

5-19-2021

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### Recommended Citation

Christine Todd Whitman, *Legislative Actions to Promote and Enforce Ethical Conduct in Government*, 47 J. Legis. 38 (2021).

Available at: <https://scholarship.law.nd.edu/jleg/vol47/iss2/3>

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## Legislative Actions to Promote and Enforce Ethical Conduct in Government

### Cover Page Footnote

Christine Todd Whitman was Administrator of the Environmental Protection Agency from 2001-2003 and Governor of New Jersey from 1994-2001.

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## LEGISLATIVE ACTIONS TO PROMOTE AND ENFORCE ETHICAL CONDUCT IN GOVERNMENT

*Hon. Christine Todd Whitman\**

The commitment to government by and for the American people is undergirded by a set of ethical principles that ensure officials remain free of undue political, foreign, or business influences, and that they conduct actions based on the public interest. These standards have been implemented both formally and informally throughout our nation's history as protection against corruption. Ethical safeguards were first codified in the Constitution through the penalty of impeachment for bribery, including through the Foreign and Domestic Emoluments Clauses, and in the system of checks and balances both between and within branches of the federal government.

Despite the Founders' actions to prevent corruption through the law, officials have transgressed ethical norms at times in our nation's history. As these situations have arisen, the government has responded by updating the relevant safeguards and enhancing the protections against possible future oversteps. When George Washington stepped down in 1797, he established a norm of two-term limits on the presidency. One hundred and fifty years later, after Franklin Delano Roosevelt overstepped this tradition by running for a third and then a fourth term, Congress reacted by codifying the tradition of the two-term limit in the Twenty-Second Amendment. After John F. Kennedy appointed his brother Robert as Attorney General in 1961, Congress responded by passing the Federal Anti-Nepotism Statute to prevent public officials from appointing family members to positions within their jurisdiction.

Richard Nixon's abuses resulted in numerous new rules, including the Federal Election Campaign Act, which passed while he was in office. Following Watergate, a scandal of unprecedented proportions in American politics, Congress enacted a robust system intended to provide accountability in government. This post-Watergate framework, which still forms the basis of responsibility in the federal government, relies on a combination of formal laws and informal traditions to preserve public trust in our democratic institutions. Historically, when members of the government transgressed the boundaries, the system reacted with course corrections that formalized appropriate standards. But this does not happen

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\* *Christine Todd Whitman was Administrator of the Environmental Protection Agency from 2001-2003 and Governor of New Jersey from 1994-2001.*

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automatically. At each instance of transgression, Congress needed to step up to prevent further erosion of ethical norms.

Our current moment demands that Congress act again to turn longstanding customs into clear, enforceable laws delineating proper conduct in government, especially at its highest levels. In recent years, the level and frequency of ethical breaches have ballooned, which, in turn, has eroded public trust in our government and the foundations of our democracy. In the wake of the Trump administration, which openly flaunted established standards on issues ranging from the release of presidential tax returns to the independence of law enforcement, the freedom of the press, and the separation of personal and public interests while in office, the time is ripe to act.

In acting, Congress will have support from the American public. Americans overwhelmingly support transparency in government, a key component of ensuring ethical behavior and safeguarding against corruption. In a 2020 poll, 96% of Americans said that transparency and openness in government are very or somewhat important for the country, but only 30% believe that the government is very or somewhat open and transparent.<sup>1</sup> This gap between expectation and perceived reality indicates that legislation in this area is needed. In 2018, more than three-quarters of voters ranked corruption in government as a top issue for the election.<sup>2</sup> In 2020, 85% of registered voters said in a survey that they viewed a corrupt political establishment as a big or moderate problem in the United States.<sup>3</sup> With such overwhelming public concern about corruption, ensuring principled conduct should be a top legislative priority.

As co-chair of the National Task Force on the Rule of Law and Democracy at the Brennan Center, I worked with a group of policy experts and former public officials to develop policy recommendations that support two basic principles of democratic governance: the rule of law and ethical conduct in government.<sup>4</sup> Three years later, our policy recommendations stand as a prescient reminder of the safeguards needed to prevent the transgression of democratic norms, and yet the system of government accountability has yet to be strengthened through their implementation. Given both historical precedent and the rampant prevalence of ethical breaches across the Trump administration, we need legislation to put guardrails on a system that has previously been just a gentlemen's agreement. Just like how the events of Watergate prompted bipartisan collaboration that ushered in our current system, the close of the Trump administration should precipitate a renewal of our ethical balustrades.

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<sup>1</sup> *In Views of U.S. Democracy, Widening Partisan Divides Over Freedom to Peacefully Protest*, PEW RESEARCH CTR. (Sept. 2, 2020), <https://www.pewresearch.org/politics/2020/09/02/in-views-of-u-s-democracy-widening-partisan-divides-over-freedom-to-peacefully-protest/>.

