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Navigating the Ethical Cliff of Public Service

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I. Introduction

The United States government needs to reform its ethical structure regarding the fringe benefits and conflict of interest laws that accompany taking on the mantle of leadership, because there is “much more to [the] high standard of public officials than merely staying within the law . . . It is a question for moral purity in public service.”¹ In short,

¹ 131 CONG. REC. S1621 (1985) (daily ed. Feb. 20, 1985) (presenting his objections to the nomination of Edwin Meese III to be Attorney General of the United States, Archibald Cox, former Special Watergate Prosecutor and former Solicitor General of the United States quoted Senator Barry Goldwater who helped force Sherman Adams, a senior White House aide to President Eisenhower, to resign). *See also*, Hana Callaghan, *Unavoidable Ethical Dilemmas for Public Officials*, MARKKULA CTR. FOR APPLIED ETHICS (July 24, 2014), <https://www.scu.edu/government-ethics/resources/unavoidable-ethical-dilemmas-for-public-officials/> [<https://perma.cc/2QBQ-BPME>].

For a citizenry to retain its trust in government, it must have confidence that those in public service are at all times acting in the best interest of the public. As stewards of the public trust, government leaders and employees have a fiduciary responsibility to act in a manner that is fair and unbiased, that is loyal to the public by putting public interest before personal gain, and that fulfills duties of competency, integrity, accountability, and transparency.

Id. *See* 5 C.F.R § 2635.101(b)(1) (1990) (“Public Service is a public trust, requiring employees to place loyalty in the Constitution, the laws and ethical principles above private gain.”). The principles of ethical conduct were issued by George H. W. Bush in Executive Order 12674, as amended by Executive Order 12731. *See* Exec. Order 12,674, 3 C.F.R 215 (1989), *amended by* Exec. Order 12,731, 3 C.F.R 306 (1990). The principles were subsequently issued in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 C.F.R. § 2635.101(b). 5 C.F.R § 2635.101(b) (2022). *See also* Memorandum from Sec’y of Def. to All Dept. of Defense Personnel (Mar. 1, 2021) <https://media.defense.gov/2021/Mar/02/2002591989/-1/-1/1/SECRETARY-OF-DEFENSE-REAFFIRMING-DOD->

while many archaic ethical rules limit the efficiency of running the government and the military, there are loopholes in the existing ethical paradigm that allows egregious conduct to go unchecked for extended periods of time, endangering the rule of law and free society. To address this dilemma, this article proposes legislative and policy changes that strike an optimal balance between running the government efficiently and protecting society from the potential abuses of power.

Part II of this article addresses the ethical rules and fringe benefits² that accompany government service. For instance, officials may use government resources such as domicile to duty transportation, and as a result, may experience taxable income.³ Meanwhile, government officials must abide by an ethical framework of laws designed to address conflicts of interest that may affect their ability to act in the public's best interest.⁴ For example, the United States needs laws similar to the Stop Trading on Congressional Knowledge (STOCK) Act to help ensure that government officials place the public's

VALUES-AND-ETHICAL-CONDUCT.PDF

[<https://perma.cc/2244-X3NP>].

² 2 C.F.R. § 200.431 (2020).

³ See, e.g., Memorandum from Susan E. Mitchell, Information paper – Taxability of Domicile to Duty Benefits for CY 2021, Dept. of Defense Armed Forces Tax Council (Sept. 28, 2021)

<https://militarypay.defense.gov/Portals/3/>

[Documents/Taxability%20of%20Domicile%20to%20Duty%20Benefits%20for%20CY%202021%20\(Sep2021\).pdf?ver=4DozhMPCyVoPhpjZvlEYfg%3D%3D](https://militarypay.defense.gov/Portals/3/Documents/Taxability%20of%20Domicile%20to%20Duty%20Benefits%20for%20CY%202021%20(Sep2021).pdf?ver=4DozhMPCyVoPhpjZvlEYfg%3D%3D).

⁴ See, e.g., Stop Trading On Congressional Knowledge (STOCK) Act of 2012, Pub. L. No. 112-105, 126 Stat. 291 (2012) (codified as amended 5 U.S.C. app. §101-103, 105; 2 U.S.C. § 104; 12 U.S.C. §4518; 15 U.S.C. 78j; & 15 U.S.C. 78u); Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. §§ 7321-26); 5 C.F.R. § 2635.702 (2020) (prohibiting government officials from endorsing products and services). See, e.g., U.S. CONST. art. I, § 9, cl. 8 (prohibiting foreign emoluments). See, e.g., U.S. CONST. art. II, § 1, cl. 7 (prohibiting domestic emoluments for the President).

interest first rather than prioritizing their own desires and trading based on nonpublic insider information.⁵

Part III of this article recognizes the need to protect the integrity of the investigative process and to hold government officials accountable for ethical violations. To accomplish this objective, investigators must focus on the government official's mental state when evaluating potential violations, such as whether the receipt of goods or services are permissible gifts⁶ or impermissible bribes.⁷ Additionally, investigators must explore whether the use of government employees, information, resources, and position are proper. Furthermore, to ensure that investigations can be conducted properly without intentional obstruction by those who may have vested interests, investigators need independence and witnesses must be protected. In short, the government must not allow another "Saturday Night Massacre" to occur, where those being investigated are able to fire their investigators.⁸

Part IV suggests a more optimal balance between running the government efficiently and protecting society from the potential abuses of power. To achieve this goal, the United States needs a more practical cost sharing model that allows government officials to use both

⁵ STOCK Act, 126 Stat. at 292.

⁶ 5 C.F.R. § 2635.201 (2016).

⁷ 18 U.S.C. § 201(b) (2018).

⁸ See, e.g., Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit: President Abolishes Prosecutors Office; FBI Seals Records*, WASH. POST (Oct. 21, 1973), https://www.washingtonpost.com/politics/nixon-forces-firing-of-cox-richardson-ruckelshaus-quit-president-abolishes-prosecutors-office-fbi-seals-records/2012/06/04/gJQAFSR7IV_story.html (explaining that during the Watergate scandal, President Nixon fired Special Prosecutor Archibald Cox, accepted the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus when they both refused to follow President Nixon's order to fire Archibald Cox, abolished the office of the special prosecutor, and turned over the Watergate investigation to the Justice Department).

government personnel and resources within certain limits, while holding those officials to fiduciary standards. Due to the inherent conflicts of interest involved in holding personal financial resources, senior government officials should have to divest themselves of certain financial assets⁹ and abide by numerous limitations if they choose to maintain their business interests. In addition, government officials should be provided a safe harbor to allow them to continue public service without the risk of accidentally incurring civil and criminal liability.

Part V concludes that the United States government must take action to facilitate efficient operations while simultaneously creating improved safeguards against the potential abuses of power by its officials. By establishing systematic checks and balances on the power of its officials and by increasing transparency, the United States government will be set up to operate under the rule of law and serve the public's best interests.

II. The Ethical Rules and Fringe Benefits that Accompany Government Service

The privilege of government service comes not only with various benefits but also with the responsibilities of operating within a complicated ethical labyrinth. Some of these benefits may include access to non-public information as well as the use of government personnel and resources to provide secure transportation between home

⁹ See, e.g., Bipartisan Ban in Congressional Stock Ownership Act of 2022, S. 3631, 117th Cong. (2022) (prohibiting “stock trading and ownership by Members of Congress and spouses of Members of Congress, and for other purposes.”); Elizabeth Warren et al., *Bipartisan Ban on Congressional Stock Ownership Act of 2022*, ELIZABETH WARREN, <https://www.warren.senate.gov/imo/media/doc/Bipartisan%20Ban%20on%20Congressional%20Stock%20Ownership%20Act%20-%20one-pager%20FINAL.pdf> (last visited Apr. 3, 2022) [<https://perma.cc/A55L-WG5X>] (proposing to ban members of Congress and their spouses from owning and trading stocks, bonds, commodities, futures, and other securities including hedge funds, derivatives, and options that could create conflicts of interest).

and work for government officials.¹⁰ Some of these benefits are taxable fringe benefits, and most of the benefits require government officials to comply with strict ethical rules.¹¹

A. Fringe Benefits and the Income Tax Implications

Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages.¹² Fringe benefits include, but are not limited to, the costs of leave, employee insurance, pensions, and unemployment benefit plans.¹³ The costs of fringe benefits are allowable deductions¹⁴

¹⁰ See 5 C.F.R. § 2635.703 (2020).

¹¹ See 2 C.F.R. § 200.431 (2020). See, e.g., Mitchell, *supra* note 3.

¹² 2 C.F.R. § 200.431(a) (2020). See generally William E. Elwood & Cynthia A. Moore, *Employee Fringe Benefits (Portfolio 394-5th)*, BLOOMBERG TAX & ACCT. (2022), (on file with author) (providing an overview of employee fringe benefits and the tax implications involved).

¹³ 2 C.F.R. § 200.431 (2020).

¹⁴ I.R.C. § 162(a). The Internal Revenue Code states:

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including-

- (1) a reasonable allowance for salaries or other compensation for personal services actually rendered;
- (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and
- (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

I.R.C. § 162(a). See *White v. United States*, 305 U.S. 281, 292 (1938) (stating that "every deduction from gross income is allowed as a matter of legislative grace, and 'only as there is clear provision therefor can any particular deduction be allowed . . . a taxpayer seeking a deduction must be able to point to an applicable statute and

to the employer so long as the benefits are reasonable¹⁵ and are required by law, non-Federal entity-employee agreement, or an established

show that he comes within its terms.” (quoting *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934))). Gross income is broadly defined. The Code states:

- Except as otherwise provided* in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
- (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
 - (2) Gross income derived from business;
 - (3) Gains derived from dealings in property;
 - (4) Interest;
 - (5) Rents;
 - (6) Royalties;
 - (7) Dividends;
 - (8) Annuities;
 - (9) Income from life insurance and endowment contracts;
 - (10) Pensions;
 - (11) Income from discharge of indebtedness;
 - (12) Distributive share of partnership gross income;
 - (13) Income in respect of a decedent; and
 - (14) Income from an interest in an estate or trust.

I.R.C. § 61(a) (emphasis added).

¹⁵ See Treas. Reg. § 1.162-7 (2020) (explaining that, “[I]n any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances. It is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned.” Treas. Reg. § 1.162- (b)(3)). See generally Carol Calhoun, *Avoiding Fringe Benefit Pitfalls*, VENABLE LLP (2019), <https://www.venable.com/-/media/files/events/2019/04/avoiding-fringe-benefit-pitfalls.pdf> (identifying and explaining a host of fringe benefits

policy of the non-Federal entity.¹⁶ Conversely, fringe benefits are generally considered as compensation and in turn, taxable income¹⁷ to the recipient of those benefits—namely, employees.¹⁸ However, the value of certain fringe benefits may be excluded from gross income and thus are non-taxable for the recipient, if such benefits fall within one of the enumerated exclusions of the Internal Revenue Code.¹⁹ Exclusions under the statute include no-additional-cost services,²⁰ qualified employee discounts,²¹ working condition fringes,²² de minimis

including working condition fringe benefits as established by I.R.C. § 132(a)(3).

¹⁶ 2 C.F.R. § 200.431 (2022).

¹⁷ I.R.C. § 63 (defining taxable income as "gross income minus the deductions allowed by this chapter . . ."). *See* Comm’r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (defining income as the “undeniable accession to wealth, clearly realized, and over which the taxpayers have complete dominion.”). *See, e.g.,* Aaron Katersky and John Santucci, *Jury Finds Trump Organization Guilty of Tax Fraud on All Counts*, ABC NEWS (Dec. 6, 2022) <https://abcnews.go.com/US/verdict-reached-trump-organizations-criminal-tax-fraud-trial/story?id=94508551> (explaining that failure to declare such income can result in criminal liability; for example, Allen Weisselberg, the CFO of the Trump Organization, pled guilty “to charges that he skirted taxes on nearly \$2 million in company-provided perks that included the rent on his Manhattan apartment, the leases on cars for himself and his wife and tuition for his grandchildren.”)

¹⁸ I.R.C. § 132(h) (defining employees as not only persons currently employed but also retired, disabled employees, spouses, and dependent children of employees).

¹⁹ I.R.C. § 132(a).

²⁰ I.R.C. § 132(a)(1). The value of fringe benefits is excluded from gross income under no-additional-cost if such services are offered for sale to customers in the ordinary line of business and the employer incurs no substantial additional cost. I.R.C. § 132(b).

²¹ I.R.C. § 132(a)(2).

²² I.R.C. § 132(a)(3). A working condition fringe, which is not included in gross income, is “any property or service provided to an employee of the employer to the extent that if the employee paid for such property or

fringes,²³ qualified transportation fringes,²⁴ qualified retirement planning services, and qualified military base realignment²⁵ and closure fringes.²⁶ To make matters more complicated, many exclusions depend on the specific year involved. For example, the exclusion for qualified moving expense reimbursement²⁷ has been suspended for taxable years 2018 through 2025, except for active-duty members of the Armed Forces of the United States who move pursuant to military orders incident to a permanent change of station.²⁸ Such moving expenses would qualify as a deduction if the active-duty member did not get reimbursed by the government.²⁹

Specifically, some fringe benefits such as transportation between one's home and work (domicile to duty) are taxable,³⁰ while other benefits such as space available travel³¹ (taking an empty seat on

services, such payment would be allowable as a deduction under section 162 or 167” of the Internal Revenue Code. I.R.C. § 132(d).

²³ I.R.C. § 132(a)(4) (defining a de minimis fringe as “any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer’s employees) so small as to make accounting for it unreasonable or administratively impracticable.” I.R.C. § 132 (e)).

²⁴ I.R.C. § 132(a)(5).

²⁵ I.R.C. § 132(a)(7).

²⁶ I.R.C. § 132(a)(8).

²⁷ I.R.C. § 132(a)(6).

²⁸ I.R.C. § 132(g)(2).

²⁹ I.R.C. § 132(g)(1).

³⁰ See, e.g., Mitchell, *supra* note 3.

³¹ 10 U.S.C. § 2641b (2021) (authorizing the Secretary of Defense to establish a program to provide transportation on Department of Defense aircraft on a space-available basis to specific categories of individuals). See generally U.S. Army, *Space-Available Travel (Space-A Travel)*, MYARMYBENEFITS (June 30, 2022), [https://myarmybenefits.us.army.mil/Benefit-Library/Federal-Benefits/Space-Available-Travel-\(Space-A-Travel\)?serv=120](https://myarmybenefits.us.army.mil/Benefit-Library/Federal-Benefits/Space-Available-Travel-(Space-A-Travel)?serv=120) (defining space available travel and specifying eligibility).

a medevac aircraft already going to a specific destination for a legitimate purpose) are non-taxable.³² The rationale for these rules are logical. Commuting between one's home and work is considered a personal expense, and personal expenses, unlike business expenses,³³ are generally not deductible for income tax purposes.³⁴ In other words, taxpayers incur commuting expenses based on a personal choice to live far from their places of employment, rather than living closer and walking to work.³⁵ Furthermore, when an employer such as the government provides transportation for commuting purposes, the employer is incurring regular and potentially significant expenses on behalf of the employee, thereby reducing the employee's personal expenses and, in effect, providing potentially a taxable benefit to the employee.³⁶ In contrast, the employer does not incur regular or significant expenses when an employee happens to fill an empty seat of a vehicle or aircraft already going to a destination for a legitimate purpose. Thus, it is an isolated fringe benefit without income tax implications that logistically would not be worth keeping track of when employees happen to "hitch a ride" at the last minute in a government vehicle or aircraft.

³² Ryan Guina, *Non-Taxable Military Pay and Benefits*, MILITARY WALLET (Jan. 12, 2022), <https://themilitarywallet.com/non-taxable-military-pay-benefits/>.

³³ See generally 31 U.S.C. § 1344(a) (establishing that transportation of individuals between their residences and their places of employment is generally not transportation for an official purpose).

³⁴ I.R.C. § 262(a) ("Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.").

³⁵ *Fausner v. Comm'r*, 413 U.S. 838, 839 (1973); but see *McCabe v. Comm'r*, 688 F.2d 102, 107 (2d Cir. 1982) (stating appellant's argument that he falls with the ambit of *Fausner* is "fatally defective").

³⁶ I.R.C. § 61; See also I.R.C. § 262; see generally *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (showing that gross income is income derived from any source). The reduction in one's personal expenses would thus be considered taxable income under the Internal Revenue Code, unless excluded from gross income or deductible. *Id.*

This rationale also justifies the non-taxable nature of de minimis fringe benefits. A de minimis fringe benefit is defined as “any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.”³⁷ Items that are deemed de minimis fringe benefits include occasional snacks, employee use of a photocopier, personal use of a cellphone provided by an employer primarily for business purposes, and occasional tickets for entertainment events.³⁸ “An essential element of a de minimis benefit is that it is unusual in frequency.”³⁹ In other words, if a benefit is too plentiful to be considered de minimis, it is in the “form of disguised compensation . . . [and] the entire benefit of the value becomes taxable to the employee, not just the excess over the de minimis amount.”⁴⁰

In a recent study, the Bureau of Labor Statistics found that fringe benefits accounted for 29.2 percent of total compensation paid by private industry employers, compared to 38 percent of total compensation for state and local government employers.⁴¹ Although percentages may slightly vary over the years, it is clear that fringe benefits account for much more total compensation for state and government employees compared to those in the private industry. This is likely attributable to the fact that public-sector employees earn less than their private sector peers, when taking into account both their

³⁷ 26 C.F.R. § 1.132-6(a) (2022).

³⁸ *De Minimis Fringe Benefits*, IRS (Jul. 15, 2021), <https://www.irs.gov/government-entities/federal-state-local-governments/de-minimis-fringe-benefits>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., EMPLOYER COSTS FOR EMPLOYEE COMPENSATION – SEPTEMBER 2021 (Dec. 17, 2021), <https://www.bls.gov/news.release/pdf/ecec.pdf> (covering 5900 private companies and about 1400 state and local government establishments).

wages and benefits such as pensions and health insurance.⁴² Thus, it is important for public-sector employees to maximize utility when it comes to fringe benefits, while remaining within the bounds of ethical conduct.

