

January 15, 2021

Dear Senator:

As organizations and individuals concerned about the integrity of government, we are increasingly concerned about the inadequacies of the current ethics review process to identify potential conflicts of interest for Cabinet nominees and other executive branch nominations.

Congress has passed a number of laws aimed at protecting the integrity of the federal government's decision-making, including the Ethics in Government Act of 1978, the Procurement Integrity Act, the Honest Leadership and Open Government Act of 2007, the Lobbying Disclosure Act, and the STOCK Act of 2012. Thanks to these laws, all Senate-confirmed nominees must fill out financial disclosure reports that are reviewed by agency ethics officials and the Office of Government Ethics in order to create ethics agreements to ensure compliance with laws designed to prevent financial conflicts of interest in performing public duties.¹ While all of these laws have been well-intentioned, they are also riddled with loopholes—not least of which is lax enforcement.

Most notably, the definition of lobbyist and lobbying activities does not capture the full scope of lobbying. As a 2016 *Politico* investigation showed in detail, to keep this activity out of the public eye, the influence industry “created an entire class of professional influencers who operate in the shadows.”² Both the Obama and Trump administrations issued executive orders placing restrictions on political appointees who were formerly registered lobbyists.³ In order to circumvent these restrictions, potential nominees of both parties have avoided the perceived stigma of registering by either not registering or de-registering.⁴ Others have instead conducted lobbying activities as strategic consultants, policy advisers, or government relations officials. Unlike registered lobbyists, individuals holding these positions do not need to publicly disclose who they worked for or which legislation, policies, or regulations they aimed to influence. They also avoided ethics restrictions of the ethics executive orders.

Voluntary disclosure has also resulted in oversights. For example, nothing in the public records submitted showed that former Defense Secretary James Mattis had advised the United Arab

¹ For information on that process see: Office of Government Ethics, *OGE Nominee Guide*. [https://www.oge.gov/web/oge.nsf/0/77E34818F9A59979852585B6005A24BB/\\$FILE/Guide%20for%20Nominees%202020_accessible.pdf](https://www.oge.gov/web/oge.nsf/0/77E34818F9A59979852585B6005A24BB/$FILE/Guide%20for%20Nominees%202020_accessible.pdf)

² Isaac Arnsdorf, “The lobbying reform that enriched Congress,” *Politico*, July 3, 2016.

<https://www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849>

³ Executive Order 13490, “Ethics Commitments by Executive Branch Personnel,” January 21, 2009.

<https://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1719.pdf>; Executive Order 13770, “Ethics Commitments by Executive Branch Appointees,” January 28, 2017. <https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02450.pdf>. For more analysis see: Project On Government Oversight, *Ethics Rules Enacted by Presidents, 1993-2017*, February 16, 2019. <https://www.documentcloud.org/documents/5728023-Ethics-Rules-Enacted-By-Presidents-1973-2017.html#document/p1>

⁴ Juliet Eilperin, “Obama promised to curb the influence of lobbyists. Has he succeeded?” *Washington Post*, March 22, 2015. https://www.washingtonpost.com/politics/obama-promised-to-curb-the-influence-of-lobbyists-has-he-succeeded/2015/03/22/e9ec766e-ab03-11e4-abe8-e1ef60ca26de_story.html

Emirates military before he joined the Trump administration.⁵ In a number of cases, Senate inquiries have made up for shortfalls in this process. During the Obama administration, then-Senator John McCain, ranking member of the Senate Armed Services committee, obtained additional information about the specific programs former Raytheon lobbyist and then-nominee for deputy secretary of defense, William Lynn, personally lobbied on.⁶

Eliminating or managing conflicts of interest must also be done expeditiously. For example, former Commerce Secretary Wilbur Ross's refusal to divest from his holdings, and multiple extensions on divesting from other entities, raised repeated concerns about whether he was using his public service to further his own financial gain.⁷ While his conduct did not violate federal law, the Commerce Department's inspector general found that he violated ethics regulations by "not endeavor[ing] to avoid actions creating the appearance that he violated the standards of ethical conduct."⁸

The confirmation process is designed to allow ethics officials and the Senate to question nominees on their commitment to following the obligations of ethical conduct for public servants.⁹ But there has been a rash of executive branch nominees who have simply refused or delayed turning over their financial disclosure reports. The Office of Government Ethics is supposed to get these reports long before the Senate acts on confirmations, which enables the Senate to scrutinize and even reject potential nominees with extensive conflicts or who otherwise fail to comply with the law. But at the beginning of the last administration, the Senate had initially scheduled confirmation hearings when only seven out of 26 confirmable appointees had publicly available ethics agreements, and half had not completed the necessary paperwork.¹⁰

Appointees must also not abuse their power to block public scrutiny of their conduct, particularly during the confirmation process. For example, we are concerned by processes established at the Department of the Interior to allow political appointees to weigh in on the release of documents under the Freedom of Information Act (FOIA).¹¹ The Department of the Interior inspector

⁵ Jeremy Herb, "First on CNN: Mattis advised UAE military before joining Trump administration," *CNN*, August 2, 2017. <https://www.cnn.com/2017/08/02/politics/mattis-advised-uae-military/index.html>