<sup>2</sup> Ashley Kirzinger et al., *Kaiser Health Tracking Poll — Late Summer 2018: The Election, Pre-existing Conditions, and Surprises on Medical Bills*, KAISER FAM. FOUND. (Sept. 5, 2018), <https://www.kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-late-summer-2018-the-election-pre-existing-conditions-and-surprises-on-medical-bills/>.

<sup>3</sup> Gabriela Schulte, *Poll: Voters list a corrupt political establishment as a 'big problem' over healthcare, gun violence*, THE HILL (May 27, 2020), <https://thehill.com/hilltv/what-americas-thinking/499771-poll-voters-list-a-corrupt-political-establishment-as-a-bigger>.

<sup>4</sup> Preet Bharara et al., *Proposals for Reform: National Task Force on Rule of Law & Democracy*, BRENNAN CTR. (Oct. 2, 2018), <https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-national-task-force-rule-law-democracy>.

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The norms of conduct play a crucial role in ensuring that public officials serve only the public interest. Constitutional provisions on domestic and foreign emoluments give Congress authority to create a broad range of rules in this area, exercised previously through the conflict-of-interest laws included in the Ethics in Government Act of 1978. While these formal laws exempt most senior government officials, including the President, Vice President, and, in some cases, members of Congress and federal judges, top officials have typically voluntarily adopted their principles. Before 2016, Presidents and major party candidates since Nixon disclosed their tax returns, and for the last four decades Presidents have voluntarily divested from assets that could pose conflicts of interest, although there is no law requiring this behavior. But this long-standing commitment to high ethical standards is slipping.

Breaking with tradition, Trump decided to keep ownership of his business holdings, creating an entire host of situations where his decisions as President could be influenced by his business interests. His ownership of U.S. and foreign hotels also rendered him vulnerable to influence from foreign governments and interest groups through their patronage of his businesses. For example, in 2018, Trump lifted sanctions on Chinese telecommunications company ZTE following a loan from a state-backed Chinese company to a Trump real estate project in Indonesia.<sup>5</sup> While it remains unclear whether Trump lifted sanctions because of legitimate policy interests or because of a back-door bribe, even the possibility of a national security decision undertaken based on the personal business interests of the President is deeply damaging to the office of the presidency. Avoiding even the appearance of conflicts of interest should be paramount for Presidents' supporters as well as their critics. If not addressed, issues involving conflicts of interest could expand in future administrations, creating even more potentially disastrous situations.

To prevent future crises, Congress should take action to increase transparency around the finances of key government officials. Full disclosure is a fundamental safeguard against corruption because it allows the public to hold officials accountable through elections and empowers journalists, legislators, and law enforcement to expose and deter corruption. In this spirit, Congress should task the Office of Government Ethics ("OGE") with creating a task force to modernize financial disclosure requirements for officeholders and candidates. Existing requirements laid out in the Ethics in Government Act are outdated, both because they allow key information to remain undisclosed and are often unduly burdensome on public officials. Updating these rules will ensure that the public gets an accurate picture of a candidate's financial situation while keeping the requirements simple for potential officeholders.

Alongside modernizing financial disclosure requirements, Congress should require major party candidates for President and Vice President to release their tax returns to the public. The norm from 1973 until 2016, this practice gives the public confidence that Presidents are following the same tax rules as other Americans and may shed light on conflicts of interest or other unethical behavior. Multiple bills have

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<sup>5</sup> Matthw Yglesias, *Trump helps sanctioned Chinese phone maker after China delivers a big loan to a Trump project*, VOX (May 15, 2018), <https://www.vox.com/policy-and-politics/2018/5/15/17355202/trump-zte-indonesia-lido-city>.

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proposed this common-sense requirement, including H.R. 1, which was passed by the House of Representatives in March 2021.<sup>6</sup>

The recent revelations about Trump's taxes are a prime example of why this information should be made publicly available. While he never released his tax returns, a *New York Times* investigation found that Trump undertook several dubious maneuvers to lower his taxes, including improperly deducting payments made to family members and other personal transactions as business expenses.<sup>7</sup> The American people should have known about Trump's maneuvers to reduce his taxes before the 2016 election. The investigation also revealed further potential conflicts of interest, as Trump earned \$73 million from abroad during his first two years in office.<sup>8</sup> The President and Vice President should not have to sacrifice all privacy, but as key public servants, they should be held accountable to the public by releasing their tax information.

Alongside public disclosure of tax returns, Congress should require a confidential national security review for incoming senior administration officials, including the President, Vice President, and White House staff working on matters related to national security. The purpose of this review should be to proactively identify leverage that foreign leaders or entities might possess over these officials and empower the officials to remove these vulnerabilities. Given the open interference of foreign governments in recent U.S. elections, it is vital to understand how top administration officials could be targeted and recommend steps to avoid blackmail of any kind.