I. Use of Employee's Time and Government Personnel

As public stewards, government officials must accomplish their duties and manage the official time of their teams as a valuable government resource. Specifically, unless authorized in accordance with law or regulations, government employees have an obligation to expend an honest effort and a reasonable portion of their time in the performance of official duties.⁴³

Additionally, “[a]n employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.”⁴⁴ For example, “[a]n employee

⁴² Elizabeth McNichol, *Some Basic Facts on State and Local Government Workers*, CTR. ON BUDGET & POL’Y PRIORITIES (June 15, 2012), <https://www.cbpp.org/research/some-basic-facts-on-state-and-local-government-workers>; see Alicia Munnell et al., *Comparing Compensation: State-Local Versus Public Sector Workers*, CTR. FOR RET. RSCH. AT BOS. COLL. (Sept. 2011), http://crr.bc.edu/images/stories/Briefs/slp_20_508.pdf; see also Keith A. Bender & John S. Heywood, *Out of Balance? Comparing Public and Private Sector Compensation over 20 Years*, CTR. FOR STATE & LOC. GOV’T EXCELLENCE (CSLGE), NAT’L INST. ON RET. SEC. (Apr. 2010), <http://www.slge.org/vertical/sites/%7ba260e1df-5aee-459d-84c4-876efe1e4032%7d/uploads/%7b03e820e8-f0f9-472f-98e2-f0ae1166d116%7d.pdf>; John Schmitt, *The Wage Penalty for State and Local Government Employees*, CTR. FOR ECON. & POL’Y RSCH. (CEPR) (Mar. 2010), <http://www.cepr.net/documents/publications/wage-penalty-2010-05.pdf>.

⁴³ 5 C.F.R. § 2635.101(5) (2022) (setting forth basic obligations of public service).

⁴⁴ 5 C.F.R. § 2635.705(b) (2022).

of the Department of Housing and Urban Development may not ask his secretary to type his personal correspondence during duty hours.”⁴⁵ Asking “a subordinate to perform such activities during *nonduty* hours constitutes an improper use of public office for private gain.”⁴⁶ Whereas if the arrangement is “entirely voluntary and appropriate compensation is paid, the secretary may type the correspondence at home on her own time.”⁴⁷ However, when “compensation is not adequate . . . the arrangement would involve a gift to the superior in violation of” the regulation.⁴⁸

2. Use of Government Equipment and Information

The use of government assets for personal use often has tax implications, creates inefficiencies, and can result in civil and criminal penalties if violations occur.⁴⁹ To ensure the efficient use of limited taxpayer funds and that resources are used in the public’s best interest, the government has established strict rules for the use of government equipment,⁵⁰ including communication and transportation assets, as

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *United States v. Farence*, 57 M.J. 674, 677-678 (C.G. Ct. Crim. App. 2002) (holding that a servicemember’s display of bestiality on a government computer constituted a criminal offense). See also INSPECTOR GEN. U.S. DEP’T OF DEF., REPORT OF INVESTIGATION: LIEUTENANT GENERAL DAVID H. HUNTOON U.S. ARMY SUPERINTENDENT U.S. MILITARY ACADEMY WEST POINT, NY, No. H11L120171242 (May 1, 2012), <https://media.defense.gov/2018/Jul/25/2001946758/-1/-1/1/H11L120171242.pdf> (holding that government personnel were misused to prepare and serve meals for the West Point Women’s Club annual charity fundraiser).

⁵⁰ See, U.S. DEP’T OF ARMY, REGUL. 25-13, ARMY TELECOMMUNICATIONS AND UNIFIED CAPABILITIES (May 11, 2017), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3184_AR25-13_Final_for_web.pdf

well as the use of information acquired during service, such as actionable intelligence.⁵¹

In general, “an employee has a duty to protect and conserve government property and must not use such property, or allow its use, for non-authorized purposes.”⁵²

Government property includes any form of real or personal property in which the government has an ownership, leasehold, or other property interest as well as any right or other intangible interest that is purchased

(addressing a host of rules on the use of U.S. Army telecommunications equipment including cell phones and satellite phones).

⁵¹ See, e.g., U.S. Dep’t of the Interior, *Use of Government Property, Time and Information* (citing 5 C.F.R. §§2635.703, .704, and .705),

<https://www.doi.gov/ethics/use-of-government-property#:~:text=Personal%20phone%20calls%20may%20not,made%20during%20non%2Dduty%20hours> (last visited Mar. 13, 2022). Specifically:

Federal employees may use Government property only as authorized. Employees may use DOI [Department of the Interior] landline telephones for personal calls when they are necessary, provide a benefit to DOI, and do not result in any additional costs to the Government. Such calls are deemed to be in the interest of the Government to the extent they enable employees to remain at their work stations, thereby increasing Government efficiency. Personal phone calls may not adversely affect the performance of official duties or the employee’s work performance, must be of reasonable duration and frequency, and could not reasonably have been made during non-duty hours. DOI cell phones may be used for personal calls only to the extent that such calls would be authorized on a DOI landline telephone and so long as no additional costs are imposed on the Government.

Id. See also 5 C.F.R. § 2635.704 (2022) (addressing the use of government property including telecommunications equipment). See also U.S. DEP’T. OF DEF., DIRECTIVE 8100.02, USE OF COMMERCIAL WIRELESS DEVICES, SERVICES, AND TECHNOLOGIES IN THE DEPARTMENT OF DEFENSE (DoD) GLOBAL INFORMATION GRID (GIG) (Apr. 23, 2007).

⁵² 5 C.F.R. § 2635.704 (2012).

with government funds, including the services of contractor personnel. The term includes office supplies, telephone and other telecommunications equipment and services, the government mails, automated data processing capabilities, printing and reproduction facilities, government records, and government vehicles. Authorized purposes are those for which government property is made available to members of the public or those purposes authorized in accordance with law or regulation.⁵³

These strict rules include when communication devices can and cannot be used, often creating significant inefficiencies⁵⁴ such as practically requiring government officials to carry numerous cell phones while also exposing them to civil and criminal liability for improper use of such telecommunications equipment.⁵⁵ Certain aspects of these rules make

⁵³ 5 C.F.R. § 2635.704 (2012).

⁵⁴ See, e.g., Mike Fong, *Smartphone Bans are Taking a Toll on the Federal Workforce*, SEC. MAG. (Feb. 13, 2019), <https://www.securitymagazine.com/articles/89840-smartphone-bans-are-taking-a-toll-on-the-federal-workforce> (explaining that rules such as smartphone bans have resulted in “smartphone break[s] . . . [replacing] the cigarette break, with employees huddling in common areas like doorways and courtyards to get their digital fix” which “adds up to a lot of wasted time. It’s no surprise that the average government worker loses 52 minutes of productivity time per day – and 28 percent in overall productivity – without a smartphone at work, according to a 2016 Frost & Sullivan survey”).

⁵⁵ See, e.g., PATRICK M. SHANAHAN, MEMORANDUM FROM DEPUTY SEC’Y OF DEF. TO CHIEF MGMT. OFF. OF THE DEP’T OF DEF. ET AL., SUBJECT: MOBILE DEVICE RESTRICTIONS IN THE PENTAGON (May 22, 2018), <https://media.defense.gov/2018/May/22/2001920731/-1/-1/1/pentagon-mobile-device-policy.pdf> (addressing policy on mobile devices including cell phones for issues such as security and reminding members of the potential criminal liabilities involved such as provided under “chapter 47 of the United States Code (also known as “the Uniform Code of Military Justice” or “UCMJ)”). See, e.g., U.S. DEPT. OF DEF., ENCYCLOPEDIA OF ETHICAL FAILURE 44 (Dec. 2021), https://dodsoco.ogc.osd.mil/Portals/102/eef_complete.pdf (providing numerous examples of the misconduct of

sense, such as the need to carry mobile secured encrypted devices for classified networks. However, other aspects such as the need to carry numerous non-secure cell phones for business and personal use, can create costly and burdensome redundancies. For example, in contrast to the government sector, private industry employers often provide cell phones to employees for both business and personal use.⁵⁶ This fringe benefit may result in taxable income⁵⁷ to the employee, but it is

government officials including an Army Brigadier General who received punishment under the Uniform Code of Military Justice for improper cell phone use and improper use of a credit card), [hereinafter ENCYCLOPEDIA OF ETHICAL FAILURE].

⁵⁶ IRS., NOTICE 2011-72, TAX TREATMENT OF EMPLOYER-PROVIDED CELL PHONES (2011) (explaining how employers provide employees with cell phones primarily for noncompensatory business reasons); see INDO-ASIAN NEWS SER., *A Google-led Study States that 68% of Employees Use One Smartphone for Both Work and Personal Use*, BUS. INSIDER INDIA (May 28, 2021, 12:19 IST), <https://www.businessinsider.in/tech/apps/news/a-google-led-study-states-that-68-of-employees-use-one-smartphone-for-both-work-and-personal-use/articleshow/83029350.cms>.; see *Providing Company Phones for Private Use- Is It a Good Idea?*, EVERPHONE (July 3, 2022), <https://www.everphone.com/en/blog/company-phone-private-use/> [<https://perma.cc/U69L-ESC3>].

⁵⁷ IRS, PUB. 15-B, EMPLOYER'S TAX GUIDE TO FRINGE BENEFITS 13 (2022). Specifically:

Personal use of an employer-provided cell phone, provided primarily for noncompensatory business reasons, is excludable from an employee's income as a de minimis fringe benefit . . . [Employers] provide a cell phone primarily for noncompensatory business purposes if there are substantial business reasons for providing the cell phone. Examples of substantial business reasons include the employer's: Need to contact the employee at all times for work-related emergencies, [r]equirement that the employee be available to speak with clients at times when the employee is away from the office, and need to speak with clients located in other time zones at times outside the

extremely efficient because it reduces overall costs incurred by employers and employees as a whole while minimizing the burden placed on employees to carry redundant communications equipment.

i. Use of Government Resources

Laws and regulations allow for a limited use of government resources by government employees for reasons like efficiency. For instance, an employee may make a personal long-distance call charged to a personal calling card.⁵⁸ Similarly, an attorney employed by the Department of Justice may be permitted to use an office word processor and agency photocopy equipment to prepare a paper to be presented at a conference sponsored by a professional association of which the employee is a member.⁵⁹

As another example, the Department of Veterans Affairs defines conditions where government equipment may be used for non-government purposes. Specifically, office equipment may be used

when such use involves minimal additional expense to the government, is performed on the employee's non-work time, does not interfere with the VA's mission or operations, and does not violate standards of ethical conduct for Executive branch employees. Employees do not have an inherent right to use government office equipment for anything other than official activities;

employee's normal workday . . . [However, employers] can't exclude from an employee's wages the value of a cell phone provided to promote goodwill of an employee, to attract a prospective employee, or as a means of providing additional compensation to an employee.

Id. See I.R.S., NOTICE 2011-72, TAX TREATMENT OF EMPLOYER-PROVIDED CELL PHONES (2011) (clarifying that cell phones were removed from the definition of listed property for taxable years beginning after December 31, 2009 and providing detailed guidance on the potential tax implications of employer provided cell phones).

⁵⁸ 41 C.F.R. § 101-35.201 (1999).

⁵⁹ 5 C.F.R. § 251 (2012) (enumerating the Office of Personnel Management regulations).

therefore, necessary controls should be established to ensure that the equipment is used appropriately.⁶⁰ Although these uses are allowed, other uses of government resources are clearly prohibited. For example, “[a]n employee of the Commodity Futures Trading Commission whose office computer gives [the employee] access to a commercial service providing information for investors, may not use that service for personal investment research.”⁶¹ Similarly, government officials are prohibited from using government equipment to view “materials that are sexually explicit[,] . . . for commercial purposes[,] or in support of other ‘for profit’ activities such as outside employment or businesses.”⁶² In addition, government officials are prohibited from using government credit cards to make unauthorized personal purchases, even if they later reimburse the government.⁶³

ii. Use of Transportation Resources and Domicile to Duty

Similar to using other government resources, government officials must abide by strict rules⁶⁴ when using government

⁶⁰ See DEP’T OF VETERANS AFFAIRS, VA DIRECTIVE 6001, LIMITED PERSONAL USE OF GOVERNMENT OFFICE EQUIPMENT INCLUDING INFORMATION TECHNOLOGY (July 28, 2000). See, e.g., *Parker v. McDonald*, No. 15-1910, 2016 U.S. Dist. LEXIS 87138 (E.D. Pa. July 6, 2016) (granting summary judgment in favor of the Secretary of Veterans Affairs after Plaintiff’s removal from employment after violating, *inter alia*, VA Directive 600).

⁶¹ 5 C.F.R. § 2635.704 (2012).

⁶² See, e.g., DEP’T OF HOMELAND SECURITY, MD4600.1, PERSONAL USE OF GOVERNMENT OFFICE EQUIPMENT 6 (April 14, 2003).

⁶³ See, e.g., ENCYCLOPEDIA OF ETHICAL FAILURE, *supra* note 55, at 99 (explaining that a former manager at the U.S. Postal Service was removed for reasons including improperly using his government credit card to make personal purchases even though he eventually repaid the charges).

⁶⁴ See, e.g., U.S. DEP’T OF DEF., INSTR. 4515.13, AIR TRANSPORTATION ELIGIBILITY (Oct. 23, 2020) (establishing strict rules for members of the Department of Defense concerning air travel). See 41 C.F.R. § 301-10.264

transportation or commercial transportation paid for by the government,⁶⁵ which is often at significant taxpayer expense.⁶⁶ For instance, domicile to duty rules require various government officials and employees who use government transportation to commute to and from work for security purposes to declare this benefit as taxable income.⁶⁷ First, only certain officials are authorized to receive domicile to duty benefits.⁶⁸ Some of these officials include the President and Vice

(requiring reimbursement for travel on government aircraft under certain conditions such as political travel). *See* 11 C.F.R. § 106.3 (allocating expenses between campaign and non-campaign related travel).

⁶⁵ *See, e.g.*, 2 C.F.R. § 200.475(e) (discussing applicable rules for commercial air travel at government expense); *see, e.g.*, U.S. DEP'T OF DEF., JOINT TRAVEL REGULATIONS § 020206, THE PER DIEM, TRAVEL, & TRANSP. ALLOWANCE COMM., (Sept. 1, 2022) (providing rules on airplane, train, ship, and bus travel). “The Joint Travel Regulations implements policy and laws establishing travel and transportation allowances of Uniformed Service members and Department of Defense civilian travelers. . . The JTR has the force and effect of law for travelers, and implements statutory regulations and law for DoD civilian travelers.” *Id.*

⁶⁶ *See, e.g.*, Emily Goodin, *Trump Navy Secretary Kenneth Braithwaite Spent \$2.3 million on Travels*, DAILY MAIL (May 6, 2021, 6:29 PM EDT), <https://www.dailymail.co.uk/news/article-9551155/Trumps-Navy-Secretary-Kenneth-Braithwaite-spent-2-3million-travels.html> (showing the high cost of air travel incurred by some government officials such as Secretary of the Navy Kenneth Braithwaite who "spent more than \$2.3 million on air travel" in the short eight months that he was in office).

⁶⁷ *See, e.g.*, Mitchell, *supra* note 3; *see, e.g.*, Memorandum from David Dulaney, Information paper – Taxability of Domicile to Duty Benefits for CY 2018, Dep't. of Defense Armed Forces Tax Council (Nov. 7, 2018) [<https://perma.cc/4HTJ-53WV>] (providing information on the income tax implications of employer provided home-to-work transportation when the DoD provides a vehicle for the use of an employee).

⁶⁸ *See* 31 U.S.C. § 1344(b); *See* U.S. DEP'T OF DEF., 4500.36, DEPARTMENT OF DEFENSE MANUAL: ACQUISITION, MANAGEMENT, AND USE OF DOD NONTACTICAL VEHICLES 7-9 (July 7, 2015) (providing policy, responsibilities and procedural guidance for members entitled to domicile to

President of the United States, the Chief Justice and Associate Justices of the United States Supreme Court, and officers compensated at Level I of the executive schedule (Secretary of State, Secretary of the Treasury, Secretary of Defense, and the United States Attorney General, etc.).⁶⁹ In contrast, other employees must be approved by the appropriate authority to receive domicile to duty benefits.⁷⁰ Second, those authorized to receive domicile to duty benefits must keep diligent accounting records and report them to the applicable government pay agent so that taxable income can be attributed to them.⁷¹

B. Conflicts of Interest Laws

A byproduct of the fringe benefits that accompany government service are the complications of operating efficiently within a complex ethical labyrinth where government officials may unintentionally expose themselves to liability. The reach of these rules is so broad that

duty transportation, as well as, those authorized to grant domicile to duty benefits). *See* 10 U.S.C. § 2637.

⁶⁹ *See* 31 U.S.C. § 1344(b); 5 U.S.C. § 5312 (listing what positions are at Level I of the executive schedule). *See* U.S. DEP'T OF DEF., 4500.36, DEPARTMENT OF DEFENSE MANUAL: ACQUISITION, MANAGEMENT, AND USE OF DOD NONTACTICAL VEHICLES 7-9 (JULY 7, 2015).

⁷⁰ *See* 31 U.S.C. § 1344(b)(9); *See* U.S. DEP'T OF DEF., 4500.36, DEPARTMENT OF DEFENSE MANUAL: ACQUISITION, MANAGEMENT, AND USE OF DOD NONTACTICAL VEHICLES 7-9 (July 7, 2015) (providing policy, responsibilities and procedural guidance for members entitled to domicile to duty transportation, as well as those authorized to grant domicile to duty benefits). 10 U.S.C. § 2637 (“empowering the Secretary of Defense to authorize the commander of unified commands to use Government owned or leased vehicles to provide transportation in an area outside the United States if commanders determine that public or private transportation in such areas are unsafe or not available”).

