **Congress should create a White House agency responsible for presidential records management.** One of the challenges with enforcing the PRA is that courts are reluctant to enjoin the president. For that reason, Congress should establish or designate an agency within the White House—such as the Office of Administration—with the responsibility of carrying out the statutory responsibilities created by the PRA.

- **Congress should designate a White House official to certify the White House’s compliance with the Presidential Records Act on a quarterly basis.** Instead of relying on the White House to respond to congressional or archivist inquiries about compliance with the PRA, a White House official should be required to certify its compliance with recordkeeping laws proactively. The certificant should note any instances in which records were not created, maintained, or disposed in accordance with the requirements of the PRA.

## Resources

Rep. Cummings’ [Electronic Message Preservation Act](#), H.R. 1582 (116th Congress, 2019).

Rep. Maloney’s [Presidential Records Preservation Act](#), H.R. 6542 (116th Congress, 2020).

[CREW asks Government Oversight to rework proposed Federal and Presidential Records Acts Bill](#), CREW, April 21, 2009.

Anne Weismann, [Recordkeeping laws matter, especially in this administration](#), CREW, March 15, 2019.

Memorandum Opinion, [Citizens for Responsibility and Ethics in Washington v. U.S. Department of Homeland Security](#), No. 2018-cv-02473 (D.D.C., May 24, 2019).

Jared P. Cole, [An Introduction to Judicial Review of Federal Agency Action](#), *Congressional Research Service*, December 7, 2016.

Kel McClanahan, [Trump and the Demise of the Presidential Records Honor System](#), *Just Security*, March 22, 2019.

Meghan M. Stuessy, [The Presidential Records Act: An Overview](#), *Congressional Research Service*, December 17, 2019.

## Issue 2: Slow processing of FOIA requests

The Freedom of Information Act (FOIA) simultaneously created a public right to government information and an access mechanism, but its implementation hinders those missions. Agency backlogs have reached an all-time high, and requesters who may not have the resources to litigate often wait years to receive documents. Those who are willing and able to litigate expend precious resources enforcing statutory deadlines that agencies rarely meet. At a time when the tenets of our democracy are under attack and the public's need for information is at an apex, the FOIA is failing.

At agencies such as the Department of Homeland Security (DHS) and the Department of Justice (DOJ), for example, FOIA requests are being processed at a much slower rate than they are filed. The DHS receives more FOIA requests than any other federal department or agency, with 400,245 requests alone and 31,454 backlogged requests in [FY 2019](#). As of yet, the DHS has not developed a strategy to fully rectify these issues, and continues to let requests accumulate. Similarly, as of FY 2019, the [DOJ](#) had a total of 121,441 active requests and a FOIA backlog of 25,558.

According to the 2018-2020 FOIA Advisory Committee's final [assessment](#), "[t]he number of FOIA requests filed annually across all agencies has generally increased every year during the past decade, reaching a record 863,729 requests filed in Fiscal Year (FY) 2018, with only a slight drop to 858,952 requests filed in FY 2019." Backlogs will continue to stay at a high level in the foreseeable future if agencies do not address this institutional issue.

Technological solutions, such as the e-discovery tools routinely used by the DOJ and other agencies in their litigation work are available for more efficient responses to FOIA requests. Yet, [agencies have fallen short](#) and continue to utilize outdated methods to process requests. Only a [modest](#) number of agencies have access to e-discovery solutions to ease their processing burdens. Further, agencies are not fully leveraging existing processes that would reduce their FOIA load, including proactive disclosures and compliance with the FOIA's requirement that a release to one requester should result in the release of those records to all.

FOIA backlogs create an impediment to the public's right to scrutinize and hold the government accountable for their actions. In many situations, the delay of releasing information even makes the information no longer relevant. The FOIA is supposed to help the public scrutinize executive branch decisions, but the backlog undermines its utility.

### Solutions

- **Amend the Freedom of Information Act to broaden categories of records for mandatory, proactive disclosure.** Proactive disclosure of categories of records that are often requested will reduce the burden of FOIA offices that are currently processing individual requests for these types of records. Additionally, the Office of Government Information Service—the governmentwide FOIA ombudsman housed at the National Archives and Records Administration—should be tasked with the responsibility to conduct regular audits of agency compliance with existing proactive disclosure requirements.

- **Implement a governmentwide automated processing program for Freedom of Information Act offices.** Begin with an e-discovery pilot program and task the Office of Government Information Services with evaluating the overall success of the program, including identification of any challenges, and making specific technological recommendations with the ultimate goal of implementing governmentwide automated FOIA processing.
- **Modernize the creation and management of immigration records in digital format with all law enforcement information either maintained in separate records or segregated into easily redacted fields.** In 2018, the four immigration offices (three within DHS and one within DOJ) received more than 400,000 FOIA requests for Alien Files (A-files), which represented more than 46 percent of all FOIA requests received by the entire federal government that year. The majority of these requests are from individuals seeking their own A-files. Ensuring that these files are created in a digital format will facilitate their integration into a less labor-intensive electronic process for a shorter turnaround period for document production. Moving this entire process outside of the FOIA would also free up bandwidth for the applicable FOIA offices to process non-immigration requests, greatly reducing their backlogs.

## Resources

Rep. Quigley's [Transparency in Government Act of 2019](#), H.R. 5150, § 701 et seq. (116th Congress, 2019).

[Testimony of David A. Powner, U.S. Government Accountability Office, Senate Judiciary Committee](#), March 13, 2018.

[Freedom of Information Act: Federal Agencies' Recent Implementation Efforts](#), U.S. Government Accountability Office, March 11, 2020.

[Draft Report to the Archivist of the United States, Freedom of Information Act Federal Advisory Committee](#), May 19, 2020.

## Issue 3: Legal standards that favor non-disclosure

The primary tool for the public to obtain information is the [Freedom of Information Act \(FOIA\) request](#). The public's right to obtain records via the FOIA is undermined, however, when the law's exemptions are routinely weaponized and abused to shield the government from disclosing politically harmful or embarrassing information. Congress established specific categories of records that are exempt from the FOIA and do not have to be furnished by an agency in response to a [FOIA request](#). Those [exemptions](#) are intended to balance the transparency interests served by the FOIA with legitimate privacy and security interests of the executive branch, such as protecting sensitive information relating to ongoing investigations, litigation privileges, and the personal privacy interests of those whose information is gathered by the government.

The [most frequently abused](#) exemption is [Exemption 5](#), which permits federal agencies to assert litigation privileges, including the "deliberative process privilege." This privilege exempts agency records reflecting pre-decisional deliberations. In theory, the deliberative process privilege is not supposed to be deployed to withhold records that would create embarrassment or shed light on governmental misconduct. Yet, in practice, it is used to do precisely that. A notable example of such abuse can be found in the government's response to a FOIA request for emails related to the Trump Administration's withholding of aid to Ukraine, an action for which President Donald Trump was later impeached. In response to the request, the Administration relied on FOIA exemptions to [heavily redact emails](#) and thereby conceal information shedding light on why and how the aid was withheld.

Just Security [obtained unredacted copies](#) of these records through other means, offering a rare insight into how the exemptions were applied. The withheld portions of the emails revealed that officials at the Department of Defense and the Office of Management and Budget were grappling with the serious implications of President Trump's unilateral decision to withhold the aid for political gain. As is often the case, the government most heavily relied on FOIA's deliberative process privilege.

## Solutions

- **Congress should amend the Freedom of Information Act to add a public interest balancing test to all discretionary exemptions (exemptions agencies can elect to assert depending on the factual circumstances).** This would mirror how the deliberative process privilege is treated in the litigation context, where the same governmental interests exist, but there is an acknowledgement that those interests should be weighed against the value of the information sought to the litigator, and in the case of the FOIA—the value of the information sought to the public.



- Congress should amend the Freedom of Information Act to codify the court-recognized government misconduct exception to the deliberative process privilege.** There is [established case law that rejects the use of the deliberative process privilege](#), outside of the FOIA context, “where there is reason to believe the documents sought may shed light on government misconduct” and shielding such documents would “not serve the public’s interest in honest, effective government.” In applying this exception, the deliberative process privilege [“disappears altogether when there is any reason to believe government misconduct occurred.”](#) Courts have [diverged](#) on whether the government misconduct exception applies in FOIA cases, and other courts have construed the exception very narrowly in the FOIA context. Congress should amend the FOIA to clarify that the exception applies in FOIA cases just as it does in the non-FOIA context.

## Resources

Sen. Grassley’s [Open and Responsive Government Act of 2019](#), S. 2220 (116th Congress, 2019).

