

**A TEMPORARY STOPPER IN THE REVOLVING DOOR:
EXECUTIVE ORDER ETHICS PLEDGES AND THEIR
ROLE IN PROMOTING GOVERNMENT ACCOUNTABILITY
AND INTEGRITY WITHIN THE PRESIDENT’S BRANCH**

CAITLIN-JEAN JURICIC*

INTRODUCTION

For many individuals, Washington, D.C. is a shining symbol of democracy—but for others, it embodies everything wrong with government. Lobbyists. Backdoor politicking. Strong corporate influence. It is because of these things that Washington has become synonymous with the “revolving door of politics.” The colloquialism describes the pattern of behavior of government officials oscillating between public sector service and lobbying on behalf of companies or industries within the private sector.¹ From an outside perspective, this trend may be an inevitable byproduct of the election pendulum swinging back and forth between political parties.² Indeed, when an incumbent party loses its bid for the White House, hundreds of then-current executive branch officials and appointees find themselves facing impending unemployment and are thrust into searching for job opportunities outside the confines of the federal government. There is, however, a more troubling explanation for this phenomenon—namely that individuals are willing to use their time in government for private or personal gain.

This latter account has negatively shaped public opinion in such a way that a majority of individuals now believe that our government is no longer of and for the people, but rather one serving private, corporate interests.³ To demonstrate this declining faith in our democratic institutions, one study found that in 1964, *over 75%* of American respondents stated that they trusted the government to do the right thing; however, in 1995, roughly thirty years later, *only 25%* of Americans

* Juris Doctorate Candidate, Notre Dame Law School, 2022; Bachelor of Arts, Political Science, Minors in History and International Global Studies, Sewanee: University of the South, 2014. Special thanks to Professor Veronica Root Martinez for her introduction to issues surrounding legal ethics and compliance within government service and her guidance during law school. Many thanks to Professor Andrea C. Hatcher for her introduction to the study of government institutions and her mentorship over the years. Lastly, I would like to thank my family and friends for their never-ending support and the staff on the Notre Dame Journal of Law, Ethics & Public Policy for their diligent edits. All errors are my own.

1. See Jordi Blanes i Vidal et al., *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731 (2012).

2. See Kathryn L. Saurack, Note, *The Revolving Door: An Analysis of Post-Government Employment Restrictions on Foreign Representation*, 14 J.L. & POL. 383, 383–84 (1998).

3. See generally Lee Rainie et al., *Trust and Distrust in America*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america/>.

believed this to be true.⁴ And since then, faith in government has only gotten worse.⁵ While public trust in our government institutions has continued to decline over the past forty years for a variety of reasons, “one major factor is certainly the public perception about the way . . . lobbyists work in Washington.”⁶ Consequently, voters have begun looking for presidential candidates who are willing to dismantle the system.

Take, for instance, the 2016 election. Growing public resentment of Washington’s revolving door prompted hundreds of thousands of individuals to flock to then-candidate Donald Trump during the early stages of his presidential campaign on account of his pledge to “drain the swamp.”⁷ In fact, Trump’s unapologetic bashing of the revolving door led the public to believe that change within the Beltway might be imminent if he were to be elected. And once sworn in, it appeared he was serious. During his first week in office, President Trump issued an executive order ethics pledge for executive branch appointees that placed new restrictions on post-employment lobbying, conflicts of interest, as well as extended government contact cool-down periods⁸ once public officials left their positions in the administration.⁹

But Trump was not the first president to try and rid corruption out of the executive branch this way. Ethics pledges like this have been used as early as the Kennedy administration¹⁰ and were readopted by more modern presidencies,¹¹

4. Glenn Harlan Reynolds, *The Ethics Establishment: A Study in Failure*, 82 SOUNDINGS INTERDISC. J. 143, 148 (1999).

5. *See generally* *Americans’ Views of Government: Low Trust, But Some Positive Performance Ratings*, PEW RSCH. CTR. (Sept. 14, 2020), <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/> (noting that only “20% of U.S. adults say they trust the government in Washington to ‘do the right thing’ just about always or most of the time”).

6. James A. Thurber, *The Contemporary Presidency: Changing the Way Washington Works? Assessing President Obama’s Battle with Lobbyists*, 41 PRESIDENTIAL STUD. Q. 358, 369 (2011).

7. Joe Albanese, “*Drain the Swamp*” Means Different Things for Trump Supporters and Speech Regulation Supporters, INST. FOR FREE SPEECH: BLOG (Dec. 6, 2016), <https://www.ifs.org/blog/drain-the-swamp-means-different-things-for-trump-supporters-and-speech-regulation-supporters>.

8. Cooling-off periods prohibit former government employees from representing clients or interests before government agency or officials on matters “previously within the former employee’s official responsibility.” Rafael Gely & Asghar Zardkoohi, *Measuring the Effects of Post-Government-Employment Restrictions*, 3 AM. L. & ECON. REV. 288, 290 (2001).

9. *See* Ethics Commitments by Executive Branch Appointees, Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017).

10. *See* To Provide a Guide on Ethical Standards to Government Officials, Exec. Order No. 10,939, 26 Fed. Reg. 3951 (May 5, 1961).

11. It is important to note, however, that while other former presidents also issued executive orders to address government ethics within their administrations, most of these were limited in scope (e.g., relating to financial disclosures) and did not create binding obligations on the executive officials. Instead, these pledges set forth various “standards” by which the government employees were to conduct themselves. *See, e.g.*, Prescribing Standards of Ethical Conduct for Government Officers and Employees, Exec. Order No. 11,222, 30 Fed. Reg. 6469 (May 11, 1965); Principles of Ethical Conduct for Government Officers and Employees, Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (Apr. 12, 1989).

including the Clinton,¹² Obama,¹³ and Biden¹⁴ administrations. Executive branch officials are, of course, already subject to federal laws and agency policies that address government ethics and the revolving door.¹⁵ Nevertheless, executive order ethics pledges serve a unique role in helping incoming administrations acknowledge the revolving door's negative influence on the integrity of our democracy. Specifically, executive order ethics pledges help demonstrate to the public that the new administration is dedicated to upholding and promoting government accountability and ethics within the executive branch.¹⁶ But if "[t]he ethics of presidents are best understood by looking at the standards they create for those who work for them,"¹⁷ then one might assume that every administration that has issued an ethics pledge would do all it could to uphold its pledge commitments and maintain a culture of ethics and accountability within the branch. These assumptions, however, are wrong. Despite every administration's attempt to place a stopper in the revolving door, each president ultimately derailed their pledge by either (i) waiving various ethics restrictions for certain officials,¹⁸ or (ii) wholly revoking the ethics pledge during that the last moments in office.¹⁹ Thus, the question then becomes what purpose do executive order ethics pledges play if the restrictions themselves are superficial at worst or selectively enforced at best?

Part I of this Note begins by offering background information regarding the revolving door. Specifically, it presents arguments made by advocates on both sides of the argument of revolving door restrictions and examines possible implications of imposing tougher ethics obligations on executive branch officials. In doing so, the Part provides a framework to understand why modern United States presidents may have implemented executive order ethics pledges.

12. See Ethics Commitments by Executive Branch Appointees, Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 22, 1993).