⁷¹ *See* Treas. Reg. § 1.61-21 (establishing the valuation of transportation benefits); *See* Treas. Reg. § 1.132-5 (establishing rules related to allocating vehicles); *See generally* Elwood & Moore, *supra* note 12 (explaining that fringe benefits are all benefits that are provided by an employer to its employees other than through wages for services rendered).

it encompasses campaign finance and even post-government employment.⁷² For example, after leaving government service, former officials may still be subject to numerous rules such as prohibitions against lobbying and representation.⁷³ Although the liabilities may be great, it is evident that “the Framers were concerned about the potential for the abuse of power . . . [because they drafted sections six and nine of Article I of the Constitution addressing] the potential for conflicts of interest in a democratic government and the necessity for provisions to protect government integrity.”⁷⁴

⁷² See, e.g., Editorial Board, Opinion, *The Supreme Court green-lights political corruption - again*, WASH. POST (May 17, 2022, 3:28 PM), <https://www.washingtonpost.com/opinions/2022/05/17/supreme-court-ted-cruz-decision-political-corruption/> [<https://perma.cc/BB5Z-V8MQ>] (addressing federal rules that previously barred candidates from taking more than \$250,000 in repayment from their campaigns if those funds came from donations after election day; explaining that now candidates can be restored to the status quo by being “repaid for personal loans they make to their campaigns.”).

⁷³ See, e.g., 18 U.S.C. § 207 (prohibiting former officers and employees from representing employers on certain matters and communicating with their former department or agency for one year after leaving service); OFF. OF THE GEN. COUNS. OF THE DEP’T OF DEF., DoD Instruction 1000.32, PROHIBITION OF LOBBYING ACTIVITY BY FORMER DOD SENIOR OFFICIALS (Mar. 26, 2020) (applying the limitations of Section 1045 and establishing periods of time based on the grade of the officer, where lobbying activities are prohibited; prohibiting officers in the grades of O-7 and O-8 for one year, and officers in the grades of O-9 and O-10 for two years from engaging in lobbying activities with respect to the Department of Defense. See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 §1045, 131 Stat. 1283, 1555 (2018)).

⁷⁴ John D. Feerick, *Ethics, Lawyers, and the Public Sector: A Historical Overview*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 2 (Patricia E. Salkin ed., 1999) (providing that the Framers took many steps such as ensuring that “[t]hreshold requirements for integrity in public office were

In short, the “idea that law should be used to promote ethics in government is neither new nor uniquely American.”⁷⁵ As “[m]ore people are hired and more transactions occur, the potential for ethical violations increase,” and the more advanced government gets, the more ethical violations are likely to occur.⁷⁶ Overall, as government has grown, so has the sophistication of the ethics laws.⁷⁷ Clearly it is improper for government officials to act or fail to act, in order to advance interests other than those they are supposed to advance, such as self-interest or bias.⁷⁸ It becomes increasingly more complicated, however, when decisions advance both legitimate and illegitimate interests; thus, it is important to recognize the pervasiveness of the conflicts of interest and find ways to mitigate the potential temptations that come with wielding power.⁷⁹

1. The STOCK Act

adopted by the First Congress in the creation of the United States Treasury.” *Id.* at 3).

⁷⁵ Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715, 724 (2006).

⁷⁶ Jeffrey Green, *History of Conflicts Law*, 26 HAMLINE L. REV. 555, 557 (2003).

⁷⁷ *Id.*

⁷⁸ Claire Hill & Richard W. Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1641 (2011).

⁷⁹ *See id.* *See also* U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION 7 (Nov. 9, 2021) (addressing the origins of “the Pendleton Act in 1883 and the Hatch Act in 1939, that such conflicts [of interest] be resolved in favor of the general public welfare and that the power, prestige, and influence that executive branch employees wield . . . not be used for partisan advantage.”). Conflicts of interest are also a concern for state public officials, which are addressed through various state statutes. *See, e.g.*, *Conflict of Interest Definitions*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 3, 2021), <https://www.ncsl.org/research/ethics/50-state-table-conflict-of-interest-definitions.aspx> (providing a compendium of state statutes defining conflicts of interest).

The improper use of information obtained during government service to further one's self-interests is one such powerful temptation, consequently leading the government to create numerous laws to mitigate this concern. One such law, the Stop Trading on Congressional Knowledge (STOCK) Act bars members of Congress and their aides from using nonpublic information and making investment decisions based on insider information that they have access to as government officials.⁸⁰ Until the 2008 financial crisis, the public was “unable to find out much about Congress members’ personal investments.”⁸¹ Thus, in 2012, the STOCK Act was passed to create more stringent guidelines on using nonpublic information for personal gain.⁸² The intent behind the STOCK Act is to prohibit members of Congress and employees of Congress from using nonpublic information derived from their official Congressional capacity for personal benefit or other unofficial purposes.⁸³ Despite the intent behind enacting the STOCK Act, there are several loopholes,⁸⁴ such as failing to cover all government

⁸⁰ Stop Trading on Congressional Knowledge (STOCK) Act of 2012, 112 Pub. L. No. 105, 126 Stat. 291, 291.

⁸¹ Brian Clark & Tala Hadavi, *Insider trading and Congress: How lawmakers get rich from the stock market*, CNBC (Oct. 22, 2020, 9:57 AM), <https://www.cnbc.com/2020/10/22/insider-trading-and-congress-how-lawmakers-get-rich-from-stock-market.html>.

⁸² *Id.*

⁸³ 126 Stat. at 291.

⁸⁴ See David Leonhardt, *Good Morning. Some Members of Congress have Strangely Good Timing when it comes to Stock Investments*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/briefing/congress-stock-investments-profits.html?searchResultPosition=2> (pointing out the flaws such as the difficulties in prosecution as well as the ineffective consequences such as an initial fine of only \$200 for “failing to report a trade on time.”). See Madison Hall, *Nancy Pelosi’s Husband Just Invested Millions into NVIDIA and Sold Large Amounts of Visa and Apple Stocks and Call Options*, BUS. INSIDER (July 14, 2022), <https://www.businessinsider.com/nancy-pelosi-stock-trades-paul-pelosi-nvidia-visa-apple-2022-7> (explaining that “Insider’s ‘Conflicted Congress’

officials,⁸⁵ as well as the difficulties "determining what information is 'nonpublic'" which has likely resulted in the failure to prosecute those suspected of violating the law.⁸⁶ For example, a couple of months after

project, in addition to work from other outlets, identified 65 members of Congress—both Democrats and Republicans—who [appear to] have violated . . . the STOCK Act” and that while Speaker of the House Nancy Pelosi does not trade stocks, her husband is a frequent investor who has traded millions of dollars of stock in the past two years alone). *But see* Derek Saul, *Pelosi Unloads Millions in NVIDIA Stock at a Loss Before Senate Passes Massive Tech Subsidies*, FORBES (Jul. 27, 2022), <https://www.forbes.com/sites/dereksaul/2022/07/27/pelosi-unloads-millions-in-nvidia-stock-at-a-loss-before-senate-passes-massive-tech-subsidies/?sh=323d807e55f3> (showing Speaker Pelosi’s efforts to avoid further ‘misinformation’ about the couple’s investments and quoting Speaker Pelosi when she answered “Absolutely not” when asked by a reporter if her husband ever traded on information provided by her).

⁸⁵ Clare Foran, *Pelosi Says Democrats Reviewing Proposals to Ban Lawmaker Stock Trading and Expects Action this Year*, CNN (Feb. 9, 2022), <https://www.cnn.com/2022/02/09/politics/pelosi-stock-trading-ban/index.html> (explaining that proposals need to be government wide and that many government officials such as the judiciary are not covered by laws requiring disclosure of stock transactions). *See also* Richard W. Painter, *Why Members of Congress Should Not Trade Stocks*, BLOOMBERG (Jan. 25, 2022, 4:01 AM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/why-members-of-congress-should-not-trade-stocks> (arguing for a ban on stock trading by congressional members); *See* Deirdre Walsh, *A Push to Ban Members of Congress from Trading Individual Stocks Gains Momentum*, NPR (Jan. 19, 2022), <https://text.npr.org/1073865837> (discussing the controversy of congressional officials and their spouses trading stocks).

⁸⁶ *See* Joe Nocera, *‘Stop Trading’ Act for Congress Isn’t Stopping Much Trading*, BLOOMBERG NEWS (Dec. 4, 2020), <https://www.bloomberg.com/opinion/articles/2020-12-04/-stop-trading-act-for-congress-isn-t-stopping-much-trading>. *See also* Brian Clark & Tala Hadavi, *supra* note 81; *see also* Sana Mesiya, *Failures of the Stock Act and the Future of Congressional Insider Trader Reform*, 58 AM. CRIM. L. REV. 92 (2021) (discussing ways to mitigate this problem including the Ban

U.S. Senators were accused of violating the STOCK Act by using insider information about the COVID-19 pandemic to profit in the stock market, the investigations were closed.⁸⁷ Unfortunately, Congressional insider trading is not a new phenomenon.⁸⁸ “Scandals relating to members of Congress using their offices for private gains dates back to at least 1968.”⁸⁹

Continuously, studies show that investments of members of Congress “outperform the market.”⁹⁰ Hence, the optics of congressional trading, especially in times of national emergency, can erode the public’s trust in Congress to legislate fairly.⁹¹ One problem may be that “[t]he STOCK Act is enforced by the Department of Justice and the Securities Exchange Commission . . . [who] get their funding from Congress, which is the very body that they are supposed to be regulating.”⁹² Clearly, not having an independent enforcement mechanism may have a detrimental impact on the ability to hold government officials accountable.

2. The Hatch Act

Similar to the STOCK Act, the Hatch Act attempts to mitigate conflicts of interest. “The Hatch Act is the cumulation of efforts, dating back nearly to the country’s founding, to limit the partisan political activity of federal employees.”⁹³ Further, “[t]he underlying rationale

Conflicted Trading Act which was reintroduced in March, 2021, which banned the buying or selling of individuals stocks but allowed other vehicles such as blind trusts, diversified mutual funds, and exchange traded funds); see Ban Conflicted Trading Act, H.R. 1579, 117th Cong. (2021-2022).

⁸⁷ Mesिया, *supra* note 86, at 92-93.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Clark & Hadavi, *supra* note 81.

⁹³ U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020

for these efforts is that the ‘efficiency in government services requires a lack of partisanship in administration.’”⁹⁴ As government officials act in their official capacity,⁹⁵ there are significant dangers that they may take actions or make statements that serve their own political purposes or the purposes of their political party.⁹⁶ To address this concern, the Hatch Act forbids executive branch employees from taking part in political activities while engaged in their official duties. Although Congress has repeatedly amended the Hatch Act and loosened its restrictions, Congress has not explicitly defined the scope of “official authority or influence.”⁹⁷ Some evidence of the potential broad scope of “official authority or influence” comes from Civil Service Commission rulings interpreting the Civil Service Rule I, which was incorporated into the Hatch Act by Congress in 1940.⁹⁸

However, like the STOCK Act, the Hatch Act has many loopholes rendering it ineffective. For example, pursuant to 5 U.S.C. §

PRESIDENTIAL ELECTION 7 (Nov. 9, 2021) (discussing 5 C.F.R. § 734.104 and 7323(a)(1)).

⁹⁴ *Id.*

⁹⁵ See Peter Overby & Brett Neely, *Kellyanne Conway Violated Federal Ethics Rules, Watchdog Agency Says*, NPR (Mar. 6, 2018), <https://www.npr.org/2018/03/06/591184395/kellyanne-conway-violated-federal-ethics-rules-watchdog-says>. In two separate interviews regarding the Alabama race, White House advisor Kellyanne Conway, spoke in front of the White House in her official capacity attacking Democratic candidate Doug Jones and on November 20, 2018, on Fox and Friends she stated, "Doug Jones . . . will be a vote against tax cuts. He is weak on crime. Weak on borders. He's strong on raising your taxes. He is terrible for property owners." *Id.*

⁹⁶ See, e.g., U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION 30 (Nov. 9, 2021).

⁹⁷ *Id.* See also Hatch Act § 12(a), 5 U.S.C. § 7323.

⁹⁸ U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION 7 (Nov. 9, 2021); see also Hatch Act § 12(a)-17.

7322(1), not only are certain government officials such as the President and Vice President not covered by the law, but also, as the U.S. Office of Special Counsel points out, "flagrant and unpunished violations [of the Hatch Act] erode the principal foundation of our democratic system—the rule of law."⁹⁹ In short, "there is currently no mechanism for holding senior administration officials accountable for violating the law" where "the White House chooses to ignore the Hatch Act's requirement."¹⁰⁰ Hence, the Hatch Act is only as effective as the White House decides it will be. Where the White House chooses to ignore the Hatch Act's requirements, the public is then left with no protection from senior administration officials taking advantage of their "authority for partisan political gain in violation of the law."¹⁰¹

3. Endorsements

As the Hatch Act tries to mitigate the dangers as government officials act in their official capacity, other laws try to lessen similar dangers when government officials act either in their official or personal capacity. For example, "[a]n employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with

⁹⁹ U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION 4, 45-59 (Nov. 9, 2021), (suggesting numerous potential fixes to address Hatch Act violations such as additional OSC enforcement tools); 5 U.S.C. § 7322(1).

¹⁰⁰ U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION 1-2 (Nov. 9, 2021) (concluding that at least 13 senior Trump administration officials violated that Hatch Act "with the administration's approval" prior to the election including Secretary of State Pompeo who changed U.S. Department of State policy days before recording a speech to the Republican National Convention while on official State Department travel to Jerusalem. *Id.* at 2, 32).

¹⁰¹ *Id.* at 11.

whom the employee is affiliated in a nongovernmental capacity.”¹⁰² A violation by federal employees of this standard of conduct warrants consideration of disciplinary action.¹⁰³ One common example of a violation is when government employees use their official positions to promote commercial products.¹⁰⁴

4. The Emoluments Clauses

Like the statutes directed at conflicts of interests, the Framers of the Constitution attempted to address conflicts of interest ramifications through the emoluments clauses in the Constitution.¹⁰⁵ Specifically, the

¹⁰² 5 C.F.R. § 2635.702 (2020); see Ben Jacobs, *Kellyanne Conway Violated Federal Standards of Conduct, Says Ethics Agency*, GUARDIAN (Feb. 14, 2017, 4:32 PM), <https://www.theguardian.com/us-news/2017/feb/14/kellyanne-conway-ethics-violation-ivanka-trump>; see also Jon Schuppe & Mark Murray, *Did Kellyanne Conway's Ivanka Trump Fashion Line Plug Violate Ethics Rules?*, NBC NEWS (Feb. 9, 2017, 11:24 AM), <https://www.nbcnews.com/news/us-news/was-kellyanne-conway-s-ivanka-trump-fashion-line-plug-legal-n718831>.

¹⁰³ Jacobs, *supra* note 102.

¹⁰⁴ See, e.g., Richard Perez-Pena, *Ethics Watchdog Denounces Conway's Endorsement of Ivanka Trump Products*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/kellyanne-conway-ivanka-trump-ethics.html>. See also Jim Zarroli, *Kellyanne Conway Tells Americans to Buy Ivanka Trump's Products*, NPR (Feb. 9, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/09/514317345/kellyanne-conway-tells-americans-to-buy-ivanka-trumps-products> (addressing that the chairman of the House Oversight Committee, Republican Jason Chaffetz stated that “That is absolutely wrong . . .” and the committee’s ranking minority member, Democrat Elijah Cummings asked the U.S. Office of Government Ethics to determine whether disciplinary action should be taken against Kellyanne Conway who endorsed Ivanka Trump's clothing line on television stating, “Go buy Ivanka’s stuff . . . It’s a wonderful line. I own some of it. I’m going to give a free commercial here. Go buy it today, everybody. You can find it online”).

¹⁰⁵ See *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 891-95 (D. Md. 2018) (discussing the different definitions of emoluments and concluding

Foreign Emoluments Clause in Article I¹⁰⁶ and the Domestic Emoluments Clause in Article II¹⁰⁷ of the Constitution allow government officials to receive emoluments only with the consent of Congress.¹⁰⁸

The Foreign Emoluments Clause . . . generally prohibits any person holding ‘an office of profit or trust’ from accepting ‘any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.’ The Domestic Emoluments Clause . . . prohibits the President from receiving any ‘other emolument from the United States’ during his term in office.¹⁰⁹

that “the common understanding of the term "emolument" during the founding era was that it covered any profit, gain, or advantage, including profits from private transactions.”).

¹⁰⁶ U.S. CONST. art. I, § 9 (stating "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.").

¹⁰⁷ U.S. CONST. art. II, § 1 (stating "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.").

¹⁰⁸ See Claire Gianotti, Note, *Ethics in the Executive Branch: Enforcing the Emoluments Clause*, 32 GEO. J. LEGAL ETHICS 615, 615 (2019); see also *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 53 (D.D.C. 2018) (discussing specific instances of Presidents seeking congressional consent prior to acceptance of foreign presents or emoluments).

¹⁰⁹ Giannotti, *supra* note 108, at 615 (For example, after negotiating the Treaty of Mortefontaine, American diplomats Oliver Ellsworth, William Davie, and William Vans Murray received gold Roman coins from Napoleon Bonaparte but returned them upon advice of the legal advisor and the delegation’s Secretary); see Adam Levinson, *The Emoluments Clause: Part I*, STATUTES & STORIES (Mar. 29, 2019), https://www.statutesandstories.com/blog_html/the-emoluments-clause-part-1/ (There are many other historical examples of gifts received by government

However, the enforcement of the Emoluments Clauses depends on whether a constitutional/ethical violation gives rise to a remedy and the definition of “ethical governance.”¹¹⁰ “In this way, the Constitution designates Congress as [a] regulator to mediate the tension between government ethics and foreign relations, in a diplomatic culture of gift-giving.”¹¹¹ There are no such exceptions for emoluments from domestic officials.