Sen. Warren and Rep. Jayapal’s [Anti-Corruption and Public Integrity Act](#), S. 3357, § 621 et seq. (115th Congress, 2018).

Anne Weismann, [How Should FOIA Be Reformed to Prevent Further Abuse of Redactions?](#), *Just Security*, January 9, 2020.

Nick Schwellenbach and Sean Moulton, [The “Most Abused” Freedom of Information Act Exemption Still Needs to Be Reined In](#), *Project on Government Oversight*, February 6, 2020.



## Issue 4: The Office of Legal Counsel's secret interpretations of law

The Department of Justice's (DOJ) Office of Legal Counsel (OLC) provides legal advice to the White House and executive branch agencies, including DOJ. The OLC's legal opinions are binding on federal agencies and employees. In this sense, the OLC acts in a pseudo-legislative capacity by producing its own far-reaching body of law and legal directives that can only be overridden by the attorney general or the president. The explicit power and implicit influence of these formal opinions extend far beyond the executive bureaucracy. The OLC has issued opinions on a broad range of critical issues, such as justifying the legality of [warrantless surveillance](#), the [targeted killings of Americans on foreign soil](#), and the [torture of enemy combatants](#).

Congress has long endeavored to protect our democracy from the detrimental effects that result from allowing bodies of law to function in the dark. In 1965, upon noting a disturbing trend of agencies exploiting the various loopholes in the Administrative Procedure Act (APA) to "[deny legitimate information to the public](#)," and "[as an excuse for secrecy](#)," Congress proposed legislation to clarify that "section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute[.]" These concerns eventually led Congress to strengthen the [reading room provision](#) and incorporate it into the then newly-enacted Freedom of Information Act (FOIA), with the goal of eliminating secret law.

Despite this long history of Congress's unambiguous intent to eliminate secret laws, most of the OLC's work remains secret. The OLC considers itself to be largely exempt from FOIA requests. In 1980, the OLC publicly released memos and documents for the first time ever, and disclosed only 25 percent of its rulings from the previous few years. According to a high-ranking OLC official, "[\[t\]he majority of OLC memorandum remains confidential](#)." Only in [exceptional circumstances](#) are OLC memos even shared with Congress.

The secrecy of the OLC's binding interpretations of law is unparalleled in our democracy. When Congress makes laws, the courts issue decisions, or the president takes executive action, each almost always does so on the record. Without this transparency, dubious legal assertions could affect government decisions without being challenged and morally repugnant decisions like the endorsement of torture could escape public scrutiny.

### Solutions

- **The president should issue an executive order requiring the Office of Legal Counsel to proactively disclose its binding interpretations of law.** The OLC should be required to identify records falling within the scope of the FOIA's reading room provision, § 552(a)(2). The executive order should specifically clarify the OLC's ongoing duty to:

Make those records available for public inspection and copying without a triggering a FOIA request; and to

Make publicly available “current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by § 552(a)(2) to be made available or published[.]”

- **Congress should require that the attorney general publish all Office of Legal Counsel opinions on the public website of the Department of Justice to be accessed by the public free of charge.** This proposal is contained in the [DOJ OLC Sunlight Act](#), which applies retroactively to previously unpublished final opinions, and provides for limited redactions and exceptions for national security and foreign policy concerns.
- **Amend the Freedom of Information Act to include final Office of Legal Counsel opinions among the categories of records subject to mandatory proactive disclosure.** This requirement would impose on each agency the duty to proactively disclose OLC opinions applicable to the respective agency.

## Resources

Rep. Cartwright’s [See UNdisclosed Legal Interpretations and Get Honest Transparency Act of 2019](#), H.R. 4556 (116th Congress, 2019).

Rep. Quigley’s [Transparency in Government Act of 2019](#), H.R. 5150, § 611 et seq. (116th Congress, 2019).

Rep. Schiff’s [Protecting Our Democracy Act](#), H.R. 8363, § 524 (116th Congress, 2020).

Sen. Duckworth’s [DOJ OLC Transparency Act](#), S. 3334 (116th Congress, 2020).

[CREW Calls on OLC to Disclose Legal Opinions](#), *CREW*, July 3, 2013.

[Office of Legal Counsel: Opinions](#), *United States Department of Justice*, June 5, 2016.

Daniel Van Schooten and Nick Schwellenbach, [Justice Department’s “Secret Law” Still Prevalent, Documents Show](#), *Project on Government Oversight*, March 22, 2017.

## Issue 5: Secret presidential visits

Logs of official visitors to the White House, Camp David, and other places frequented by the president must be publicly available. These logs provide the public with insight into which government officials, outside interests, and lobbyists shape the presidents' views, policies, and actions. Yet, these records are governed by a [series of agreements](#) between the White House and the Secret Service that effectively prevent their public release under the Freedom of Information Act (FOIA). Although the Secret Service, an agency within the Department of Homeland Security, is subject to the FOIA, most components of the White House, including the Executive Office of the President, are not.

A series of judicial decisions under both the Obama and Trump Administrations have further constrained the public's access to presidential visitor records. In 2013, the D.C. Circuit Court of Appeals [held](#) that most White House visitor logs were not agency records subject to the FOIA, but instead presidential records subject to the Presidential Records Act (PRA). The Court foreclosed public access to presidential visitor logs until at least five years after the end of a presidential administration. This precedent was confirmed by the Second Circuit Court of Appeals in a [2020 lawsuit](#) seeking records of presidential visits to the White House and President Donald Trump's resort at [Mar-A-Lago](#). And in early 2017, the White House announced that it would [end access](#) to visitor logs that the Obama Administration [voluntarily produced](#) in response to December 2009 litigation.

While most presidential visitor logs are withheld, a recent court [settlement](#) mandated the release of visitor logs of the Office of Management and Budget, Office of Science and Technology Policy, U.S. Council on Environmental Quality, and Office of National Drug Control Policy. All of these offices are agencies with independent statutory authority and are therefore subject to the FOIA.

Congress and the American people should demand access to visitor logs of presidential visitors. The public has a right to know who is influencing the highest levels of our government; it is appropriate to require that records of those visits be disclosed. The disclosure can occur after the fact to avoid security risks, and the White House or Secret Service could still assert existing privileges to protect information that implicates law enforcement, national security, or other sensitive interests.

## Solutions

- **Create a White House Office of Recordkeeping and grant it authority to assist the president and the archivist in managing presidential and federal records and to make affirmative disclosures.** One of the challenges facing any attempt by Congress or members of the public to enforce recordkeeping and transparency laws at the White House is that courts are reluctant to issue orders requiring the president to comply with the law. Creating a subordinate office responsible for White House transparency obligations would help ensure that the White House fulfills obligations that Congress establishes.

- **Congress should require the White House and/or the Secret Service to affirmatively disclose information about official visits to the White House, Camp David, and other locations frequented by the president.** The American people have a right to know who is influencing government policy, which includes those who lobby or participate in decisions made at the White House. While there can and should be reasonable exceptions for personal visits and information that could undermine specific law enforcement or national security interests, Congress should require the White House to affirmatively disclose official visits to the White House, Camp David, and other properties frequented by the president.
- **Congress should clarify that agency records that contain presidential schedule information are subject to the Freedom of Information Act and the Federal Records Act.** Congress should also clarify the definition of “agency records” under the FOIA and “federal records” under the Federal Records Act to ensure that recent court decisions do not erode timely public access to information that has come into the agency’s possession in the course of conducting its official duties. Congress should clarify that no special exceptions should be made for agency or federal records that contain presidential schedule information or other information that the White House would prefer not to disclose. To the extent that those interests need to be protected, agencies can assert one of the existing FOIA exemptions that Congress has already established to protect privileged or personal information.
- **The president should direct the Secret Service to publish a searchable, sortable, downloadable online database of visitors to the White House, the vice president’s residence, and any location where the president and/or vice president are meeting with individuals or groups to conduct official business.** It should include at least: the name of each visitor, the name of the individual who requested clearance for each visitor, the date and time of entry for each visitor, a brief and accurate description of the nature of the visit, and confirmation that the guests were actually present.

## Resources

Sen. Heinrich’s [White House Visitor Logs Transparency Act of 2017](#), S. 953 (115th Congress, 2017).

Rep. Quigley’s [Transparency in Government Act of 2019](#), H.R. 5150, § 602 (116th Congress, 2019).

Sen. Udall and Representative Quigley’s [MAR-A-LAGO Act](#), S. 769 (116th Congress, 2019).