13. See Ethics Commitments By Executive Branch Personnel, Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009).

14. See Ethics Commitments by Executive Branch Personnel, Exec. Order No. 13,989, 86 Fed. Reg. 7029 (Jan. 20, 2021).

15. See, e.g., 18 U.S.C. § 207; 5 C.F.R. § 2641 (2008).

16. In his remarks during the signing ceremony for his executive order ethics pledge, President Obama noted that the underlying purpose in adopting the pledge was to help "restore th[e] [people's] faith in government, . . . build [] a more responsible, more accountable government, . . . [and] close the revolving door that lets lobbyists come into government freely, and . . . use their time in public service as a way to promote their own interests over the interests of the American people." Remarks to White House Senior Staff, 2009 DAILY COMP. PRES. DOC. 12 (Jan. 21, 2009) [hereinafter Obama Signing Remarks].

17. Stuart C. Gilman, *Presidential Ethics and the Ethics of the Presidency*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 58, 58 (1995).

18. See Julie Bykowitz, *White House Says It Granted 14 Ethics Waivers to Staff*, PBS NEWS (May 31, 2017, 10:39 PM), <https://www.pbs.org/newshour/politics/white-house-says-granted-14-ethics-waivers-staff>.

19. See John Mintz, *Clinton Reverses 5-Year Ban on Lobbying by Appointees*, WASH. POST (Dec. 29, 2000), <https://www.washingtonpost.com/archive/politics/2000/12/29/clinton-reverses-5-year-ban-on-lobbying-by-appointees/e5a0571f-5c54-4988-adc6-5571a7557e83/>; Brian Slodysko, *Trump Frees Former Aides from Ethics Pledge, Lobbying Ban*, ASSOCIATED PRESS (Jan. 20, 2021), <https://apnews.com/article/donald-trump-lobbying-e911209abab83899eadd18b5776f6095>.

Part II then outlines several enforcement regimes governing executive branch officials and the revolving door. First, it provides a general overview of minimum ethics requirements for individuals within the executive branch as mandated by federal law. Next, the Part then turns to the main topic of this Note, executive order ethics pledges. It identifies the various, additional obligations placed on executive branch officials as adopted through the Clinton, Obama, Trump, and Biden administrations' pledges. In examining the strengths and weaknesses of these pledges, Part II considers the role executive order ethics pledges play in advancing and promoting government accountability and ethics within the executive branch and assesses the extent to which these presidents successfully—or unsuccessfully—enforced their pledges' obligations.

After identifying the various limitations and issues within these pledges, Part III then puts forth the Note's thesis, namely that in drafting executive order ethics pledges, presidents and their administrations should (i) eliminate—or reformulate—waiver provisions that currently allow for discretionary ethics enforcement, and (ii) include strong safeguards to prevent officials from escaping ethics obligations should the President decide to revoke his or her executive order ethics pledge.

I. BACKGROUND

Before examining the shortcomings of executive order ethics pledges, it is important to consider the surrounding debates regarding the government's attempts to curtail the revolving door. The following Part considers claims made by those on both sides of the argument regarding whether the government should adopt strong revolving door restrictions as a means to promote accountability, ethics, and public trust in government.

A. *Surrounding Debates Regarding Revolving Door Restrictions*

As with any problem, the revolving door has the potential to produce both benefits and detriments for the government and society at large. Consequently, a rift has evolved between those opposing tougher restrictions and those advocating in their favor. Opponents of tougher restrictions often argue that strict ethics obligations negatively impact the government by creating a loss of particularized expertise within the branches that is necessary for effective governance.²⁰ Per this argument, lobbyists are “expert technician[s] . . . capable of explaining complex and difficult subjects in a clear, understandable fashion,” and therefore, serve a “very useful purpose . . . and important role” in helping administrations advance their policies.²¹ By preventing lobbyists with specialized knowledge from working in government on issues they are familiar with, the government, thus, becomes disadvantaged by having to recruit from a smaller, less-qualified applicant pool which may ultimately result in an absence of policy experts serving within the government.

A second argument put forth by these opponents is that post-employment lobbying bans may disincentivize individuals from ever entering public service if they know that doing so—even if for a limited time—will jeopardize their ability

20. See generally James S. Roberts Jr., *The Revolving Door: Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343, 343–44 (1992).

21. *Issues of Democracy: Advocacy in America*, 3 ELEC. J. U.S. INFO. AGENCY 2 (June 1998) (quoting then-Senator John F. Kennedy).

to find private sector employment once they leave their government post.²² Indeed, recent executive order ethics pledges have expanded the federal law's revolving door restrictions by preventing executive branch officials from engaging in certain forms of work indefinitely or for extended periods of time once they leave government.²³ Thus, for specialized lobbyists with narrow expertise, these types of restrictive covenants may force these individuals—who otherwise would have been willing to serve in government for a limited tenure—to forego working in the public sector altogether.

Of course, not every executive branch official will use the proverbial revolving door when entering or leaving government service.²⁴ But for those that do, concerns over conflicts of interests, corruption, and transparency within our government institutions have justified strengthening these restrictions. Those who advocate strengthening revolving door regulations argue that these restrictions do not prevent individuals “from pursuing career opportunities in their areas of professional competence,” but rather prevent them from serving two masters.²⁵ Advocates of stricter rules have expressed concerns that lobbyists who end up working in government will ultimately “make ‘final decisions . . . [based on] private friendships and loyalties rather than . . . the public good,’” and thereby act corruptly for their own benefit.²⁶ Such concerns are not unfounded. Prior to the enactment of the Ethics in Government Act of 1978,²⁷ one study found over 500 cases of financial conflicts of interest within the federal government.²⁸ The study also

22. See, e.g., PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR: REPORT AND RECOMMENDATIONS TO THE PRESIDENT 59 (1989) (noting that certain one-year bans on post-government employment “could also discourage officials from serving in high-level positions by limiting excessively their post-government activities . . . [and] would be highly detrimental to the efforts of the government to attract able personnel.”); Op-Ed, *How to Deprive the U.S. of Top-Flight Talent*, N.Y. TIMES, Mar. 21, 1979, at A22 (“If such a person is prohibited for a period of one year from appearing before an agency, that person is essentially not employable, except possibly in an advisory capacity to others who are much less knowledgeable. There are few professionals today who can afford to take a holiday for a year from employment . . . Therefore, one must look long and hard before taking governmental employment in the first place if such impairment of earning capacity is in prospect.”).

23. See discussion *infra* Section II.B.

24. Several Obama executive branch appointees—for example, David Axelrod (former Senior Advisor to the President), Jerry Abramson (former White House Director of Intergovernmental Affairs), and Shailagh Murray (former Senior Advisor to the President)—never pursued lobbying careers after leaving the administration. Press Release, Univ. of Chi., University Creates New Institute of Politics (Jan. 19, 2012), https://www.uchicago.edu/features/20120119_axelrod/; Press Release, Bellarmine Univ., Abramson to Serve as Executive in Residence at Bellarmine (Jan. 18, 2017) <https://www.bellarmino.edu/news/archives/2017/01/18/jerry-abramson-at-bellarmino/>; Press Release, Colum. Univ., Shailagh Murray Appointed Executive Vice President for Public Affairs (Sept. 5, 2018), <https://gca.columbia.edu/news/shailagh-murray-appointed-executive-vice-president-public-affairs>.