Despite the intent of these clauses, numerous loopholes such as the requirements for standing and mootness may make these clauses ineffective at achieving their objectives.¹¹² For example, in *District of Columbia v. Trump*, the District of Columbia and the State of Maryland sued then-President Trump, alleging violations of the Foreign and Domestic Emoluments Clauses.¹¹³ However, even though the District Court held that plaintiffs had standing, the Supreme Court vacated the Fourth Circuit’s judgment and remanded with instructions to dismiss the

officials); *see, e.g.*, Adam Levinson, *The Emoluments Clause: Part II*, STATUTES & STORIES (Mar. 29, 2019), https://www.statutesandstories.com/blog_html/the-emoluments-clause-part-2/; Andrew Fagal, *Thomas Jefferson and the Arabian Stallion: A Research Note on the Third President and the Foreign Emoluments Clause*, L. & HIST. REV. <https://lawandhistoryreview.org/article/thomas-jefferson-and-the-arabian-stallion-a-research-note-on-the-third-president-and-the-foreign-emoluments-clause/> (last visited Sept. 22, 2022) (discussing President Thomas Jefferson’s return of an Arabian stallion received as a gift from the Tunisian ambassador).

¹¹⁰ *Id.* at 619.

¹¹¹ *Id.* at 615-16.

¹¹² *See, e.g.*, KEVIN J. HICKEY & MICHAEL A. FOSTER, CONG. RSCH. SERV., IF11086, THE EMOLUMENTS CLAUSES OF THE U.S. CONSTITUTION (2021) [hereinafter CRS IF11086], <https://crsreports.congress.gov/product/pdf/IF/IF11086> (providing an overview of the constitutional provisions that prohibit accepting or receiving “emoluments” in certain circumstances and reviewing the litigation against former President Donald Trump based on his alleged violations of these provisions).

¹¹³ *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018).

case as moot.¹¹⁴ Regardless, to avoid these types of issues and to reduce the potential as well as the perception of corruption,¹¹⁵ where government officials may be perceived by the public as being “obsessed only with maintaining and maximizing their power, and enriching

¹¹⁴ See *Trump v. District of Columbia*, 141 S. Ct. 1262 (2021); *Trump v. Citizens for Resp. & Ethics in Washington*, 141 S. Ct. 1262 (2021); CRS IF11086, *supra* note 110. The question remains whether the Supreme Court should have categorized these issues as moot since former President Trump could run again for presidency. See Zeeshan Aleem, Opinion, *Trump's 2024 Politicking Looks Like It's Breaking Campaign Finance Law*, MSNBC (Mar. 20, 2022, 5:30 AM), <https://www.msnbc.com/opinion/msnbc-opinion/trump-s-2024-politicking-looks-it-s-breaking-campaign-finance-n1292079>. See Gabby Orr et al. *Former President Donald Trump Announces a White House Bid for 2024*, CNN (Nov. 16, 2022) <https://www.cnn.com/2022/11/15/politics/trump-2024-presidential-bid/index.html>. Perhaps this should fall under the “dispute capable of repetition yet evading review” exception to the Mootness doctrine. See Darren Samuelsohn, *Who's watching Trump's ethics watchdogs?*, POLITICO (Feb. 25, 2017, 7:26 AM), <https://www.politico.com/story/2017/02/trump-ethics-watchdogs-lawyers-235385>.

¹¹⁵ See, e.g., Victoria Bekiempis, *A quarter of Americans open to taking up arms against government, poll says*, GUARDIAN (June 30, 2022, 11:48 AM), <https://www.theguardian.com/us-news/2022/jun/30/poll-americans-guns-against-government> (explaining that according to a survey published by the University of Chicago's Institute of Politics, many Americans believe the government is “corrupt and rigged against everyday people”).

themselves,”¹¹⁶ government officials should use independent ethics advisors and heed their advice.¹¹⁷

III. Penalties for Ethical Violations and Protections of the Investigative Process

Existing laws have failed to effectively mitigate the dangers of conflicts of interest, especially when the questionable conduct of high-

¹¹⁶ David Dewitt, *Ohio’s Most Powerful Elected Politicians are Morally and Ethically Bankrupt*, OHIO CAP. J. (June 2, 2022, 3:20 AM), <https://ohiocapitaljournal.com/2022/06/02/ohios-most-powerful-elected-politicians-are-morally-and-ethically-bankrupt/>; *see also*, Peter Weber, *Jared Kushner’s Firm Got \$2 Billion from Saudi Wealth Fund Run by Crown Prince, Despite Board’s Objections*, MSN (Apr. 11, 2022), <https://www.msn.com/en-us/news/politics/jared-kushners-firm-got-dollar2-billion-from-saudi-wealth-fund-run-by-crown-prince-despite-boards-objections/ar-AAW5bZ2?li=BBnb7Kz> (explaining that Saudi Arabia Crown Prince Mohammed bin Salman invested \$2 billion in Jared Kushner’s new private equity firm six months after Kushner left the White House which may create “the appearance of potential payback for Mr. Kushner’s actions in the White House-or of a bid for future favor if Mr. Trump seeks and wins another presidential term in 2024”).

¹¹⁷ *See* Bobby R. Burchfield, *Ethics in the Executive Branch: The Constitutional, Statutory, and Ethical Issues Faced by the Ethics Advisor to a President Holding Immense Wealth*, 22 TEX. REV. L. & POL. 265, 281 (2017) (alleging that “President Trump has gone beyond the legal requirements to insulate himself and his businesses from ethical issues.”); *see President Trump’s legacy of corruption, four years and 3,700 conflicts of interest later*, CREW (Jan. 15, 2021), <https://www.citizensforethics.org/reports-investigations/crew-reports/president-trump-legacy-corruption-3700-conflicts-interest/> (tracking President Trump’s conflicts of interest); *see* Austin Evers, *Trump abuses power in using public funds for private benefit*, HILL (July 31, 2017, 4:00 PM), <https://thehill.com/blogs/pundits-blog/the-administration/344627-trump-abuses-power-in-using-public-funds-for-private>.

ranking government officials is involved. For example, President Donald Trump's administration had Lt. Col. Alexander Vindman and Ambassador Gordon Sondland removed from their positions after they testified before Congress during President Trump's impeachment inquiry.¹¹⁸ Their removal resulted in Rep. Eliot Engel, Chair of the House Committee on Foreign Affairs criticizing President Trump's actions, stating:

Lt. Col. Vindman honored his oath and did his duty when he came forward about President Trump's abuse of power [The removal] is shameful, of course. But this is also what we should now expect from an impeached president whose party has decided he is above the law and accountable to no one.¹¹⁹

In short, all government officials must be subject to effective checks and balances to ensure that they are held accountable to the rule of law. So that government officials abide by laws such as the STOCK and Hatch Acts and do not improperly make endorsements or receive emoluments, the government needs increased criminal and civil penalties for ethical violations as well as increased protections for the investigative process.

A. The Requisite Mental State and the Types of Violations

To ensure a healthy environment where competent individuals are not discouraged from government service, an appropriate focus must be placed on the mental state required by ethical rules that attempt to mitigate the dangers of conflicts of interest. Specifically, to punish abuses of power, while not discouraging individuals from taking on the mantle of public service, negligent and even reckless violations of

¹¹⁸ Hallie Jackson & Adam Edelman, *Trump Fires Key Impeachment Witnesses Sondland, Lt. Col. Vindman in Purge*, NBC NEWS (Feb. 7, 2020, 9:23 PM), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/vindman-who-provided-key-impeachment-testimony-escorted-white-house-attorney-n1132526> (discussing President Trump's alleged plan to get dirt on former Vice President Joe Biden and his son Hunter Biden, and to ask Ukrainian President Volodymyr Zelensky to commit to the investigations that President Trump wanted).

¹¹⁹ *Id.*

conflict-of-interest laws should not be punished as severely as knowing or purposeful violations of these ethical rules.¹²⁰

In addition, the government should foster compliance with these ethics rules from the lowest to the highest levels of government so that officials who rise to greater levels of responsibility are set up to operate effectively and ethically.¹²¹ Furthermore, not all ethics violations should be treated equally. The increasing penalties based on the applicable mental states required by conflict-of-interest laws should apply to the vast types of violations ranging from the abuse of one's government position to the misuse of government personnel, resources, and information.

1. Allowable Gifts Versus Bribery

To prevent the improper influence of government officials, the government has criminalized both the intentional giving and receiving

¹²⁰ See, e.g., Mark Quiner, *Ethics and Public Corruption Laws: Penalties*, NCSL (Sept. 9, 2021), <https://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx> (listing the variety of consequences of ethical violations in various states).

¹²¹ See, e.g., Johnson, *supra* note 75, at 716 (explaining that fostering ethics in government should begin at the local rather than the state or national level because if “proper values and ethical practices have been ingrained in ... officials when they first serve in local government, there is reason to hope that the same high standards and practices may follow them when their careers move to a broader stage.”); see, e.g., Sarah Hyser-Staub, *Criminalizing Politics: Ethical Obligations of Pennsylvania’s Public Officials*, MCNEES: PUBLIC SECTOR (Oct. 9, 2018), <https://www.mcneespublicsector.com/2018/10/criminalizing-politics-ethical-obligations-pennsylvanias-public-officials/> [<https://perma.cc/2BUW-9JRG>] (explaining the dangers involved when the private activities of government officials cross the path of their official duties).

of bribes,¹²² exposing violators to both imprisonment and fines.¹²³ To further prevent the improper influence of government officials, even gifts, broadly defined as

¹²² See, e.g., Rachel Martin, *Federal Prosecutors will be in Court with an Illinois Political Corruption Case*, NPR (Mar. 9, 2022, 5:01 AM), <https://www.npr.org/2022/03/09/1085355613/federal-prosecutors-will-be-in-court-with-an-illinois-political-corruption-case> (explaining the pending bribery and racketeering case against Michael Madigan who served as the Illinois House speaker for 36 years as well as the state Democratic Party chairman).

¹²³ 18 U.S.C. § 201(b)(1)-(2), (4) (establishing the crime of bribery of public officials and witnesses and exposing violators to both imprisonment and fines). The statute states:

(b) Whoever-

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, *with intent-*

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to

any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value . . . [including] services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred¹²⁴

are generally prohibited.¹²⁵ A few exceptions exist such as the "20/50 rule," which states

collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
(C) being induced to do or omit to do any act in violation of the official duty of such official or person . . .
(4) shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States;

Id. (emphasis added).

¹²⁴ 5 C.F.R. § 2635.203(b) (2022) (prohibiting employees "from soliciting or accepting any gift from a prohibited source or any gift given because of the employee's official position, unless the item is excluded from the definition of a gift or falls within one of the [applicable] exceptions"). A prohibited source is defined as any person who:

- (1) Is seeking official action by the employee's agency;
- (2) Does business or seeks to do business with the employee's agency;
- (3) Conducts activities regulated by the employee's agency;
- (4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties . . .

Id. § 2635.203(d) (2022).

¹²⁵ See, e.g., Lois Romano, *Cunningham Friends Baffled His Blunder Into Bribery*, WASH. POST (Dec. 4, 2005), <https://www.washingtonpost.com/archive/politics/2005/12/04/cunningham-friends-baffled-his-blunder-into-bribery/218a9656-2992-4fcc-8140->

[a]n employee may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person . . . does not exceed \$50 in a calendar year.¹²⁶

In addition, other exceptions apply to foreign gifts as many government officials are often presented with gifts and decorations when they work or travel abroad.¹²⁷ For instance, in general, employees must not accept foreign gifts of more than minimal value.¹²⁸ In the event they accept

6dbb6decc48f/ (discussing a California congressman and decorated Navy pilot who resigned his seat after confessing to accepting at least \$2.4 million in bribes to “help friends and campaign contributors win military contracts” and explaining that congressional ethics laws prohibit members from accepting “any largess over \$100 per year from any one source, and only \$50 at one time”); *see, e.g.,* Felicia Sonmez et al., *House Ethics Committee investigating Reps. Cawthorn, Jackson, Mooney*, WASH. POST (May 23, 2022, 4:59 PM), <https://www.washingtonpost.com/politics/2022/05/23/house-ethics-committee-investigating-reps-cawthorn-jackson-mooney/> [<https://perma.cc/7TAZ-ZCP9>] (explaining investigations into three lawmakers including West Virginia Rep. Alex Mooney who is alleged to have had his family’s vacation to Aruba costing approximately \$11,000 paid for by one of his campaign vendors which likely was “an impermissible gift”); *see, e.g.,* Bryan Metzger, *Rep. Alexandria Ocasio-Cortez is Under Investigation by the House Ethics Committee*, BUS. INSIDER (Dec. 7, 2022) <https://www.businessinsider.com/alexandria-ocasio-cortez-investigation-house-ethics-committee-2022-12> (alleging that Representative Ocasio-Cortez received an impermissible gift when she accepted attendance at the 2021 Met Gala, an exclusive event run by Conde Nast, a for-profit company, where the cost of attendance for many guests is \$35,000).

¹²⁶ 5 C.F.R. § 2635.204(a) (2022) (establishing the “20/50 rule”).

¹²⁷ 5 U.S.C. § 7342(c) and (d) (2022) (providing exceptions for where an employee may accept a gift or decoration).

¹²⁸ U.S. Gen. Servs. Admin., *Foreign Gifts*, GSA (June 26, 2020), <https://www.gsa.gov/policy-regulations/policy/personal-property-management-policy/foreign-gifts> (establishing the minimal value for foreign gifts for 2020 to 2023 as \$415). *See also* U.S. GEN. SERVS. ADMIN., FMR

tangible gifts of more than minimal value, such as when it would insult the foreign gift giver to refuse such a gift, the recipient must deposit the gift with their employing agency within 60 days of accepting the gift.¹²⁹

2. Misuse of Government Employees

Similar to the criminalization of bribes and the strict limitation of gifts, the government has established rigid rules regarding the use of government personnel. Because employees' time is a valuable resource, misuse of government personnel's time must have ramifications.¹³⁰ For

BULLETIN B-50, FOREIGN GIFT AND DECORATION MINIMAL VALUE (Mar. 2020), https://www.gsa.gov/cdnstatic/FMR%20Bulletin%20B-50%20Signed%20Foreign_Gift_Minimal_Value_Mar_2020.pdf [<https://perma.cc/DP8H-S45C>] (redefining foreign gifts of minimal value every three years). See, e.g., Craig Whitlock, *U.S. Army General Improperly Accepted Gifts in South Korea*, WASH. POST (Aug. 7, 2013), https://www.washingtonpost.com/world/national-security/us-army-general-improperly-accepted-gifts-in-south-korea/2013/08/07/87d823de-ff1e-11e2-a661-06a2955a5531_story.html (describing numerous general officers who engaged in ethical misconduct including Maj. Gen. Joseph Fil, Jr., who “improperly accepted gold-plated Montblanc pens, a \$2,000 leather briefcase, and other gifts from a South Korean citizen” and who allowed one of his family members to accept “a \$3,000 cash gift” from the South Korean donor, resulting in Maj. Gen. Fil, Jr.’s retirement as a two-star rather than as a three-star general).

¹²⁹ 5 U.S.C. § 7342(b) and (c)(2) (2022); see also U.S. DEP’T OF DEF., DIRECTIVE NUMBER 1005.13, GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS, para. 4.4 (Feb. 19, 2002) <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/100513p.pdf?ver=2019-04-03-141601-737> (directing that such gifts can be returned by the United States to the donor, used within the Component, or disposed of by the General Services Administration).

¹³⁰ See, e.g., Oliver Milman, *A Scandal for All Seasons: Scott Pruitt’s Ethics Violations in Full*, GUARDIAN (June 10, 2018, 6:00 AM), <https://www.theguardian.com/environment/2018/jun/10/scott-pruitt-epa-administrator-scandal-list> [<https://perma.cc/ZNT8-GNGG>] (explaining that Scott Pruitt, the administrator of the EPA, resigned amidst a series of

example, in 2019, Press Secretary Dana White abruptly resigned from her position due to allegations that she used subordinates to complete personal errands and had staff reassigned when they raised issues.¹³¹ Similarly, in *Commonwealth v. Berry*, the court found that a former judge improperly used his authority to direct his secretary to administer his real estate business and used court resources to avoid overhead costs.¹³² The trial court originally adjudicated an aggregate term of three years' probation and deferred a determination regarding the amount of restitution owed, but the Superior Court of Pennsylvania vacated the judgment as to restitution and remanded for sentencing.¹³³

In another case, Scott Pruitt, who was the administrator of the EPA, resigned in 2018 after several allegations were made that questioned his use of government employees.¹³⁴ Reports showed that Pruitt instructed his bodyguards to pick up his dry cleaning, purchase protein bars and Greek yoghurt from the grocery store, and demanded the bodyguards to go out and find a specific lotion used in Ritz-Carlton hotels.¹³⁵ Ultimately, upon Pruitt's resignation, the EPA inspector general opened an investigation into Pruitt's conduct.¹³⁶ Since leaving the EPA, Pruitt has faced more than a dozen federal investigations.¹³⁷ In short, government employees are not allowed to deploy staff for purely personal tasks. While that should seem obvious to government

corruption scandals including allegations that he wasted taxpayer money on first-class travel and expensive pens, and used his bodyguards to conduct personal errands such as driving him to pick up personal items).

¹³¹ Aaron Mehta, *Dana White taps out as Pentagon press secretary*, DEFENSENEWS (Jan. 2, 2019), <https://www.defensenews.com/pentagon/2019/01/02/dana-white-taps-out-as-pentagon-press-secretary/> [<https://perma.cc/CC6Y-4BS8>].

¹³² See *Commonwealth v. Berry*, 167 A.3d 100, 107 (Pa. Super. Ct. 2017).