Rep. Cicilline’s [White House Open Data Act](#), H.R. 7580 (116th Congress, 2020).

Anne Weismann, [Mar-a-Lago is a national security risk](#), *CREW*, April 10, 2019.

[As a Result of Public Citizen Lawsuit, the Trump Administration Is Releasing Visitor Logs for Four Agencies in the White House Complex](#), *Public Citizen*, April 11, 2018.

Tom Blanton and Lauren Harper, [2nd Circuit Helps White House Hide Visitor Logs](#), *National Security Archive*, May 18, 2020.

## Issue 6: Abuse of security classifications

Security classifications exist to protect national security, but the system design and implementation often hinder that mission. The framework is hampered by over-classification and, not coincidentally, by the increasing concealment of politically sensitive disclosures. This undermines the integrity of the classification system, makes vague what truly requires protection, and contradicts the public interest.

The Trump Administration has egregiously exploited the security classification system to sidestep public knowledge of politically damaging misconduct. Many of the most prominent events and controversies of Donald Trump's presidency have been plagued by unethical cover ups and concealment. In the Ukraine scandal, for example, Administration [officials acted swiftly](#) to classify all transcripts of President Trump pressuring Ukraine to provide political 'dirt' on then-candidate Joe Biden. [The Administration took unusually stringent](#) measures to limit access to the call record, and [placed the transcript on a separate system](#) used to handle especially sensitive information. The release of the information did not pose any national security threat, but did pose a political threat to the Trump Administration. And troublingly, a key witness in the Ukraine scandal [alleged](#) a pattern of similar concealment throughout the Administration's tenure.

Part-and-parcel of this pattern is the federal response to the COVID-19 pandemic—a jarring example of misclassification. In mid-March 2020, President Trump [ordered the Department of Health and Human Services](#) to conduct meetings in a classified manner. This period marked the beginning of the pandemic in the United States, and the public release of up-to-date accurate information was critical to the public interest and good. This classification of information, however, had just the opposite effect. Matthew Collette, a former longtime Department of Justice attorney with experience litigating classification matters, [argued](#) that the classification was baseless and irrelevant to national security. That President Trump baselessly classified information about *an infectious disease* for political gain is telling of the gravity and flagrancy of the situation.

The Trump Administration's violations have culminated in an unmatched disregard for government integrity and personal ethics, and are the latest manifestation of the unrelenting insult to the American public's right to knowledge, national security, and our democratic system. Reform is needed now more than ever.

### Solutions

- **Simplify and standardize the classification process.** Misuse of the classification system is made possible in part by its complexity, and the lack of transparent, consistent standards in its application. Congress should amend the National Security Act to require the president to issue new guidelines for security classifications.

- **Require original classifying officers and other White House officials to certify that legitimate national security concerns underlie top-secret classifications or the placement of any records on “code word” or other highly restricted servers.** The certification requirement would foster accountability by exposing individuals to potential criminal liability if they intentionally file a false certification.

## Resources

Sen. Wyden and Rep. Thompson’s [CORRECT Act](#), S. 2683, (113th Congress, 2014).

Sen. Warner’s [A bill to protect integrity, fairness, and objectivity in decisions regarding access to classified information, and for other purposes.](#), S. 838 (116th Congress, 2019).

Sen. Wyden’s [Declassification Reform Act of 2020](#), S. 3733, (116th Congress, 2020).

[Transforming the Security Classification System: Report to the President](#), *Public Interest Declassification Board*, November 27, 2012.

Kelly Magsamen, [I helped classify calls for two presidents. The White House abuse of the system is alarming.](#), *Washington Post*, September 29, 2019.

## 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 2012](#). 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.

## SECTION 7 *of* WHAT DEMOCRACY LOOKS LIKE

# Reforming Judicial Ethics

### **The federal judiciary lacks a comprehensive and robust ethics regime.**

Although judges are supposed to avoid even the appearance of impropriety and litigants may seek judicial recusals in cases with potential conflicts of interest, these obligations are difficult to enforce. Litigants are reluctant to seek recusals for fear that if their judge declines, the motion may influence the final decision. For district and circuit judges, ethics and misconduct issues are handled within the circuit, which means that judicial ethics and misconduct complaints are adjudicated by a judge's peers. Meanwhile, justices on the Supreme Court are not subject to any binding ethics requirements, nor are they under any obligation to explain recusal decisions.

It is time for the federal judiciary to take ethics seriously. We call on the judiciary to establish an independent ethics body that is empowered to promulgate ethics rules for federal judges, establish enforceable recusal standards, and hold judges accountable. To the extent that sufficient reforms are not pursued by the courts, Congress should step in and enact them.

In addition, the judiciary should adopt transparency measures to increase public confidence in the courts—including providing free access to court records as well as audio and video access to court proceedings. Again, to the extent courts do not increase transparency on their own, Congress should be ready to act in their stead.

## Issue 1: Unaccountable judges

The single greatest impediment to improving judicial ethics is the absence of a single, independent body charged with providing judicial ethics regimes and policing misconduct violations. Currently, the [Judicial Conduct and Disability Act of 1980](#) allows ethics and misconduct complaints to be filed with the chief judge of any district or circuit court. The chief judge may then [appoint](#) a special committee of judges within the circuit to investigate and report on the alleged misconduct. This current precedent raises multiple concerns: first, those responsible for handling a complaint have a professional and possibly personal relationship with the judge facing misconduct allegations. Second, the use of special committees to handle complaints—rather than a permanent body—means that those responsible for investigating and adjudicating complaints are unlikely to have the experience or expertise for handling them. Third, the Supreme Court has not bound itself to these regulations, which apply to all lower courts.

In addition to the flaws illustrated above, there is also no independent body charged with identifying and disclosing potential judicial conflicts of interest or with resolving recusal motions by litigants. Judicial officers are required to make regular [financial disclosures](#) under the Ethics in Government Act of 1978. Those forms may be [requested](#) from the Administrative Office of the Courts, but they are not disclosed affirmatively. Although disclosure reports are potentially subject to public scrutiny and have been [corrected](#) in the past, there is no judicial entity proactively policing compliance.

The federal judiciary has taken [strides](#) towards addressing sexual harassment and discrimination in the workforce; however, judges who flout these rules can still avoid accountability. Investigations of judicial misconduct currently end if a judge quits or—in some cases—is promoted. Panels of judges convened to consider a colleague’s misconduct have [concluded](#) that they have no authority to investigate a judge who retires or is appointed to a different court. Investigations into the misconduct of retired Court of Appeals Judges [Alex Kozinski](#) and [Maryanne Trump Barry](#), retired District Judges [Walter Smith](#) and [Carlos Murguia](#), and now-Supreme Court Justice [Brett Kavanaugh](#), among others, have been dropped for this reason. Moreover, under [28 U.S.C. § 371](#), judges who resign amidst misconduct investigations still collect tax-payer funded pensions [for life](#). Judges Kozinski and Barry each continue to collect annual pensions of nearly \$220,000 despite unresolved allegations of [sexual misconduct](#) in the case of Judge Kozinski and [tax fraud](#) in the case of Judge Barry.

## Solutions

- **Establish a consolidated, independent ethics office within the Judicial Conference of the United States Courts.** A single, independent organization within the Judicial Conference should have consolidated power to shape and enforce the ethics standards of the federal judiciary. This entity can be led by judges appointed by the Chief Justice of the United States for a fixed number of years—the mechanism by which judges are appointed to the Foreign Intelligence Surveillance Court.
- **Establish a process for handling judicial ethics and misconduct complaints that applies to all judges and justices and that retains jurisdiction even if a judge**

**resigns, retires, or is removed from office.** The independent ethics office established within the Judicial Conference should be given jurisdiction over judicial ethics and misconduct complaints by any judicial officer—including Supreme Court justices. This entity should have a complaint process that protects the privacy interests of whistleblowers or accusers. It should also have the authority to launch investigations based on public reports of misconduct as well as specific complaints that it has received.

- **Empower the independent ethics office to impose stronger sanctions on judges.** While ethical violations of the code can lead to investigation or sanction under the [Judicial Conduct and Disability Act of 1980](#), penalties are rarely [administered](#). Indeed, despite [high profile](#) allegations of ethics violations and misconduct, no federal judge has been sanctioned [in years](#). Stronger disciplinary authority is needed, including the ability to strip judges or justices of their non-vested [taxpayer-funded pension benefits](#). While [Article III](#) of the Constitution prohibits compensation from being reduced after a judge is in office, retirement pay for new judges could be made contingent on their refraining from serious misconduct. The independent ethics office should also have the authority to refer cases to Congress for impeachment or the United States Attorney for prosecution.
- **Empower the independent ethics office to aggregate and disseminate information about potential judicial conflicts, and issue recusal opinions (as discussed in issue 3 of this section).** The independent ethics office should help ensure that recusal motions are well founded by arming litigants with accurate information about potential conflicts of interest, including judges' financial disclosures and the disclosures of personal contacts proposed in issue 2 of this section. As discussed in issue 3 of this section, the independent ethics office should also decide or weigh in on recusal motions.

