

REPORT



**BAKER'S DOZEN:
13 Policy Areas that
Require Congressional Action**

January 31, 2019



ABOUT

The Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing.

We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

ACKNOWLEDGEMENTS

PRINCIPAL AUTHORS

Liz Hempowicz
Rebecca Jones
Sean Moulton
Peter Tyler

CONTRIBUTORS

Dan Grazier
Jake Laperruque
Mandy Smithberger

SPECIAL THANKS

Scott Amey
Danielle Brian
Danni Downing
Leslie Garvey
Neil Gordon
CJ Ostrosky
Mia Steinle



PROJECT ON GOVERNMENT OVERSIGHT

1100 G Street NW, Suite 500

Washington, DC 20005

WWW.POGO.ORG

Abbreviations

BRAC	Base Realignment and Closure
CIGIE	Counsel of the Inspectors General on Integrity and Efficiency
DOD	Department of Defense
DOJ	Department of Justice
DATA ACT	Digital Accountability and Transparency Act
DOT&E	Director of Operational Test & Evaluation
FBI	Federal Bureau of Investigation
FEMA	Federal Emergency Management Agency
FARA	Foreign Agents Registration Act
FCPA	Foreign Corrupt Practices Act
FISA	Foreign Intelligence Surveillance Act
FOIA	Freedom of Information Act
GAO	Government Accountability Office
ICE	Immigration and Customs Enforcement
IG(S)	Inspector(s) General
IC	Intelligence Community
LDA	Lobbying Disclosure Act
MSPB	Merit Systems Protection Board
NNSA	National Nuclear Security Administration
NSA	National Security Agency
OGE	Office of Government Ethics
OIRA	Office of Information and Regulatory Affairs
OLC	Office of Legal Counsel
OSC	Office of Special Counsel
POGO	Project On Government Oversight
SEC	Securities and Exchange Commission

Table of Contents

Introduction	7
Promoting Ethics and Addressing Corruption	9
Office of Government Ethics	
Department of Justice Attorneys	
Nominees Before the Senate	
Foreign Corrupt Practices Act	
Foreign Agents Registration Act	
Beneficial Ownership	
Improving Transparency and Accountability in US Immigration Detention and Exploring Alternatives	15
Oversight	
Alternatives	
Placing Proper Checks and Limits on Invasive Surveillance	17
Call Data Records Program	
Retention of Collected Surveillance Material	
Foreign Intelligence Surveillance Court	
Facial Recognition Technology	
Electronic Location Tracking	
Slowing the Federal Revolving Door.....	20
Ethics Pledges	
Cooling-Off Periods	
Smarter National Security Spending and Policy	23
War Powers	
Acquisition	
Financial Accountability	
Military Infrastructure	
Earmark Requests	

■ Accountability Reports	
■ Star Creep	
Reprioritize and Revitalize Work of Federal Inspectors General.....	27
■ Leadership	
■ Access	
Commonsense Contracting Reforms to Protect the Taxpayer	30
■ Service Contracts	
■ Key Acquisition Terms	
■ Natural Disasters	
■ Federal Spending Data	
■ Contract Auditing	
Ensuring Good Stewardship of Publicly Owned Land	33
■ Area-Wide Leasing	
■ "Non Viable" Tracts	
■ Rollback of Safety Regulations	
■ Lost Natural Gas	
■ Royalties on Hard Rock Mining	
Improving Protections for Whistleblowers and Fortifying Their Outlets of Relief.....	36
■ Congressional Staff	
■ Service Members	
■ Intelligence Community	
■ Policy Dissent	
Making Open Government the Default Operating Standard	40
■ Freedom of Information Act	
Reforming Government Operations to Maximize Transparency and Accountability	43
■ Federal Vacancies Reform Act	
■ Oversight Officials	

Defending Democratic Institutions 44

- |** Census
- |** Elections
- |** Regulations

Reforming Congress 48

- |** Necessary Tools
- |** Congressional Fellowships
- |** Congressional Rules

Introduction

The Project On Government Oversight investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. Our areas of expertise are diverse: when we opened our doors in 1981 we began investigating and exposing wasteful Pentagon spending such as the \$7,600 coffee pots and \$435 hammers; since then we have expanded our work to cover the entire federal government and its contractors. In our final investigative report of 2018, for instance, we detailed an alarming rollback of safety standards that had been implemented by the Department of the Interior in the wake of the Deepwater Horizon disaster.

Further, the 2017 addition of The Constitution Project to POGO began a new chapter for us in defending democracy, allowing us to focus on issues where constitutional rights and principles collide with public policy, such as immigration oversight and surveillance programs.

But at POGO we don't just want to highlight the problems; we want to be a part of the solution. That's why our investigative findings are often paired with recommendations for Congress and the executive branch to address the harms exposed by our reporting. This "Baker's Dozen of Policy Reforms for the 116th Congress" is a collection of our recommendations, both new and legacy, that presents the incoming Congress with a possible starting point for the important work they're about to take on.

The problems detailed in this report and the solutions accompanying them are rooted in our mission and stem from our own investigations.

By reviving the Renegotiation Board, which had been created after World War II to recoup excess profits from defense contractors, Congress could help cut back on significant wasteful spending by establishing a federal contract audit agency to ensure the federal government isn't being overcharged for goods and services. By strengthening the Office of Government Ethics and by making it easier for the Department of Justice to enforce penalties under the Foreign Agents Registration Act, Congress could take necessary steps to root out corruption in the United States.

By reining in secretive surveillance authorities that allow the Intelligence Community to act almost unchecked, and by replacing existing and broadly

interpreted statutory war authorities with ones that are specific and clearly defined, Congress could address executive branch abuses of power.

By enforcing existing transparency requirements for the Office of Information and Regulatory Affairs, Congress could hold the executive branch accountable for when it fails to serve the public by allowing improper industry influence on regulatory actions.

And by ensuring that all federal employees, contractors, and Congressional staffers have robust and enforceable whistleblower protections so they can come forward to expose wrongdoing without fear of retaliation, Congress could make it more difficult for the executive branch to silence those who report wrongdoing.

Implementation of these and the other recommendations contained in this report would go a long way to achieving a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Promoting Ethics and Addressing Corruption

It's important that all government officials work to benefit the public, not just themselves, their former employers or clients, or others. The Office of Government Ethics (OGE) plays a critical role in ensuring that executive branch officials are free from conflicts of interest and that they comply with the federal ethics laws passed by Congress. However, as the director of OGE stated in a hearing before the House Subcommittee on Government Operations in 2015, the OGE lacks sufficient authority to investigate and enforce those laws. Granting our top federal ethics law experts investigative enforcement powers over alleged violations is an improvement that would strengthen the office's authority and ability to determine wrongdoing and to take necessary action, making it much more effective.¹ Currently, the administration of these ethics laws and the decisions about disciplinary actions are largely left to designated agency ethics officials, which can result in inconsistent enforcement.

Increased transparency into OGE's operations and findings is another improvement that will increase OGE's effectiveness. The office does not proactively post many ethics records, including waivers that have been granted, which would allow for oversight and increased transparency around ethics compliance and enforcement. Additionally, OGE isn't insulated from political pressure that could undermine the office's independence. The Director of OGE serves at the pleasure of the president, which creates potential issues when ethics allegations involve White House staff or cabinet-level officials.

Further, there must be transparency when an independent body finds that senior government officials have committed intentional misconduct or acted with reckless disregard for the law. Unlike most senior government officials, Department of Justice attorneys are insulated from public scrutiny and accountability even when they are found to have committed severe violations of laws, rules, or ethical

¹ Letter from Danielle Brian, Executive Director, Project On Government Oversight, to Chairman Jason Chaffetz and Ranking Member Elijah Cummings, House Committee on Oversight and Government Reform, about government ethics reform, February 14, 2017.

http://www.pogoarchives.org/m/ga/POGO_Letter-to-HOGR-on-Ethics-Suggestions-2017-02-14.pdf
(Hereinafter POGO Letter to Chaffetz and Cummings)

standards governing their work.² This is because the independent body that investigates these violations, the Office of Professional Responsibility, does not release the names of these attorneys after it issues its findings; nor does it inform the defendants whose cases were affected by the attorney misconduct.

Another issue affecting whether the American people can trust that government officials are working for the public rather than their own wallets is the revolving door between government service and private industry. Increased transparency of and stronger prohibitions on post-government employment are vital to ensuring that future employment options in the private sector aren't influencing senior officials' behavior.

Congress should also address ethics problems stemming from the nomination process. Nominees for high-level positions generally use handlers, called "Sherpas" (after the Himalayan mountain guides) to guide them through the Senate confirmation process. In most cases, these handlers are staffers assigned by the White House from the agency the nominee would serve in, or in the early days of a new Administration, a presidential transition team. But in other cases Sherpas come from outside the government and may have a direct financial interest in the nomination. Despite numerous ethics and conflict-of-interest laws and regulations that apply to government employees, there is a huge gap in ethics restrictions applying to nominees and their Sherpas: bans covering personal financial conflicts of interest, cooling-off periods, and gifts don't apply when a non-government nominee is wading through the confirmation process.³

And corruption from outside influences isn't just a problem for the executive branch. POGO's work on the Foreign Corrupt Practices Act (FCPA), the Foreign Agents Registration Act (FARA), and "beneficial ownership" has found that reforms are necessary to the laws that govern activities of American companies and the influence of foreign entities on US policy.

The FCPA makes it illegal for companies to make payments to foreign government officials in order to obtain or retain government contracts, licenses, and other

² Nick Schwellenbach, "Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards," Project On Government Oversight, March 13, 2014.

<https://www.pogo.org/report/2014/03/hundreds-of-justice-department-attorneys-violated-professional-rules-laws-or-ethical-standards/>

³ Laura Peterson, "Washington Sherpas: Lobbyists Shepherding Agency Nominees Create Ethics Concerns," Project On Government Oversight, December 20, 2018.

<https://www.pogo.org/investigation/2018/12/washington-sherpas/>

concessions. However, a lack of transparency around enforcement of the FCPA leaves lingering questions about its utility.⁴ There are similar issues with FARA, the law that requires anyone working on behalf of, or representing, foreign governments and political parties to register their activities with the Justice Department and to submit regular documentation describing their activities. The current definitions are broad and meant to capture many different kinds of influence peddling, from traditional lobbying to public relations campaigns. However, a lack of departmental guidance and a lack of definitions for terms like “principal beneficiary” has left many potential registrants wondering, for example, what exactly triggers a registration requirement and leads to under-registration. The law is intended to provide transparency into how foreign governments attempt to influence US policies on everything from foreign aid to multi-billion dollar arms deals. But when lobbyists fail to register or properly disclose their activities, the public and even Congress can be left in the dark about how laws are shaped and influenced.

Finally, the ability to form companies without revealing the identity of the individuals who control them—the “beneficial owners”—is a breeding ground for corruption. Companies with anonymous owners are easily formed in the United States, and can be used to defraud businesses, taxpayers, and the government. For example, a non-veteran beneficial owner could benefit from programs meant to increase federal contracting with companies owned by veterans by obfuscating who is the true owner of the company.⁵

■ **Empower Office of Government Ethics to fulfill its mission.** Congress should grant OGE clear authority to investigate cases and issue binding corrective and disciplinary actions in noncriminal cases.