25. Symposium, *Panel V: “The Revolving Door” – Should it Be Stopped?*, 32 ADMIN. L. REV. 383, 385 (1980).

26. David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 510 (2013) (quoting Senator Douglas).

27. Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

28. See ANDREW KNEIER, COMMON CAUSE, SERVING TWO MASTERS: COMMON CAUSE STUDY OF CONFLICTS OF INTEREST IN THE EXECUTIVE BRANCH (1976).

discovered that several officials and agency heads were working in high-level positions which they previously had lobbied.²⁹ Moreover, scholarship is replete with stories and data documenting how those serving in government have a tendency to be “captured” by the same businesses and industries which these regulatory bodies are empowered to oversee.³⁰ Consequently, if the goal is to ensure that individuals do not use their time in government “as a way to promote their own interests over the interests of the American people,” then ethics pledges must contain strong obligations that would prevent lobbyists from accessing information or working on issues that will ultimately enable them to benefit themselves or their former or future employer.³¹

But regardless of whether the government has engaged in actual ethical misconduct, public perceptions that government corruption exists, even if speculative, have the potential to create “more devastating effects than corruption itself . . . [by] generat[ing] a ‘culture of [public] distrust’ towards [government] institutions.”³² The danger of creating such a cynical culture has both political and social implications. As some scholars have observed, when citizens no longer trust particular politicians or government institutions, they become more likely to “support nonincumbent and third-party candidates,” that fall outside of the standard political mold.³³ Thus, to overcome public cynicism toward the government and to rebuild the relationship between citizens and the executive branch, the government will need to adopt robust ethics obligations that eliminate even the appearance of impropriety.³⁴

II. ATTEMPTS TO LOCK THE POLITICAL REVOLVING DOOR

Despite the potential benefits that the revolving door may provide, the government has clearly found that its harms necessitate adopting strong restrictions to prevent the revolving door from continuing to spin. Having accepted the principles driving the demand for regulating public servants’ personal and professional behavior—particularly those serving as executive branch officials—this Part looks at several different federal laws that have established governmental ethics standards for executive branch employees. In examining these legal provisions, this Part identifies the current obligations imposed on executive branch officials and the loopholes that have emerged as a result. The Part then turns to the central focus of this Note, namely executive order ethics pledges, and examines their role in filling in the gaps of the federal law and considers the success of these mechanisms in working to ensure a culture of ethics and accountability in the executive branch.

29. *Id.*

30. See Suzanne Dovi, *The Ethics of the Revolving Door*, 12 GEO. J.L. & PUB. POL’Y 535, 544–48 (2014); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. OF ECON. POL’Y 203 (2006).

31. Obama Signing Remarks, *supra* note 16 (discussing the purpose of his ethics pledge).

32. Natalia Melgar et al., *The Perception of Corruption*, 22 INT’L J. PUB. OP. RSCH. 120, 120 (2010).

33. Virginia A. Chanley et al., *The Origins and Consequences of Public Trust in Government: A Time Series Analysis*, 64 PUB. OP. Q. 239, 240 (2000).

34. See Thurber, *supra* note 7, at 369.

A. Federal Laws Governing Executive Branch Officials

While the public's concern over ethical impropriety by executive branch officials has risen over the last several decades, efforts to regulate the behavior of public officials during their time in government have occurred for almost a century.

One of the first federal restrictions pertaining to conflicts of interest and the revolving door came from a 1919 appropriations act. The act made it unlawful for any federal employee who either (i) previously represented the United States in procuring military supplies, or (ii) engaged in the settlements or adjustments of contracts or agreements for procuring military supplies

to solicit employment in the presentation or to aid or assist for compensation in the prosecution of claims against the United States arising out of any contracts or agreements for the procurement of supplies [within two years after employment with the government].³⁵

The inclusion of this provision indicates an early awareness by Congress of the potential harms that can arise from former government employees using insider knowledge and experience in public service for private sector employment. However, the depth of Congress's concern at that time may have been marginal, as it would take Congress another three decades to pass new legislation addressing conflicts of interest.³⁶ Indeed, in 1948, Congress passed what is considered to be the first comprehensive federal lobbying law governing the activities and behaviors of government officials: the Legislative Reorganization Act ("LRA").³⁷ Prior to its passage, the Special Senate Committee on the Organization of Congress held a hearing to discuss the public's concerns and sentiments about the legitimacy and accountability of government. Specifically, the Committee noted that public opinion had become "distorted and obscured by the pressures of special interest groups" and that Congress itself had struggled to legislate in the public interest.³⁸ The committee then pointed out how Congress had become "[b]eset by swarms of lobbyists seeking to protect this or that small segment of the economy or to advance . . . [a] narrow interest."³⁹ As a result of this growing distrust toward government, the joint committee incorporated various lobbying provisions within the Act in an effort to strengthen Congress's relationship with the public. One of these provisions required lobbyists to register under the law so that Congress could better "evaluate and determine evidence, data, or communications from organized groups seeking to influence legislative action" and thus avoid the distortion of public opinion" by making their connections easily transparent.⁴⁰

In addition to the numerous interpretative challenges regarding its scope, coverage, and implementation, one of the law's most glaring limitations in ensuring government accountability and ethics in policy decisions was that the Act *did not*

35. Pub. L. No. 66-8, 41 Stat. 131 (1919).

36. Legislative Reorganization Act, Pub. L. No. 79-601, 60 Stat. 812 (1948).

37. *Id.*

38. *Id.*

39. S. REP. NO. 791400, at 4 (1946).

40. George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 AM. POL. SCI. REV. 41, 65 (1965).

cover lobbying of executive branch appointees and officials.⁴¹ The upshot was that these government officials were able to engage in quid-pro-quo-like behavior, thus giving rise to potential policy-for-employment arrangements between government officials and corporate actors. This shortcoming, however, was later resolved in 1995.⁴²

It would be another thirty years before Congress passed the Ethics in Government Act in 1978 (“EGA”).⁴³ Recent scandals involving President Nixon and the Watergate Hotel⁴⁴ prompted renewed calls to preserve and promote ethics and accountability within the executive branch. Under Title II of the EGA, Congress adopted several new ethics obligations for those serving within the executive branch as well as imposed pre- and post-government service restrictions to address conflicts of interest and the revolving door.⁴⁵ For example, Section 201 required that upon entering their position, executive branch employees—including the President and Vice President⁴⁶—must file a report detailing potential conflicts of interest, including previous sources of income. Additionally, the EGA established the Office of Government Ethics, an independent agency within the executive branch, tasked with ensuring that executive agencies comply with the new ethics program requirements.⁴⁷ It also developed monitoring mechanisms to oversee that senior official also complied with their ethics commitments.⁴⁸ Furthermore, since its adoption and its subsequent amendments, the EGA has created a series of post-employment restrictions to combat the revolving door by prohibiting government officials from engaging in lobbying and representation before the federal government on matters that they worked on while serving in

41. Pub. L. No. 79-601, 60 Stat. 812, §§ 302, 307 (1948) (noting that “legislation” covered under the act were those “bills, resolutions, amendments, nominations, and other matters pending or proposed in either House of Congress, and includes any other matter which *may be the subject of action by either House*”) (emphasis added). See also JACOB R. STRAUS, CONG. RSCH. SERV., R44292, THE LOBBYING DISCLOSURE ACT AT 20: ANALYSIS AND ISSUES FOR CONGRESS 11 (Dec. 1, 2015).

42. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified at 2 U.S.C. §§ 1601 *et seq.*). Under the Lobbying Disclosure Act, Congress effectively expanded the scope and coverage of ethics obligations to include “covered executive branch official[s]”—this definition incorporated the President, Vice President, and officers or employees, or any other individual either (i) functioning in the capacity of such an officer or employee, in the Executive Office of the President, or (ii) serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order. 2 U.S.C. § 1602(3).

43. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–599).

44. JACOB R. STRAUS, CONG. RSCH. SERV., R44974, ETHICS PLEDGES AND OTHER EXECUTIVE BRANCH EMPLOYEE RESTRICTIONS SINCE 1993: HISTORICAL PERSPECTIVE, CURRENT PRACTICES, AND OPTIONS FOR CHANGE 4 (Feb. 23, 2021); see also Adam Raviv, *Government Ethics in the Age of Trump*, 54 U. MICH. J.L. REFORM 331, 336–37 (2021); Thomas J. Sater, *The Ethics in Government Act of 1978 and Subsequent Reforms: The Effect of Political and Practical Influences on the Creation of Public Policy*, 13 SETON HALL LEGIS. J. 243 (1990).

45. Pub. L. No. 95-521 § 2, 92 Stat. 1824 (1978) (amended and repealed by Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716 (1989)).

46. 5a U.S.C. § 102; *id.* § 101 (f)(1)–(2) (requiring the president and vice president to file).

47. 5a U.S.C. § 401 *et seq.*

48. See *What We Do*, U.S. OFF. OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/about_what-we-do (last visited Feb. 4, 2022).

government. As a result, executive branch officials today are subject to various ethical rules, including:

- lifetime bans on “switching sides” regarding involving specific parties on which any executive branch employee had worked personally and substantially while with the government;
- two-year bans on “switching sides” on broader range of matters which were under the employee’s official responsibility;
- one-year bans on assisting persons with certain trade or treaty negotiations;
- one-year “cooling off” periods that bar “senior” officials from representing and communicating on behalf of parties before the departments or agencies that the senior official served in;
- a two-year “cooling off” period prohibiting “very senior” officials from communicating and attempting to influence certain high-ranking officials in the entire executive branch of government; and
- one-year bans (for certain officials) from representing or advising foreign governments or foreign political parties on certain matters.⁴⁹

While these restrictions establish the ethical floor by which public officials must engage with private actors and conduct themselves while serving in government, certain shortcomings and limitations within these rules have led to several loopholes that allow individuals to bypass these legal obligations.

One issue at the forefront of calls for reform has been the rise of “shadow lobbying.” The term describes individuals who work to advocate or influence public policy but need not register as a lobbyist because they fail to meet certain criteria under the Lobbying Disclosure Act (“LDA”).⁵⁰ The LDA defines lobbyists as any individual who is “employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.”⁵¹ Therefore, in an effort to bypass the law’s requirements, shadow lobbyists will engage in lobbying activities for *less than* twenty percent of their time by mere technicalities (for instance, nineteen percent) or will work for clients for fewer than three months (for example, working for two months and twenty-nine days). The upshot is that although such conduct is permitted, the underlying activities effectively cut against the intent of the legislation—specifically, to avoid ethically suspect behavior by former government employees who have since gone on to work for companies seeking to influence government policy.

49. STRAUS, *supra* note 41, at 26–27.

50. *Id.* at 20; *see* 2 U.S.C. § 1602(10).

51. 2 U.S.C. § 1602(10).

Another potential problem arising from the federal framework is the sufficiency of the two-year cool-down period which prohibits former government officials from utilizing government contacts while attempting to influence public policy.⁵² Norm Eisen, former ethics czar and the Obama administration's Special Counsel for Ethics and Government Reform, has suggested that two-year cooling-off periods are effective mechanisms against the revolving door. In his view, "[companies] will pay[] to put [officials] on ice for one year . . . to ply [their] contacts. But no one wants to pay [officials] to put [them] in cold storage for two years."⁵³

Yet given today's political environment, Eisen's defense of the two-year ban fails to fully appreciate the impact of the declining pace of the legislative process. Furthermore, his argument does not consider the possible instances where a President wins a second term (thereby allowing agencies to continue advancing their regulatory agendas). Thus, while the two-year ban may appear to eliminate the threat that public officials will use their government experience and connections for personal or private gain, the fact remains that such timeline may actually fail to achieve its intended purpose.⁵⁴

B. Executive Order Ethics Pledges

As illustrated above, the United States has developed a comprehensive ethics structure in an attempt to deter and combat ethical misconduct by government officials, particularly those serving within the executive branch. And yet, despite the obligations required under federal law as well as oversight by both political and non-partisan agencies—like the Department of Justice ("DOJ"), the Office of Government Ethics ("OGE"), the Government Accountability Office ("GAO")—problems and controversies still arise, and loopholes are continually found. Consequently, in an effort to address the various shortcomings under the current framework, presidents have taken it upon themselves to unilaterally implement stricter ethics obligations on those serving within the executive branch.

Indeed, of the last five presidents to hold office, four have issued executive order ethics pledges as a means to raise ethical floor requirements for executive branch officials. Yet despite their intentions, each president derailed their pledge's success in various ways. This Section examines executive order ethics pledge provisions and considers their effect in promoting or eroding ethics and accountability within the president's branch.

President Clinton. On his first day in office, President Clinton issued an executive order ethics pledge affecting all "senior appointee[s] in every executive agency"⁵⁵ or approximately "1,100 [g]overnment officials, including 700

52. 18 U.S.C. § 207(b)-(d).

53. Isaac Arnsdorf, *Trump Lobbying Ban Weakens Obama Rules*, POLITICO (Jan. 29, 2017, 10:40 AM), <https://www.politico.com/story/2017/01/trump-lobbying-ban-weakens-obama-ethics-rules-234318>.

54. This is particularly true if these actors maintain personal relationships with those continuing to serve in government and later reemerge in a professional context to influence federal law and policy once the ban expires.

55. Ethics Commitments by Executive Branch Appointees, Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 20, 1993). "Senior appointees" included "every full-time, non-career Presidential, Vice presidential or agency head appointee[s] in an executive agency." *Id.* at 5912.

Presidential appointees who [we]re subject to Senate confirmation.”⁵⁶ Clinton’s pledge expanded various restrictions within the 1989 Ethics Reform Act⁵⁷ by subjecting appointees to a five-year, post-government lobbying ban for issues that appointees “had personal and substantial responsibility” for, and a five-year ban on lobbying on behalf of foreign entities.⁵⁸ Officials were also subject to a five-year ban on utilizing government contacts for the purpose of lobbying.⁵⁹

On its face, the pledge appears to be an effective tool in addressing the issue of the revolving door. By increasing cooling-off periods for government contacts, the pledge decreases a former official’s likely success in lobbying in the private sector given that effective advocacy is largely influenced by the strength of one’s relationships and connections in government.⁶⁰ Moreover, longer wait periods between when former officials can lobby on issues they directly worked on while in government reduces the threat that officials will use their time in public service for personal gain—an issue driving public distrust of government.⁶¹ But while the ethics order appears to promote government accountability and ethics within the executive branch, certain features of the pledge allowed Clinton to shortchange its intended goal.