## Resources

Sen. Warren and Rep. Jayapal's [Anti-Corruption and Public Integrity Act](#), S. 3357, § 403 (115th Congress, 2018).

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 7001 (116th Congress, 2019).

Rep. Johnson's [Twenty-First Century Courts Act](#), H.R. 6017 (116th Congress, 2020).

Stephen Breyer, et al., [Implementation of the Judicial Conduct and Disability Act of 1980: A report to the Chief Justice](#), *The Judicial Conduct and Disability Act Study Committee*, September, 2006.

Danielle Root and Sam Berger, [Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts](#), *Center for American Progress*, May 8, 2019.

Arthur D. Hellman, [An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings](#), 32 *The Georgetown Journal of Legal Ethics* 341, 2019.

[Restoring Trust in an Impartial and Ethical Judiciary](#), *Warren Democrats*.

## Issue 2: Weak ethics standards

The independence and integrity of the judiciary are paramount to public trust in the courts' ability to deliver impartial justice. The rule of law depends more than anything on the expectation that neutral principles and application of the law will drive outcomes—not the ability of individuals to curry favor with jurists. For this reason, the [Federal Disqualification Statute](#) and the [Judicial Code of Conduct](#) have encouraged judges to avoid even the appearance of impropriety that could undermine the courts' legitimacy. Under the [Judicial Code of Conduct](#), “[e]very judge is required to develop a list of personal and financial interests that would require recusal, which courts use with automated conflict-checking software to identify court cases in which a judge may have a disqualifying conflict of interest under 28 U.S.C. § 455 or the Code of Conduct.”

Current ethics requirements for federal jurists fall short of this aspiration. Existing rules permit judges and justices to trade individual stocks, which creates a considerable risk that their participation in a dispute could impact an investment. This risk is not theoretical. In 2012, the [Center for Public Integrity](#) examined the financial disclosures of appellate circuit judges and found 24 cases where judges owned stock in a company with a case before them. In 20 other cases, the judge’s investment(s) raised questions even if they did not present a clear conflict of interest.

Additionally, while there are existing [Judicial Conference ethics rules](#) preventing judges from accepting gifts that create the appearance of conflicts, judges are still permitted to accept certain all-expenses-paid trips to appear in certain contexts. On occasion, those trips have involved [appearances](#) that have a fundraising component. Judges are only required to disclose these types of gifts once a year on their annual financial disclosures.

Jurists do not have a good record of following the existing disclosure requirements. For instance, in 2011, [Supreme Court Justice Clarence Thomas](#) failed to disclose his wife’s employment with the Heritage Foundation. In 2016, [Supreme Court Justice Sonia Sotomayor](#) left expensive gifts off her financial disclosure report. Neither justice faced discipline for these oversights.

Overall, the disclosure regime for jurists focuses on financial conflicts of interest without shining a light on the potential for other forms of influence that are damaging to the courts’ independence and impartiality. Both the public and private litigants have a right to know if judges have had contacts or meetings with executive branch officials, litigants, or attorneys with interests before the court.

## Solutions

- **Require federal judges to divest assets that are likely to create conflicts of interest or the appearance of a conflict of interest.** Recusal is in many cases an undesirable outcome: federal judges should be able to participate in matters to which they are assigned. That’s why judges should be required to take prophylactic steps to prevent conflicts of interest by divesting stocks, non-diversified mutual funds, and other ownership interests in private entities.



- **Establish new affirmative disclosure requirements for the personal and professional contacts of jurists and make them available in a searchable database.** Members of the public and litigants before the courts need accurate, timely information about potential conflicts of interest including relevant extrajudicial conduct and activities of federal judges and justices. In addition to making financial disclosures, federal jurists should be required to disclose on a regular basis, a list of meetings, communications, or other contacts they have had with any executive, legislative, or corporate officers. There should be exceptions for widely attended gatherings or open-press events.
- **Provide judges with a budget for travel to make public appearances or appearances at educational institutions and ban them from accepting reimbursement for travel.** Federal judges should be encouraged to participate in extrajudicial activities, including appearances at educational institutions and public events; however, their travel should not be reimbursed by any private individual or entity. Accordingly, the judiciary should budget for and Congress should appropriate funds for federal judges to travel to avoid any appearance of impropriety.

## Resources

Sen. Warren and Rep. Jayapal's [Anti-Corruption and Public Integrity Act](#), S. 3357, § 401 et seq. (115th Congress, 2018).

Sen. Whitehouse and Rep. Cicilline's [Judicial Travel Accountability Act](#), S. 2632 (116th Congress, 2019).

Rep. Johnson's [Twenty-First Century Courts Act](#), H.R. 6017 (116th Congress, 2020).

Johanna Kalb and Alicia Bannon, [Supreme Court Ethics Reform: The Need for an Ethics Code and Additional Transparency](#), *Brennan Center for Justice at New York University School of Law*, September 24, 2019.

## Issue 3: Unclear and unenforceable recusal requirements

Judicial recusal and disqualification are crucial mechanisms for safeguarding both the reality and the perception of judicial integrity. Federal law requires judges to recuse in certain cases; however, it is not always clear when recusal is required and litigants may be reluctant to seek recusal for fear of adversely impacting the judge's assessment of the merits of a case.

Three statutes establish federal judicial recusal rules: [28 U.S.C. § 47](#) prohibits a trial judge from participating in an appeal of the same case; [28 U.S.C. § 144](#) permits a party to file an affidavit stating that a district court judge is biased or prejudiced; [28 U.S.C. § 455](#) establishes a general disqualification standard for all federal judges—"any proceeding in which his impartiality might reasonably be questioned" and identifies specific circumstances that require recusal.

Seeking a judge's recusal from a matter is not an ordinary motion, for it has the potential to end a judge's participation in a case and is resolved by the judge whose recusal is sought. There are good [reasons](#) to think that judges should not rule on their own recusal or disqualification motions, including the potential for unconscious bias or blind spots in their self perception. Moreover, litigants might hesitate to file a recusal motion for fear of it [negatively affecting](#) the judge's assessment of the merits of a case in the event he or she decides not to recuse. A mechanism for independent, swift adjudication of recusal motions could eliminate that disincentive without opening the door to disingenuous recusal efforts.

There have also been notable cases in which Supreme Court justices have failed to recuse in circumstances that suggested that there was the appearance of bias. In 2004, it was [widely reported](#) that the late Supreme Court Justice Antonin Scalia had traveled with then-Vice President Richard Cheney for a duck-hunting trip while a case involving Cheney was pending before the Supreme Court. Despite the [appearance](#) of favoritism that the trip presented, Justice Scalia wrote a [21-page memo](#) rejecting the argument that the hunting trip was reasonable cause to question his impartiality. Scalia later cast a vote for the majority in a [7-2 decision](#) in Cheney's favor. There is, of course, a particularly strong motive for a judge or justice not to recuse in cases that are perceived to be important or controversial and where the stakes of stepping aside could be particularly high.

A separate, disturbing trend is the recusal of judges and justices without explanation. A recent [report](#) by Fix the Court noted that Supreme Court justices recused from approximately 200 matters each year without explaining why. That lack of transparency is bad for the public and bad for litigants. If there are reasons why a justice cannot participate in one case, it is plausible that they might need to recuse from similar cases.

### Solutions

- **An independent authority (such as the ethics office proposed in issue 1 of this section) should be empowered to decide (or at least offer its opinion on) recusal or disqualification motions.** Recusal motions should be referred to an independent body for swift adjudication so that judges themselves are not involved in deciding whether they should continue participating in a matter. To prevent such motions from being used by parties as a dilatory tactic, the ethics office should be required to rule



expeditiously on recusal motions and empowered to deny facially insufficient motions and to require a response from the opposing party or the judge whose recusal is sought. Alternatively, the ethics office could be charged with issuing an advisory opinion in circumstances where recusal is warranted. In either case, the procedure should apply to all federal jurists—including Supreme Court justices.