■ **Empower Office of Government Ethics to serve as a central clearinghouse for all ethics actions.** Congress should require executive branch officials occupying positions for which the pay is set at Levels 1 or 2 of the Executive Schedule to include all ethics restrictions they must comply with in their final submission of

⁴ Neil Gordon, “United States Among Leaders in Fighting Bribery,” Project On Government Oversight, September 12, 2018. <https://www.pogo.org/analysis/2018/09/united-states-among-leaders-in-fighting-bribery/> (Hereinafter “United States Among Leaders in Fighting Bribery”)

⁵ Letter from civil society organizations to Chairman Jason Chaffetz and Ranking Member Elijah Cummings, House Oversight and Government Reform Committee, about beneficial ownership and contracting transparency. October 28, 2016. <https://www.pogo.org/letter/2016/10/pogo-joins-24-groups-in-urging-house-to-promote-new-system-to-identify-contractors-and-publish-beneficial-ownership-information/#fn3>

ethics paperwork to OGE.⁶ Additionally, OGE should be required to publicly post final submissions of ethics paperwork for executive branch officials. Final submissions should include signed ethics pledges and waivers, financial disclosure reports, disciplinary actions and reprimands related to ethics violations, and other appropriate documentation.⁷

■ **Protect independence of the Office of Government Ethics.** Congress should limit the president's ability to remove the Director of OGE to only when there is just cause for removal. Traditionally this includes only when there is "inefficiency, neglect of duty, or malfeasance in office."⁸ Additionally, Congress should authorize OGE to communicate with and report directly to Congress.

■ **Require Office of Professional Responsibility to report findings of intentional misconduct or reckless disregard.** Congress should require OPR to notify both the relevant state bar authorities and the House and Senate Judiciary Committees about any findings of intentional misconduct or reckless disregard by Justice Department attorneys. Further, Congress should give the Justice Department's Inspector General explicit authority to investigate allegations of misconduct throughout the agency, including those against attorneys, an ability that other agency inspectors general already have.⁹

■ **Close conflict-of-interest loophole for former procurement officials.** Congress should close the loophole that allows certain procurement officers to leave government to work for contractors they contracted with in their previous positions. The Procurement Integrity Act currently allows former government employees to accept compensation from "a division or affiliate" of a contractor as long as that division does not "produce the same or similar products or services" that the former government employee procured while in their previous position.¹⁰

⁶ Letter from Scott Amey, General Counsel, Project On Government Oversight, to Acting Director and General Counsel David J. Apol, Office of Government Ethics, about federal official ethics agreements, September 12, 2017.

<https://www.pogo.org/letter/2017/09/pogo-urges-oge-to-require-comprehensive-appointee-ethics-agreements/>

⁷ POGO Letter to Chaffetz and Cummings

⁸ 5 U.S.C. § 1211(b)

⁹ Nick Schwellenbach, "Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards," Project On Government Oversight March 13, 2014.

<https://www.pogo.org/report/2014/03/hundreds-of-justice-department-attorneys-violated-professional-rules-laws-or-ethical-standards/>

¹⁰ 48 C.F.R. § 3.104-3(d)(3); 41 U.S.C. § 2104

This means a government official who was in charge of purchasing helicopters for the government can leave to go work for a contractor that produces helicopters, as long as the former official is employed by a division that produces something else, such as tanks. However, this is too weak a distinction and allows former officials to leverage their relationship with the contractor for future employment, calling into question the decisions they made while in government service.¹¹

- Codify lobbying ban for political appointees.** Congress should codify President Trump's executive order to require a five-year limitation on former political appointees lobbying their former agencies.¹² Congress also should ban former officials from lobbying any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.¹³
- Improve transparency of Foreign Corrupt Practices Act enforcement.** Congress should establish a centralized public repository of information about open and pending investigations and cases, to make the United States' efforts to combat international bribery more effective. Additionally, when a company reports possible FCPA violations to the Department of Justice and/or the Securities and Exchange Commission (SEC) and either agency decides against bringing an enforcement action, Congress should require the public disclosure of the facts that the company reported and the reasons enforcement action was not taken. Either the Justice Department or the SEC should also be required to report statistics regarding instances when the United States government seeks help from, or provides help to, other countries in foreign bribery cases.¹⁴

¹¹ Project On Government Oversight, *Brass Parachutes: Defense Contractors' Capture of Pentagon Officials through the Revolving Door*, November 5, 2018. <https://www.pogo.org/report/2018/11/brass-parachutes/> (Hereinafter *Brass Parachutes*); Project On Government Oversight, *The Politics of Contracting*, June 29, 2004.

http://www.pogoarchives.org/m/co/POGO-Report-Politics-of-Contracting-all-appendices_2004.pdf (Hereinafter *Politics of Contracting*)

¹² Executive Order 13770, January 28, 2017.

[https://www2.oge.gov/web/oge.nsf/0/A43C4DBAB9EC4DC7852580BC006FBA83/\\$FILE/Exec%20Order%2013770.pdf](https://www2.oge.gov/web/oge.nsf/0/A43C4DBAB9EC4DC7852580BC006FBA83/$FILE/Exec%20Order%2013770.pdf)

¹³ *Brass Parachutes; Politics of Contracting*; Scott Amey, General Counsel, "Trump Fails to Expand Definition of Lobbyist in Ethics Order," Project On Government Oversight, January 30, 2017.

<https://www.pogo.org/analysis/2017/01/trump-fails-to-expand-definition-of-lobbyist-in-ethics-order/>

¹⁴ "United States Among Leaders in Fighting Bribery."

- Create civil penalties for Foreign Agents Registration Act violations.** Congress should amend FARA to give the Justice Department authority to levy civil fines on offenders who do not properly label their FARA filings, who file late, who don't file if they should have, or who don't register if they should have. These penalties should increase with the severity and number of infractions.
- Close loophole that unnecessarily complicates Foreign Agents Registration Act registration.** Congress should eliminate the Lobbying Disclosure Act (LDA) loophole to FARA registration. Under the current law, individuals representing foreign companies could opt to register under the less stringent disclosure mechanism of the LDA, which requires far less information about lobbying activities and contravenes the intent of FARA. However, foreign governmental and commercial interests are not always as distinct from one another as they are in the United States, and this exemption has frequently been misunderstood and exploited.
- Clarify Foreign Agents Registration Act registration requirements.** Congress should clarify the definitions within FARA meant to describe what relationships and activities require registration as a foreign agent.
- Modernize reporting requirements within Foreign Agents Registration Act.** Congress should update the reporting requirements under FARA to cover the current ways information is distributed and influence is peddled. For example, FARA does not adequately address the role of social media, multi-national corporations, or United States-based foreign media outlets, but it should.
- Require disclosure of "beneficial owners" of corporations and limited liability companies.** Congress should require persons who form corporations and limited liability companies in states where they are not required to disclose the beneficial owner of that entity to disclose that information to the federal government.
- Require nominees to disclose when someone with a financial interest in the nomination helps with the process.** Congress should ensure that nominees publicly disclose any material benefit they received to advance their nomination from any individuals who currently have or have had in the past year employers or clients with financial interests involving the nominee's agency.

Improving Transparency and Accountability in US Immigration Detention and Exploring Alternatives

The 2017 addition of The Constitution Project to POGO began a new chapter for us in defending democracy, allowing us to focus on issues where constitutional rights and principles collide with public policy, such as immigration oversight and surveillance programs.

The policy debate guiding changes to US immigration law is often viewed as inherently partisan. But as with any other policy challenge that Congress takes on, there will always be issues that can and should be bipartisan. For example, if the United States is detaining immigrants, the facilities in which detainees are housed should be ethically and transparently maintained; this respects not only the constitutional rights of the individuals being detained but also the taxpayers who deserve to know how their money is being used. However, independent investigations continue to show year after year that baseline standards for detention are not being met. In order for Congress to effectively evaluate immigrant detention, facilities must be inspected and operated in an independent and transparent manner. Unfortunately, POGO's investigations¹⁵ and Department of Homeland Security Inspector General investigations have found that these facilities are managed in a way that lacks both transparency and accountability.¹⁶

¹⁵ Mia Steinle, "ICE Detention Center Inspections Repeatedly Fall Short," Project On Government Oversight, June 29, 2018. <https://www.pogo.org/analysis/2018/06/ice-detention-center-inspections-repeatedly-fall-short/> ; Ken Silverstein, "Leading For-Profit Prison and Immigration Detention Medical Company Sued at Least 1,395 Times," Project On Government Oversight, October 29, 2018. <https://www.pogo.org/investigation/2018/10/leading-for-profit-prison-and-immigration-detention-medical-company-sued-at-least-1-395-times/>

¹⁶ Department of Homeland Security Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, June 26, 2018. <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>; Department of Homeland Security Office of Inspector General, *Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California*, September 27, 2018. <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf> (All downloaded December 12, 2018)

Further, although Congress continues to put limits on detention-bed spending for the Department of Homeland Security, the agency regularly exceeds that budget in direct defiance of the appropriations process rather than relying on viable alternative solutions such as home visits, self-reporting, or electronic monitoring where appropriate. These solutions have been vetted by bipartisan evaluators as viable alternatives to traditional detention centers, and they should be seriously evaluated and utilized in situations that are deemed appropriate.¹⁷

Recommendations

- Ensure detention facilities comply with legal standards.** Congress should codify a requirement that all facility inspection reports be made available to the public; curb the unnecessary overuse of costly and inadequate private detention facilities by setting explicit budgetary restrictions on detention spending; enforce compliance with Immigration and Customs Enforcement's (ICE) 2011 Performance-Based National Detention Standards of oversight and facility maintenance;¹⁸ and, codify limitations on the detention of children to comply with the Flores Settlement Agreement.¹⁹
- Investigate and codify alternatives to detention.** While Congress appropriated funds to maintain an average daily population of immigration beds, ICE reportedly surpasses that funding on a daily basis, leading Members of Congress to have "persistent and growing concerns about ICE's lack of fiscal discipline...."²⁰ Rather than rewarding ICE's lack of fiscal discipline with additional taxpayer-funded spending, Congress should evaluate and accordingly mandate that DHS make use

¹⁷ The Constitution Project, *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, October 2009.

<https://constitutionproject.org/wp-content/uploads/2012/10/359.pdf>; Alex Nowrasteh, "Alternatives to Detention Are Cheaper than Universal Detention," Cato Institute, June 20, 2019.