In the legislation mandating this examination, Congress should require the review to establish whether the office holder's financial portfolio presents national security concerns and to issue divestment recommendations based on these findings. The legislation should also mandate that officials comply with requests for relevant information during the review. The review's findings should remain confidential and be shared only with the so-called "Gang of Eight" in Congress for oversight purposes and with the official in question, provided that revealing the information would not jeopardize counterintelligence operations.

Although increasing transparency around finances will improve accountability, it is not sufficient. Congress must also act to create enforceable safeguards that keep government officials from acting unethically. One area where enforcement is needed is with regard to the Foreign and Domestic Emoluments Clauses. Because the Vice President and President have generally voluntarily divested from problematic holdings, Congress has paid little attention to the enforcement of these Clauses. The Trump administration, however, showed that greater attention is needed in this area. Trump's U.S. hotels and foreign businesses were sued several times for violating these clauses, as foreign governments and domestic interest groups sought influence with the Trump administration by spending

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<sup>6</sup> H.R. 1, 117th Cong. (2021).

<sup>7</sup> Russ Buettner et al., *The President's Taxes: Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html>.

<sup>8</sup> *Id.*

money at his properties.<sup>9</sup> Whether this is defined as a violation of the Emoluments Clauses and how to enforce compliance with these Clauses are issues upon which Congress needs to act.

Congress should pass legislation to clarify and enforce these Clauses to prevent bribery of key administration officials. Legislation should define prohibited emoluments in detail, create an enforcement mechanism for breaches of the Emoluments Clauses, and establish penalties for violating the Clauses. Clear provisions in this area are backed by the Founders' intent as laid out in the Constitution and will safeguard our democracy for generations to come, and thus should be supported by both parties.

In addition to bolstering enforcement of the Emoluments Clauses, Congress should extend federal conflict-of-interest laws to cover the President and Vice President. While the President and Vice President have been exempted from these provisions in recognition of the uniquely wide scope and authority of their office, conflict-of-interest protections can and should be applied to these positions. Indeed, Presidents and Vice Presidents have typically voluntarily complied with conflict-of-interest rules. Existing conflict-of-interest laws only apply to direct situations where the conflict of interest occurs, not to broad policymaking. Conflict-of-interest laws for the President and Vice President will not restrict their duties if they follow this model. One modification to existing laws will be needed: for the Vice President and President, the remedy for a conflict of interest should be to divest the assets causing the conflict, not recusal. Conflict-of-interest safeguards are also needed for members of Congress, as scandals on issues such as insider stock trading happen repeatedly.

To ensure ethical conduct across the government, Congress needs to create a system that can hold officials accountable for breaches in ethics. Enforcement is a necessary component of ethics standards because, without clear penalties and mechanisms for investigation, ethics laws will be easily disregarded. There is currently no independent body dedicated to ethics enforcement, an oversight that hampers accountability efforts across the board. The Office of Government Ethics is the natural agency in which to house an enforcement division given its existing oversight role, but it needs reform to function effectively. The OGE's current configuration is advisory, and it lacks complete independence from the executive branch, which must be adjusted for it to function properly as an enforcer of ethics in the executive branch.

Congressional legislation to create an enforcement division should ensure OGE's independence by stating that the President cannot remove the OGE director without good cause, bringing the process in line with safeguards against undue removal in place at other regulatory agencies. The legislation should also give the OGE the ability to communicate directly with Congress to establish a degree of autonomy from the White House. To establish a credible process for enforcement, the legislation should also create an OGE enforcement division, grant the OGE the power to initiate and direct investigations into alleged violations, give the OGE director the authority to bring civil enforcement actions in federal court and seek other

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<sup>9</sup> Peter Overby, *Emoluments Lawsuit Against President Trump Allowed to Proceed*, NPR (March 28, 2018), <https://www.npr.org/2018/03/28/597734486/emoluments-lawsuit-against-president-trump-allowed-to-proceed>; see also *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018), *rev'd sub nom. In re Trump*, 928 F. 3d 360 (4th Cir. 2019), *rev'd en banc*, 780 F. App'x 36 (4th Cir. 2019); *Citizens for Resp. & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *rev'd*, 939 F.3d 131 (2d Cir. 2019).

corrective action, and direct the OGE and Department of Justice to establish a confidential referral process for potential criminal violations.

The OGE can also be strengthened by legislation ensuring that ethical standards are applied uniformly across the executive branch. This should include giving the OGE the power to review and object to individual conflict-of-interest exemptions and confirm that all White House staff must follow the federal guidelines on conflicts of interest and other ethics rules.

Taken together, these policy recommendations offer a cohesive set of principles that will update and strengthen behavior in government. In acting, Congress will stand in a long tradition of legislative action to curb dangerous practices and the transgression of ethical norms in administrations from our nation's founding to the present day. Holding government officials to high standards of transparency and above-board conduct is essential for the continued legitimacy of our government, and it ought to be something both parties can support. President Trump's departure from office offers an opportunity to reverse course on the decline in ethical standards in government. It will take swift, decisive action to change public perception of government corruption and shore up standards, but these policy recommendations offer a clear path forward.