- **Recusal decisions should be made in writing and on the record.** Public confidence in the integrity of the courts is best served by recusal decisions that articulate why a judge has decided not to participate in a matter. That transparency could help establish precedent for recusal and help inform the public and litigants about the existing conflicts of sitting judges.
- **Strengthen existing recusal requirements and make them binding on the Supreme Court.** A judge who was employed by a corporation, law firm, agency, or office should recuse from all cases involving that entity for at least one year from their last day of employment. Recusal obligations should be binding on the Supreme Court, and not subject merely to the compliance of individual justices.

## Resources

Rep. Murphy's [Supreme Court Transparency and Disclosure Act of 2011](#), H.R. 862 (112th Congress, 2011).

Sen. Warren and Rep. Jayapal's [Anti-Corruption and Public Integrity Act](#), S. 3357, § 403 et seq. (115th Congress, 2018).

Rep. Johnson's [Twenty-First Century Courts Act](#), H.R. 6017 (116th Congress, 2020).

James Sample, et al., [Fair Courts: Setting Recusal Standards](#), *Brennan Center for Justice at New York University School of Law*, 2008.

Matthew Menendez and Dorothy Samuels, [Judicial Recusal Reform: Toward Independent Consideration of Disqualification](#), *Brennan Center for Justice at New York University School of Law*, November 30, 2016.

Danielle Root and Sam Berger, [Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts](#), *Center for American Progress*, May 8, 2019.

## Issue 4: Poor public access to court proceedings and records

Courts lack transparency and accessibility to the general public. This issue extends across all levels of the judicial system, including the Supreme Court. Access to court proceedings is often limited to those who have time to attend in person; and in high-profile cases, only a limited number of people can fit in the courtroom where the proceedings are occurring. Additionally, it is particularly difficult to gain access to the Supreme Court, where a limited number of seats are made available to the public and one must wait in line for hours to attend especially controversial or important arguments. Most federal courts provide no alternative to attending in person: live-access to court proceedings is for the most part limited, and transcripts or recordings of proceedings are not routinely released to the public.

[The Public Access to Court Electronic Records \(PACER\) system](#), which is designed to provide access to federal court documents for the public, presents another significant barrier to transparency in the judicial system. While the PACER system is supposed to ease access to court documents, it is [complicated, expensive, and there are limited search options](#). Specifically, the system charges users to access most documents (10 cents per page), and it is difficult for laypeople to find the information they need.

Better access to court proceedings is possible. In May 2020, as a result of the coronavirus, the [U.S. Bankruptcy Court](#) of the Southern District of New York issued a temporary waiver of PACER fees for specific parties if the fees would cause an unreasonable burden. This waiver should be more widely and permanently applied. In August 2020, the [U.S. Court of Appeals](#) for the Federal Circuit ruled that the public is being overcharged to access court records and the unreasonable fees for operating the PACER system violates federal law. Unfortunately, this did not result in free access to the PACER system, as fees could continue to be charged due to the 2002 E-Government Act.

The barriers that the public must overcome in order to obtain information about court proceedings and access court records are unjustifiable. By livestreaming court proceedings and making the PACER system free and easier to use, the public will be able to learn about decisions that are impacting their lives as they are issued.

### Solutions

- **Provide audio livestream of circuit court and Supreme Court proceedings.** The limited in-person seating, lack of audio arguments, and delayed transcripts create a barrier to the public. Making available audio livestream of circuit court and Supreme Court hearings will increase accessibility to rulings that potentially affect the public at large.
- **Eliminate Public Access to Court Electronic Records system fees.** The PACER system, which is used by federal trial and appellate courts, is not easily searchable and charges 10 cents per page. Removing the PACER system fees would encourage public-facing third party websites to help members of the public access court filings.

## Resources

Sen. Portman and Rep. Collins' [Electronic Court Records Reform Act of 2019](#), S. 2064 (116th Congress, 2019).

Rep. Quigley's [Transparency in Government Act of 2019](#), H.R. 5150, § 801 et seq. (116th Congress, 2019)

Sen. Durbin's [Cameras in the Courtroom Act](#), S. 822 (116th Congress, 2019).

Rep. Johnson's [Twenty-First Century Courts Act](#), H.R. 6017 (116th Congress, 2020).

Danielle Root and Sam Berger, [Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts](#), *Center for American Progress*, May 8, 2019.

Dylan Hedtler-Gaudette and Anthony Marcum, [Simple Reforms to Improve Transparency and Public Trust in the Federal Judiciary](#), *Project on Government Oversight*, March 2, 2020.

## SECTION 8 *of* WHAT DEMOCRACY LOOKS LIKE

# Improving Our Democracy

**All three branches of government: the executive, the legislative, and the judiciary, face a legitimacy crisis that imperils ethical and responsible government.** Fully restoring our democracy will require structural reforms to ensure that our government works better on behalf of the American people. Most of this report is focused on the detailed work of improving specific components of our ethics and transparency laws and of reforming institutions so that they can hold government officials accountable. Those fixes are important, but they are insufficient. In this section, we address some of the most critical issues threatening our democracy.

Addressing those issues begins with affirmatively guaranteeing the right to vote and passing federal legislation to ensure that every American's ability to exercise that right is a reality. Tragically, our democracy has never engaged in a comprehensive and sustained effort to do so. Instead, the powers of our state and federal governments have been wielded to prevent massive portions of the populace from voting, including, at various points in our history: men without property, women, slaves, former slaves, indigenous peoples, Black Americans, individuals convicted of felonies, and others. A government that cannot guarantee to its citizens the equal right to elect public officials is not a democracy.

We must also revisit the ways in which our jurisdictional boundaries and election rules subvert voters' choices. Our mechanisms for electing senators and a president are becoming increasingly undemocratic because a smaller and smaller percentage of voters are capable of controlling each. And partisan redistricting of congressional districts in many states has allowed parties to control a disproportionate number of seats to the votes they have earned. Some of those structural choices reflect outdated compromises from our nation's founding. Others reflect different compromises—such as ensuring that there were insufficient votes in the Senate to outlaw slavery for the first eighty years of our republic.

The power imbalances ingrained in the presidency and U.S. Senate have, by extension, threatened the legitimacy of the Supreme Court of the United States. A majority of justices on the Supreme Court have been appointed by Republican presidents for the last 50 years. That

statistic is remarkable given that Democratic candidates for president won the popular vote in seven of the last eight elections. Over the last three decades, there has also been a complete breakdown in the norms that used to govern the Senate's consideration of Supreme Court nominees.

Finally, the Supreme Court has taken its own affirmative steps to undermine the legitimacy of our government. The Court has increased the role and influence of money in our politics by placing severe restrictions on Congress's ability to impose sensible limits on the amount that candidates, campaigns, individuals, and corporations can spend to influence the outcome of our elections. The Court has also severely undermined efforts to police and prosecute public corruption by overturning the convictions of members of Congress, governors, and other elected officials—whose wealthy donors benefited enormously from special access or treatment. These decisions, ostensibly grounded in the First Amendment, have contributed to the perception that campaign donations and election expenditures—not votes—are the key to influencing elected officials.

## Issue 1: Disenfranchised Americans

A citizen's right to vote is the bedrock of any representative democracy; it is the basis for our government's legitimacy. Our leaders compete to win the support of citizens and then translate voters' preferences into policy.

That is the theory anyway. But the United States has never guaranteed its citizens the right to vote. Even after hard-fought victories to extend the franchise to former slaves, people of color, women, and all persons 18-or-older, serious impediments to voting persist. In many cases, these roadblocks reflect intentional efforts by those in power to disenfranchise portions of the electorate unlikely to support their continued dominance.

Deliberate efforts to disenfranchise voters were bolstered by the Supreme Court's decision in [\*Shelby County v. Holder\*](#) to invalidate key provisions of the Voting Rights Act of 1965. That legislation, which was reauthorized by Congress for five decades, required jurisdictions with a history of voter suppression and low voter registration or turnout to seek approval from the Department of Justice before changing their voting laws. The Brennan Center [estimates](#) that approximately two million voters would not have been purged from voter registration rolls between 2012 and 2016 if the preclearance provisions of the Voting Rights Act were still in effect.

In many jurisdictions, restrictions on voting are justified as efforts to combat voter fraud, but in reality, voter fraud is [vanishingly rare](#). Unfounded concerns about voter fraud are nevertheless used to enact laws and policies that disenfranchise voters without improving the security of elections or the veracity of election results.

In addition, entire segments of the United States continue to be denied the franchise by states and the federal government. Citizens who reside in the District of Columbia are entitled to vote for president under the Twenty-Third Amendment, but they do not have voting representation in Congress. Citizens of Puerto Rico, Guam, the U.S. Virgin Islands, and other federal territories cannot vote for the president or members of Congress.