<https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention> (Downloaded January 18, 2019)

¹⁸ U.S. Immigration and Customs Enforcement, "2011 Operations Manual ICE Performance-Based National Detention Standards." <https://www.ice.gov/detention-standards/2011> (Downloaded December 12, 2018)

¹⁹ Rebecca Jones, "Particular Vulnerability: Opposing Indefinite Detention of Children," Project On Government Oversight, November 26, 2018. <https://www.pogo.org/analysis/2018/11/particular-vulnerability-opposing-indefinite-detention-of-children/>

²⁰ Senate Report Accompanying S. 3109, *Department of Homeland Security Appropriations Bill, 2019*, S. Rept. 115-283, June 21, 2018. <https://www.congress.gov/congressional-report/115th-congress/senate-report/283/1> (Downloaded January 1, 2018)

of certain alternatives to detention that have proven to be highly effective and would lead to significant cost savings.²¹

Placing Proper Checks and Limits on Invasive Surveillance

As technology rapidly evolves and more and more of our sensitive information moves into digital spaces, government surveillance—and placing proper checks and limits on it—continues to be a critically important issue. Fortunately, in the past year the Supreme Court and key stakeholders have done much to advance reforms and lift up issues in need of greater discussion. In the coming session, Congress needs to step up as well, notably in three key areas: telephone record collection, facial recognition, and location tracking.

In 2015 civil liberties advocates won a major victory by reforming the authorities—colloquially referred to as “Section 215”—that the National Security Agency (NSA) used to collect the telephone records of hundreds of millions of Americans. The 115th Congress passed legislation that banned bulk collection of Americans’ phone records, and created greater transparency of the secret Foreign Intelligence Surveillance Court (FISA Court) where the bulk collection program was authorized. However, several serious problems remain. Although bulk collection is now banned, collection of phone records through the new “call detail records” program is still far too broad.²² The call detail records program collects a record of all calls sent not only by a target, but also everyone within two degrees of that call. For example, if you call your mother and that call is collected in this program, the program could also collect your mother’s records as well as anyone that she calls. This results in the collection of hundreds of millions of phone records, many from individuals not suspected of wrongdoing. Yet the government has not demonstrated any security value provided by this highly invasive program. In fact, it voluntarily deleted hundreds of millions of records obtained over the

²¹ “The Real Alternatives to Detention,” June 6, 2017, p. 1.

<https://justiceforimmigrants.org/2016site/wp-content/uploads/2017/07/The-Real-Alternatives-to-Detention-FINAL-06.27.17.pdf> (Downloaded January 1, 2019)

²² Charlie Savage, “N.S.A. Purges Hundreds of Millions of Call and Text Records,” *The New York Times*, June 29, 2018. <https://www.nytimes.com/2018/06/29/us/politics/nsa-call-records-purged.html> (Downloaded January 9, 2019) (Hereinafter “N.S.A. Purges Hundreds of Millions of Call and Text Records”)

course of three years after a number of them were collected unlawfully.²³ Broad collection and long storage of this sensitive information puts it at risk of misuse or exposure in a data breach. The FISA Court still needs additional transparency, and more input from outside experts. Section 215 is set to expire at the end of 2019, and these and other reforms should be considered before it is reauthorized.

Congress must also examine the use of facial recognition, a highly invasive surveillance technology that allows computers to scan an individual's face in a photo, and within a single second run it against hundreds of millions of photos to identify them.²⁴ This creates serious risks of pervasive surveillance, and of the government effortlessly watching everyone wherever they go. Yet the Federal Bureau of Investigation (FBI) already has access to photos of about half of American adults, and runs thousands of facial recognition scans every month,²⁵ and companies are considering adding facial recognition capabilities to body cameras in use by local law enforcement.²⁶ Facial recognition is also prone to misidentification; putting this technology in the hands of law enforcement without proper limits could actually endanger the public by labeling innocent people as wanted fugitives. In 2018, POGO uncovered that Amazon was pitching its facial recognition technology, which scans crowds of people in "real-time," to the Immigration and Customs Enforcement (ICE). Among the many problems with this is that Amazon's technology makes errors even more frequently than older technology.²⁷

Finally, Supreme Court case law on surveillance has created a huge loophole to Fourth Amendment protections that Congress must address. In 2018, the Supreme Court ruled that the government needs a warrant to track an individual's location via cellphone records older than one week, a historic victory for privacy rights.²⁸

²³ "N.S.A. Purges Hundreds of Millions of Call and Text Records."

²⁴ Jake Laperruque, "Unmasking the Realities of Facial Recognition," Project On Government Oversight, December 5, 2018. <https://www.pogo.org/analysis/2018/12/unmasking-the-realities-of-facial-recognition/> (Hereinafter "Unmasking the Realities of Facial Recognition")

²⁵ "Unmasking the Realities of Facial Recognition."

²⁶ Lisa Marie Segarra, "Police Body Cameras Could Get Facial Recognition Technology," *Fortune*, April 26, 2018. <http://fortune.com/2018/04/26/police-and-body-cameras-facial-recognition/> (Downloaded January 10, 2019)

²⁷ Andrea Peterson and Jake Laperruque, "Amazon Pushes ICE to Buy Its Facial Recognition Surveillance Tech," *The Daily Beast*, October 23, 2018. <https://www.thedailybeast.com/amazon-pushes-ice-to-buy-its-face-recognition-surveillance-tech> (Downloaded January 11, 2019)

²⁸ Jake Laperruque, "The Carpenter Decision: A Huge Step Forward for Privacy Rights but Major Problems Remain," Project On Government Oversight, June 28, 2018.

But while the ruling was a major step forward, it left critical questions unanswered. It did not provide a clear rule for location tracking for less than a week, or discuss rules for “stingrays,” devices used by law enforcement that imitate cell towers and secretly suck up the phone location data of every person in a large area. It is critical that even when the requirement for a warrant applies to surveillance technology, that warrant requirement be supplemented by clear statutory guidelines about how surveillance is carried out. This statutory limit to the use of surveillance authorities would provide clarity to law enforcement and would protect due process rights. Finally, we need protections to prevent private entities from grabbing our location data from phone apps and simply handing them over to the government. All of these issues necessitate supplementing the Supreme Court’s ruling with Congressional action.

Recommendations

- **End or strongly limit the call detail records program.** Congress should terminate the call detail records program unless the NSA can show it provides some unique value.
- **Set stronger limits on retention of information collected under Section 215.** By voluntarily deleting all records obtained over three years by the call detail records program, not just records that had been unlawfully collected, the NSA has already demonstrated that, even if the information provides some security value (although no such value has yet been shown), that long retention is not necessary. Strong retention limits should be put into place so that the government does not stockpile extraneous data.
- **Improve FISA Court processes.** Congress should increase transparency regarding important FISA Court rulings. The USA FREEDOM Act dramatically increased transparency of the FISA Court, a critical step to restoring trust in the system. However FISA Court judges still possess too much discretion in deciding whether to disclose significant rulings. Similarly, the FISA Court also has too much discretion in the appointment of “Special Advocates,” the outside advocates meant to present the Court with an outside perspective. Currently, FISA Court judges can decide which cases deserve a Special Advocate. Instead, Congress should require

that a Special Advocate be appointed for every case unless there is a logistical reason that prevents an appointment, such as an emergency proceeding.

- Require independent authorization before use of facial recognition scans and surveillance.** Congress must require a judicial authorization, like a warrant, for police to use facial recognition technology.
- Limit use of facial recognition to serious crimes.** Congress must set forth an enumerated set of serious crimes for which facial recognition technology incorporated into body cameras could be used. This would set an effective balance, preventing potential abuses stemming from overbroad use while still allowing a system to flag serious threats for law enforcement. Limiting use of powerful technological tools to serious offenses has precedent; federal law limits surveillance of phone calls and electronic communications to a list of serious crimes.²⁹
- Reinforce and clarify warrant requirement for electronic location tracking.** Congress should act immediately to establish the same warrant standard for real-time cellphone tracking as the Supreme Court established for historical cell phone tracking data, thereby removing incentives to engage in bulk collection for later use. This warrant requirement must be accompanied by statutory guidelines for how the surveillance can be carried out.

Slowing the Federal Revolving Door

Governments and corporations want to make sure their leaders and employees act in the best interest of the organization. The private sector has a number of tools for protecting itself from conflicts of interests. For instance, major corporations often require departing executives to sign non-disclosure and non-compete agreements to protect their interests. Similarly, for government officials, there are ethics laws that are supposed to protect the public interest.

Unfortunately, senior agency officials too often pass through a revolving door from government service to the very industries they regulate and oversee, and back. In fact, our research has identified hundreds of instances involving high-ranking government officials shifting into the private sector, often as lobbyists in the field

²⁹ 18 U.S.C. § 2511.

they used to oversee.³⁰ People move the other way through the door, too, going from industry into government service. Problems arise, however, when a company offers financial incentives to encourage executives to move to government service—as many companies do.³¹ These types of professional moves raise questions about whether the decisions of those officials while in office were influenced by their future career plans or past employers, or if they were truly in the public interest.

And these types of moves have real-life consequences. One of the starkest is how the revolving door between the Drug Enforcement Administration and the pharmaceutical industry contributed to the rise of the opioid crisis.³²

Notably, the government ethics system often relies on the current and former employees to disclose and manage their own conflicts of interest. Congress should take action to limit possible conflicts of interest and the undue influence that can happen when federal officials seek and find employment in the industry they regulated, oversaw, or contracted with, as well as when top federal positions are filled with industry veterans.³³

Recommendations

- **Require clear limits to employment for departing government officials.** Congress should require government officials to enter into a written, binding revolving-door exit plan that sets forth the programs and projects from which the former employee is banned from working. Like financial disclosure statements, these reports should be filed with the Office of Government Ethics and made available to the public.
- **Codify ethics pledges for executive branch employees.** Congress should build on past and current presidential Executive Orders that require ethics commitments by executive branch personnel. By expanding rules that restrict lobbyists' impact on public policy to apply to all persons with conflicts of interest, Congress could

³⁰ *Brass Parachutes*

³¹ Michael Smallberg, "Big Business Offers Revolving Door Rewards," Project On Government Oversight, March 21, 2013. <https://www.pogo.org/investigation/2013/03/big-businesses-offer-revolving-door-rewards/>

³² Scott Higham and Lenny Bernstein, "The Drug Industry's Triumph over the DEA," *The Washington Post*, October 15, 2017. https://www.washingtonpost.com/graphics/2017/investigations/dea-drug-industry-congress/?noredirect=on&utm_term=.3b7b90363788 (Downloaded December 14, 2018)

³³ *Politics of Contracting*

address the problem of “shadow” Washington influencers who take advantages of loopholes and don’t register under the Lobbying Disclosure Act. Congress should also prohibit incentive payments such as bonuses from private companies to former employees entering government service. And it should prohibit senior officials from accepting private sector positions if they could have used their public office to directly and substantially benefit their new employers, partners, or clients.

Publicly release information about Pentagon officials going through the revolving door to defense contractors. Congress should amend current law to require the Department of Defense (DoD) to make public the After Government Employment Advice Repository, the database of senior DoD officials seeking employment with defense contractors, including all requests for opinions on whether the DoD official could accept employment with a specific contractor and any issued opinions. Congress should also legislate that the DoD database be expanded government-wide to better track the revolving door in all federal agencies.