¹³³ *Id.*

¹³⁴ Milman, *supra* note 130.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

officials, recent high-profile investigations highlight the “old narrative that those at the top often become poisoned by their power.”¹³⁸

3. Misuse of Government Information

While it is not easy to police the conflict of interest areas involving gifts and the use of government personnel, it is much more challenging to regulate the improper use of information obtained by government officials who may use that information for their own purposes rather than for the public good.¹³⁹ Although some government

¹³⁸ Tom Vanden Brock, *Sense of Entitlement Behind Military Ethics Scandals?*, USA TODAY (Nov. 14, 2012 3:04 PM), <http://www.usatoday.com/story/news/nation/2012/11/13/generals-behavior-military-petraeus-allen/1702119/> [<https://perma.cc/S8TQ-JKHN>] (reporting that General Ward was ordered to repay the government \$82,000); *see, e.g.*, INSPECTOR GEN., U.S. DEP’T OF DEF., NO. 11-119226-153, REPORT OF INVESTIGATION: GENERAL WILLIAM E. WARD, U.S. ARMY, COMMANDER, U.S. AFRICOM (June 26, 2012), https://media.defense.gov/2012/Aug/17/2001774469/-1/-1/1/WardROI_Redacted.pdf [<https://perma.cc/96XM-GK7A>] (finding that General Ward misused Government funds, aircraft, vehicles, personnel, and his position for personal use); INSPECTOR GEN., U.S. DEP’T OF DEF., NO. 11H118481105, REPORT OF INVESTIGATION: ADMIRAL JAMES G. STAVRIDIS, U.S. NAVY, COMMANDER, U.S. EUCOM (May 2012), [https://media.defense.gov/2018/Jul/25/2001946777/-1/-1/1/ADMSTAVRIDISROI\(FINAL\)_REDACTED.PDF](https://media.defense.gov/2018/Jul/25/2001946777/-1/-1/1/ADMSTAVRIDISROI(FINAL)_REDACTED.PDF) (finding that Admiral Stavridis misused Government aircraft and cellular telephones for personal use).

¹³⁹ *See, e.g.*, Renae Merle, *Ex-congressman Chris Collins Sentenced to 2 Years on Insider-trading, False-statements Charges*, WASH. POST (Jan. 17, 2020), <https://www.washingtonpost.com/business/2020/01/17/former-rep-chris-collins-be-sentenced-insider-trading-case/> [<https://perma.cc/8GYC-ER5E>]; *see, e.g.*, *California Mayor Resigns Amid Baseball Stadium Deal Scandal*, AP NEWS (May 23, 2022), <https://apnews.com/article/mlb-politics-sports-political-scandals-482fc6ec2b946bd84c73efd05d7241c6> [<https://perma.cc/KL2D-XDAG>] (explaining that Southern California City of Anaheim Mayor Harry Sidhu was under investigation “for allegedly giving

officials are held accountable when they make blatant violations,¹⁴⁰ large loopholes allow others who may be more subtle to evade accountability.¹⁴¹ For example, government officials may be prosecuted if they blatantly share nonpublic information with a relative (insider trading); however, government officials may evade accountability if they use the information in a less obvious way—such as making their own personal investment decision, where the prosecution will struggle determining what information the government official relied upon when making the applicable investment decisions and whether the information was public.¹⁴²

4. Misuse of Government Resources

Similar to policing the improper use of government information, the government must also prevent the misuse of resources at all levels of government as the potential conflicts of interest are great.¹⁴³ For example, in *Dickman v. Office of State Ethics*, the court

confidential information to the [Los Angeles Angels] . . . at least twice during negotiations [for the sale of land around the stadium] in the hope of getting a campaign donation.”).

¹⁴⁰ *E.g.*, Merle, *supra* note 139 (discussing a congressman who was fined \$200,000 and sentenced to 26 months each for two counts of conspiracy to commit securities fraud and making false statements). In this case, the ex-congressman provided his son with confidential information that a small Australian biotechnology company’s new therapy for multiple sclerosis had failed a critical clinical trial. *Id.* In this case, the congressman served on the company’s board and was its largest shareholder. *Id.*

¹⁴¹ *See, e.g.*, Joe Nocera, *supra* note 86.

¹⁴² *See id.*

¹⁴³ *See, e.g.*, *Dickman v. Off. of State Ethics*, 60 A.3d 297, 304 (Conn. App. Ct. 2013) (emphasizing that “Section 1–84(c) provides in relevant part: ‘[N]o . . . state employee shall use his . . . position . . . to obtain financial gain for himself, his spouse, child, child’s spouse, parent, brother or sister or a business with which he is associated.’”); *see, e.g.*, *People v. Haywood*, 607 N.Y.S.2d 798, 798 (N.Y. App. Div. 1994) (affirming the conviction of a defendant, who was the superintendent of the water utilities department . . .

held that a state employee used a state computer and telephones to conduct a jewelry business and provide services as a travel agent while working as a microbiologist.¹⁴⁴ By using work time for personal gain, which was an ethical violation in Connecticut, the employee misused government resources and it was thus irrelevant that the gain was unrelated to the employee's duties.¹⁴⁵

While some ethical violations are egregious, based on malicious intent, and are tantamount to criminal acts,¹⁴⁶ other ethical violations result simply due to a lack of awareness or negligence.¹⁴⁷ This is partly

for permitting his son to use a hydraulic cart owned by the town at the son's place of business for over three years).

¹⁴⁴ *Dickman*, 60 A.3d at 306.

¹⁴⁵ *See id.*

¹⁴⁶ *See, e.g., United States v. Farence*, 57 M.J. 674, 675 (C.G. Ct. Crim. App. Sept. 30, 2002).

¹⁴⁷ *See, e.g., ENCYCLOPEDIA OF ETHICAL FAILURE, supra* note 55, at 46-47 (showing that a former Postmaster General of the United States rendered advice to the Postal Service Board of Governors concerning a potential strategic alliance with a soft drink company when the government official owned stock in the soft drink company, resulting in the Postmaster General being charged "with violating 18 U.S.C. § 208, a criminal statute that prohibits an employee from participating personally and substantially, as a Government official, in a particular manner in which he or she has a financial interest."); *see also* Randolph Schmid, *Civil Settlement Ends Probe of Postmaster General*, AP NEWS (Oct. 31, 1997), <https://apnews.com/article/e3678f2cb599cfa276a9bad26a9366a6> [<https://perma.cc/25UA-YVQV>] (explaining that even though the deal was never completed and that the Postmaster General only committed non-willful violations by simply sitting in on some of the discussions, civil liability was still incurred and there was still an appearance of impropriety). In this case, a civil settlement was reached which "are permitted in cases of 'non-willful' violations of the law banning federal officials from taking part in matters in which they have a financial interest." *Id.* Postmaster General Runyon stated, "[a]t no time was I thinking of my investments when our marketing group was exploring a Coca-Cola alliance. In retrospect, I should have thought about those holdings and recused myself earlier." *Id.*

because a government employee's ability to use government resources depends on whether a specific law or regulation allows the contemplated use.¹⁴⁸ In other words, the use of government property requires an affirmative grant of authority, rather than an existence of inherent authority because no law or regulation prohibits it.¹⁴⁹ "This requirement for affirmative authority contrasts [with] other areas of the law, where conduct is legal, unless prohibited."¹⁵⁰ With the allowed uses for government property being prescribed, this may seem straightforward at first; however, statutes and regulations do not actually list every permissible use of government resources but instead generally provide

¹⁴⁸ 5 C.F.R. § 2635.101(b)(9) (2014). Though perhaps overlooked, government employees and their use of 'on-the-clock' or official time are also government resources. The fifth ethics principle reminds employees that government time must be used in an "honest effort to perform official duties." *Id.* § 2635.101(b)(5). There is also an affirmative obligation to disclose "waste, fraud, abuse, and corruption" of government resources. *Id.* § 2635.101(b)(11).

¹⁴⁹ *See* *United States v. MacCollum*, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." (citing *Reeside v. Walker*, 11 How. 272, 291 (1851))).

¹⁵⁰ Major Yolanda A. Schillinger, *Fielding Requests for Use of Government Resources: Is the Event Official or Unofficial?*, *ARMY LAW*, 5 (Apr. 2015), <https://tjaglcspublic.army.mil/documents/27431/45331/2015-April-Schillinger-Use%20of%20Government%20Resources.pdf/ed64f925-e327-4b87-851e-ceabc38f5821> [<https://perma.cc/2UMJ-DU47>] (explaining that criminal law contains the most prevalent example of this legal framework, providing that conduct may not be prosecuted or punished absent a specific prohibition applicable at the time of the conduct.); *see also* U.S. CONST. art. I, § 9, cl. 3 (prohibiting states from enacting ex post facto laws); *see also* *Ex Post Facto Law*, *BLACK'S LAW DICTIONARY* (11th ed. 2019) (Ex Post Facto laws are those "[d]one or made after the fact; having retroactive force or effect").

that government resources must be used for “official purposes.”¹⁵¹ Similarly, a “statute and regulation cannot foresee and capture the creative ways [government employees] seek to use resources.”¹⁵² Therefore, to navigate this labyrinth where law and regulation are silent or inconclusive, properly utilizing government resources within the prescribed ethical norms begins with the Principles of Ethical Conduct.¹⁵³ To avoid pitfalls, military personnel often field requests to judge advocates,¹⁵⁴ who review the requests and evaluate them

¹⁵¹ See U.S. DEP’T OF DEF., 5500.7-R, JOINT ETHICS REGUL., § 2-301b. (30 Aug. 1993) (stating that “[f]ederal [g]overnment resources, including personnel, equipment, and property, shall be used by DoD employees for official purposes only,” except for certain authorized uses that are listed therein); see also U.S. DEP’T OF ARMY, REGUL. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES, para. 2-3 (June 12, 2014) [hereinafter AR 58- 1] (restricting use of Army-owned or controlled non-tactical vehicles (NTVs) to official purposes and not authorizing any personal use).

¹⁵² Schillinger, *supra* note 150, at 6. For example, Army regulation does not state whether or not an employee may travel by government vehicle to a non-federal entity (NFE) event where the employee will act as a guest speaker. See AR 58-1, at paras. 2-3, 2-4. The Office of Government Ethics provided some clarification stating that employees may utilize a government vehicle to travel to an NFE event where the employee will present information on behalf of the agency in an official capacity, on official time. See Memorandum from Gen. Couns., Off. of Gov’t Ethics to Designated Agency Ethics Offs. (Sept. 7, 2012).

¹⁵³ Schillinger, *supra* note 150, at 6. See Exec. Order No. 12,731 pt. 1 (Oct. 17, 1990), reprinted in 5 C.F.R. § 2635.101(b)(1)-(14) (2014).

¹⁵⁴ Art. 1, cl. 13, UNIF. CODE MIL. JUST., 10 U.S.C. § 801 (13) defines “judge advocate” as: (A) an officer of the Judge Advocate General’s Corps of the Army or the Navy; (B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or (C) an officer of the Coast Guard who is designated as a law specialist. In turn, a “staff judge advocate” is a judge advocate so designated in the Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate. JOINT SERV. COMM. ON MIL. JUST., r. 103(18),

depending on the type of resource,¹⁵⁵ function,¹⁵⁶ and non-federal entity.¹⁵⁷ These judge advocates must possess a high degree of understanding regarding the rules and the analytical framework in order to accurately and efficiently process such requests.¹⁵⁸

Due to the costs involved, travel and conferences require special attention.¹⁵⁹ As a result, the federal and state governments have

MANUAL FOR CTS.-MARTIAL U.S. (2019). According to section 12 of the Uniform Code of Military Justice, "legal officer" means any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command. § 801(12).

¹⁵⁵ See AR 58-1, at para. 2-3 (restricting use of Army-owned or controlled non-tactical vehicles (NTVs) to official purposes and not authorizing any personal use); *but see* U.S. DEP'T OF DEF., 5500.7-R, JOINT ETHICS REGULATION, para. 2-301 (Aug. 1993) (authorizing use of federal communications systems, such as telephones and internet systems, for some personal use such as "e-mailing directions to visiting relatives," provided certain conditions are met).

¹⁵⁶ See AR. 58-1 (restricting use of Army-owned or controlled non-tactical vehicles (NTVs) to official purposes and not authorizing any personal use); *but see* U.S. DEP'T OF DEF., 5500.7-R, JOINT ETHICS REGULATION, para. 2-301 (Aug. 1993) (permitting transportation by Army-owned vehicle to a retirement ceremony but not to private social functions).

¹⁵⁷ Schillinger, *supra* note 150, at 5.

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., Kevin Liptak & Miranda Green, *Price Out as HHS Secretary After Private Plane Scandal*, CNN (Sept. 29, 2017), <https://www.cnn.com/2017/09/29/politics/tom-price-resigns/index.html> [<https://perma.cc/8C2J-ATVU>] (explaining that Tom Price, the Health and Human Services Secretary, resigned amid a scandal over his use of private and government aircraft). Price allegedly used non-commercial travel 24 times (amounting to more than \$1 million), as well as two military flights which were approved by the White House. Although Price stated that he would write a personal check to pay for the flights, the check covered only a fraction of the cost; *see id.*; *see, e.g.*, Andrew Caplan, *SC Senator Says Taxpayers Shouldn't Fund Officials' State Plane Use, Cites Abuse*, STATE (Mar. 5, 2021), <https://www.thestate.com/news/politics-government/>

developed complex rules to curb costs at the price of creating excessive “layers of authorization . . . for some of the most mundane travel – even to get vital training – [that] have proven onerous.”¹⁶⁰ For example, the Federal Travel Regulation (FTR) “implements statutory requirements and Executive branch policies for travel by federal civilian employees and others authorized to travel at [g]overnment expense.”¹⁶¹ The Code of Federal Regulations states that the first principal purpose of the FTR is “to interpret statutory and policy requirements in a manner that balances the need for official travel to be conducted in a responsible manner with the need to minimize administrative costs.” The FTR’s second principal purpose is “to communicate the resulting policies in a clear manner to federal agencies and employees.”¹⁶² That said, despite a host of complex rules and policies, abuses continue, and thus government officials need to stay vigilant to conserve taxpayer

article249724033.html (discussing several instances in which state aircraft were abused by legislators). For example, in 2012, then-Gov Nikki allegedly took an aircraft to press conferences and bill signings in violation of state rules and repaid the state nearly \$10,000 as a result. *See id.* Similarly, former Gov. Mark Sanford allegedly took flights for dentist appointments, haircuts and political gatherings for campaign donors which along with other ethics charges ultimately led to a \$74,000 fine for the governor and a reimbursement of \$8,000 to the state for the personal use of a state-owned aircraft. *Id.* Similarly, in 1984, former Democratic Sen. Jack Lindsay came under fire for taking a state flight to Tampa, Florida for the Super Bowl. *Id.*

¹⁶⁰ Sarah Braley, *The State of Government Meetings*, MEETINGS & CONVENTIONS (Nov. 1, 2015) <https://www.meetings-conventions.com/News/Third-Party/Government-meetings-SGMP-federal-meetings> (explaining that the government may have overreacted to abuses by some government officials such as Jeffrey Neely, who held a General Service Administration training event costing more than \$800,000, resulting in the government establishing a difficult bureaucratic approval process that is lengthy and cumbersome for government employees to navigate).

¹⁶¹ 41 C.F.R. § 300-1.1 (2022).

¹⁶² *Id.* § 300-1.2.

resources.¹⁶³ Striking an appropriate balance to prevent these abuses while facilitating government employees to conduct necessary training will continue to be difficult.

5. Misuse of Government Position

Similar to the rules regulating the use of government resources, an employee must not use his public office for his own private gain, or for that of persons or organizations with which he is associated personally.¹⁶⁴ Misuse of one's government position is one of the most

¹⁶³ Lillian Cunningham, *Resigned. The Fast Fall of a Washington Career*, WASH. POST (Apr. 25, 2014, 10:20 AM), <https://www.washingtonpost.com/news/on-leadership/wp/2014/04/25/resigned-martha-johnsons-fast-fall-from-power-at-the-gsa/> [https://perma.cc/B642-CE2E]. The General Services Administration hosted a training conference that made national news since it cost taxpayers \$823,000 for 300 employees and included costs for eight site visits to pick a hotel, a \$7000 sushi tab, and hiring a mind reader. The incident resulted in Martha Johnson, the head of the GSA, resigning. *See id.*

¹⁶⁴ 5 C.F.R. § 2635.702 (2022).

common¹⁶⁵ conflict of interest violations.¹⁶⁶ The temptation of using one's official position to further one's personal objectives is clear¹⁶⁷ and steps must be taken by the government to mitigate these risks.¹⁶⁸

¹⁶⁵ See, e.g., *Misuse of Position Most Common Ethics Violation, Says OGE*, FEDWEEK (July 16, 2019), <https://www.fedweek.com/federal-managers-daily-report/misuse-of-position-most-common-ethics-violation-says-oge/> [<https://perma.cc/DXN4-FJNN>] (explaining that “[f]orty agencies reported taking a total of 1,077 disciplinary actions, 623 of them involving misuse of position. That includes prohibitions against using public office for the private gain of themselves, friends, relatives or other associates; using nonpublic information for private gain; use of duty time for other than authorized purposes; and unauthorized use of government property.”); see, e.g., Coral Davenport et. al., *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html> [<https://perma.cc/G53D-MGTV>] (noting that in 2018, the administrator of the Environmental Protection Agency, Scott Pruitt, resigned for allegedly enlisting aides to obtain special favors for him and his family, such as reaching out to the chief executive of Chick-fil-A to help Pruitt’s wife open a franchise).