In many states, citizens convicted of a felony are prohibited from voting or face enormous obstacles to restoring their voting rights. The efforts to disenfranchise this class of voters, who are disproportionately Black and Latino, are staggeringly cynical. In Florida, for instance, voters overwhelmingly [approved](#) a state ballot [initiative](#) amending the state Constitution to "automatically restore the right to vote for people with prior felony convictions, except those convicted of murder or a felony sexual offense, upon completion of their sentences, including prison, parole, and probation." After the initiative passed, the Republican controlled legislature enacted a new law requiring the formerly incarcerated to complete "all terms of sentence" including full payment of restitution, or any fines, fees, or costs resulting from the conviction, before they could regain the right to vote. Despite the amendment to Florida's state constitution, as of a month before the 2020 election, [fewer than 8 percent of state citizens](#) convicted of a felony had registered to vote since the constitutional amendment passed.

## Potential Solutions

- **Enact federal legislation securing every American's right to vote.** Comprehensive voting legislation could include:

Uniform standards for state voter registration, including online registration systems, longer periods for voter registration, same-day registration, and automatic voter registration;

Criminal penalties for interfering with an individual's voter registration;

Prohibitions on deceptive practices aimed at discouraging voting or suppressing voter registration;

Banning the disenfranchisement of citizens convicted of a felony;

Prohibiting states from imposing any costs on a voter, including the costs of mailing a ballot or the payment of any form of fine, restitution, or back tax; and

Requiring states to offer vote by mail to eligible voters without additional conditions or requirements except for signature verification.

- **Renew federal voting rights protections.** Congress could reestablish and bolster federal voting rights protections by:

Establishing new criteria for determining which states and political subdivisions must obtain preclearance before changes to voting practices in these areas may take effect;

Requiring all jurisdictions to preclear changes to documentation requirements or registering to vote by mail; and

Specifying what practices will require preclearance, including changes to methods of election, changes to jurisdiction boundaries, redistricting, changes to voting locations and opportunities, and changes to voter registration list maintenance.

Expand the congressional representation of citizens of the District of Columbia and Puerto Rico.

Congress could admit the District of Columbia as a state. The District of Columbia is [home](#) to more than 700,000 Americans that include fire fighters, teachers, small business owners, and veterans. That's more people than the states of Wyoming and Vermont, almost as much as Alaska. The District of Columbia has completed the steps typically required of prospective states, including passing a [referendum](#) supporting statehood and drafting a state [Constitution](#).

Congress could separately establish a process and timeline for Puerto Rico to consider becoming a state. Puerto Ricans [voted](#) to support statehood in 2020.



- **Consider a constitutional amendment to permit the territories to vote for president and enjoy congressional representation.** Under the Twenty-Third Amendment, citizens of the District of Columbia have been afforded the right to vote in presidential elections. Congress could consider a constitutional amendment to allow all citizens who reside in federal territories to vote in federal elections.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1 (116th Congress, 2019).

Rep. Norton's [Washington, D.C. Admission Act](#), H.R. 51 (116th Congress, 2019).

Rep. Serrano's [Puerto Rico Statehood Admission Act](#), H.R. 4901 (116th Congress, 2019).

Sen. Leahy and Rep. Sewell's [John Lewis Voting Rights Advancement Act](#), S. 4263 (116th Congress, 2020).

Amber L. Cottle, [Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections](#), *University of Chicago Legal Forum*, 1995.

Neil Weare, [Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia](#), *46 Stetson Law Review* 1, February 2, 2017.

## Issue 2: Undemocratic elections

Another threat to our government’s legitimacy is the fact that federal elections are producing increasingly anti-majoritarian results. Those results are the product of outdated rules and institutions like the electoral college, which were not designed in anticipation of the advent of political parties—not to mention the enormous demographic and social changes that have occurred over the last 240 years. In some cases, these results are intended, such as the admission of slave states to ensure that the Senate would not have the votes to end slavery, or the gerrymandering of House districts to maximize the chances that one party will win. In other cases, they reflect the ideological [sorting](#) of Americans between rural and urban jurisdictions.

Twice in the last twenty years, the presidential candidate who won the support of the most Americans did not win the most electoral votes and, therefore, the election. Even though such events have been unusual in our history, we should not expect them to be rare in the future. One study [showed](#) that a presidential candidate of one political party can expect to win the electoral college even if they lose the popular vote by six percentage points.

Nor does the electoral college secure the benefits that are sometimes attributed to it. The electoral college does not produce an incentive for candidates to campaign in smaller states; rather, it provides an [incentive](#) for candidates to campaign in competitive larger states. Indeed, in 2020, campaign visits and spending by both President Donald Trump and President-Elect Joe Biden were [focused on](#) a relatively small number of states.

And the Senate is becoming even more anti-majoritarian. Estimates indicate that by 2040, about 70 percent of Americans will live in 16 states. This means that the remaining 30 percent of Americans, spread across 34 states, will [control](#) 68 percent of Senate seats. As a result, individuals in less populous states, who are overwhelmingly white, [will have dramatically more](#) power to influence Congress than those in more diverse populous states.

The problem is compounded by systemic, intentional efforts in many states to establish House district boundaries that give one party an unfair advantage. This “gerrymandering” has led to misrepresentation—a mismatch between votes won and seats won—in the composition of many states’ congressional representation. This misrepresentation can be dramatic. In 2016, Republicans [earned](#) 1.2 percentage points more votes than Democrats; however, they ended up with 10.8 percent more seats than Democrats. A significant portion of this over-representation can be attributed to partisan gerrymandering. According to a [study](#) by the Center for American Progress, gerrymandering shifted an average of 19 seats per election from Democrats to Republicans between 2012 and 2016. A 2017 Brennan Center [report](#) pegged the advantage at 16-17 seats.

During the Trump Administration a new, insidious effort to skew both congressional apportionment and the electoral college has emerged. The Administration has repeatedly interfered with the decennial census, first by trying to add a citizenship question that “[could cause the census to miss millions of Hispanics](#)” and seems explicitly aimed at [reducing](#) their response rates. After that effort failed, President Trump [issued](#) a presidential memorandum calling for the exclusion of unauthorized immigrants from the census counts used to apportion congressional seats. It is unclear whether this effort will succeed, for the [Fourteenth](#)

[Amendment](#) requires that congressional representatives “be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.”

In addition, several states have election rules that discourage majoritarian results. Many southern states continue to require the top two candidates to participate in a runoff election after the general election if no candidate receives at least 50 percent of the vote. Such rules, a [legacy](#) of the Jim Crow era, are common in the South and were put in place as part of an effort to prevent Black communities which represented a sizable minority of the population from electing the candidate of their choice. Such rules might appear majoritarian on their face, but in reality, they present an obstacle to every citizen’s preference being counted because they require citizens to vote a second time, and [many do not](#). In other states such as Maine (prior to its adoption of instant-runoff voting in 2018) and Alaska, the prevalence of independent candidates has produced races in which candidates win office with soft, plurality support.

The structure of many state primary elections may [encourage](#) polarization. Partisan primaries contribute to polarization because they force candidates to appeal to primary voters who are more ideologically extreme than the electorate as a whole. In many [states](#), participation in a primary is limited to registered party members. In other [states](#), unaffiliated voters can only vote in one party’s primary. As a result, many general elections feature candidates who, having emerged from partisan primaries, are not well-placed to represent the true preferences of the full electorate. This problem is particularly acute in jurisdictions where the general election is not competitive because the winner of one of the partisan primaries is heavily favored to win.

These structural features of our democracy are not immovable objects. We have changed key features of federal elections when our system has been exposed as flawed or illegitimate. We enacted constitutional amendments to fix the electoral college after the disputed election of 1800; we twice amended the apportionment of members to the House of Representatives—once to fix the number of members, and once to require that they be apportioned on the basis of whole persons not “three fifths;” we provided for the direct election of senators, discontinuing the practice of state legislatures choosing them; and we gave the District of Columbia the right to vote in presidential elections.