Extend cooling-off periods for employees who enter and leave government. Congress should reform the lobbying and representational bans governed by 18 U.S.C. § 207 by extending the bans to cover any federal employee, and by extending the bans to two years instead of one. Specifically, the restrictions should require employees who leave federal agencies to wait at least 2 years before contacting their former agency on behalf of any individual or entity to discuss agency business, including regulations or rules, policy-making, federal funds, examinations, and enforcement matters. Congress should, extend lobbying prohibitions covering “behind-the-scenes” lobbying activities, which are currently permitted, as it did for the Department of Defense.³⁴ Congress should also require departing federal employees to wait at least two years before taking a job with any entity that had agency business within a year prior to their departure. Additionally, political appointees and Senior Executive Service policymakers (people who develop rules and determine program requirements) should be prohibited for a period of two years from being able to seek employment from companies materially impacted by—including financially benefiting from—the policies they helped draft. Materially benefiting would include obtaining a direct and predictable economic, financial, business, or competitive advantage or right.

³⁴ P.L. 115 91 div. A, title X, §1045

Smarter National Security Spending and Policy

Congress needs to conduct better oversight of our wars and the Department of Defense (DoD).

The power to declare war is one of Congress's most important constitutional duties. Yet multiple presidents have extended previous authorities—far beyond that which Congress has given them—to pursue illegal and unconstitutional wars, and Congress hasn't acted to rein in those statutory authorities, essentially abdicating this important constitutional responsibility.

Congress also needs to rein in the DoD itself. Spending is in serious need of reform, and military effectiveness would be greatly improved by increasing accountability and transparency at DoD. In many cases Congress doesn't need to pass new laws or policies to get this done; instead, it needs to conduct effective oversight of DoD, which appears to sorely lack the discipline to follow the laws and rules governing operations and spending, especially at key decision points, that already exist. In fact, DoD is the only major agency that has been unable to pass a Congressionally mandated audit. Yet, Congress continues to increase its funding. So when DoD does try to be fiscally responsible by asking for Congressional authorization to reduce costs and increase efficiency, as it has by requesting a new Base Realignment and Closure round, Congress generally should approve those requests.

Sometimes, though, it's Congress that's the problem. For instance, Congress recently statutorily required the military services and the National Nuclear Security Administration (NNSA) to provide “wish lists”³⁵—a list of what military leaders want but didn't consider important enough to include in the president's budget requests—a practice that Former Defense Secretary Robert Gates had appropriately curtailed at DoD.³⁶

³⁵ 10 U.S.C. § 222A; National Defense Authorization Act for Fiscal Year 2018, Public Law 115-232, Sections 3124 and 1677. <https://www.congress.gov/bill/115th-congress/house-bill/5515> (Downloaded January 10, 2019)

³⁶ Mark Thompson, “They're Baaack! The Military Resurrects Its Wish Lists,” Project On Government Oversight, June 12, 2017. <https://www.pogo.org/analysis/2017/06/theyre-baaack-military-resurrects-its-wish-lists/>

In addition to ensuring fiscal responsibility, it's important to ensure that DoD is operating with as much transparency as possible. Over the last few years, DoD has increased secrecy around the number of troops stationed outside the United States, and about whether our efforts abroad are working. In addition, the requirement for the Director of Operational Test & Evaluation (DOT&E) to provide an annual report to Congress about DoD's test and evaluation processes for weapons systems is set to sunset. This trend of increased secrecy must end. Maintaining a public record of troop numbers serving abroad is essential for the public to understand exactly where their tax dollars are being spent, and for Congress to understand where more or less funding is needed. It is even more important for understanding if our military strategies are working when service men and women are wounded or killed and more troops are being committed to the effort. It is essential for Congress and DoD to know whether the immensely expensive new weapon systems being produced will function as required, or if they will fail the mission and put our troops in harm's way.

Further, our military has become too top heavy. Star creep—the creation of a top-heavy military with a historically large proportion of generals and admirals—puts morale, combat effectiveness, and the budget at risk. Despite Congressional requirements to reduce the number of general and flag officers on active duty, that number remains disproportionate to the size of the forces they lead.³⁷ A radical culling of politically appointed civilians, headquarters, three- and four-star generals and admirals, and their associated staff and infrastructure would save real money and would greatly improve the efficiency, performance, and morale of those who defend the nation.

³⁷ 10 U.S.C. 525 Note; National Defense Authorization Act for Fiscal Year 2017, Public Law 114-328, Section 501. The most recent data available shows the share of the total force made up of general and flag officers increased by 43 percent from 1965. Department of Defense, "Active Duty Military Personnel by Rank/Grade," November 30, 2018. https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp; Lawrence Kapp, *General and Flag Officers in the U.S. Armed Forces: Background and Considerations for Congress*, Congressional Research Service, February 18, 2016, Executive Summary. <https://fas.org/sqp/crs/natsec/R44389.pdf> (All downloaded January 10, 2019)

Recommendations

- **Exercise proper restraints on war.** Congress should repeal the current, outdated war authorizations to make clear that it does not condone the expansive interpretation of this authority by current and previous executive branch Administrations. Any new war authority passed by Congress should specify the enemy and the mission objectives, have a sunset clause, and include robust reporting requirements to enable Congress to oversee the wars.
- **Increase oversight to ensure Department of Defense is not buying unaffordable, ineffective weapons.** Congress should require the Department of Defense to follow commonsense best practices for acquisition, particularly by increasing the role of testing and evaluation to comport with a true “fly before you buy” acquisition strategy. Congress should require DoD to seek permission from Congress for any waivers to acquisition laws designed to protect taxpayers, and those waivers and justifications should be made public. Congress should also require DoD to conduct thorough contract audits of all major defense acquisition programs to ensure contracts are fair, and services and goods provided are what the military actually needs. And Congress should require DoD to consider and address the cyber risks of every program from its inception, and endeavor to limit cyber vulnerabilities by pursuing non-networked programs whenever possible.
- **Increase financial accountability in Pentagon spending.** Congress should enhance oversight of DoD spending by reviving the Renegotiation Board, created after World War II to recoup excess profits from defense contractors, and the Wartime Contracting Commission, an independent, bipartisan legislative commission dedicated to holding hearings on waste, fraud, abuse, and mismanagement of wartime contracts. Both entities should have the authority to refer any violations or potential violations of law to the Attorney General. Finally, when contractors sell weapon systems that taxpayers paid to develop to foreign governments, Congress should ensure those companies are required to fairly repay the taxpayers for that investment.
- **Authorize Department of Defense to cut excess military infrastructure.** Congress should authorize a Base Realignment and Closure (BRAC) round. The previous four rounds continue to create over \$13 billion in *annual* savings and another round is likely to save another \$2 billion per year. Congress’s refusal to authorize a new BRAC round has resulted in funds not being available for more productive

programs and in a waste of taxpayer dollars.³⁸ Any BRAC round should also include adequate funding for the Office of Economic Adjustment to help communities transition effectively and productively.

■ **Eliminate statutory requirements for earmarks.** Congress should repeal statutory requirements for DoD components and the National Nuclear Security Administration (NNSA) to submit wish lists to Congress.³⁹ Congress should make sure our national security agencies are focused on strategic interests and our national security, not force them to support parochial and campaign-contributor interests.

■ **Keep key accountability reports public.** Congress should require the DoD to make contracting and performance information public, along with the Administration's legal justifications for the use of force, and remove the sunset provision that would end the requirement for the Director of Operational Test & Evaluation to provide an annual report to Congress.⁴⁰

■ **Reduce star creep.** Congress should cut excess general and flag officer positions that make our military top-heavy, starting with requiring the Department of Defense to conduct a roles and missions review. That review should include a mandate to recommend changes or eliminate offices that do not contribute to increased military effectiveness.

³⁸ "An Open Letter on BRAC," Cato Institute.

https://object.cato.org/sites/cato.org/files/articles/brac_letter2.pdf. (Downloaded January 18, 2019)

³⁹ See for example 50 U.S.C. § Section 2538a; 10 U.S.C. § 5062(b).

⁴⁰ 10 U.S.C. § 139 (c)(h)(2). The Section 809 Panel, created by Congress to streamline and improve defense acquisition, recommended preserving the requirement for the annual review report, finding that "the existence of the report assists with both the office's internal success and the ability of Congress to exercise proper oversight." 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, January 2018, p. 265. https://section809panel.org/wp-content/uploads/2018/04/Sec809Panel_Vol1-Report_Jan18_REVISED_2018-03-14.pdf (Downloaded January 10, 2019)

Reprioritize and Revitalize Work of Federal Inspectors General

Federal inspectors general (IGs) have proven to be a vital resource in the more than 40 years since their creation via the Inspector General Act of 1978. In 2018, POGO released a report with detailed recommendations for federal IGs, and several require Congressional action.⁴¹ Perhaps most importantly, presidents have too few incentives to appoint strong watchdogs, and instead leave positions vacant, sometimes for years. Further, IG offices across the federal government are currently spending too many resources creating statutorily required but unnecessary and labor-intensive semiannual reports to Congress. As current semiannual reporting requirements were created before the internet age, much of the information still required on paper could easily be turned into a living document on IG websites. Theoretically, this would be of greater use to the public and Congress, and would put less pressure on the IGs to show Congress their worth in statistical reporting that is otherwise of limited—or no—value.

Further, current law requires IGs to report the annual return on investment (ROI) of its work to Congress. This includes the “dollar value of disallowed costs that were recovered by management through collection, offset, property in lieu of cash, or otherwise,” as well as, “the dollar value of recommendations,” whether implemented or not by the agency.⁴² However, there is no consistency across the IG community as to how these values are determined. Each IG has its own methodology for the ROI calculation. Further, ROIs often lack context and may be misleading. For example, some IG recommendations may actually result in increased costs in the short term, such as measures that better protect public health and safety, but save money in the long run.

One of the major obstacles facing IG offices across the federal government is a lack of resources. This is especially apparent when an agency receives a large surge in funding—such as emergency funding provided to the Federal Emergency Management Agency (FEMA) in the wake of a natural disaster. Funding for IGs

⁴¹ Project On Government Oversight, *The Watchdogs After Forty Years: Recommendations for Our Nation's Federal Inspectors General*, July 9, 2018. https://docs.pogo.org/report/2018/2018-07-09_POGO_The_Watchdogs_After_40_Years_IG_Report.pdf?_ga=2.210848917.1283525203.1544453533-1927841140.1515169712

⁴² Inspector General Act of 1978, as Amended. 5 U.S.C. App. § 5(b)(2-3).

almost never increases in these scenarios, even as the workload does. Another obstacle is an outdated understanding of what IGs should have access to within an agency to do their jobs. The IG Act clearly states that IGs should have access to all the “documents” they need; however, in the 40 years since the law was written, electronic data has come into common usage, and has proven to be a much more critical medium for information sharing. IGs are constantly seeking data, such as program payment information, program eligibility data, and contract data, and have begun to request systems that give them continuous access to electronic data, rather than a onetime snapshot of information when they ask for it.

Even with the challenges laid out above, reports issued by IG offices still provide some of the most impactful critiques of agency operations. If these reports languish in secret, however, they do the public little good. The Inspector General Empowerment Act requires that all IG reports be available online within three days of being sent to the agency, unless those reports are classified or otherwise restricted from public dissemination.⁴³ Individual IGs do not have consistent rules for reporting on classified or unclassified but sensitive reports. For example, the Department of Defense IG provides the titles of classified reports to the public, while other IGs do not. Even Congress could remain unaware of a non-public report, as there is no consistent method among IGs for making Congress aware of it.