First, Clinton’s pledge did not address the issue of *appointing* former lobbyists to government posts. Lobbyists who had previously lobbied on particular issues were able to serve in administration roles that they once sought to directly influence as a result. Second, the pledge did not ban ex-officials from lobbying the administration for the remainder of Clinton’s term. Meaning, former officials who only worked one or two years within the Clinton administration could have essentially lobbied it during Clinton’s last two years in office. Third, the pledge granted the President the power to waive pledge commitments for any individual if he believed doing so was in the “public interest.”⁶² While waivers were required to be published within the Federal Register, the pledge itself provided little guidance as to what constituted a sufficient justification—and failed to describe the level of specificity needed—for granting a waiver. Moreover, allowing a President to unilaterally grant waivers without supplemental oversight is an issue that runs counter to the goal of ensuring accountability within one’s own branch of government. But Clinton’s waiver provision was not the most damning aspect of his ethics pledge.

With less than a month left in office, Clinton wholly rescinded his executive order, effectively releasing all former and then-current senior administration appointees from every restriction within the pledge—including the stringent five-

56. Gwen Ifill, *Clinton Team Issues 5-Year Lobby Ban*, N.Y. TIMES (Dec. 10, 1992) www.nytimes.com/1992/12/10/us/the-transition-clinton-team-issues-5-year-lobby-ban.html.

57. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989) (requiring one-to-two-year lobbying and government contact bans depending on an executive branch official’s status).

58. See Ethics Commitments by Executive Branch Appointees, Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 22, 1993).

59. STRAUS, *supra* note 44.

60. See Maggie McKinley & Thomas Groll, *The Relationship Market: How Modern Lobbying Gets Done*, HARV. CTR. FOR ETHICS (Feb. 13, 2015), <https://ethics.harvard.edu/blog/relationship-market-how-modern-lobbying-gets-done>.

61. See Rainie et al., *supra* note 3.

62. Ethics Commitments by Executive Branch Appointees, 58 Fed. Reg. at 5913.

year bans.⁶³ This meant that those Clinton officials were now only bound to the ethics obligations covered under the federal law—namely the Ethics in Government Act.⁶⁴ Consequently, all senior appointees who had previously left the Clinton administration the year prior to the revocation could effectively resume lobbying again.⁶⁵ Unsurprisingly, the move was not well received. Critics quickly noted that “Clinton got the benefit of appearing to be tough on the ‘revolving door’ while in office, [but] then in his last days sa[*id*], ‘Never mind.’”⁶⁶ And the administration’s attempt to defend the President’s move—arguing that “the main policies underlying the Executive Order no longer appl[*ied*] . . . [because] there [wa]s a change of parties at the White House,”—simply ignored the fundamental principles that prompted creating a pledge in the first place.⁶⁷ Moreover, it disregarded the fact that former officials could still lobby Democratic members in the House and Senate, as well as career officials in non-appointed agency positions. While some media outlets covered news of the pledge being revoked, elected officials from the opposing party, however, did not appear to even be aware of the decision, even weeks after it occurred.⁶⁸ It seemed that larger concerns over the economy and the new incoming administration trumped concerns over ethics and accountability.

President Obama. Prior to President Obama taking office, executive branch officials under George W. Bush faced no heightened ethics requirements, as Bush chose to forgo adopting an ethics pledge during his eight years in office.⁶⁹ However, once President Obama was sworn in, he resurrected the use of

63. Revocation of Executive Order 12834, Exec. Order No. 12,184, 66 Fed. Reg. 697 (Dec. 28, 2000).

64. 18 U.S.C. § 207.

65. *Id.* (discussing one-year bans).

66. Mintz, *supra* note 19.

67. Timothy P. Carney, *Clinton Presume to Nullify No-Lobbying Pledge*, 57 INSIDE WASH. 4 (Jan. 12, 2001).

68. *Id.*

69. President George W. Bush’s decision to not adopt a similar pledge created mixed reactions. David Litt, *Republicans Will Try to Create an “Ethics” Trap for Democrats. Don’t Fall For It*, GUARDIAN (Jan. 25, 2021, 6:31 AM), <https://www.theguardian.com/commentisfree/2021/jan/25/republicans-will-try-to-create-an-ethics-trap-for-democrats-dont-fall-for-it> (noting that when “George W Bush took office, Republicans went all in on ‘The K Street Project,’ formally integrating lobbyists into conservative policymaking and vice versa. Industries who donated to Republican candidates and hired Republican staff were given access to party leaders. Those that did not were not.”). Nevertheless, despite forgoing the decision to create an executive order ethics pledge, President George W. Bush instead chose to issue a presidential memorandum to the heads of executive agencies and departments, advising them to “ensure that all personnel within [the] departments and agencies [we]re familiar with, and faithfully observe[d], applicable ethics laws and regulations.” Memorandum from President George W. Bush to the Heads of Executive Departments and Agencies (Jan. 20, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/20010124-2.html>. However, and importantly, the memorandum did not impose new obligations on executive branch official. Rather, the memorandum served as a mechanism to reiterate existing statutory ethics obligations on executive branch officials and appointees, and reaffirm general principles of government ethics—for example, “not us[ing] public office for private gain . . . act[ing] impartially and not giv[ing] preferential treatment to any private organization or individuals . . . [and a] commitment to maintain the highest standards of integrity in Government.” *Id.*

presidential ethics pledges by signing Executive Order 13,490.⁷⁰ Compared to President Clinton's ethics pledge, Obama's appeared to be more comprehensive inasmuch that it covered "every appointee" in the executive branch.⁷¹ The pledge also placed new restrictions on the type of work *incoming lobbyists* could engage in and prevented them from working in agencies they once lobbied.⁷² Yet, Obama's pledge was less restrictive insofar that it only placed two-year bans on post-government service lobbying and government contact.⁷³ However, the pledge appeared to try and compensate for this deficiency by requiring officials who left the administration be prevented from lobbying "any covered executive branch official or non-career Senior Executive Service appointee" for the remainder of Obama's time in office.⁷⁴

Obama's pledge also contained a waiver provision that gave the Director of the Office of Management and Budget ("OMB"), not the president, the power to grant ethics waivers.⁷⁵ While the pledge did not require that the waivers be published in the Federal Register, it did mandate an "annual public report on the administration of the pledge."⁷⁶ However, in an effort to provide greater transparency, the administration created an exclusive White House webpage that provided a list of the executive branch officials who received ethics waivers.⁷⁷ However, despite the initiative's goal of providing greater public accountability, questions began to arise about whether the administration was being truly transparent about its waivers process after news outlets reported that the administration had "quietly releas[ed] a succession of four waivers, weeks and sometimes months after they were first granted."⁷⁸ Thus, not only were there questions about the number of waivers granted, additional concerns were raised about the process of review itself. Indeed, some of the waivers made publicly available by the administration only contained a few lines explaining why such waiver was granted.⁷⁹

While President Obama himself did not revoke his administration's ethics pledge, the pledge was ultimately revoked by his successor, in order for President

70. Ethics Commitments by Executive Branch Personnel, Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 26, 2009).

71. *Id.*

72. STRAUS, *supra* note 41, at 19–20.

73. Ethics Commitments by Executive Branch Personnel, Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 26, 2009).

74. *Id.*

75. *Id.* at 4675 (noting that waivers could be granted if they were in the "public interest," which included, but were not limited to, issues of "national security" and "the economy").

76. *Id.* at 4676.

77. *Ethics Pledge Waivers Released by the White House*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/briefing-room/disclosures/ethics-pledge-waivers> (last visited Mar. 6, 2021) [hereinafter Obama White House Waiver Website].

78. Kenneth P. Vogel, *Grassley After W.H. Ethics Waivers*, POLITICO (June 10, 2009, 8:34 AM), <https://www.politico.com/story/2009/06/grassley-after-wh-ethics-waivers-023612>.