## Potential Solutions

- **States could assign electors based on the national popular vote by joining the [National Popular Vote Compact](#).** That compact provides that if enacted in states comprising 270 electoral votes, each state would allocate its electoral votes to the winner of the national popular vote. This change would prevent a candidate from winning the electoral college without winning the popular vote.
- **States could adopt open, top-two primaries to reduce partisan polarization.** In a top-two primary system, the top-two vote getters in the primary advance to the general election, regardless of which—if any—party they belong to. Evidence [suggests](#) that after California, Louisiana, and Washington adopted top-two primary systems, federal representatives elected in each state displayed less extreme voting behavior. In California, state representatives also [became](#) less ideologically extreme after adoption of two-party primaries.
- **States could create independent redistricting commissions to draw nonpartisan**

**House districts.** One way to ensure that redistricting is based on fair, neutral criteria is to empower an independent body to perform that task. To the extent that states fail to do so, Congress could consider banning consideration of partisanship or ideology in redistricting.

- **States could adopt instant-runoff elections (ranked-choice voting).** Instant runoff elections prevent voters from being disenfranchised by having to return to the polls if the top two candidates do not get 50 percent of the vote. Ranked-choice voting helps ensure that a candidate cannot claim victory with a small plurality while at the same time encouraging third party candidacies. By reallocating the votes of the lowest-placing candidates and counting those voters' lower-ranked choices, ranked-choice voting is one powerful way to encourage a diversity of choices in a first-past-the-post election.
- **Congress could rebuff President Donald Trump's attempts to interfere with the census and ensure it is protected from future interference.** Congress could reject census results that have been unconstitutionally manipulated by President Trump. In addition, Congress could explore ways to prevent future political interference with the census, such as insulating the Census Bureau from the influence of the president and treasury secretary.

## Resources

Rep. Sarbanes' [For the People Act of 2019](#), H.R. 1, § 2400 et seq. (116th Congress, 2019).

Rep. Beyer's [Fair Representation Act](#), H.R. 4000 (116th Congress, 2019).

Rep. Raskin's [Ranked Choice Voting Act](#), H.R. 4464 (116th Congress, 2019).

Sen. Menendez's [Every Person Counts Act](#), S. 201 (116th Congress, 2019).

Sen. Klobuchar and Rep. Lofgren's [Redistricting Reform Act of 2019](#), S. 2226 (116th Congress, 2019).

Sen. Merkley's [A joint resolution proposing an amendment to the Constitution of the United States to abolish the electoral college and to provide for the direct election of the President and Vice President of the United States.](#), S.J.Res. 16 (116th Congress, 2019).

Yurij Rudensky and Annie Lo, [A Better Way to Draw Districts](#), *Brennan Center for Justice*, December 12, 2019.

[The National Popular Vote Compact Bill](#), *National Popular Vote!*, 2020.

### Issue 3: The judiciary's legitimacy crisis

The legitimacy of the Supreme Court is being threatened by the collapse of norms that govern Supreme Court nominations. In the last decade, the process has broken down completely and become an exercise in naked political power—largely to the advantage of the conservative legal movement.

In 2016, the Republican-controlled Senate [refused to consider](#) the nomination of Merrick Garland to fill the vacancy created by the passing of Supreme Court Justice Antonin Scalia in the last year of Barack Obama's presidency. Republican senators asserted that the American people should have a chance to decide who should pick the next Supreme Court justice.

President Donald Trump was elected in 2016 despite losing the popular vote by nearly 3 million votes. During the consideration of President Trump's eventual nominee for the same seat, the Republican-controlled Senate [eliminated](#) the filibuster for Supreme Court justices (a step that the Democratic-controlled Senate [had taken](#) for lower court judges in 2013). Now, in 2020, the Republican-controlled Senate ignored the rule it had established to deny Merrick Garland consideration and [confirmed](#) Amy Barrett to fill a vacancy created less than 60 days before the 2020 election. Supreme Court Justices Neil Gorsuch, Brett Kavanaugh, and Amy Barrett [were](#) the first three justices in American history nominated by a president who had not won the popular vote and confirmed by a Senate coalition representing a minority of Americans. Supreme Court Justices Clarence Thomas and Samuel Alito were also confirmed by Senate coalitions [representing](#) a minority of Americans.

The consequences for many of the reforms discussed in this report could be profound. At all times since 1970, a majority of the justices on the Court have been appointed by Republican presidents, and the result has been a dramatic shift in the law. By advancing extreme views of executive power and the First Amendment while consistently undermining Congress's power to conduct oversight and legislate, the Court has issued decisions that threaten our constitutional order.

The hard question is how to reestablish a stable paradigm that both parties can support moving forward. The Supreme Court is an integral institution for our democracy, and its legitimacy will continue to be in peril if it continues to reflect structural power imbalances in our Constitution and is subjected to further partisan efforts to shape its composition. Simply adding seats to restore ideological balance to the Court—as some have [proposed](#)—may not solve the problem because it could lead to a reciprocal expansion of the Court by the other party in the future. We need a proposal that lowers the stakes for both sides and that is sustainable in the long run.

Another significant consideration is the fact that the Constitution also establishes certain parameters with which any reform must be compatible. [Article III](#) states that federal judges shall hold their offices in good behavior, which means that justices are entitled to serve on the Court until they resign, pass away, or are impeached and convicted. Article III does not require Congress to create a Supreme Court with a particular number of justices; however, it does state that “[t]he judicial Power of the United States, shall be vested in one supreme Court.”

Expanding the Court could have benefits beyond addressing the Court's legitimacy. A larger Court might prove less consistently divided along ideological lines and thereby reduce public

perception that the Court is purely an extension of partisan politics. A larger Court could reduce the consequences of a death or resignation, and perhaps even encourage more justices to retire earlier rather than waiting until their health fails them. It could also expand the Court's capacity to hear more cases, since there would be more judges to craft opinions and decide them.

Adding more justices could help the Supreme Court be a better reflection of the country. In its entire history, the Court has had 114 justices. Only five have been women, and only two have been Black. It is past time we had a diverse group of individuals on our highest court.

## Potential Solutions

- **Congress could pass legislation expanding the size of the Supreme Court by a specific number of seats or by providing that every president shall nominate one justice to the Supreme Court during each Congress.** Granting every president the opportunity to nominate a new justice every two years (once in each Congress) and allowing the size of the Court to fluctuate could fix many of the Court's ills. Establishing regularity to Supreme Court nominations would reduce the incentives for brinkmanship by partisans in the Senate. This solution can also be enacted without a constitutional amendment because it does not impose term limits on any justice, require use of rotating panels of justices, or require a justice to serve on a different court after a certain number of years.
- **Congress could consider proposing a constitutional amendment imposing term limits for all Article III judges and justices.** Term limits very likely require constitutional, not merely legislative change. Nonetheless, proposing a constitutional amendment setting lengthy term limits for federal judges and justices could help ensure that individuals leave the bench while they are still in good health. Congress has established long but fixed terms for certain Article I judges, including [magistrate](#), [bankruptcy](#), and [tax court](#) judges.

## Resources

Rep. Khanna's [Supreme Court Term Limits and Regular Appointments Act of 2020](#), (116th Congress, 2020).

John M. Lawlor, [Court Packing Revisited: A Proposal For Rationalizing The Timing Of Appointments To The Supreme Court](#), 134 *University of Pennsylvania Law Review* 967, 1986.

Steven G. Calabresi and James Lindgren, [Term Limits for the Supreme Court: Life Tenure Reconsidered](#), 29 *Harvard Journal of Law and Public Policy* 3, April 7, 2005.



## Issue 4: The invalidation of laws targeting public corruption

Over the last five decades, the Supreme Court has done immeasurable damage to Congress's ability to combat public corruption. Relying on an ahistorical, maximalist interpretation of the First Amendment, the Court has invalidated common-sense bipartisan efforts to limit the role of money in politics. The damage inflicted by the Court is not limited to the specific statutory schemes it has overturned. By relying on constitutional considerations—including the First Amendment and principles of federalism—the Court has completely removed many of the most effective policy solutions from the table.

Over the last 50 years, bipartisan coalitions of Congress have enacted federal campaign finance restrictions that would have placed fair and sensible restrictions on the role of money in our elections. Modern campaign finance law took shape in the years before and after the Watergate scandal. The Federal Election Campaign Act of 1971 (FECA) regulated political campaign spending and fundraising by establishing a comprehensive system for disclosing contributions to federal political campaigns. After extensive misconduct in President Richard Nixon's 1972 reelection campaign, Congress amended the FECA by establishing limits on contributions by individuals, political parties and political action committees and by establishing the Federal Election Commission—an independent agency—to monitor campaign disclosures and enforce the FECA. The Court responded immediately in *Buckley v. Valeo* (1976) by invalidating the FECA's restrictions on candidate contributions to a campaign and independent expenditures.