In addition to investigating agency programs, IGs are also tasked with investigating agency personnel to ensure they are carrying out agency missions legally and ethically. It should go without saying that IG investigations into possible ethics violations by senior government officials should continue even after the official under investigation resigns or is fired. However, IGs often terminate those investigations once the official has left office, both because they lack resources and want to focus on investigations into current officials, and because they lack the authority to compel cooperation after individuals have left government service. This leaves a vacuum of accountability and sets the stage for those former officials to return to future government service without any resolution of previous alleged ethical lapses.

Recommendations

- **Ensure strong and consistent inspector general leadership.** Congress should require an explanation and estimated date of nomination when an IG office remains

⁴³ Inspector General Act of 1978, as Amended. 5 U.S.C. App. §4(e).

vacant for more than 210 days, and should consider allowing an independent entity, such as the Council of Inspectors General on Integrity and Efficiency (CIGIE), to appoint temporary acting IGs until the president makes a nomination.

- Re-prioritize the work of inspectors general.** Congress should cut back on certain unnecessary and labor-intensive semiannual reporting requirements in favor of reports to Congress that focus on issues that the IG finds most important and that highlight problems like undue agency pushback experienced by the IG. Congress should also standardize the return-on-investment calculation used by IGs.
- Couple agency surge funding with an increase to the budget of that agency's inspector general.** Congress should take into account that surge funding for an agency requires additional oversight work by the IG. The IG should therefore also receive additional funds on these occasions in order to ensure that they can adequately oversee new and expanded agency programs.
- Improve and expand inspector general access to agency data.** Congress should provide IGs with expanded and ongoing access to systems of data, rather than individual records, to ensure timely access and to limit agency barriers to data.
- Ensure improved and consistent access to the work of inspectors general.** Congress should mandate that IGs create and publish written rules for how they will respond to written requests from Congress and the public. Congress should also codify a means for public awareness of the publication of classified or sensitive IG reports. At a minimum, each IG should publicize in a prominent location information such as title of the report or report number, subject, and date of publication so that the public can request those reports through the Freedom of Information Act (FOIA). Finally, Congress should mandate that IGs publicly post reports online after they have been released through FOIA requests.
- Ensure that inspector general investigations are completed.** Congress should mandate that IGs notify Congress at least 30 days before terminating an investigation into a possible ethics violation of a senior agency official, with an explanation of why the IG has decided to terminate it. Congress should formally request all investigative findings and documentation from the IG so that it can continue the investigation where appropriate.

Commonsense Contracting Reforms to Protect the Taxpayer

The federal government paid over \$554 billion to contractors in FY 2018.⁴⁴ Year after year we hear about weapons systems and IT projects that are over budget and behind schedule, or just plain wasteful. We need commonsense reforms to address well-known contracting problems and to protect taxpayers' money. For example, service contracts account for over \$175 billion in DoD spending and should be monitored to eliminate duplicative work assignments as well as waste, fraud, and abuse. However, while we know how much is spent on service contracts, there has been no government-wide study to determine exactly how many service contract workers are funded by this spending.

There are a number of problems with how the federal government chooses contractors and awards procurement money.

First, contractors are taking advantage of poorly defined authorities granted by Congress to encourage agencies to do business with more nontraditional contractors. Congress has allowed agencies to bypass the normal regulations that provide a check on how contracts, grants, and other procurement vehicles are awarded. Contractors that have long done business with the federal government utilizing "Other Transaction Authority" (OTA), which is meant to even the playing field for "nontraditional" contractors that want to work with the federal government, is one example.

Second, POGO has long been pointing out a problem caused by "commercial item" purchases, an area ripe for increased oversight, accountability, and cost savings.⁴⁵ Commercial markets provide for competition, which can drive down costs and ensure buyers are getting fair prices. The government's version of commercial, however, doesn't result in competition and doesn't result in lower costs or fair

⁴⁴ USASpending.gov, "Spending Over Time."

<https://www.usaspending.gov/#/search/3ccfdff6c8b1cda22f39de8cd0bc9ccd> (Downloaded January 17, 2019)

⁴⁵ Letter from Scott Amey, General Counsel, Project On Government Oversight, to Mark Gomersall, Defense Acquisition Regulations System, opposing a commercial item rule, November 10, 2016.

<https://www.pogo.org/letter/2016/11/pogo-opposes-latest-commercial-item-rule-that-will-lead-to-bad-deals/>

prices; instead, it has loopholes that allow goods or services not actually sold on the commercial market to qualify as commercial, negating the purpose of the program. Further, the system prohibits agencies from obtaining cost or pricing data on “commercial” contracts even when it’s a non-competitive award. Numerous government reports highlighting excessive spending under poorly planned and administered “commercial item” contracts illustrate why this is a problem taxpayers and Congress should care about.⁴⁶

Beyond routine contracting and spending, over the last two years, our nation has been tested by natural disasters—major hurricanes, raging wildfires, deadly mudslides, and other tragic events. These tragedies have also revealed serious problems in how we prepare for and respond to disasters. More disasters are in our future—we know that—and we can do a better job in our disaster preparation and response, resulting in saved lives, time, and money.

Once contracts are awarded and federal spending is approved, the government still needs to track and monitor this spending. USASpending.gov is the primary portal through which the public can review and understand federal spending, which reached \$6.6 trillion in FY 2018. Despite ongoing improvements to the website, thanks in large part to the expanded requirements of the Digital Accountability and Transparency Act (DATA Act), limitations in functionality⁴⁷ and data quality often prevent users from getting the answers they need. Audits by agency inspectors general revealed widespread data quality problems.⁴⁸

Audits are among the most useful tools we have to check on federal contracts and ensure the money was spent wisely. But currently, contract audits are performed by numerous federal offices, including DoD’s Defense Contract Audit Agency, small auditing offices in other agencies, contracted auditors, and various inspectors general. This sprawling fragmented system means missed opportunities,

⁴⁶ Scott Amey, “Congress Locks Pentagon into Commercial Item Ripoffs,” Project On Government Oversight, December 23, 2015. <https://www.pogo.org/analysis/2015/12/congress-locks-pentagon-into-commercial-item-ripoffs/>

⁴⁷ Letter from Sean Moulton, Senior Policy Analyst, Project On Government Oversight, to Amy Edwards, Deputy Assistant Secretary for Accounting Policy and Financial Transparency, U.S. Treasury Department, and Victoria Collin, Chief of Management Controls and Assistance Branch Office of Federal Financial Management, Office of Management and Budget, offering recommendations to improve USASpending.gov functionality and data quality, June 28, 2018. <https://www.pogo.org/letter/2018/06/pogo-offers-recommendations-to-improve-usaspendinggov/>

⁴⁸ Sean Moulton, “Government Earns Poor Grades for Spending Data Accuracy,” Project On Government Oversight, December 1, 2017. <https://www.pogo.org/analysis/2017/12/government-earns-poor-grades-for-spending-data-accuracy/>

patchwork coverage, and limited effectiveness. A single consolidated federal contract audit agency could save more than it would cost to run by uncovering waste and fraud across the federal government.

Recommendations

- **Gather information on service contracts.** Congress should commission a study of the federal government's use of service contracts and the performance results achieved through them. Service contracting information must be used to inform budgeting and manpower decisions as well as mission and readiness capabilities.
- **Limit the definition of nontraditional contractors.** Congress needs to restore the original intent of bringing innovation to the public from nontraditional government contractors, rather than throwing billions of dollars with no oversight controls to the government's top vendors. The definition of nontraditional contractors should be revised and the rules should be changed to prohibit any contractor who has accepted a FAR contract from being eligible to receive an OTA.
- **Limit when agencies can use the "commercial item" acquisition process.** Congress should redefine a "commercial item" to mean goods or services that are actually sold to the general public in like quantities. Congress should also require manufacturers to share certified cost or pricing data with the government when the government is acquiring commercial goods or services on a sole-source basis, even if the awarded contract contains no flexible pricing provisions. Without such data, there is no assurance that prices are fair and reasonable.
- **Require better preparation for responding to the new normal in disasters.** Congress needs to oversee improved interagency coordination and more realistic budgeting that allows for expanded pre-established supply stockpiles and properly vetted contracts for rapid effective disaster response. Congress should also strengthen the federal suspension and debarment system so taxpayer money is not wasted on awards to poorly performing or corrupt vendors. Finally, Congress must engage in ongoing oversight of disaster-related spending to ensure timely and effective spending and to safeguard the money from fraud and improper diversion.
- **Improve federal spending data on USASpending.gov.** Congress should work with the Department of the Treasury and the Office of Management and Budget (the agencies overseeing implementation of the DATA Act) to ensure the agencies have the authority, resources, and guidance necessary to improve USASpending.

Congress should also closely review the data quality and level of detail for awards reported into USASpending, and demand that agencies meet higher standards for critical information around data points such as award descriptions, place of performance, and sub-recipient awards.

Establish a federal contract audit agency to conduct all contract audits. Congress should establish a consolidated agency to provide all federal agencies with a needed check on contractors, ensuring by pre- and post-award audits that the government is not being overcharged for goods and services. Such an office would be more effective than provisions passed in the FY 2017 National Defense Authorization Act that allow defense contractors to choose their own private auditors. Those provisions should be repealed to maintain government oversight of federal defense contracts.

Ensuring Good Stewardship of Publicly Owned Land

The federal government holds nearly 30 percent of the nation's lands in trust for the American people. Therefore, taxpayers should be holding the government accountable when it fails to properly exercise its authority over public lands.

As part of its role as trustee of public lands, the federal government leases some lands and waters to energy companies to drill for offshore oil and gas. In order to ensure that taxpayers receive fair market value for the use of public offshore waters, the government is required to use a competitive bidding process. However, decades of data suggest that the government has been falling down on the job.⁴⁹ A 1983 change to the law allowing the government to auction off many tracts of sea floor at a time through a process called "area-wide leasing" has contributed to a 95.7 percent drop in the going rate for the average acre off the Gulf of Mexico.⁵⁰ While the government purports the system fosters competition in bidding for drilling rights, a majority of leases awarded for offshore drilling in the last 20 years only drew a single bid.⁵¹

⁴⁹ David Hilzenrath and Nicholas Pacifico, "Drilling Down: Big Oil's Bidding," Project On Government Oversight, February 22, 2018. <https://www.pogo.org/investigation/2018/02/drilling-down-big-oils-bidding/> (Hereinafter "Drilling Down: Big Oil's Bidding")

⁵⁰ "Drilling Down: Big Oil's Bidding."

⁵¹ "Drilling Down: Big Oil's Bidding."