¹⁶⁶ See, e.g., Eli Stokols, *Interior Secretary Ryan Zinke, Under a Cloud of Scandal, is Forced Out*, L.A. TIMES (Dec. 15, 2018, 6:49 AM), <https://www.latimes.com/politics/la-na-pol-trump-zinke-departs-20181215-story.html> [<https://perma.cc/G99A-UA47>]. Interior Secretary Ryan Zinke resigned amid an investigation into whether he personally benefited from a Montana development deal linked to energy giant Halliburton. Allegedly, Zinke improperly used taxpayer funds to meet with Halliburton’s chairman to discuss the deal. Furthermore, he was accused of using more than \$25,000 in taxpayer funds for a vacation. See *id.*

¹⁶⁷ See, e.g., *Fitch v. State*, 851 So. 2d 103 (Ala. Crim. App. 2001). Jerry Fitch, the elected county commissioner for Pickens County, was convicted of using his public office for personal gain, aiding and abetting another in using his public position for personal gain, and first-degree theft. Fitch was found to have used his position to earn a financial profit from the closing of a landfill. See *id.* See, e.g., *State Ethics Comm’n v. Antonetti*, 780 A.2d 1154, 1157-59 (Md. 2001). Robert Antonetti served as the Administrator of the

B. Intentional Obstruction of Investigations

In addition to establishing clear conflict of interest laws that can be practically enforced to hold government officials accountable, special steps must be taken to prevent the intentional obstruction of investigations.¹⁶⁹ Obstruction is a serious offense with roots in the

Board of Supervisors of Election (“the Board”) in a Maryland county. On separate occasions, he hired his wife and children to work on the Board for different jobs, such as a book runner, voting machine technician, and election clerk. This was in direct violation of a Maryland statute regarding the Public Ethics Law. *See, e.g.,* *Rampey v. State*, 415 So. 2d 1184, 1185 (Ala. Crim. App. 1982). The Alabama Ethics Act prohibited acts of the defendant who, while the mayor of the city, bought lumber for his personal use, had his invoice doctored, and instructed the city clerk to pay for the purchase. *See id.* In addition, the mayor persuaded the city council to approve the city’s payment by falsely telling them that the lumber would be used to build a concession stand in a public park. *See id.*

¹⁶⁸ *See, e.g.,* Jodi Wilgoren, *Trial Shows Ex-Governor in 2 Lights*, N.Y. TIMES (Sept. 29, 2005), <https://www.nytimes.com/2005/09/29/us/trial-shows-former-illinois-governor-in-two-lights.html> [<https://perma.cc/TW26-DAJL>] (discussing a prosecution that “netted 73 convictions of state officials, political operatives and business leaders”).

¹⁶⁹ *See, e.g.,* Bennett L. Gershman, *Constitutionalizing Ethics*, 38 PACE L. REV. 40, 42 (2017) (discussing the Moreland Act in 2013, which created a commission to investigate public corruption and was later “hampered by infighting, arguments, and accusations, its independence was compromised, and its investigations undermined by pressure from the governor’s office”; proposing prosecuting ethics and incorporating ethic laws into state constitutions as viable mechanisms for enforcement). “New York over the past fifteen years has experienced more scandals, criminal prosecutions, and convictions of lawmakers and other government officials for corruption than any state in the nation Tweaking and tinkering Potemkin-like ethics laws—laws that create a façade of serious ethics oversight—and officials engaging in false bravado to publicize these “sweeping ethics reform” bills only reinforce the public’s cynicism over New York’s broken ethics system.” *Id.*

nation's founding.¹⁷⁰ The first federal obstruction statute, which dates back from 1831, provided for the punishment of "any person or persons who corruptly, or by threats of force, obstruct, or impede, the due administration of justice in any courts of the United States."¹⁷¹ This original obstruction statute has survived with relatively minor modifications.¹⁷² Despite numerous statutes designed to prohibit interference with investigations,¹⁷³ interference continues—especially at the higher levels of government that may not be subject to sufficient checks and balances.¹⁷⁴

¹⁷⁰ Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1277, 1283 (2018).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See, e.g.*, CHARLES DOYLE, CONG. RSCH. SERV., RL34303, OBSTRUCTION OF JUSTICE: AN OVERVIEW OF SOME OF THE FEDERAL STATUTES THAT PROHIBIT INTERFERENCE WITH JUDICIAL, EXECUTIVE, OR LEGISLATIVE ACTIVITIES 1 (2014) (discussing "six general federal obstruction of justice provisions: 18 U.S.C. § 1512 (tampering with federal witnesses), 18 U.S.C. § 1513 (retaliating against federal witnesses), 18 U.S.C. § 1503 (obstruction of pending federal court proceedings), 18 U.S.C. § 1505 (obstruction of pending congressional or federal administrative proceedings), 18 U.S.C. § 371 (conspiracy), and contempt."); *see also* CHARLES DOYLE, CONG. RSCH. SERV., RS22784, OBSTRUCTION OF CONGRESS: AN ABRIDGED OVERVIEW OF FEDERAL CRIMINAL LAWS RELATING TO INTERFERENCE WITH CONGRESSIONAL ACTIVITIES 1 (2010); *see, e.g.*, Leigh Ainsworth et al., *Obstruction of Justice*, 53 AM. CRIM. L. REV. 1551 (2016) (discussing acts that are prosecuted under 18 U.S.C. § 1503).

¹⁷⁴ *See, e.g.*, Hemel & Posner, *supra* note 170, at 1278-79 (discussing actions of former Presidents Trump, Clinton, and Nixon and whether their actions potentially constituted obstruction of justice; pointing out that six of the last nine presidents, or their top aides, were embroiled in obstruction of justice scandals). *See also* Kyle Cheney et al., *Trump Likely Committed Felony Obstruction, Federal Judge Rules*, POLITICO (Mar. 28, 2022, 11:02 PM), <https://www.politico.com/news/2022/03/28/trump-judge-felony-obstruction-insurrection-00020918> [<https://perma.cc/XWT2-B7HN>] (explaining that U.S. District Court Judge David Carter ruled that former President Trump "more

What many consider to be especially disturbing is that some senior government officials are pardoned¹⁷⁵ before being brought to trial, while others are acquitted due to the government's inability to prove obstruction charges.¹⁷⁶ Even worse, other senior government

likely than not' attempted to illegally obstruct Congress as part of a criminal conspiracy when he tried to subvert the 2020 election on Jan. 6, 2021"). See, e.g., Alexander Mallin et al., *DOJ Alleges 'Obstructive Conduct' by Trump's Legal Team in Efforts to Retrieve Classified Records*, ABC NEWS (Aug. 31, 2022, 1:42 AM), <https://abcnews.go.com/Politics/doj-responds-trumps-call-special-master-review-materials/story?id=89044148> (explaining that the government "developed evidence that government records were likely being concealed and removed from the Storage Room [at Mar-a-Lago] and that efforts were likely taken to obstruct the government's investigation") (alteration in original).

¹⁷⁵ See, e.g., Gerald R. Ford Presidential Library & Museum, *President Gerald R. Ford's Proclamation 4311, Granting a Pardon to Richard Nixon* (Sept. 8, 1974), <https://www.fordlibrarymuseum.gov/library/speeches/740061.asp> (pardoning former President Nixon because President Ford believed that "the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States").

¹⁷⁶ See, e.g., Morgan Winsor, *Richard Nixon, Bill Clinton Both Faced Impeachment Over Obstruction of Justice*, ABC NEWS (Sept. 25, 2019, 5:17 PM), <https://abcnews.go.com/US/richard-nixon-bill-clinton-faced-impeachment-obstruction-justice/story?id=47460022> [<https://perma.cc/W86M-HSSN>] (explaining that President Clinton was impeached "on the grounds of perjury and objection of justice in connection with an extramarital affair he had with White House intern Monica Lewinsky."); see, e.g., *Obstruction of Justice*, HISTORY (Aug. 28, 2018), <https://www.history.com/topics/us-government/obstruction-of-justice> [<https://perma.cc/M3TL-3YE3>] (explaining Independent Counsel Kenneth Starr's inability to prove that President Clinton obstructed justice as charged by The House of Representatives); see, e.g., Christina Wilkie & Kevin Breuninger, *Trump Acquitted of Both Charges in Senate Impeachment Trial*, CNBC (Feb. 6, 2020, 4:10 PM), [145](https://www.cnbc.com/2020/02/05/trump-</p></div><div data-bbox=)

officials who are tried and even convicted of obstruction charges are sometimes pardoned¹⁷⁷ or have their sentences commuted.¹⁷⁸ Thus, some senior government officials have been able to evade full accountability to the rule of law.

C. Increasing Protections for Witnesses and Inspectors General

Of the utmost importance to upholding the rule of law, the government must find ways to fiercely protect both the investigators as well as the witnesses who are essential to the process of holding government officials accountable. For example, regardless of their status within the government, investigated officials must not be able to fire those who investigate them or retaliate against witnesses who testify against them without effective checks and balances in place to protect those investigators and witnesses.¹⁷⁹

acquitted-in-impeachment-trial.html [<https://perma.cc/N79L-8YBM>]
(explaining that President Trump was impeached but acquitted on the charge of obstruction of Congress).

¹⁷⁷ See, e.g., Hemel & Posner, *supra* note 170, at 1279 (discussing President George H.W. Bush's pardon of former Defense Secretary Caspar Weinberger who was convicted in the Iran-Contra scandal).

¹⁷⁸ See *id.* (discussing President George W. Bush's commutation of former Vice President Chief of Staff "Scooter Libby's" sentence, after he was tried and convicted for numerous offenses including obstruction of justice); see, e.g., *United States v. Libby*, 432 F. Supp. 2d 81, 82 (D.D.C. 2006).

¹⁷⁹ See, e.g., Nicholas Fandos & Eric Lipton, *Walter Shaub's Ethics Recommendations for the Government*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/politics/walter-shaub-ethics-recommendations.html> [<https://perma.cc/SG9E-MM74>] (summarizing proposals from the former director of the Office of Government Ethics, Walter M. Shaub Jr., including establishing that the director of the Office of Government Ethics may only be fired by the President for cause and with 30 days' notice to Congress, clarifying that the agency has the authority to oversee ethics compliance in all divisions of the Executive Office of the President, requiring political appointees to prepare formal ethics agreements

Even if terminating an investigator or witness is warranted by the government official, the public perception of such a firing by the government official under investigation or even after the investigation has concluded has the likelihood of eroding the public's confidence in the government.¹⁸⁰ To help address this issue, in 2021, Senators reintroduced a bill to bolster protections for inspector generals.¹⁸¹ The bill stated: "Inspector generals are essential to helping Congress save taxpayer dollars and hold government accountable to the American people."¹⁸² These hardworking agency watchdogs must be allowed to do their jobs without political interference in order for justice to be done."¹⁸³

In short, it is paramount to grant watchdogs independence and whistleblowers additional protections. To accomplish this objective, department and agency level inspector generals should be reorganized so that they report directly to the White House Chief of Staff who would have the sole ability to remove such officials (creating "stove-piped"

with their agencies, and requiring federal employees to disclose assets that are placed in discretionary trusts).

¹⁸⁰ See, e.g., James Barragan, *Whistleblowers say Ken Paxton is misleading Texans about his bribery and abuse of office allegations*, TX TRIBUNE (Feb. 22, 2022), <https://www.texastribune.org/2022/02/21/Paxton-whistleblowers-speak-out/> [<https://perma.cc/Y2ZD-G47B>] (explaining that Texas Attorney General Ken Paxton fired "four whistleblowers-former deputy attorneys general James Blake Brickman, Mark Penley, and Ryan Vassar, as well as the office's former director of law enforcement, David Maxwell," after they accused him of bribery and abuse of office).

¹⁸¹ News Release, Senator Chuck Grassley, Senators Reintroduce Bipartisan Bill to Bolster Protections for Inspectors General (Mar. 4, 2021), <https://www.grassley.senate.gov/news/news-releases/senators-reintroduce-bipartisan-bill-to-bolster-protections-for-inspectors-general> [<https://perma.cc/FCV9-MKXG>].

¹⁸² *Id.*

¹⁸³ *Id.*

chains of command).¹⁸⁴ For example, the Department of Defense Inspector General and the Department of State Inspector General would report directly to the White House Chief of Staff to ensure that the departments that they investigate do not have the power to remove them,¹⁸⁵ assuming that such limitations of the President's removal power over these officials do not impede the execution of the President's Article II duties.¹⁸⁶ Meanwhile, lower-level inspector generals would continue to report to the department or agency level inspector generals.

¹⁸⁴ See, e.g., Edward Wong, *Inspector General's Firing Puts Pompeo's Use of Taxpayer Funds Under Scrutiny*, N.Y. TIMES (May 17, 2020), <https://www.nytimes.com/2020/05/17/us/politics/pompeo-inspector-general-steve-linick.html> [<https://perma.cc/8SQ2-RCQJ>] (showing the dangers of allowing government officials under investigation to fire those who investigate them; describing several allegations of misuse of government resources by Secretary of State Mike Pompeo including asking diplomatic security agents to run personal errands, using State Department aircraft on the auspices of official business, and using his official position to engage in partisan political activities). In contrast, by creating stove-pipe chain of commands, independence is maintained since investigators would not work for and could not be fired by those being investigated; see also James MacLaren, *U.S. Army Trial Defense Service Protects Soldiers* (June 9, 2008), https://www.army.mil/article/9744/u_s_army_trial_defense_service_protects_soldiers (explaining that the Trial Defense Service (TDS) operates independently to accomplish its mission, to defend those accused of crimes; TDS operates outside of the control of the local command, eliminating even the appearances of conflicts of interest as local commanders would not be able to take reprisal actions against a defense counsel who achieved an acquittal of a servicemember accused of committing heinous crimes).

¹⁸⁵ See, e.g., Wong, *supra* note 184.

¹⁸⁶ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 495 (2010) (establishing that it is unconstitutional to have two layers of insulation between the executive official and the President since the President may not be able to hold executive officers accountable by removing them from office; explaining that the Court has upheld limited restrictions on the President's removal power where only one level of protected tenure separated the President from the officer exercising executive

Second, similar to the additional protections needed for investigators, whistleblowers also need extra protections. Whistleblowers perform an important service for the public and the Department of Justice when they report evidence of wrongdoing. The reality is that whistleblowers often face retaliation through subterfuge.¹⁸⁷ When the government allows whistleblowers to be punished for performing their duties, it not only destroys accountability and diminishes integrity within the public sector, but also discourages other whistleblowers from coming forward in the future.¹⁸⁸

Ultimately, existing protections are not sufficient. For example, The Military Whistleblower Protection Act provides the following:

- (1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing-
.....
- (B) a communication that is . . . made (or prepared to be made) to-
 - (i) a Member of Congress;
 - (ii) an Inspector General[;] . . .

power—for example, the “President—or a subordinate he could remove at will—decided whether the officer’s conduct merited removal under the good-cause standard.”). *See also List of Court Cases Relevant to Executive Appointment and Removal Power*, BALLOTPEDIA (Sept. 6, 2022) https://ballotpedia.org/List_of_court_cases_relevant_to_executive_appointment_and_removal_power (providing a list of relevant removal powers cases).

¹⁸⁷ Meghann Myers, *How the Army Officer Who Testified Against Trump Could End Up in a Court-Martial*, MILITARYTIMES (Oct. 31, 2019), <https://www.militarytimes.com/news/your-military/2019/10/31/how-the-army-officer-who-testified-against-trump-could-end-up-in-a-court-martial/> [<https://perma.cc/Y8B5-TGD2>] (addressing the Military Whistleblower Protection Act which “prohibits government officials from interfering with a member of the military in communicating with Congress or an inspector general”).

¹⁸⁸ *Id.*

- (iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;
 - (iv) any person or organization in the chain of command;
 - (v) a court-martial proceeding; or
 - (vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications; or
- (C) testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under subparagraph (A) or (B), or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section.¹⁸⁹

Although the statute is extremely thorough and appears to provide adequate protections, it leaves one huge unanswered question: what happens when those who are supposed to enforce the law and protect the whistleblower are the subject of the investigation?

To address this issue, witnesses who come forward as whistleblowers should be temporarily reorganized to fall under the entity conducting the investigation. However, even this proposal may not fully protect whistleblowers as retaliatory action can take place after investigation are concluded.¹⁹⁰ Thus, Congress should enact an additional private right of action so that whistleblowers who are improperly fired upon the conclusions of such investigations have recourse to right such wrongs. This remedy would help protect future whistleblowers who may come forward.

IV. Increasing Efficiency While Mitigating Conflicts of Interest

“Power unchecked is power abused.”¹⁹¹ The doctrine of separation of powers is embedded in the nation’s fabric. As such,

¹⁸⁹ 10 U.S.C. § 1034.

¹⁹⁰ Jackson & Edelman, *supra* note 118 (discussing the firing of impeachment witnesses after President Trump's impeachment acquittal).

¹⁹¹ Jerry Spangler, *Power Unchecked Is Power Abused*, DESERT NEWS (Oct. 23, 1995) [https:// www.deseret.com/1995/10/23/19200369/power-unchecked-is-power-abused](https://www.deseret.com/1995/10/23/19200369/power-unchecked-is-power-abused).

legislative and policy changes are warranted to improve the running of the government efficiently, while protecting Servicemembers, government officials, and society from the abuses that accompany unchecked power.

A. A More Practical Cost Sharing Model

The government needs to modernize its rules to allow for a limited allowance of personal usage of government personnel, equipment, and housing by incorporating a cost-sharing model for additional costs incurred by government personnel for limited personal usage. The government should follow the private sector's allowance for employees' use of non-secure mobile phones for personal use as long as personnel pay any associated additional costs for such usage, such as the cost to make or receive personal international phone calls while traveling abroad.

Moreover, government officials should be allowed to use aides for limited personal tasks such as walking their dogs, helping with Christmas cards, and holding networking events as long as the government officials reimburse the government for these costs within a reasonable period of time (e.g., ninety days of the event).¹⁹² This

¹⁹² See, e.g., OFF. OF INSPECTOR GEN., U.S. DEP'T OF STATE, ESP-21-02, REVIEW OF ALLEGATIONS OF MISUSE OF DEPARTMENT OF STATE RESOURCES (April 2021), https://www.stateoig.gov/system/files/esp_21-02_-_review_of_allegations_of_misuse_of_department_of_state_resources.pdf [<https://perma.cc/6ACT-PPFE>] (finding "that both Secretary and Mrs. Pompeo requested that the political appointee and other employees in the Office of the Secretary undertake work of a personal nature, such as picking up personal items, planning events unrelated to the Department's mission, and conducting such personal business as pet care and mailing personal Christmas cards. OIG found that such requests were inconsistent with Department ethics rules and the Standards of Ethical Conduct for Employees of the Executive Branch."); see also Lara Jakes & Pranshu Verma, *Dog Care, Hair Appointments and Restaurant Reservations: The Odd Jobs of State Dept. Aides Under Mike Pompeo*, N.Y. TIMES (July 27, 2001),

allowable limited usage of government personnel, equipment, and housing should result in increased efficiency and security.¹⁹³ The costs should be based on an established schedule based on the grade of the employee. For example, use of a GS-14 should be more expensive than use of a GS-9. When evaluating this course of action, it is important to realize that similar types of usage of government personnel, such as to facilitate communication between government officials and their spouses, is already occurring to some degree in government for reasons such as security and record keeping.¹⁹⁴ As a result, establishing clearer ground rules and limitations makes sense.