79. *See, e.g.*, ROBERT CUSICK, OFF. OF GOV'T ETHICS, FIRST ANNUAL REPORT ON THE PRESIDENT'S EXECUTIVE ORDER ON ETHICS 50 (2009), [https://oge.gov/web/OG.E.nsf/0/95CA4BF9134C4507852585B6005A14B5/\\$FILE/161fa958f2514391a87cfff0397f0d8e9.pdf](https://oge.gov/web/OG.E.nsf/0/95CA4BF9134C4507852585B6005A14B5/$FILE/161fa958f2514391a87cfff0397f0d8e9.pdf) (listing Valerie Jarrett's waiver).

Trump to issue his own ethics pledge once he entered office.⁸⁰ The upshot is that while covered Obama officials were still subject to federal ethics restrictions, they were no longer bound to the Obama administration's tougher ethics obligations. These officials also were able to evade the public scrutiny that the Trump and Clinton administrations received after revoking their ethics orders just prior to leaving office.

President Trump. In an effort to make good on his promise to “drain the swamp,” President Trump issued an executive order ethics pledge that subjected executive branch appointees to enhanced revolving door restrictions.⁸¹ Though Trump's pledge was stronger than Obama's inasmuch that it created five-year restrictions pertaining to lobbying and government contacts, it was also weaker by having (i) reduced from two years to one, post-employment bans for appointees working on matters they previously engaged in but did not lobby,⁸² (ii) allowed lobbyists to join the administration so long as their work did not involve anything they specifically lobbied on in the preceding two years,⁸³ and (iii) permitted incoming lobbyists to work in government agencies they once lobbied.⁸⁴ Trump's pledge also contained a waiver provision that gave *the president and his designee* the authority to grant waivers.⁸⁵ But unlike his predecessors, Trump's pledge *did not require* waivers be published in the Federal Register nor even be made publicly available by the OGE—a move that appeared intentional. Additionally, the waiver provision failed to set forth any standards or criteria for which to grant waivers.⁸⁶ Then-Director of the GAO, Walter Shaub, noted that granting waivers had effectively become “a political decision, . . . mean[ing] career government ethics officials [w]ould no[] [longer] get involved” in waiver determinations.⁸⁷ Consequently, several groups within the executive branch were granted broad waiver exemptions.⁸⁸

Three months into his term, media sources began reporting that waivers had been granted but had yet to be disclosed, prompting public concerns and growing

80. Ethics Commitments by Executive Branch Appointees, Exec. Order No. 13,770, 82 Fed. Reg. 9333, 9337 (Feb. 3, 2017) (“This order supersedes [President Obama's] Executive Order . . . and therefore . . . [it] is hereby revoked.”).

81. See generally *id.*

82. Arnsdorf, *supra* note 53.

83. *Id.* Trump reportedly had 281 lobbyists serving within his administration during the first two years he was in office. MARTHA KINSELLA, RUDY MEHRBANI, WENDY R. WEISER & ELIZABETH GOITEIN, BRENNAN CTR. FOR JUST., EXECUTIVE ACTIONS TO RESTORE INTEGRITY AND ACCOUNTABILITY IN GOVERNMENT 14 (last updated Oct. 6, 2020).

84. Arnsdorf, *supra* note 53.

85. Ethics Commitments by Executive Branch Appointees, Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017).

86. Virginia Canter, *Biden, Trump and Obama Ethics Pledges, Compared*, CITIZENS FOR RESP. & ETHICS IN WASH. (Feb. 9, 2021), <https://www.citizensforethics.org/reports-investigations/crew-reports/biden-ethics-pledge-compared-obama-trump/>.

87. Eric Lipton, Ben Protess, & Andrew W. Lehren, *With Trump Appointees, a Raft of Potential Conflicts and No Transparency*, N.Y. TIMES (Apr. 15, 2017), <https://www.nytimes.com/2017/04/15/us/politics/trump-appointees-potential-conflicts.html>.

88. *Waiver Certifications for WHO/OVP Employees*, OFF. OF THE WHITE HOUSE, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/09/Waiver-Chart-092220.pdf> (last updated Sept. 22, 2020).

distrust of the executive branch.⁸⁹ The administration initially sought to stay requests for copies of these waivers, calling into question the GAO's legal authority to request such information.⁹⁰ However, days later, former Director Shaub responded by rebutting the OMB's interpretation, noting that such requests were well within the agency's purview, and that "[p]ublic confidence in the integrity of government decisionmaking demands" independence, accountability, and transparency.⁹¹ With increased public scrutiny and media reports,⁹² as well as inquiry requests by members of Congress,⁹³ the administration ultimately relented, reporting that "at least 16" waivers had been granted within the first five months.⁹⁴ But like Clinton, Trump's waivers and efforts to forego transparency and compliance were not the most damning actions against his pledge.

During his last day in office, Trump wholly revoked his ethics pledge,⁹⁵ thereby freeing his officials from the rigorous five-year restrictions, which he himself said were necessary to address the existing law's "loopholes."⁹⁶ Ironically, Trump's decision to revoke his pledge was a move which he frequently criticized former President Clinton for, suggesting that the "Clintons lifted the executive order so that . . . their [former officials] could start raking in cash."⁹⁷ Ultimately Trump faced greater backlash in revoking his order given his repeated calls to "drain the swamp."⁹⁸

President Biden. President Biden's mission to restore ethics and accountability to the executive branch began with issuing an executive order ethics pledge on his first day in office. Though the administration is just a year and a half into its first term, certain provisions within the pledge identify its strengths and weaknesses. The pledge prevents lobbyists from serving in government, requires a two-year recusal from engaging in matters that new, incoming officials directly

89. Editorial, *Trump is Issuing Secret Waivers to His Own Ethics Rules. So Much for Draining the Swamp*, WASH. POST (May 6, 2017), https://www.washingtonpost.com/opinions/trump-is-issuing-secret-waivers-to-his-own-ethics-rules-so-much-for-draining-the-swamp/2017/05/06/60f11762-302a-11e7-9dec-764dc781686f_story.html.

90. Letter from Mick Mulvaney, Dir., Off. of Mgmt. & Budget, to Walter Shaub, Dir., Off. of Gov't Ethics (May 17, 2017).

91. Letter from Walter Shaub, Dir., Off. of Gov't Ethics, to Mick Mulvaney, Dir., Off. of Mgmt. & Budget (May 22, 2017).

92. See Bykowicz, *supra* note 18.

93. Letter from Dianne Feinstein, Gary C. Peters & Charles E. Grassley, U.S. Senators, to Mick Mulvaney, Dir., U.S. Off. of Mgmt. & Budget (Aug. 1, 2017), <https://www.peters.senate.gov/imo/media/doc/2017-08-01%20Peters-Grassley-Feinstein%20Letter.pdf> [hereinafter Senate Ethics Waiver Letter to OMB].

94. Rebecca Ballhaus, *Ethics Office Releases Nearly a Dozen Trump Waivers*, WALL. ST. J. (June 7, 2017, 2:47 PM), <https://www.wsj.com/articles/ethics-office-releases-nearly-a-dozen-trump-waivers-1496858394>.

95. Revocation of Exec. Order No. 13,770, Exec. Order No. 13,983, 86 Fed. Reg. 6835 (Jan. 19, 2021).

96. Tamara Keith, *Trump's Executive Order on Ethics Pulls Word for Word from Obama, Clinton*, NPR (Jan. 28, 2017, 10:08 PM), <https://www.npr.org/2017/01/28/512201631/trumps-executive-order-on-ethics-pulls-word-for-word-from-obama-clinton>.