Further, before it accepts any bid, the government studies the tract of ocean floor to make sure the winning bid delivers fair market value.⁵² When the government concludes that tracts are viable, it conducts a thorough geological and economic assessment. However, the government classified almost 80 percent of tracts that companies bid on from 1997-2017 as “non-viable,” which means the government wasn’t required to perform a full evaluation on those tracts. Yet nearly 69 percent of tracts that turned out to produce oil or gas were classified as non-viable, with no guarantee the companies paid fair market value to drill them. There is a clear need to overhaul this bidding system to ensure the American taxpayer is getting full value for the use of public lands by private companies.⁵³

Those same offshore lands are home to another problem requiring Congressional attention—lax safety standards for the last line of defense against an uncontrolled offshore oil spill: blowout preventers. In an emergency, blowout preventers should stop the flow of highly pressurized gas and oil rising through well pipes from deep beneath the ocean floor. When blowout preventers fail, we can end up dealing with catastrophic consequences. There’s no better example than the Deepwater Horizon disaster from 2010. When the blowout preventer failed in 2010, eleven people died and the months-long oil spill killed wildlife, wreaked havoc on the coastline, and damaged local economies. After the Deepwater Horizon disaster, the government strengthened regulatory safety standards for blowout preventers; the Trump Administration has proposed rolling those safety standards back to reduce “unnecessary regulatory burdens.”⁵⁴

The federal government’s management of oil, gas, and coal leases results in lost revenue for the American taxpayer. When companies extract oil and gas from federal lands, they vent and burn natural gas, and taxpayers lose millions of dollars in potential federal royalties. The same is true when there are gas leaks. Companies pay no royalties on these lost resources, and there is no centralized location where taxpayers can find data on how much natural gas is lost.

⁵² “Fair Market Value Determination,” Bureau of Ocean Energy Management, Department of the Interior. <https://www.boem.gov/Oil-and-Gas-Energy-Program/Resource-Evaluation/Fair-Market-Value-Determination/Index.aspx> (Downloaded December 21, 2018)

⁵³ “Drilling Down: Big Oil’s Bidding.”

⁵⁴ “Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control Revisions,” Bureau of Safety and Environmental Enforcement, Department of the Interior, May 11, 2018. <https://www.federalregister.gov/documents/2018/05/11/2018-09305/oil-and-gas-and-sulfur-operations-in-the-outer-continental-shelf-blowout-preventer-systems-and-well#p-45> (Downloaded December 21, 2018)

Further, when the laws governing extraction of hard rock minerals from public lands were written in 1872, the federal government decided not to charge any royalties for this category of extraction and to rent out these public lands for only \$1 per acre per year in order to incentivize the development of the American west. The West has long been settled, and it's time to reevaluate these laws: taxpayers are missing out on millions of dollars in potential revenue each year.

Recommendations

- **End the use of “area-wide leasing.”** Congress should require the Department of the Interior to change its policies regarding “area-wide leasing” and return to the system used to identify lands for offshore leasing prior to the 1983 change in policy. This would require companies to nominate tracts to include in auctions, limiting the number of tracts for sale at one time, which would in turn increase competition and reduce the burden on the government to conduct thorough geological and economic assessments of the tracts to ensure fair market value lease terms.
- **Reform process of leasing offshore land classified as “non-viable.”** Congress should require the Bureau of Ocean Energy Management to reject any bid for a tract that it considers “non-viable” unless that bid is accompanied by an explanation of why the company considers the tract to be worth bidding on. This will provide the government with insight into the value of a tract they deemed worthless and ensure that a fair price floor is set.
- **Reexamine the blowout preventer safety rollback.** Congress should require the Department of the Interior to impose minimum testing standards for blowout preventers. The most recently proposed standards don't ensure that the preventers will be tested under conditions closely resembling those they would be performing under in an emergency, and are therefore inadequate.
- **Increase transparency about lost natural gas.** Congress should require the Bureau of Land Management to take steps to minimize loss of natural gas to venting and flaring, and to set up an online database to track monthly aggregated data on lost natural gas. Congress should also consider imposing royalty fees on natural gas lost from leaks in the process of mining.

- **Institute fees and royalties on hard rock mining.** Congress should explore options to institute royalties on hard rock mining. Congress should also set up a hard rock mining reclamation fee—similar to fees that the coal mining industry pays—to provide the federal, state, and tribal governments with funds to clean up hazardous mining sites.

Improving Protections for Whistleblowers and Fortifying Their Outlets of Relief

Whistleblowers are the lifeblood of a checks-and-balances system. They help root out corruption, waste of taxpayer-funded resources, abusive practices, and unlawful actions that otherwise persist for years or even decades. The Whistleblower Protection Act of 1989 and, more recently, the Whistleblower Protection Enhancement Act of 2012, made great strides in protecting those who look out for us. But after seven years, it's time for Congress to pass the next round of commonsense whistleblower protections to ensure that those who speak out can do so without signing their livelihood away.

Over the past few years, Congress has rightfully chosen to strengthen protections for government contractor employees. However, protections for federal employees lag behind, and those for military personnel need significant reform. And Congressional staff do not have whistleblower protections at all.

Once enacted, whistleblower protections must be enforceable to avoid giving a whistleblower a false sense of security when they make the decision to speak out. While there are currently protections for whistleblowers who work in the intelligence community, for example, these rights are effectively unenforceable. In a never publicly released draft report to Congress, the Intelligence Community (IC) Inspector General detailed that many IC components weren't following legally mandated policies and procedures for dealing with whistleblowers, and stated "these deficiencies are significantly undermining the intent of PPD-19 [Presidential Policy Directive 19] and strongly suggest that there has been no impact by PPD-19

to protect whistleblowers in the evaluated agencies.”⁵⁵ An internal system that isn’t structured to address wrongdoing and to protect the individual who reported it from retaliation will only incentivize future whistleblowers to look for alternative avenues, such as the media, to disclose through.

Furthermore, the weaponization of security clearances threatens to strip career-essential clearances from whistleblowers in acts of reprisal and could chill cleared employees from coming forward in the future. While revoking or suspending a security clearance in retaliation for blowing the whistle is prohibited under the law,⁵⁶ enforcement of this provision is left entirely to the agency responsible for stripping the clearance in the first place, leaving little chance for a whistleblower to challenge a retaliatory revocation.

Even where whistleblower protections exist, enforceability continues to be a problem. Vacancies at the Merit Systems Protection Board (MSPB), the quasi-court in the executive branch that handles employment disputes, make it almost impossible to protect employees who raise concerns. Without at least two members,⁵⁷ it cannot hear cases; this lack of a quorum means federal employees will have to wait for a shot at justice.

In addition to whistleblowing, there is also dissenting—when agency employees raise concerns about an agency’s policy decision. A few agencies have created internal policy-dissent channels through which employees can voice their opposition, and agency regulations generally protect employees from retaliation when they use those channels. However, it’s unclear if the use of these channels is protected by federal whistleblower statutes.⁵⁸

While whistleblower rights have come a long way, Congress could make great strides toward leveling the playing field.

⁵⁵ Adam Zagorin, “CIA Inspector General Nominee Has Three Open Whistleblower Retaliation Cases Implicating Him,” Project On Government Oversight, October 16, 2017. <https://www.pogo.org/investigation/2017/10/cia-inspector-general-nominee-has-three-open-whistleblower-retaliation-cases-implicating-him/> [Editor’s note: The draft report at the heart of this story has not been publicly released. POGO obtained a copy but will not publish it to protect our source.]

⁵⁶ 50 U.S.C. 3341(j).

⁵⁷ At the time of publishing, the MSPB had one member whose term is set to expire in March 2019.

⁵⁸ Per 5 U.S.C. §2302(b)(9), it is unlawful to retaliate against a whistleblower when they exercise their right to communicate a complaint or grievance where that right is granted by any law, rule, or regulation. The question of whether this statutory provision applies whistleblower protections to employees who use established dissent channels has never been tested in court.

Recommendations

- **Codify access to jury trials for whistleblowers.** Federal employee whistleblowers are the only major sector of the labor force who don't have the right to have their cases tried in front of a jury. Congress was correct to codify jury trial rights for federal contractors in 41 U.S.C. §4712, but contractors now have stronger whistleblower protections than civil service employees. After years of evidence that extension of these rights does not overly burden the courts, the time is ripe to extend jury trial rights to federal employee whistleblowers.
- **Extend whistleblower protections to Congressional staff.** Although the Office of Compliance has recommended it on ten separate occasions,⁵⁹ Congressional staff still do not receive protections available to executive branch employees under the Whistleblower Protection Act.⁶⁰ While the Congressional Accountability Act of 1995 Reform Act made great strides in holding Members of Congress personally accountable for their actions, Congressional staffers still lack the robust whistleblower protections they need to safely disclose wrongdoing.
- **Strengthen whistleblower protections for service members.** Congress should place the burden of proof on the Department of Defense (DoD) to show it did not illegally retaliate against a whistleblower—the same standard civilian whistleblowers enjoy—and should require periodic reviews to investigate and address falling DoD Inspector General substantiation rates of service members' disclosures. Further, Congress should consider changing the structure of leadership at each service's inspector general office so that the offices are headed by permanent leadership rather than by officers with rotating duty assignments. This would ensure retention of institutional knowledge and inspire trust among service-member whistleblowers.
- **Protect whistleblowers from retaliatory investigations.** When whistleblowers come forward with disclosures, the unfortunate reality is that the resulting

⁵⁹ "Recommendations for Improvements to the Congressional Accountability Act," House of Representatives Office of Compliance, December 2016, p. 13.
<https://www.compliance.gov/sites/default/files/102b%20print%20no%20bleeds.pdf> (Downloaded January 19, 2019)

⁶⁰ "Prepared Statement of Susan Tsui Grundmann, Executive Director, Congressional Office of Compliance," December 7, 2017.
<https://docs.house.gov/meetings/HA/HA00/20171207/106702/HHRG-115-HA00-Wstate-GrundmannS-20171207.pdf> (Downloaded December 12, 2018)

investigations, rather than focusing squarely on the subject of the disclosure, are often wrongfully turned on the whistleblowers themselves. The result is less focus on the underlying disclosure while investigators undertake years-long criminal investigations that seek to discredit the whistleblower. Congress should end this practice of retaliatory investigations.

Provide whistleblowers temporary relief while their cases are pending.

Whistleblower retaliation cases can go on for years while a whistleblower's life is on hold. All the while, the whistleblower is often left with no income. Congress should consider broadening the Office of Special Counsel's (OSC) authority to compel a federal agency to stay an adverse personnel action under OSC investigation when the whistleblower can prove a *prima facie* case of retaliation and the action would cause immediate and substantial harm to the whistleblower.

Ensure that protections for intelligence community whistleblowers are enforceable. Some employees in the intelligence community (IC) can claim protection from whistleblower retaliation through PPD-19,⁶¹ codified in part through the Intelligence Authorization Act of FY 2014,⁶² and through Intelligence Community Directive (ICD)-120,⁶³ which provided some implementing guidance for PPD-19. But the sections of PPD-19 that have been codified do not clearly provide enforceable relief. Congress should codify a means for IC whistleblowers to enforce their rights in court or an administrative review body. Such a right would allow IC whistleblowers to seek relief from retaliation and would allow them to introduce in evidence inspector general findings that substantiate their claims of retaliation.