In 2002, Congress again passed bipartisan campaign finance reform. The [Bipartisan Campaign Reform Act of 2002](#) (BCRA) (frequently referred to as McCain-Feingold) amended the FECA by, among other things, banning committees and candidates from raising non-federal funds (i.e. “soft money”); limiting and requiring the disclosure of campaign ads (termed “electioneering communications”); strengthening limits on coordinated outside spending; and increasing contribution limits for candidates facing an opponent who uses personal funds for large campaign expenditures.

The BCRA faced court challenges immediately, and although the Supreme Court upheld parts of the law, it struck down several of the BCRA's most important elements. In *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007), the Court invalidated the ban on corporate-funded electioneering communications within sixty days of an election, opening the door to ads masquerading as non-political communications that stop short of endorsing or opposing a candidate but are nonetheless intended to impact an election. In *Davis v. Federal Election Commission* (2008), the Court invalidated a provision that raised the contribution limits for individuals running against candidates who infuse their campaigns with personal funds. And in *Citizens United v. Federal Election Commission* (2010), the Court invalidated limits on independent corporate expenditures. In all three cases, the Court split 5-4 along ideological lines.

In the wake of these decisions, there has been a massive increase in spending on federal elections. In the decade prior to *Citizens United*, outside individuals and groups (excluding parties) spent \$296 million on independent expenditures. In the decade following that decision, spending on independent expenditures experienced a [14-fold increase](#). In the 2020 election cycle alone, outside individuals and groups have already spent nearly [\\$2.6 billion](#) on independent expenditures.



The Court has done similar damage to laws Congress enacted to deter and punish public corruption by narrowing into oblivion criminal prohibitions on gratuities, bribery, honest services fraud, and extortion. The Court's decisions have eviscerated the ability of prosecutors to charge public officials for misconduct that is not an explicit exchange of money or some other thing of value for an extremely limited set of official acts.

In *United States v. Sun-Diamond Growers of California* (1999), the Supreme Court erased the distinction between two public-corruption crimes: bribery and gratuities. Congress had seen fit to criminalize conduct beyond an explicitly corrupt exchange (bribery), and therefore made it a crime to give a public official (or for the public official to accept) a thing of value because of an official act, but not necessarily in order to influence the official to act in a certain way. In *Sun-Diamond Growers of California*, the Court held that even when charging the lesser crime of gratuity, prosecutors had to establish a *quid pro quo*—much as they would in a bribery case.

Prosecutors then sought to charge similar conduct as honest services fraud under the theory that public officials who seek or demand payments are depriving their victims—the public—of their honest services. But in *Skilling v. United States* (2009), the Court struck down this approach as well by holding that honest services fraud also could not be charged unless it involved a bribe or a kickback.

In *McDonnell v. United States* (2016), the Court narrowed the scope of the federal bribery law and interpreted it to apply only to a narrow category of official actions that a public official might take in exchange for a bribe. In the Court's view, charging a fee for a meeting or for setting up meetings with other public officials was insufficient to support a bribery conviction. The Court relied in part on concerns that penalizing politicians from arranging meetings for donors might interfere with “the basic compact underlying representative government” which is “that public officials will hear from their constituents and act appropriately on their concerns . . . .” The Court also referenced concerns that federal prosecution of state officials on bribery charges raised federalism issues.

Finally, in *Kelly v. United States* (2020), the Court overturned federal-program fraud and wire fraud convictions for two individuals who closed lanes on the George Washington Bridge to divert traffic to Fort Lee, New Jersey because the town's mayor had chosen not to support Chris Christie in the 2013 New Jersey gubernatorial election. The Court held that the corruption statutes charged were “limited in scope to the protection of property rights” and that since the object of defendants' fraud was not money or property but rather political retribution, their convictions could not be sustained.

From *Buckley* to *Citizens United*, and from *Skilling* to *Kelly*, the Supreme Court has sided with corruption over democracy. Congress needs to reassert its authority to ensure that our elections reflect the will of the people and to ensure that influence of those elected cannot be purchased.

## Potential Solutions

- **Congress could seek to ratify a constitutional amendment reestablishing its authority to combat corruption.** Congress needs to reassert its power to set reasonable limits on contributions and expenditures in federal elections and to regulate bribery and other forms of corruption involving elected officials in federal, state, and local government. The amendment could clarify that notwithstanding the Supreme Court's decisions in *Buckley* and its progeny, Congress has the authority to regulate political

expenditures and contributions, including by establishing limits on both or by banning electioneering by corporations. The amendment could also affirmatively give Congress the power to combat public corruption, including by establishing laws with civil and criminal penalties for misconduct associated with public office, including bribery, gratuity, extortion, and fraud.

- **Congress could bolster the public corruption laws that the Court has weakened.** This could be achieved by:

Expanding the definition of the term “official act” in the bribery and gratuity statutes to deter public officials from accepting bribes or gifts for a wider range of actions that could influence public policy;

Defining the crime of gratuity to include gifts given because of the office that the recipient occupies or will occupy, not merely an official act; and

Establishing a new crime of honest services fraud that involves undisclosed self-dealing or the misuse of government resources for a corrupt purpose.

## Resources

Rep. Sensenbrenner’s [Clean Up Government Act of 2011](#), H.R. 2572 (112th Congress, 2011).

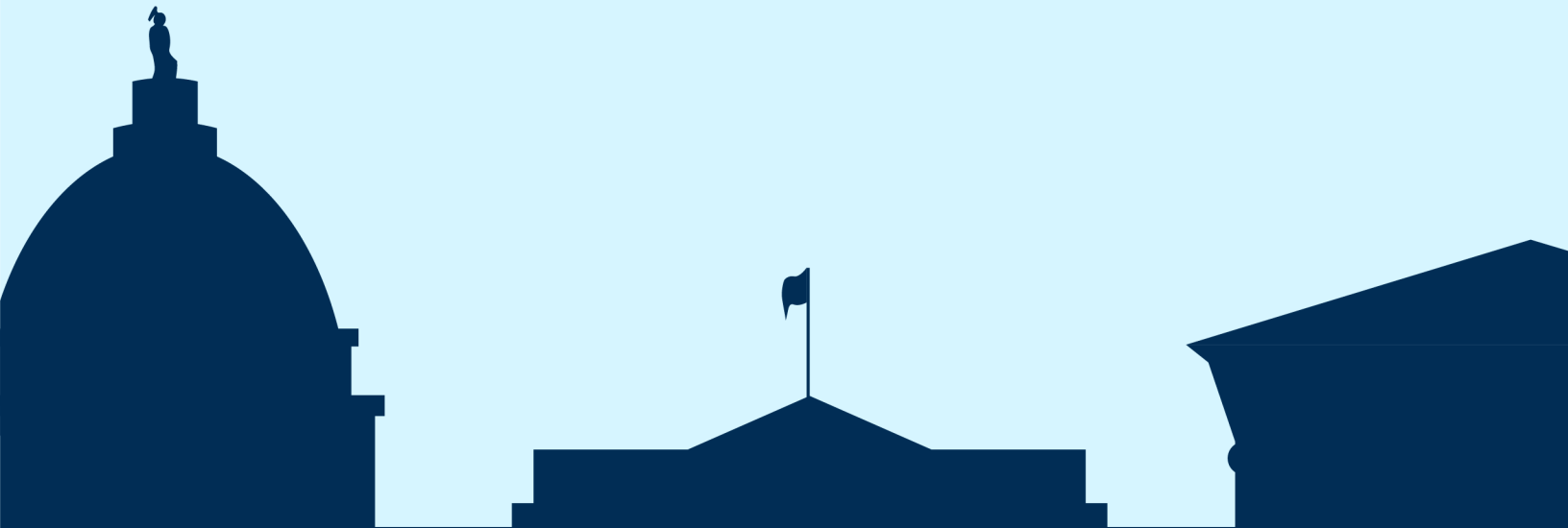
Sen. Leahy’s [Public Corruption Prosecution Improvements Act](#), S. 401 (112th Congress, 2011).

Rep. Suozzi’s [Close Official Acts Loophole Act of 2017](#), H.R. 3843 (115th Congress, 2017).

Jennifer Ahearn, [A Way Forward for Congress on Bribery after McDonnell](#), *121 Penn. St. L. Rev.* 1013, 2016-2017.

Jennifer Ahearn and Noah Bookbinder, [“Paralyzing gridlock” in criminal public-corruption law](#), *SCOTUSblog*, September 25, 2019.

Michael A. Foster, [Bribery, Kickbacks, and Self-Dealing: An Overview of Honest Services Fraud and Issues for Congress](#), *Congressional Research Service*, May 18, 2020.



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