97. *Id.*

98. *Id.*

and substantially worked on while in the private sector, and requires a lifetime ban on representing foreign interests.⁹⁹ Additionally, President Biden implemented a one-year “shadow-lobbying” ban, tackling a significant issue that occurred in all of the previous administrations.¹⁰⁰

Biden’s ethics pledge confers onto the OMB Director the power to grant ethics waivers if doing so is “in the public interest.”¹⁰¹ While the pledge requires that the waivers be made publicly available within ten days after being granted, the Biden administration, like the Obama administration, appears to have made a deliberate yet cautious decision regarding the way in which it makes these waivers accessible to the public.¹⁰² For example, the Biden administration’s official White House website only lists ethics waivers that have been granted for officials working *within* the White House.¹⁰³ The upshot is that waivers for officials serving in different agencies and departments will be scattered across different platforms, making it more difficult for the public to access this information, and consequently harder to ensure public accountability and oversight over these public officials. In addition to the media’s criticism, former GAO Director Walter Shaub has also expressed his concern over the lack of transparency, calling on the administration to “release all ethics-related documents, including waivers when people get an exception.”¹⁰⁴

As of this moment, the Biden administration has only granted two waivers for individuals serving in the White House.¹⁰⁵ But the degree of specificity with which it has attempted to justify granting these waivers, as compared to last administration,¹⁰⁶ suggests that it is hoping to make good on its promise to increase

99. Ethics Commitments by Executive Branch Personnel, Exec. Order No. 13,989, 86 Fed. Reg. 7029, 7029–30 (Jan. 25, 2021).

100. Caitlin Oprysko, *What’s in Biden’s Ethics Pledge*, POLITICO (Jan. 21, 2021, 3:55 PM), <https://www.politico.com/newsletters/politico-influence/2021/01/21/whats-in-bidens-ethics-pledge-792904> (“The Biden ethics pledge also clamps down on so-called shadow lobbying—a top demand of good-government watchdogs—banning former officials from working behind the scenes to lobby until one year after they’ve left the government and prohibiting senior officials from holding out to lobby for one year.”).

101. *Id.* at 7032 § 3(c). Biden’s pledge lists several factors one “may consider” when determining whether to grant a waiver. However, including the phrase “*may consider*” indicates that these factors need not be considered every time one is contemplating granting a waiver, nor even at all.

102. *Id.* § 3(b).

103. *Ethics Pledges and Waivers*, WHITE HOUSE, <https://www.whitehouse.gov/omb/information-for-agencies/ethics-pledges-and-waivers/> (last visited Mar. 26, 2021).

104. All Things Considered, *Biden’s Ethics Pledge Is Tougher Than Past Administrations—But Is It Tough Enough?*, NPR (Feb. 1, 2021), <https://www.npr.org/2021/02/01/962946837/bidens-ethics-pledge-is-tougher-than-past-administrations-but-is-it-tough-enough>.

105. *Pledge Waivers (E.O. 13989) - Biden Administration*, U.S. OFF. OF GOV’T ETHICS, [https://www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+\(EO+13989\)](https://www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+(EO+13989)) (last visited Mar. 27, 2022) (listing White House ethics waivers for Kristine Lucius and Erika Moritsugu).

106. *Compare, e.g.*, Memorandum from Dana Remus, Counsel to the President, to Kristine J. Lucius (June 11, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Kristine-Lucius-Pledge-Waiver.pdf> (justifying the grant of Lucius’ waiver based on factors including “(i) the governments need for the individual’s service, including the existence of special circumstances related to national security, the economy, public health, and the environment, the uniqueness of the individual’s qualifications, to meet the government’s needs; (iii) the scope and natural of the individual’s prior

transparency and avoid the appearance of misconduct in its decision-making processes.

III. ENSURING INTEGRITY AND ACCOUNTABILITY THROUGH EXECUTIVE ORDER ETHICS PLEDGES

This Part offers a series of recommendations to address the problems arising from ethics waivers and decisions to revoke an executive order ethics pledge. While some lawmakers¹⁰⁷ and scholars¹⁰⁸ have proposed drafting new legislation or amending current federal law to tackle the revolving door within the executive branch, this Note focuses solely on executive branch solutions in drafting and enforcing executive order ethics pledges. In focusing on this approach, the following Part offers a framework for how future presidents can impose more meaningful and substantive obligations through executive order ethics pledges that ensure government accountability during and after their time in office.¹⁰⁹

A. “Unwaivering” Ethics

Depending on how a president decides to frame and move forward with granting waivers, utilizing the pledge’s waiver provisions may therefore give the appearance of impropriety, or indicate that the administration is in fact actively trying to relieve its officials from having to adhere to the ethical obligations placed within the pledge. Moreover, efforts to withhold waiver information only exacerbate public distrust in government by creating the appearance that the administration is granting its waivers arbitrarily or for improper reasons.

The most effective solution for how to address many of the problems arising from ethics waivers is for administrations to wholly exclude adding waiver

lobbying activities . . . and (iv) the extent to which the purpose of the restriction may be satisfied through other limitations on the individual’s services.”) *with* Memorandum from Counsel to the President, to Kellyanne Conway, Assistant to the President (last accessed Mar. 27, 2022), <https://web.archive.org/web/20190802161646/https://www.whitehouse.gov/sites/whitehouse.gov/files/KELLYANNE%20CONWAY.PDF> (noting only that White House Counsel “determined that it [wa]s appropriate and in the public interest to provide a limited waiver of the restrictions in section 1, paragraph 6, of the Executive Order to allow [Conway] to participate in meetings and communications with covered organizations which [Conway] otherwise may be barred from communicating or meeting with regarding broad policy matters and particular matters of general applicability in your official capacity even if the communication or meeting is not ‘open to all interested parties.’ The Administration has an interest in interacting with covered organizations on issues of importance to the Administration and [Conway’s] position requires [her] to interact with covered organization.”).

107. For the People Act of 2021, H.R. 1, 117th Cong. (2021); Executive Branch Conflict of Interest Act, H.R. 244, 117th Cong. (2021).

108. See STRAUS, *supra* note 41, at 19–31.

109. The purpose of limiting this Note’s scope to the drafting and implementation of executive orders is based on the view that that these orders seek to implement ethics obligations that go beyond the obligatory ethics floor set forth by federal law. While Congress could, and arguably should, move forward with proposals that strengthen legal ethic commitments, it is likely that future presidents will continue to seek out new ways to restrict certain behaviors or practices that remain permissible even after Congress adopts new requirements.

provisions within these executive ethics orders. Doing so would demonstrate a president's unequivocal commitment to unwavering ethics in his or her administration. As with any form of exception, one can always find reasons to justify waiving rules for certain individuals, and for administrations, this may be easy to do using the guise of "public interest" for people with particular backgrounds. There are, of course, some circumstances where granting waivers can help benefit the government and an administration's policy agenda.¹¹⁰ But if presidents truly want to demonstrate their desire to hold lobbyists to a "higher standard of accountability" and "restore ethics in government,"¹¹¹ then eliminating waiver provisions within an executive order ethics pledge will help to send a clear message that no one, especially public servants, should be able to evade ethical obligations. A secondary benefit of excluding waiver provisions within ethics pledges is that doing so may help administrations avoid transparency issues associated with granting these waivers. Consider the dubious nature by which the Trump administration granted waivers for several of its officials. These actions triggered public distrust of his administration and the executive branch as an institution.¹¹² Thus, by eliminating waiver provisions altogether, administrations may be able to dispel public opinion that the executive branch is corrupt and ultimately help to restore public trust in government as a whole.¹¹³

Undoubtedly, most presidents will likely find this proposal to be extreme and therefore will decline to adopt this approach. Should a president ultimately decide to retain an ethics waiver within his or her executive order ethics pledge, then the alternative solution should be to include the following stipulations within the waiver provision. First, instead of bestowing the president with the power to waive an ethics provision, the pledge should grant the OGE or OMB Director, *in coordination with a GAO official*—Director or otherwise—the power to waive certain ethics obligations. Not only should these parties be involved in the consideration of a waiver request, but the provision should also require that *all parties involved in the review of a waiver must agree* to grant a particular official's waiver. Incorporating this requirement will help to avoid the appearance that executive branch ethics waivers are being granted improperly and arbitrarily.