Furthermore, the burden of proof should be on the government officials to justify in official disclosures that their use of government

<https://www.nytimes.com/2021/04/16/us/mike-pompeo-state-department-report.html> [<https://perma.cc/U6FZ-T23K>]; *see, e.g.*, Mike Conte et al., *Pompeo's Wife Emailed State Department Staff for Help with Personal Christmas Cards, Source Says*, CNN (Sept. 15, 2020), <https://www.cnn.com/2020/09/14/politics/susan-pompeo-christmas-cards/index.html> [<https://perma.cc/CCU6-CBDF>] (discussing Secretary Pompeo's use of government personnel to hold Madison Dinners and Secretary Pompeo's wife's use of government personnel to assist with Christmas cards).

¹⁹³ Nahal Toosi, *Pompeo's Housing Request Set Off Legal Alarm Bells, Memo Shows*, POLITICO (Aug. 20, 2020, 4:30 AM), <https://www.politico.com/news/2020/08/20/pompeo-housing-request-legal-398821> [<https://perma.cc/D6FL-4VUJ>] (discussing Secretary Pompeo's payment of "fair market value" for his use of Army housing at Fort Myer in Virginia for purposes including security since the neighborhood had "24/7 controlled access . . . making it harder for those seeking to surveil" Secretary Pompeo).

¹⁹⁴ *See, e.g.*, Talia Lakritz, *Doug Emhoff Reportedly Isn't Allowed to Text Kamala Harris, So They Communicate Through Staff Instead*, INSIDER (Feb. 16, 2022, 6:39 PM), <https://www.insider.com/kamala-harris-doug-emhoff-cant-text-2022-2> [<https://perma.cc/66XW-27QN>] (explaining that aside "from cyber security risks, texting on government-issued phones present an issue because the Presidential Records Act requires that [the] administration archive all written communications").

personnel was reasonable under the circumstances and that they have reimbursed the government within the time period for compliance, similar to a taxpayer's burden to substantiate payment of their federal income taxes.¹⁹⁵ Intentional and negligent failures to comply, which can be detected with the help of third parties reporting such abuses,¹⁹⁶ should result in penalties and interest similar to those established by the Internal Revenue Code for failure to comply with income tax requirements. Furthermore, additional special funds should be established to facilitate networking and diplomatic functions where the sponsor of the event should be required to pay for any costs not authorized as determined by an established legal review process.¹⁹⁷

For purposes of efficiency, the government should allow for a small amount (e.g., \$1000 a year) similar to a federal income tax standard deduction to cover de minimis usage of government personnel

¹⁹⁵ See, e.g., *What Does it Mean that Taxes are Voluntary*, TURBOTAX (Aug. 24, 2022, 11:22 AM) <https://turbotax.intuit.com/tax-tips/general/what-does-it-mean-that-taxes-are-voluntary/L5cjhVlhh> (explaining that the U.S. tax system is “voluntary” in the sense that the calculation of taxes owed are not the federal government’s responsibility but rather the responsibility of taxpayers who are expected to comply with the tax code, report income, and pay taxes owed).

¹⁹⁶ See, e.g., *Whistleblower Office*, I.R.S. (Sept. 7, 2022) <https://www.irs.gov/compliance/whistleblower-office> (explaining that individuals can use I.R.S. Form 211 to report alleged tax noncompliance and receive awards under I.R.C. § 7623 as long as “specific and credible information regarding tax underpayments or violations of internal revenue laws” are reported and lead to proceeds being collected).

¹⁹⁷ See, e.g., U.S. DEP’T OF THE ARMY, REGUL. 37-47, OFFICIAL REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY, PARA. 2-1 (Oct. 14, 2020), https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN30174-AR_37-47-000-WEB-1.pdf [<https://perma.cc/9TFX-UQPQ>] (providing .0012 official representation funds (ORF) to pay for receptions and participation expenses at DOD-sponsored events for the purpose of extending official courtesies to authorized guests of the United States, DOD, and the Department of the Army; requiring legal reviews of requests).

and equipment. Government officials should be required to establish escrow accounts to cover the costs of their use of government personnel, which should not exceed certain thresholds (e.g., \$10,000 a year). Congress could require substantiation of these benefits, namely by maintaining these records throughout the year, similar to domicile to duty transportation records for purposes of government audits. Moreover, gray areas such as spousal travel of government officials should be clarified to avoid the perception of wrongdoing as government officials should be held to a high standard due to the need to maintain an acceptable level of public trust.¹⁹⁸ Care must be taken at all times to ensure that official participation by spouses of government officials produce a meaningful benefit so that the public is properly served by the expenditure of such funds.¹⁹⁹

B. Fiduciary Standards and Avoiding the Appearances of Impropriety

At a minimum, trustee fiduciary standards should apply to those in government service with applicable civil and criminal remedies for breaches of the duties of loyalty, prudence, impartiality, and informing/accounting.²⁰⁰ In fact, to ensure that the general public does

¹⁹⁸ See, e.g., Michelle Kosinski, *Susan Pompeo's Travels During Shutdown Anger Some Diplomats, Sources Say*, CNN (Jan. 19, 2019, 12:08 PM), <https://www.cnn.com/2019/01/18/politics/pompeo-wife-middle-east-trip/index.html> [<https://perma.cc/3HSC-D3LE>]. “At a time when most State Department staff weren’t allowed to travel for work and some weren’t even allowed to use their work phones, Secretary of State Mike Pompeo’s wife Susan embarked on an eight-day trip with her husband, requiring unpaid staffers to prepare and support her across the Middle East.” *Id.* It is “a gray area” and “according to Retired Rear Adm. John Kirby, a CNN Military & Diplomatic Analyst and former State Department spokesperson, . . . it is not unusual for secretaries’ spouses to travel with them overseas.” *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 UNIV. ILL. L. REV. 57 (2012) Fiduciary theory provides an appropriate basis for whether current ethical

not lose faith in those who govern them, avoiding any appearance of impropriety is arguably even more important than government officials simply staying within the limits of the law. Accordingly, government officials should act in a manner that comports with their common-law fiduciary duties.²⁰¹ As former Special Watergate Prosecutor Archibald Cox stated:

A public official should not mix personal financial gain with the exercise of official power or influence High officials who violated these precepts have, upon discovery, been severely criticized and forced to resign . . . [For example, when] it became known that Associate Justice Abe Fortas had accepted \$20,000 from financier Louis Wolfson . . . he was forced to resign from the Supreme Court even though Justice Fortas neither . . . intervened [n]or promised to intervene on Wolfson's behalf. When it became known that Sherman Adams, the senior White House aide to President Eisenhower, had accepted [valuable gifts] . . . from Bernard Goldfine, a textile executive who had matters pending before other parts of the government, Sherman Adams was forced to resign, even though he had committed no crime. Senator Barry Goldwater, a leader in forcing Adams' resignation, succinctly stated . . . "There is much more to [the] high standard of public officials than merely staying within the law It is a question for moral purity in public service."²⁰²

regulations are too relaxed, adequate, or overly severe. The fiduciary methodology should apply in the following areas of regulation: restrictions on government employees' receipt of gifts, their outside financial interests, and their receipt of compensation for non-expressive and expressive conduct.

Id.

²⁰¹ Vincent R. Johnson, *The Fiduciary Obligations of Public Officials*, 9 ST. MARY'S J. ON LEGAL MAL. & ETHICS 298, 324-25 (2019).

²⁰² *Confirmation of Edwin Meese III to be Attorney General of the United States: Hearing Before the S. Comm. On the Judiciary*, 99th Cong. S. Hrg. 99-108 (1985) (Replica of original) (presenting his objections to the nomination of Edwin Meese III to be Attorney General of the United States,

In short, government officials must act in the best interests of the public similarly to how a trustee acts in the best interests of a trust's beneficiaries, and government officials should strive to avoid any appearance of impropriety to ensure that the public maintains some level of faith in its government.²⁰³

C. Expanding the Thrift Savings Plan as Part of a Possible Solution

To help government officials act first and foremost in the public's interest rather than their own interest, Congress should expand the Thrift Savings Plan (TSP) so that in addition to its retirement funds,²⁰⁴ the Thrift Board would be authorized to operate non-retirement funds,²⁰⁵ a Thrift Savings Plan B, for government officials. This new program would serve as a safe harbor so that government officials could divest themselves of their personal financial interests and re-invest their proceeds in TSP's broadly based index funds to avoid

Archibald Cox, former Special Watergate Prosecutor and former Solicitor General of the United States, explained his rationale to the Judiciary Committee).

²⁰³ See, e.g., *Public Trust in Government: 1958-2021*, PEW RSCH. CTR. (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/> [<https://perma.cc/R7NP-GAPL>] (showing that public trust in government remains low with only about one-quarter of Americans saying that "they can trust the government in Washington to do what is right 'just about always' (2%) or 'most of the time' (22%)" on Apr. 3, 2022).

²⁰⁴ See, e.g., 5 U.S.C. §§ 8351, 8401-8480 (governing the Thrift Savings Plan as a retirement plan for members of the government).

²⁰⁵ See, e.g., 10 U.S.C. § 1035 (establishing the Savings Deposit Program which allows deployed members of the armed forces to deposit funds in the Treasury and earn up to 10% interest on the deposits which are kept as a separate fund and accounted for in the same manner as public funds). The success of the Savings Deposit Program shows that the government has been able to receive and invest non-retirement funds for the benefit of government employees similar to the suggested safe harbor proposal.

even the appearance of impropriety due to conflicts of interest. This objective could be accomplished by enacting statutes such as 5 U.S.C. § 8437B to state the following:

§8437B. Thrift Savings Fund B

(a) There is established in the Treasury of the United States a Thrift Savings Fund B for non-retirement funds.

(b) The Thrift Savings Fund B consists of the sum of all non-retirement fund amounts contributed by government officials who have divested their personal financial holding in order to hold government positions, increased by the total net earnings from investments of sums in the Thrift Savings Fund B or reduced by the total net losses from investments of the Thrift Savings Fund B, and reduced by the total amount of payments made from the Thrift Savings Fund B (including payments for administrative expenses).

(c) The sums in the Thrift Savings Fund B shall remain available-

(1) to invest in non-retirement funds under section 8438 of this title;

(2) to pay the administrative expenses of the Federal Retirement Thrift Investment Management System prescribed in subchapter VII of this chapter;

(3) and to purchase insurance as provided in section 8479(b)(2) of this title.

(d) Administrative expenses incurred to carry out this subchapter and subchapter VII of this chapter shall be paid out of net earnings in such Fund.

(e)(1) Subject to subsection (d) and paragraph (2), sums in the Thrift Savings Fund credited to the account of a government official or former government official may not be used for, or diverted to, purposes other than for the exclusive benefit of the government official, or former government official, or his beneficiaries under this subchapter.

(2) Moneys due or payable from the Thrift Savings Fund B to any individual and, in the case of an individual who is a government official (or former government official), the balance in the account of the government official (or

former government official) shall be subject to legal process for the enforcement of the individual's legal obligations including obligations to provide child support or make alimony payments as provided in section 459 of the Social Security Act (42 U.S.C. 659), the enforcement of an order for restitution under section 3663A of title 18, forfeiture under section 8432(g)(5) of this title, an obligation of the Executive Director to make a transfer under section 415(d)(3) of the Congressional Accountability Act of 1995 (2 U.S.C. 1415(d)(3)), or an obligation of the Executive Director to make a payment to another person under section 8467 of this title, and shall be subject to a Federal tax levy under section 6331 of the Internal Revenue Code of 1986.

(f) All sums contributed to the Thrift Savings Fund B by a government official and all net earnings in such Fund attributable to investment of such sums are held in such Fund B in trust for such government official.

This new statute would supplement 5 U.S.C. § 8437, which establishes the Thrift Savings Plan as the government's primary retirement defined contribution plan.²⁰⁶

²⁰⁶ 5 U.S.C. § 8437. For example, 5 U.S.C. § 8437 currently states:

- (a) There is established in the Treasury of the United States a Thrift Savings Fund.
- (b) The Thrift Savings Fund consists of the sum of all amounts contributed under section 8432 of this title and all amounts deposited under section 8479(b) of this title, increased by the total net earnings from investments of sums in the Thrift Savings Fund or reduced by the total net losses from investments of the Thrift Savings Fund, and reduced by the total amount of payments made from the Thrift Savings Fund (including payments for administrative expenses).
- (c) The sums in the Thrift Savings Fund are appropriated and shall remain available without fiscal year limitation-
 - (1) to invest under section 8438 of this title;
 - (2) to pay benefits or purchase annuity contracts under this subchapter;

- (3) to pay the administrative expenses of the Federal Retirement Thrift Investment Management System prescribed in subchapter VII of this chapter;
 - (4) to make distributions for the purposes of section 8440(b) of this title;
 - (5) to make loans to employees and Members as authorized under section 8433(g) of this title; and
 - (6) to purchase insurance as provided in section 8479(b)(2) of this title.
- (d) Administrative expenses incurred to carry out this subchapter and subchapter VII of this chapter shall be paid first out of any sums in the Thrift Savings Fund forfeited under section 8432(g) of this title and then out of net earnings in such Fund.
- (e)(1) Subject to subsection (d) and paragraphs (2) and (3), sums in the Thrift Savings Fund credited to the account of an employee, Member, former employee, or former Member may not be used for, or diverted to, purposes other than for the exclusive benefit of the employee, Member, former employee, or former Member or his beneficiaries under this subchapter.
- (2) Except as provided in paragraph (3), sums in the Thrift Savings Fund may not be assigned or alienated and are not subject to execution, levy, attachment, garnishment, or other legal process. For the purposes of this paragraph, a loan made from such Fund to an employee or Member shall not be considered to be an assignment or alienation.
- (3) Moneys due or payable from the Thrift Savings Fund to any individual and, in the case of an individual who is an employee or Member (or former employee or Member), the balance in the account of the employee or Member (or former employee or Member) shall be subject to legal process for the enforcement of the individual's legal obligations to provide child support or make alimony payments as provided in section 459 of the Social Security Act (42 U.S.C. 659), the enforcement of an order for restitution under section 3663A of title 18, forfeiture under

Furthermore, sections such as 5 U.S.C. § 8440 could be amended to address the applicable taxable concerns of adding this non-retirement account safe harbor option.²⁰⁷ For example, the statute could be

section 8432(g)(5) of this title, an obligation of the Executive Director to make a transfer under section 415(d)(3) of the Congressional Accountability Act of 1995 (2 U.S.C. 1415(d)(3)), or an obligation of the Executive Director to make a payment to another person under section 8467 of this title, and shall be subject to a Federal tax levy under section 6331 of the Internal Revenue Code of 1986. For the purposes of this paragraph, an amount contributed for the benefit of an individual under section 8432(c)(1) (including any earnings attributable thereto) shall not be considered part of the balance in such individual's account unless such amount is nonforfeitable, as determined under applicable provisions of section 8432(g).

(f) The sums in the Thrift Savings Fund shall not be appropriated for any purpose other than the purposes specified in this section and may not be used for any other purpose.

(g) All sums contributed to the Thrift Savings Fund by an employee or Member or by an employing agency for the benefit of such employee or Member and all net earnings in such Fund attributable to investment of such sums are held in such Fund in trust for such employee or Member.

²⁰⁷ 5 U.S.C. § 8440. For example, 5 U.S.C. § 8440 currently states:

(a) For purposes of the Internal Revenue Code of 1986-

(1) the Thrift Savings Fund shall be treated as a trust described in section 401(a) of such Code which is exempt from taxation under section 501(a) of such Code;

(2) any contribution to, or distribution from, the Thrift Savings Fund shall be treated in the same manner as contributions to or distributions from such a trust; and

(3) subject to section 401(k)(4)(B) of such Code and any dollar limitation on the application of section 402(a)(8) of such Code, contributions to the Thrift Savings Fund shall not

amended to state, "(a) Other than as provided in subsection (d), for purposes of the Internal Revenue Code of 1986-" and to add new subsection (d) to state: "Funds contributed by government officials to the Thrift Savings Fund B in order to divest themselves of their personal financial holdings subject to . . . shall be treated as non-retirement assets subject to the Internal Revenue Code."

Upon taking office, government officials would be allowed to invest proceeds of previously owned stocks, bonds, and business interests in these non-retirement TSP funds as a safe harbor option to avoid conflicts of interests. However, government officials would need to withdraw these non-retirement account funds within ninety days after leaving office.

By choosing to invest in this safe harbor option and complying with specific public disclosure requirements, government officials

be treated as distributed or made available to an employee or Member nor as a contribution made to the Fund by an employee or Member merely because the employee or Member has, under the provisions of this subchapter and section 8351 of this title, an election whether the contribution will be made to the Thrift Savings Fund or received by the employee or Member in cash.

(b) Nondiscrimination requirements.-Notwithstanding any other provision of law, the Thrift Savings Fund is not subject to the nondiscrimination requirements applicable to arrangements described in section 401(k) of title 26, United States Code, or to matching contributions (as described in section 401(m) of title 26, United States Code), so long as it meets the requirements of this section.

(c) Subsection (a) shall not be construed to provide that any amount of the employee's or Member's basic pay which is contributed to the Thrift Savings Fund shall not be included in the term "wages" for the purposes of section 209 of the Social Security Act or section 3121(a) of the Internal Revenue Code of 1986.