Ensure workers aren't stripped of clearances in retaliation for whistleblowing.

Congress should update current protections to allow for independent review of security clearance revocation when an individual has made protected disclosures.

⁶¹ The White House, "Presidential Policy Directive/PPD-19," October 10, 2012. https://www.va.gov/about_va/docs/president-policy-directive-ppd-19.pdf (Downloaded December 12, 2018)

⁶² 50 U.S.C. §3234.

⁶³ Office of the Director of National Intelligence, "Intelligence Community Directive 120." [https://www.dni.gov/files/documents/ICD/ICD%20120%20-%20IC%20Whistleblower%20Protection%20\(29%20Apr%202016\).pdf](https://www.dni.gov/files/documents/ICD/ICD%20120%20-%20IC%20Whistleblower%20Protection%20(29%20Apr%202016).pdf) (Downloaded December 12, 2018)

- **Reauthorize and restore the Merit Systems Protection Board.** Congress should extend the hold-over period for members of the MSPB from one year to two years, and should reconsider whether term limits for board members should be adjusted.
- **Protect and broaden intra-agency policy dissent.** Congress should clarify that retaliating against an employee who uses official policy dissent channels is unlawful. Congress should also legislate the creation of policy dissent programs at all cabinet-level agencies and ensure that they are overseen by agency inspectors general.

Making Open Government the Default Operating Standard

An informed and engaged citizenry is a bedrock principle of our democracy, and the United States has long been a country that seeks to be open and honest with its people. The government doesn't always meet that goal, however. When our institutions are secretive, it reduces public trust in government, it makes agencies less effective in their missions, and it weakens us as a country.

Judge Damon Keith famously said in a 2002 ruling against secret deportation hearings that “Democracies die behind closed doors. [...] When the government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”⁶⁴

But open government faces long-standing hurdles. The Freedom of Information Act (FOIA), which requires federal agencies to release requested information that is not exempt, continues to be an overly slow, confusing, and limited tool for access. For example, under current interpretation of the statute, Members of Congress can be denied information under FOIA if they are not asking for that information in the capacity of a committee or subcommittee chair. Further, the Office of Legal Counsel (OLC), a part of the Department of Justice that issues immensely influential interpretations of law, continues to abuse FOIA exemptions to withhold from the public many of its important legal memos, effectively creating a body of secret law. Additionally, although the FOIA

⁶⁴ *Detroit Free Press, et al. v. Ashcroft* (6th Cir. Aug. 26, 2002). <https://caselaw.findlaw.com/us-6th-circuit/1432834.html> (Downloaded January 10, 2019)

Improvement Act of 2016 requires agencies to release documents subject to discretionary withholding unless there is a foreseeable harm in its release, this vague standard is one that leaves room for agency misuse.

It isn't just the executive branch pushing FOIA to its limits. In 2017, the chairman of the House Financial Services Committee instructed federal agencies to not turn over communications with the committee in response to FOIA requests, asserting that they were all Congressional records and remain subject to Congressional control even when possessed by an agency.⁶⁵ Generally, FOIA has recognized that when agencies receive letters, inquiries, or other communications from outside parties—companies, individuals, the White House, or even Congress—they almost always become agency records and subject to possible release.

Federally funded but privately operated prisons and detention centers also claim that their records are not subject to public records laws such as FOIA.⁶⁶ This keeps the public in the dark about how these private prisons and immigration detention centers operate, all the more alarming because the Department of Justice Inspector General found that these facilities are substantially less safe and secure than ones run by the Bureau of Prisons.⁶⁷

We need the government to open its doors to the people, and to instill the ideal of an open government as a fundamental standard that agencies must ingrain into all their operations. It isn't an activity to be pursued by a few when it is convenient but an approach to public work to be adopted throughout the government.

Recommendations

- **Codify standards for withholding documents when the withholding is discretionary.** Congress should require an agency to show specific identifiable harm before being able to withhold discretionary documents. Congress should require an agency to show what the specific identifiable harm would be. This is not

⁶⁵ Kevin Freking, "GOP chairman warns agencies about requests for records," Public Broadcasting Service, May 6, 2017. <https://www.pbs.org/newshour/politics/gop-chairman-warns-agencies-requests-records> (Downloaded January 18, 2019)

⁶⁶ Letter from Civil Society to Senators endorsing the Private Prison Information Act of 2017, July 28, 2018. <https://www.pogo.org/letter/2017/07/pogo-joins-letter-calling-for-private-prison-transparency/>

⁶⁷ Department of Justice, Office of the Inspector General, *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, August 2016. <https://oig.justice.gov/reports/2016/e1606.pdf> (Downloaded January 28, 2019)

a burdensome requirement, as the agencies must be identifying this harm internally already before denying release of a document.

- **Fix a loophole that allows agencies to treat requests for information from Members of Congress as FOIA requests.** Congress should clarify the law so executive branch agencies discontinue responding to Congressional requests for information with documents that have been subject to FOIA redactions. Congress should revise the statute to clarify that no Member of Congress can be denied information regardless of applicable FOIA exemptions.
- **Require the Department of Justice to post Office of Legal Counsel opinions interpreting public law.** Congress should explicitly state that agencies cannot withhold final reports, memos, or interpretations of laws, such as opinions issued by the OLC, under FOIA. The OLC and other Offices of General Counsel effectively create secret law when they internally distribute an interpretation of a statute but refuse to share this interpretation externally. Laws implemented in secret restrict the ability to conduct oversight, engage in public debate, and make legislative correction—ultimately threatening the foundations of our constitutional democracy. Congress should require executive agencies to release these legal memos so that the American public can know how the agencies interpret and enforce the laws of our land. Congress should also require the Justice Department to publish a full list of OLC opinions.
- **Limit the definition of Congressional records to allow agencies to release normal communications from committees and Members.** Congress should clarify that only Congressional communications sharing unreleased Congressional material or protected records should be considered Congressional records. But requests for agency information, instructions or comments on agency activities, dialog on issues, requests and follow-ups for testimony, and other regular communications between agencies and Congress should be considered agency records and available for possible release under FOIA.
- **Make private prison and detention center contractors subject to the Freedom of Information Act.** Congress should require contractors operating private prisons or immigration detention centers to submit to their contracting agency all records about facility operations that would be subject to FOIA if the facility were operated solely by the federal government. These records should then be subject to FOIA as if they were agency records.

Reforming Government Operations to Maximize Transparency and Accountability

There are several government laws and operations that are ripe for reform, and those reforms could have a major impact on ensuring accountable and transparent functions of government agencies.

One such law is the Federal Vacancies Reform Act, which plays a significant role in making sure agencies continue to operate smoothly when an unexpected vacancy occurs in an office that requires nomination by the president and confirmation by the Senate. There are a number of problems with the Act, however, and it's time to re-examine it to provide some much-needed, commonsense reforms.

For instance, there is ambiguity around whether the provisions of the Act apply when a covered position is vacated by firing rather than by resignation. Moreover, the Act relies entirely on self-reporting; it relies on the agency to report a vacancy to the Comptroller General, who then informs the Government Accountability Office (GAO) about the vacancy. Another essential reform is ensuring that when acting agency heads cease to use the "acting" title under the Act, as required under the law after 210 days, they aren't continuing to perform the functions and duties of the vacant office. As the primary authority enabling the government to fill the seats of these vacant offices, it's crucial that the Act be clear in spelling out Congress's intent.

Another issue is the precarious nature of serving in an oversight role for the executive branch. In order to conduct transparent and thorough oversight, officers whose primary function involves ensuring transparent and accountable government operations need true independence from the body they are overseeing. From the director of the Office of Government Ethics, to inspectors general, to the Director of Operational Test and Evaluation at the Department of Defense, the nature of these positions necessitate "for cause" removal protection, wherein those individuals can only be removed for certain enumerated reasons. In

the past, efforts to grant for-cause removal protection for federal inspectors general, for example, have received bipartisan support.⁶⁸

Many of these reforms are ripe for Congressional action and center on ensuring that federal inspectors general have the independence they need to do their jobs. But part of that is making sure we have inspectors general in the first place.

Recommendations

- **Strengthen Federal Vacancies Reform Act.** Congress should require a government entity like the Government Accountability Office or the Office of Personnel Management to create and maintain a public list of all the positions to which the Act applies. Congress should also clarify whether firing triggers the Act in the same way a resignation does.
- **Protect independence of key ethics and oversight officers.** Congress should extend “for cause” removal protections to all independent oversight positions in the executive branch. This protection is essential to ensure that ethics officials can independently hold the agency they oversee accountable without worrying about being fired for doing their job. Certain oversight officials already enjoy such protections: Board members of the Merit Systems Protection Board, for example, may only be removed by the president for “inefficiency, neglect of duty, or malfeasance in office.”⁶⁹ Congress should replicate this standard for all oversight positions.

Defending Democratic Institutions

A modern democracy of more than 300 million people is not an easy thing to manage. The long-term health of our country depends upon the reliability of our most fundamental government institutions and processes. While the public understands that modern politics are messy and complicated, they rightly expect key government operations to function with objectivity and fairness. These critical

⁶⁸ For-cause removal protection was included in the bipartisan House version of the Inspector General Reform Act of 2008 but the provision was cut before final passage by the Senate.

<https://www.congress.gov/bill/110th-congress/house-bill/928/text/eh> (Downloaded December 12, 2018)

⁶⁹ 5 U.S.C. §1202(d).

activities must be free of undue influence or interference—from companies and special interests, from foreign powers and disruptive entities, and from party politics and partisan agendas.

One of the democratic institutions at risk is the decennial census. While the census may sound boring, it is an extremely important tool that determines the number of Congressional representatives each state gets and helps direct more than \$800 billion in annual government spending. The 2020 census is fast approaching and a number of problems that could adversely impact this vital process have arisen. Experts worry that proposed budget increases fall well short of what is needed to properly run the large survey.⁷⁰ Additionally, the company hired to print the \$61-million worth of questionnaires has gone bankrupt.⁷¹ And Department of Commerce Secretary Wilbur Ross decided to include an untested question about citizenship that many census experts believe will harm the accuracy of the count.⁷²

Our federal election system is also under attack. In the wake of increasing threats and confirmed intrusions by foreign adversaries,⁷³ election security has become a much-watched issue. Successful meddling in our election system could create distrust in the results even if the actual impact of the meddling was minimal, cause disorder and delays, or even tip election results.

Additionally, the regulatory process, through which many of the laws created by Congress are implemented, is subject to outsized industry influence, compromising its effectiveness. The Office of Information and Regulatory Affairs (OIRA), almost unknown to the public, wields significant power and influence over regulations with little real transparency or oversight. The office reviews drafts of major rules⁷⁴

⁷⁰ Jory Heckman, “Why more than doubling Census Bureau’s budget isn’t enough for 2020 count,” Federal News Network, February 20, 2018.