Second, waiver provisions must include explicit conditions that go beyond mere "in the public interest" justifications when seeking to waive an obligation or commitment under the ethics pledge. For instance, it may be beneficial to require that the administration be unable to hire or recruit another individual with the same (or comparable) experience and expertise for a particular policy area. Under such provision, the OGE and GAO could require that the administration provide documentation of its proactive attempts to recruit and hire other applicants. For example, the administration could provide the agency or office with (i) communication records with those considered for a position, (ii) applicant materials such as resumes and cover letters, or (iii) declination letters and/or signed documentation by those individuals who would otherwise be qualified to serve in these roles but who have refused to accept or serve in that position. Adopting this requirement would not only increase transparency, but also serve as a middle

110. See discussion *supra* Section I.A.

111. *The Biden Plan to Guarantee Government Works for the People*, BIDEN HARRIS, <https://joebiden.com/governmentreform/> (last visited Mar. 1, 2020).

112. Senate Ethics Waiver Letter to OMB, *supra* note 93.

113. Melgar et al., *supra* note 32, at 123.

ground for critics of waiver provisions primarily concerned with administrations governing blindly, and those worried about former lobbyists serving two masters.

Lastly, administrations must make all waivers, recusals, and related documents—for example, letters of support, communications regarding OMB's, OGE's, and GAO's waiver review and decisions, etc.—publicly available and place them in a centralized location on the White House website under the names of those officials receiving the waivers. This requirement will increase transparency and help to foster a better relationship between the American people and the executive branch. Moreover, to ensure greater government accountability, the pledge should also mandate publicly accessible, quarterly enforcement/compliance reports by both the OGE and GAO. Requiring both offices to produce reports may incentivize these agencies to engage in better oversight of the pledge's restrictions and ensure that the waivers are granted in accordance with the prescribed guidelines. It may also help thwart misrepresentations about whether these officials are, or have been, complying with the pledge if there is bias or undue political influence within the OGE.

Administrations face significant risks when choosing to adopt waiver provisions in their ethics pledges. Thus, while an ideal ethics pledge will forgo incorporating such a provision altogether, administrations may still be able to maintain its commitment to government accountability by including safeguards that prevent unilateral and arbitrary exceptions to ethics obligations within the executive branch.

B. Limiting Revocation's Harm

The voluntary nature of an executive order means that an ethics pledge's effectiveness will largely be dependent on an administration's attitude toward addressing government accountability. The Clinton and Trump administrations' decisions to revoke their pledge prior to leaving office illustrate how executive orders' discretionary characteristics create inherent risks in achieving its intended goals.

First, there is the risk that administrations will only adopt ethics pledges when doing so is politically advantageous. It may be that an administration simply wants *the appearance* of being committed to strong, ethical values in order to gain public support while quietly wanting to maintain its ability to escape its commitments when the political stakes are low. Presidents pursuing this path risk public fallout. But for a two-term president whose legacy is a strong economy with major policy achievements, revoking the pledge will have little, if any, consequences. Second, there may be instances in which an outgoing president does not revoke his or her own ethics pledge, but the incoming president revokes the predecessor's pledge in an attempt to implement his or her own commitments, as with Obama and Trump.

Presidents can address these issues several different ways. Ideally, presidents should wholly avoid revoking their ethics pledge during, or while leaving, office. Allowing one's ethics pledge to run its course helps avoid the appearance of having made superficial ethics restrictions that were only meant to serve a political purpose. Indeed, if the true purpose of an executive order ethics pledge is to address the loopholes within the current federal laws so as to prevent executive branch officials from utilizing the revolving door—then presidential revocations undoubtedly undermine the pledge's ability to achieve these goals by exploiting a system that enables public servants to inappropriately benefit from their time in

government. But given that two of the last four presidents have revoked their ethics pledges, an alternative solution may be necessary if presidents who revoke their orders are to retain some semblance of accountability.

One possible alternative is to have presidents postpone the enforcement on the pledge's revocation. Specifically, outgoing presidents that revoke their pledge should include within the revocation order stipulations that delay when that revocation enters into force. While such an approach may be uncommon, it is not unprecedented. For example, when President Clinton revoked his ethics pledge the month prior to leaving office, he included language that delayed the revocation's enforcement until George W. Bush was sworn in as president.¹¹⁴ Thus, for administrations seeking to free their officials from rigorous ethics obligations yet simultaneously seek to embody some type of ethical values, *presidents should delay their revocation's enforcement for an extended period of time—i.e., one or two years.* While delaying enforcement may substantially shorten or void some obligations, other restrictions may ultimately run their full course. And while delayed revocations may nevertheless still indicate that a president has compromised their ethical values, choosing this path fairs far better than the alternative.

Next, for incoming administrations seeking to create their own ethics pledge, safeguard provisions should be included to avoid freeing an outgoing administration's executive branch officials from that administration's ethics pledge. Specifically, new pledges should contain language that grandfathers the previous administration's ethics obligations for the covered outgoing officials. To do so, the new executive order should explicitly state that the creation of the new pledge does not revoke the ethics obligations binding the outgoing administration's officials. The upshot is that mere technicalities will no longer allow former officials to escape their administration's ethics requirements when that outgoing administration never even intended to release its officials from their obligations.

CONCLUSION

The recent trend of presidents utilizing executive order ethics pledges illustrates the important role these orders have in combatting corruption, preserving democratic processes, and maintaining public trust in government. While the proposed recommendations set forth in this Note may help address the shortcomings seen in the last four executive order ethics pledges, these solutions will largely be dependent on whether presidents are determined to confront these issues from the revolving door and commit themselves to unwavering ethics within their branch of government. Of course, legislation codifying heightened ethics requirements is the preferred solution, as doing so may preempt many of the challenges posed by the execution of these orders. However, until such acts are signed into law, the recommendations laid out here in this Note may help raise the executive branch's ethical standards and establish tangible mechanisms to ensure accountability among government officials.

114. Revocation of Executive Order 12834, Exec. Order No. 12,184, 66 Fed. Reg. 697 (Dec. 28, 2000) ("Executive Order 12834 of January 20, 1993, 'Ethics Commitments by Executive Branch Appointees,' is hereby revoked, effective at noon January 20, 2001. Employees and former employees subject to the commitments in Executive Order 12834 will not be subject to those commitments after the effective date of this order.") (emphasis added).