Id.

would be able to protect themselves against the appearance of acting in their own interest. In the alternative, government officials could risk civil and criminal prosecution by using blind trusts²⁰⁸ or maintaining their personal financial business interests if they or their businesses violated certain restrictions, such as failing to make timely and accurate disclosures, failing to pay applicable interest and penalties, or inappropriately receiving government funds over certain de minimis thresholds.

1. Attracting and Retaining Talented Government Officials

Establishing a safe harbor option is important because ethical rules could become so complex as to dissuade citizens from becoming government officials to avoid potential liability.²⁰⁹ Thus, by creating a

²⁰⁸ See Ethics in Government Act of 1978, 5 U.S.C. app. § 102(f). See AMERICAN LAW DIVISION, CONG. RSCH. SERV., RS21656, THE USE OF BLIND TRUSTS BY FEDERAL OFFICIALS (2005), https://www.everycrsreport.com/files/20050923_RS21656_0dc42520ee4676900f1a705040b0dfd75144bb7f.pdf [<https://perma.cc/27GH-QGHP>] (explaining the use of blind trusts and the effects of the Ethics in Government Act of 1978 which established uniform requirements such as prior approval, timeline and contents of the initial filing, an independent trustee, an unconditional transfer of assets, a prohibition of certain assets, prohibitions on communications between the trustee and beneficiaries, prohibitions on the beneficiaries attempting to gain information about the assets in the trust, and enforcement by the attorney general).

²⁰⁹ See, e.g., Bill McAllister, *Runyon to Pay \$27,550, Settling Conflict-of-Interest Case*, WASH. POST (Oct. 31, 1997), <https://www.washingtonpost.com/archive/politics/1997/10/31/runyon-to-pay-27550-settling-conflict-of-interest-case/a20e0d0e-bfd3-4cbf-aef0-152468877eea/> [<https://perma.cc/4YDQ-AQMM>]; see, e.g., ENCYCLOPEDIA OF ETHICAL FAILURE, *supra* note 55; see, e.g., Sheila Kaplan, *Dr. Brenda Fitzgerald, C.D.C. Director, Resigns Over Tobacco and Other Investments*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/health/cdc-brenda-fitzgerald-resigns.html>

safe harbor option in addition to clear ethical rules, government officials would not fear the potential liabilities of continued government service because they would know that they would be protected from even the appearance of impropriety.

Similar to the need to establish a safe harbor and clear ethical rules in order to attract and retain top talent, the government should ensure that ethical rules provide reasonable limitations without overly restricting former government officials in their subsequent employment in the private sector. For example, 18 U.S.C. § 207(a)(1) already provides numerous restrictions on former officers, employees, and elected officials of the executive and legislative branches.²¹⁰

[<https://perma.cc/K24F-YSC5>]. Director of the Centers for Disease Control and Prevention resigned due to her investments in tobacco and health care companies that posed potential conflicts of interest. Fitzgerald pledged to avoid any CDC work that would affect these holdings; however, many congressmembers were concerned that her investments have compromised her position on a variety of agency matters. *Id. See, e.g.,* Sheila Kaplan, *New C.D.C. Chief Saw Coca-Cola as Ally in Obesity Fight*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/health/brenda-fitzgerald-cdc-coke.html> [<https://perma.cc/W8G2-SZ8Y>]. When she was the health commissioner of Georgia, Dr. Fitzgerald answered the obesity crisis by partnering with Coca-Cola to create Power Up for 30, which was a program pushing schools to give students 30 minutes extra of exercise a day. *Id.* She received backlash from public health advocates for having accepted \$1 million from Coca-Cola when these sugary drinks contribute to weight gain. *See id.*

²¹⁰ 18 U.S.C. § 207(a)(1) (2022) (addressing situations where a previous government official "knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department or agency of the United States, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter . . . (B) in which the person participated personally and substantially as such officer or employee . . .]. *See supra* text accompanying note 73.

2. Components of an Expanded Thrift Savings Plan Solution

Establishing an expanded Thrift Savings Plan safe harbor could help remove natural temptations to favor one's own interests at the expense of the public by limiting investments, requiring public disclosures to increase transparency, restricting businesses owned by government officials from receiving government funds, and requiring those businesses to disgorge income and profits where appropriate. Government officials would have the flexibility to choose not to take advantage of the TSP safe harbor but would risk incurring both civil and criminal liability if they commit a violation.

i. Limiting Investment While Providing a Safe Harbor Option

The principal component of this expanded TSP solution to mitigate conflicts of interest includes limiting investment of government officials while providing such officials with a safe harbor option.²¹¹ First, regardless of whether they choose to take advantage of the safe

²¹¹ See, e.g., Gregory H. Shill, *Congressional Securities Trading*, 96 IND. L.J. 313 (2020) (discussing the risks associated with Members of Congress trading stocks and bonds, including policy distortion, lawmakers' personal investments possibly influencing their official acts, and insider trading, congressmen exploiting access to confidential information for personal gain). The current framework, which is based on common law fiduciary principles may be a poor fit. *Id.* A taxonomy of congressional securities trading (CST) and developing a comprehensive prescription to manage it may be one way to address this issue. Specifically, Rule 10b5-1 plans (which disclose trades ex ante) and the section 16(b) short-swing profits rule of the Exchange Act (which disgorges illicit profits ex post) should be adapted to the congressional context. *Id.* To further minimize conflicts of interest, lawmakers should be restricted from owning any securities other than Treasuries and passive U.S. index funds. *Id.* "Shortly after passage, the STOCK Act was weakened by amendment, but important STOCK Act prohibitions on trading by Members of Congress (though not their staff) remain in force." *Id.* at 321.

harbor option, all senior government officials and their spouses should be required to divest themselves of stock and bond portfolios in excess of a threshold amount (e.g., \$200,000) within ninety days of taking office, and maintain this status until ninety days after leaving office.²¹² This rule would not apply to government bonds or assets in qualified retirement accounts such as 401(k) and individual retirement accounts as long as the retirement assets were held in passively managed index mutual or exchanged traded funds. To avoid the shortcomings of the STOCK Act, senior government officials impacted would include the President, the Vice-President, Senate-confirmed presidential appointees, congressional members, and appellate judges. In addition, states should be encouraged to pass similar legislation to cover their counterparts at the state level.

Second, government officials and their spouses would be provided the opportunity to take advantage of a safe harbor option, by reinvesting the proceeds of their divested stocks, bonds, and personal

²¹² See, e.g., Warren et al., *supra* note 9 (proposing to ban members of Congress and their spouses from owning and trading stocks, bonds, commodities, futures, and other securities including hedge funds, derivatives, and options that could create conflicts of interest); see, e.g., Camila DeChalus, *Sen. Elizabeth Warren Now Wants to Ban All State Lawmakers and Elected Officials From Trading Corporate Stocks*, MSN (Feb. 16, 2022), <https://www.msn.com/en-us/news/politics/sen-elizabeth-warren-now-wants-to-ban-all-state-lawmakers-and-elected-officials-from-trading-corporate-stocks/ar-AATWK1h?li=BBnbfcL> [<https://perma.cc/S8MC-LNEL>] (quoting Senator Warren that "Public officials should remove all conflicts of interest - whether you're at the federal or state level The public has a right to know that when people in power make decisions, that they're doing it to advance the best interest of the public, not to advance their own personal financial interests."); see, e.g., Darragh Roche, *Nancy Pelosi Makes Huge Flip-Flop Over Stock Trading Ban*, NEWSWEEK (Feb. 2, 2022, 12:30 PM), <https://www.newsweek.com/nancy-pelosi-makes-flip-flop-stock-trading-ban-1677587> [<https://perma.cc/R8WA-FGCX>] (addressing Speaker of the House Nancy Pelosi's revised view that the limitations should apply to all branches of government).

business investments in favor of a limited number of broad-based non-retirement TSP index funds similar to, but separate from, the existing C, S, G, I, and F funds. TSP representatives would need to certify the nature of the funds being invested similar to how rollovers are handled, establish procedures for executing these transactions, and charge the government officials and their spouses appropriate fees to ensure that no additional costs would be incurred by existing retirement TSP fund investors. By having separate retirement TSP and non-retirement TSP vehicles, no changes would be required to the existing TSP retirement program.

Pursuant to 5 C.F.R. § 2634.102(a), officials and their spouses would be able to obtain certificates of divestiture that would allow them to defer recognition of capital gain in certain instances.²¹³ Upon sale or disposition of these new assets, taxpayers would need to pay taxes on any applicable gains. Thus, the overall treatment of the investment would be similar to contributions made to non-deductible traditional IRAs, where taxpayers would need to actively account for their original tax basis to avoid double taxation. Early withdrawal penalties from the fund would not apply, but penalties would apply if taxpayers failed to withdraw funds within ninety days of separation from government service. When withdrawing funds, rollovers to retirement plans would not be allowed since only non-retirement funds would be invested in the safe harbor.

²¹³ 5 C.F.R. § 2634.102(a) (2022); *see also* Houston Keene, *Biden Cabinet Members Avoid Huge Tax Hits Thanks to Little-Known Federal Law*, FOXNEWS (June 4, 2021, 6:41 AM), <https://www.foxnews.com/politics/biden-cabinet-certificates-of-divestiture> [<https://perma.cc/JV2W-KGK2>] (explaining the process of being able to defer capital gains where government officials were "required to sell assets as they enter public service" as long as the gains were reinvested into "less-conflicted interests, such as mutual funds and treasury bonds"; clarifying that the "official deferring capital gains taxes on divested assets would incur the taxes 'when they sell the new investment, not the original one'").

ii. Increasing Disclosure Requirements to Increase Transparency

To maintain the public's faith that government officials are acting first and foremost in the public's interest, government officials should have additional public disclosure requirements to increase transparency.²¹⁴ Specifically, regardless of whether they take advantage of the TSP safe harbor, government officials and their spouses should have to publicly disclose in official filings any significant changes in their positions (e.g., more than a ten percent change of their portfolios over any three month time period), at least fourteen days *before* completing the applicable transaction, if their cumulative investment portfolios exceeded a certain threshold (e.g., \$1 million). For government officials who are single, the threshold amount should be half that amount. Therefore, government officials would be less capable of exploiting knowledge gained during government service for their own personal interests at the expense of the public welfare. This change would create a fairer playing field by allowing the public to monitor how government officials were actively managing their personal assets despite what those government officials might be telling the public. At the same time, by establishing minimum thresholds for compliance, this proposal would not overly burden average government officials.

iii. Funding Riders and Disgorging Income and Profits

Government officials who choose to retain their business investments and forego the TSP safe harbor should be prevented from

²¹⁴ See, e.g., Charles L. Slamowitz, *Profiteering off Public Health Crises: The Viable Cure for Congressional Insider Trading*, 77 WASH. & LEE L. REV. ONLINE 31, 45 (2020), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss1/3/> [<https://perma.cc/5PJA-MZS4>] (providing a solution to curtail congressional insider trading during public health crises by enacting pandemic-specific congressional disclosure requirements, “a more sensible solution than prosecuting all congresspersons alleged of insider trading, barring them from owning any securities, or doing nothing”).

having their businesses receive government funds at the public's expense. To accomplish this objective, funding riders²¹⁵ should be used where businesses of government officials could receive government funds only under special circumstances—such as where the Government Accountability Office has approved transactions in advance.²¹⁶ Further, where government officials own businesses which receive government funds, such businesses should be required to disgorge both income and profits inappropriately received.²¹⁷ Focusing purely on profits may not be sufficient to hold government officials

²¹⁵ See Russell Spivak, *Purse Strings and Self-Dealings: How Congress Can Use the Budget to Prevent the Executive Branch's Ethics Violations*, 98 TEX. L. REV. 131, 132-33 (2020), <https://texaslawreview.org/wp-content/uploads/2020/02/Spivak-TLRO-V98.pdf> [<https://perma.cc/53CT-2BT4>] (describing how funding riders, “negative use of appropriations” could be used to “restrict the outlay of federal funds” to companies owned by government officials in order to “prevent federal ethics violations at the source”); see also, *Rider*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a rider as an “attachment to some document, such as a legislative bill or an insurance policy,” that describes an amendment to that document).

²¹⁶ See, e.g., Spivak, *supra* note 216, at 132 (discussing possible ethical violations by the President and the members of his administration improperly using taxpayer money for their benefit such as using taxpayer funds to stay in the President's hotels). Unfortunately, the President and many other high-level officials are currently practically immune to ethical regulations. *Id.*

²¹⁷ See, e.g., Tamara Keith, *How Congress Quietly Overhauled Its Insider-Trading Law*, NPR (Apr. 16, 2013, 5:12 PM), <https://www.npr.org/sections/itsallpolitics/2013/04/16/177496734/how-congress-quietly-overhauled-its-insider-trading-law> [<https://perma.cc/X5P5-VYXA>]. Congress repealed sections 8(a) and 11(a) of the STOCK Act except for certain officers and employees such as the President, Vice President, members of Congress, congressional candidates, and officers listed in section 5312 or 5313 of Title 5. Act of Apr. 15, 2013, Pub. L. No. 113-7, 127 Stat. 438. Congress also amended section 8(b) of the STOCK Act to eliminate the Act's applicability to congressional staff and the need to maintain databases on the official websites of the House of Representatives and the Senate for the public to view. *Id.*

accountable, as businesses that operate at a loss may still be able to benefit improperly from government funds in order to stay afloat in difficult economic environments.²¹⁸

Businesses where government officials are one-percent or more owners should be barred from receiving any government funds in excess of a de minimis amount (e.g., \$10,000 a year), unless transactions are in the best interests of the government and approved in advance by the Government Accountability Office.²¹⁹ Additionally, boards of directors, officers, partners, and one-percent or more owners receiving more than the specified amount, who intentionally or knowingly fail to take appropriate action by returning all government funds plus interest and penalties within ninety days of receipt, should be subject to criminal prosecution. The interest and penalties would be comparable to those established for the nonpayment of federal income taxes.²²⁰ A significant tax penalty (e.g., up to three times the amount of excess government funds received) would apply and be implemented for those who

²¹⁸ See, e.g., Christina Wilkie, *Trump hid over \$70 million in losses on his DC hotel, House committee report alleges*, CNBC (Oct. 8, 2021, 5:06 PM), <https://www.cnbc.com/2021/10/08/trump-hid-over-70-million-in-losses-on-dc-hotel-house-panel-alleges.html>; see also Meg Cramer, *Government Employees Spend Your Money at Trump Hotels*, WNYCSTUDIOS (June 28, 2018), <https://www.wnycstudios.org/podcasts/trumpinc/episodes/trump-inc-podcast-government-employees-spend-your-money-trump-hotels> [<https://perma.cc/ESM6-FYZM>] (explaining that hundreds of thousands of dollars were spent by government employees at Trump hotels). See also, David Fahrenthold, *Trump campaign committess spent \$1.1 million at Trump properties in the last days of his losing campaign*, WASH. POST (December 4, 2020), <https://www.washingtonpost.com/politics/2020/12/04/trump-spending-properties/> <https://perma.cc/G9RN-JTTN> (alleging that over a million dollars were spent at Trump hotels by political groups).

²¹⁹ See, e.g., Spivak, *supra* note 216, at 141 (discussing the importance of having "an independent, nonpartisan agency that works for Congress" that "examines how taxpayer dollars are spent" to evaluate whether transactions are in the best interest of the government).

²²⁰ See, e.g., 26 U.S.C. § 6651 (2022).

negligently or recklessly fail to comply with these requirements. Hence, repeat violations should be subject to increasing penalties.

If the government fails to hold violators accountable, a private right of action could be available as a recourse.²²¹ Amounts recovered should be split between plaintiffs bringing the action and the U.S. Treasury. Furthermore, funds recovered by the government should be allocated to future government enforcement actions.

Unfortunately, this solution addresses only part of the problem as government officials could still take actions due to their position of public trust that could favor their own business interests without the receipt of any government funds. To address this concern, the change in value of the business holdings should be evaluated over time. For example, if the value of the business increased by more than a set threshold (e.g., 5% of the growth of similar business during the same period), the business should have to pay the excess amount as a tax to the government, unless the government official could prove by clear and convincing evidence that the government official's service did not impact the business's valuation in a positive manner. Small businesses would not be subject to this additional tax if the business's value changed by less than a de minimis amount (e.g., \$100,000 a year). Affected government officials should have to file additional public annual disclosures each year unless they fall under an established threshold (e.g., assets under \$1 million). Further, the government officials would have the burden to show that they were not liable for applicable taxes, interest, or penalties.²²²

V. Conclusion

²²¹ See Spivak, *supra* note 216, at 141-42 (discussing possible private rights of action including the Clayton Antitrust Act and the False Claims Act).

²²² See, e.g., U.S. OFF. OF GOV'T ETHICS, *Public Financial Disclosure Guide*, <https://www.oge.gov/Web/278eGuide.nsf>; U.S. OFF. OF GOV'T ETHICS, OMB No. 3209-0006, CONFIDENTIAL FINANCIAL DISCLOSURE REPORT (2021), [https://www.oge.gov/web/OGE.nsf/0/2026049D943E0C34852585B6005A23CE/\\$FILE/OGE%20Form%20450%20Nov%202021_accessible.pdf](https://www.oge.gov/web/OGE.nsf/0/2026049D943E0C34852585B6005A23CE/$FILE/OGE%20Form%20450%20Nov%202021_accessible.pdf) [<https://perma.cc/ESD5-TTVE>].

The nation must reform its ethical construct to facilitate the efficient operation of government, while simultaneously improving safeguards against the potential abuses of power by government officials. By creating a more effective cost sharing model for personal usage, enhancing separation of powers by creating stove-piped inspector general reporting chains, reducing financial conflicts of interests by limiting investment and creating a safe harbor, protecting witnesses from reprisal, and improving disclosure and accountability measures, the government will be set up to help ensure the success of a free society operating on a more even playing field.