<https://federalnewsnetwork.com/management/2018/02/why-more-than-doubling-census-bureaus-budget-isnt-enough-for-2020-count/> (Downloaded January 14, 2019)

⁷¹ United States Census Bureau, “Census Bureau’s Statement on 2020 Census Printing and Mailing Contract,” August 3, 2018. <https://www.census.gov/newsroom/press-releases/2018/2020-printing-cenveo.html> (Downloaded January 14, 2019)

⁷² Edith Honan and Tara Bahrapour, “Statistics expert testifies census citizenship question would harm count,” *The Washington Post*, November 5, 2018. https://www.washingtonpost.com/local/social-issues/statistics-expert-testifies-census-citizenship-question-would-harm-count/2018/11/05/ee0a489a-e144-11e8-b759-3d88a5ce9e19_story.html?utm_term=.5c703804858f (Downloaded January 14, 2019)

⁷³ Cynthia McFadden, William M. Arkin and Kevin Monahan, “Russians penetrated US Voter Systems, Top US Official Says,” ABC News, February 8, 2018. <https://www.nbcnews.com/politics/elections/russians-penetrated-u-s-voter-systems-says-top-u-s-n845721> (Downloaded January 10, 2019)

⁷⁴ 5 U.S.C. § 801

(any rule that would result in an annual effect on the economy of \$100 million or more), often requiring changes before agencies can publish the proposed rules for public review. While OIRA is nominally amenable to meetings with all stakeholders, the meetings skew heavily toward the regulated industries seeking to influence proposed rules that the office is reviewing.⁷⁵ The office may also feel the effects of industry influence from its own employees, as many of the lawyers and economists hired have held positions with regulated companies, industry associations, and lobby firms associated with parts of the regulated community.⁷⁶

A 1993 Executive Order by President Clinton sought to balance this considerable influence with transparency requirements that OIRA disclose any changes made to a draft rule during OIRA review, identifying those made at the suggestion of OIRA, and to publish all documents exchanged between the office and the agency during the review.⁷⁷ However, agencies and OIRA have regularly ignored these transparency requirements.

Finally, when agencies are developing regulations, they are permitted to adopt standards developed by industry associations merely by referencing them, a process called incorporation by reference. For the government, adopting privately written standards is a way to reduce effort and tap private-sector expertise. However, many of these referenced standards carry copyright protections and cannot be republished by the agency. Some associations require members of the public to pay for print or printable electronic copies.⁷⁸ But the government has a responsibility to provide access to proposed regulations so that interested members of the public can become properly informed and weigh in on the proposal. And once regulations are established, agencies should ensure those regulations are available to the public.

⁷⁵ Rena Steinzor, Michael Patoka, and James Goodwin, *Behind Closed Doors at the White House: How politics Trumps Protection of Public Health, Worker Safety, and the Environment*, Center for Progressive Reform, November 2011. http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf (Downloaded January 10, 2019)

⁷⁶ James Goodwin, "The Most Important Revolving Door You've Never Heard Of," Coalition for Sensible Safeguards, June 30, 2017. <https://sensible safeguards.org/the-most-important-revolving-door-youve-never-heard-of/> (Downloaded January 18, 2019)

⁷⁷ Executive Order 12866

⁷⁸ David Hilzenrath, "Big Oil Rules: One Reporter's Runaround to Access 'Public' Documents," Project On Government Oversight, December 6, 2018. <https://www.pogo.org/investigation/2018/12/big-oil-rules-one-reporters-runaround-to-access-public-documents/>

Recommendations

- Ensure a fair and complete census.** Congress should work with the White House to ensure that the Census Bureau receives sufficient resources to effectively carry out its vital responsibility and that the decennial census is fair, just, and accurate. Congress also should prevent the inclusion of any untested question in the decennial survey. If Congress and federal agencies determine that more data on citizenship is needed, hearings can explore the best census survey in which to include the issue after proper testing and oversight.
- Protect our elections against outside interference.** Congress should pass legislation that takes concrete steps to protect registration data, voting machines and tabulators, and other election infrastructure from outside intrusion. Congress should also require states to develop backups for registration databases that employ and adapt to security best practices, and should require voting systems to incorporate a paper ballot that is retained for potential manual recounts. Congress should update the Help America Vote Act to ensure provisional ballots can be broadly used in the event of a successful attack on election systems.⁷⁹ This combination of safeguards is the best practical defense to prevent or offset the harms of cyberattacks against election systems.
- Codify and enforce transparency requirements for Office of Information and Regulatory Affairs reviews.** Congress should codify the transparency requirements laid out in Executive Order 12866 into law and include penalties for noncompliance to ensure compliance by agencies and OIRA.
- Require unimpeded access to all material incorporated by reference into regulations.** Congress should require agencies to provide the public with unimpeded access to any standards incorporated by reference into rules or regulations, or proposed to be incorporated. Further, Congress should clarify that copyright protections do not apply to any material incorporated—by reference or otherwise—into laws or regulations.

⁷⁹ Jake Laperruque, “Securing Our Elections: How States Can Mitigate the Potential Damage of Hacked Voter Registration Rolls,” Project On Government Oversight, November 16, 2018. <https://www.pogo.org/report/2018/11/election-day-under-attack-how-states-can-mitigate-the-potential-damage-of-hacked-voter-registration-rolls/>

Reforming Congress

Congressional interaction with whistleblowers is an essential part of conducting robust oversight of the executive branch. Unfortunately, many Congressional offices don't know the best practices for working with insiders alleging waste, fraud, abuse, or malfeasance within federal agencies or federal contractors. Because of this, Congressional offices may prove less than effective in engaging with whistleblowers. Further, offices could be more likely to inadvertently mishandle whistleblower cases, increasing the likelihood of retaliation or misdirected communications, possibly dissuading other whistleblowers from working with Congress.

Additionally, Congressional committees play pivotal roles in overseeing our military and national security. In order to aid Members in their oversight work, committee staff generally have appropriate levels of security clearance, allowing them access to classified materials and briefings necessary to do their jobs. However, in the case of the House of Representatives, not every Member of Congress on committees that deal largely with classified information has a designated committee staffer. Because personal office staff rarely hold a security clearance at the necessary level many Members on those committees are often overseeing the executive branch blindfolded.

The ability of Congress to do its job is also being impacted by the high turnover of Congressional staff, which has led to a decrease in office work capacity. One way Members of Congress are compensating for the high turnover is to take advantage of fellowships sponsored by corporations, foundations, universities, nonprofits, and other non-governmental entities.⁸⁰ The work of these Congressional fellows is often indistinguishable from permanent staff, and fellows generally conduct policy research and write legislation. Congressional offices should ensure that fellows have no conflicts of interest and that their placement in the office gives no undue advantage to companies or special interest groups. The House has no rules regarding its fellows. The Senate does, though, and according to those rules a Senate office with a fellow is required to report to the Senate Ethics Committee the

⁸⁰ POGO sponsors a fellowship for midcareer professionals to spend a year working with a Congressional committee, to learn about and contribute to the Congressional oversight process. Our fellows follow all current rules as well as our recommended enhancements. For more information: <https://www.pogo.org/congressional-oversight-fellowships/congressional-oversight-fellowships-policies/>

source and amount of the fellow's compensation, and make these reports available to the public.⁸¹ But compliance is poor and POGO has found numerous examples of conflicts of interest within the program.⁸²

Finally, the rules of the House and the Senate determine important procedures, duties, and authorities of Congressional committees. These rules range from how committees initiate investigations and conduct hearings to how they determine whether to subpoena government officials. Both the House and Senate allow its committees to adopt their own rules on specific matters, as long as those rules don't contradict the respective chamber's rules. Congress should ensure that all of its rules are crafted in a way that increases the effectiveness of Congress.⁸³

Recommendations

■ Increase resources for Congressional staff to work with whistleblowers.

Congress should establish and provide adequate funding for a whistleblower resource center for both the House and Senate. These centers would educate and support Congressional staff in working with whistleblowers. Although not intended to directly handle whistleblower cases, they would help ensure whistleblowers go to the appropriate offices and those offices are equipped with best practices to protect whistleblowers and act on their complaints.

■ Provide all relevant Congressional staff adequate security clearance levels.

The House of Representatives should ensure that at least one Congressional staffer for each Member on the House Permanent Select Committee on Intelligence, the House Appropriations Defense Subcommittee, and the House Armed Services Committee should be eligible to receive a top secret/sensitive compartmented information clearance. This would significantly strengthen

⁸¹ Senate Rules, XLI Political Fund Activity; Senate Ethics Manual, p. 125.

<https://www.ethics.senate.gov/downloads/pdf/files/manual.pdf> (Downloaded November 8, 2018)

⁸² Lydia Dennett, "The Insidious (and Totally Legal?) Way that Industry Has Infiltrated Congress," Project On Government Oversight, September 21, 2016.

<https://www.pogo.org/investigation/2016/09/insidious-and-totally-legal-way-that-industry-has-infiltrated-congress/>

⁸³ Open letter to Congress from Danielle Brian, Executive Director, Project On Government Oversight, about proposal to improve Congressional committee rules, November 13, 2018.

<https://www.pogo.org/letter/2018/11/strengthening-congressional-committee-rules-recommendations-for-improved-oversight-and-transparency/>

those Members' ability to conduct oversight, as it allows staff to press the intelligence agencies to answer the hard questions.

- Create clear reporting rules for Congressional fellowships, and enforce those rules.** The House of Representatives should require ethics reporting rules regarding Congressional fellows similar to the Senate's, and include requirements to ensure full compliance and a review process. For example, fellows should have no conflicts of interest, and their placement in the office should give no undue advantage to companies or special interest groups.⁸⁴ The Senate should establish a review process to ensure accurate and complete reporting.
- Strengthen Congress's procedural and committee rules.** The Senate and House should adopt improvements in their rules, such as mandating that staff and members of a committee must have access to all investigative reports at least 72 hours before a hearing, and allowing ranking members to object to depositions initiated by the chair, triggering a full committee vote before the deposition can proceed.
- Clarify authority to release classified information in the public interest.** Committee rules are vague as to who determines when to release classified information that is part of its oversight jurisdiction. Committee rules should specify procedures that allow the chair, ranking member, or two-thirds of the membership of a committee to refer information to the full chamber for release in the public interest. Congress could allow the president thirty calendar days (or five calendar days, if there is a pressing need) to explain why any motion to release the information should be withdrawn.
- Require witnesses to disclose funding from all foreign government sources.** All of Congress should adopt and broaden current House rules to ensure their witnesses disclose any potential conflicts of interest. If a witness is a registered foreign agent, he or she should be required to provide that information to the committee as part of the disclosure process.
- Enhance conflict of interest rules for Members of Congress.** Congress should add to both the House of Representatives and the Senate rules that members of Committees shall not own or trade stock in companies with a financial interest in

⁸⁴ Nicholas Trevino and Lydia Dennett, "Congress (Still) Fails to Enforce Ethics Rules for Fellows," Project On Government Oversight, November 13, 2018. <https://www.pogo.org/investigation/2018/11/congress-still-fails-to-enforce-ethics-rules-for-fellows/>

their official duties to avoid even the appearance of a conflict of interest. Situations in which the potential benefit to the interested Member, officer, or employee is tenuous, remote or insubstantial—such as investments in a mutual fund that holds stock in many companies—should not be considered a conflict of interest.