⁶ Project On Government Oversight, "POGO Releases Lynn's Responses to Senator McCain's Ethics Concerns," Project On Government Oversight, February 5, 2009. <https://www.pogo.org/press/release/2009/pogo-releases-lynn-responses-to-senator-mccains-ethics-concerns/>

⁷ See for example: Eden Tadesse, John Morgan, and Virginia Canter, "Has Commerce Secretary Ross resolved all potential conflicts of interest?" Citizens for Responsibility & Ethics in Washington, November 1, 2017. <https://www.citizensforethics.org/reports-investigations/crew-investigations/commerce-secretary-ross-resolved-potential-conflicts-interest/>; Letter from Senators Richard Blumenthal, Margaret Wood Hassan, Cory Booker, Maria Cantwell, Tammy Baldwin, and Tammy Duckworth to Department of Commerce Inspector General Peggy Gustafson concerning whether Commerce Secretary Wilbur Ross and his chief of staff Wendy Teramoto met federal ethics requirements, November 13, 2017. <https://www.blumenthal.senate.gov/imo/media/doc/11.13.17%20Ltr%20to%20Commerce%20IG.pdf>;

⁸ Department of Commerce Inspector General, *Investigation into Multiple Allegations That Secretary of Commerce Wilbur L. Ross, Jr., Failed to Comply with His Ethics Agreement and Violated Conflict of Interest Laws*, December 3, 2020, 152. https://www.oig.doc.gov/OIGPublications/OI%20Report%2018-0286_redacted.pdf

⁹ 5 C.F.R. § 2635.101(b)(1)-(14).

¹⁰ Libby Nelson, "Trump's Team Got A Guide to Running an Ethical Transition. They Ignored it," *Vox*, January 11, 2017. <https://www.vox.com/policy-and-politics/2017/1/10/14215074/trump-confirmation-hearings-ethics>

¹¹ Memorandum from Cindy Carafano, Interior Departmental FOIA Officer, to Assistant Secretaries, Heads of Bureaus, and Offices about the updated awareness process for Freedom of Information Act Productions, February

general found in August 2020 that the then-counselor to the secretary directed Interior staff to temporarily withhold FOIA documents related to then-Deputy Secretary and Interior Secretary nominee David Bernhardt after his nomination was announced.¹² Disclosure of information should be rooted in what is allowed under statute, not the whims of officials who want to prevent or delay disclosure of misconduct or embarrassing information.

Senate-confirmed nominees set the tone for what is acceptable behavior at government agencies. Real or perceived self-dealing, misconduct, and misrepresentation of agency activities fundamentally undermines the public's trust in the integrity of the federal government. Vetting nominees provides an important review to ensure that appointees are qualified to perform their duties, nonconflicted, and committed to performing the duties in the public's interest.

The Constitution provides the Senate significant power to scrutinize potential conflicts of interest through its duty to provide advice and consent on presidential nominees.¹³ Therefore, we urge Senate committees to require nominees to do the following as a condition for confirmation:

1. Submit the necessary financial disclosures to the Office of Government Ethics and formalize an ethics agreement before any confirmation hearing is held.
2. Disclose to the committee all previous paid or unpaid employers or clients from the past two years who may have a financial or material interest in the operations of the agency where they have been appointed to serve.
3. Disclose to the committee any work on behalf of foreign governments or parties in the past two years.
4. Disclose any "golden parachute" payments made by previous employers.
5. Request amended ethics decisions to encompass any potential conflicts identified by disclosures to the committee and not captured in the Office of Government Ethics form 278 or the agency's ethics agreement.
6. Pledge to provide the committee with any ethics decisions that require the nominee to recuse themselves from a particular matter or program.
7. Pledge to publicly disclose any meetings in which former employers or clients were present, other than widely attended events.
8. Pledge to publicly release all waivers and recusals in a timely manner.
9. Pledge to be recused from matters that impact the material interests of any spouse's clients or employers.
10. Pledge to not interfere with or politicize the Freedom of Information Act process.

Many of these reforms could be achieved immediately by an executive order from incoming President Joe Biden. Nevertheless, these reforms should also be permanently written into the legislative process.

28, 2019.

https://web.archive.org/web/20190726171708/https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_2.0.pdf

¹² Department of the Interior Inspector General, *Alleged Interference in FOIA Litigation Process*, August 11, 2020, 1. https://www.oversight.gov/sites/default/files/oig-reports/WebRedacted_AllegedFOIAInterference.pdf

¹³ U.S. Constitution art. II, § 2, cl. 2.

Our ethics system makes clear that appointees must not only conduct themselves with integrity, but also “endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards” codified in law and executive orders.¹⁴ We urge you to use the powers given to you under the Constitution to ensure our government leaders are worthy of the public’s confidence.

Sincerely,

American Oversight

BOLD Rethink

Campaign Legal Center

Citizens for Responsibility and Ethics in Washington (CREW)

Clean Elections Texas

Government Accountability Project

Issue One

Government Accountability Project

Government Information Watch

National Institute for Lobbying & Ethics

Open The Government

Project On Government Oversight

Public Citizen

Public Employees for Environmental Responsibility

RepresentUs New Mexico

Revolving Door Project

Thomas M. Susman

Prof. James A. Thurber

True North Research

Wisconsin Faith Voices for Justice

¹⁴ 5 C.F.R. § 2635.101(b)(14).