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Government Ethics in the Age of Trump

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GOVERNMENT ETHICS IN THE AGE OF TRUMP

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ABSTRACT

Americans' trust in government officials has never been lower. Despite the intense public focus on ethics in government in recent years, legal scholarship on the subject has been sparse. This Article fills the gap by examining the ethics regime of the federal executive branch in depth, with a discussion of both the applicable ethics standards and the agencies and offices that are charged with ensuring that government officials comply with those standards. The Article describes how the current system heavily emphasizes prevention, education, and highly detailed disclosures while it rarely enforces the law against wrongdoers. A federal official in the United States is literally more likely to be struck by lightning than to be charged with violating a government ethics law. The Article then considers the federal government's ethics regime through the lens of criminal deterrence theory and concludes that the current system is an example of what not to do if the goal is to discourage violations. To address this deficiency, the Article proposes a number of reforms to the current system to improve the deterrent effect of federal ethics standards, including a radical reimagining of the authority of government ethics officials.

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INTRODUCTION

American trust in government has hit a low point. In 2019, just seventeen percent of Americans agreed that they could trust the government in Washington to do what is right most or all of the time.[1] This was not the result of a sudden, recent shift, as trust in the federal government has steadily eroded ever since a peak after 9/11.[2]

In particular, a 2014 Gallup poll found that seventy-five percent of Americans agreed that "corruption [is] widespread throughout the government in this country."[3] President Trump, of course, was

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1. *Public Trust in Government: 1958-2019*, PEW RSCH. CTR. (Apr. 11, 2019), https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019 [https://perma.cc/2DS3-Q2YT]; *see also* Lee Raine, Scot Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RSCH. CTR. (July 22, 2019), https://www.people-press.org/2019/07/22/trust-and-distrust-in-america [https://perma.cc/5RTK-67BG].

2. *See Public Trust in Government: 1958-2019*, *supra* note 1.

3. *75% in U.S. See Widespread Government Corruption*, GALLUP (Sept. 19, 2015), https://news.gallup.com/poll/185759/widespread-government-corruption.aspx [https://perma.cc/45WL-5YEF].

elected in 2016 on promises to "drain the swamp" of corruption in Washington.[4] But a 2017 survey by Transparency International, the international anticorruption organization, concluded that "rather than feeling better about progress in the fight against corruption over the past year, a clear majority of people in America now say that things have become worse."[5] The following year, the United States dropped in Transparency International's international corruption rankings, as it was designated a "country to watch and monitor" due to the finding that "[t]he country is currently witnessing threats to its system of checks and balances, as well as an erosion of ethical norms at the highest levels of power."[6]

For all the concern about corruption and unethical behavior in American government, it is not for lack of a set of express standards that officials are required to follow. On the contrary, an extensive mosaic of laws and rules governs the behavior of federal employees. Nor, for that matter, is it for lack of substantial government resources devoted to ensuring officials comply with those standards. A vast array of agency ethics offices, inspectors general, and other officials throughout the government supposedly police misbehavior as well as provide guidance and training on proper compliance with the rules.

Part of the reason for this disconnect may be another disconnect: that between the extensive system of federal ethics standards and offices and the extremely rare acts of enforcement against suspected violators. Despite the numerous laws and regulations, it is very uncommon for a federal official to be disciplined in any way for violating them, and the total number of such disciplinary actions has dropped steadily in recent years. And criminal prosecutions are orders of magnitude rarer, taking place only in the most exceptional of cases. A federal official in the United States is literally more likely to be struck by lightning than to be charged with violating government ethics laws.[7]

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4. *See, e.g.*, Ryan Lovelace, *Trump Proposes Ethics Plan to 'Drain the Swamp in Washington'*, WASH. EXAM'R (Oct. 17, 2016, 9:39 PM), https://www.washingtonexaminer.com/trump-proposes-ethics-plan-to-drain-the-swamp-in-washington [https://perma.cc/VZQ7-6QAS].

5. *Corruption in the USA: The Difference a Year Makes*, TRANSPARENCY INT'L (Dec. 12, 2017), https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes [https://perma.cc/D8NL-6GJ5].

6. *Americas: Weakening Democracy and Rise in Populism Hinder Anti-Corruption Efforts*, TRANSPARENCY INT'L (Jan. 29, 2019), https://www.transparency.org/news/feature/cpi-2018-regional-analysis-americas [https://perma.cc/D39Z-TWM2].

7. The National Weather Service estimates that an American has a one in 15,300 chance to be struck by lightning in their lifetime. *How Dangerous Is Lightning?*, NAT'L WEATHER SERV., https://www.weather.gov/safety/lightning-odds [https://perma.cc/PWC6-H474] (last visited Nov. 4, 2020). As discussed below, approximately 10 federal employees per year are subject to civil or criminal actions for violating ethics laws. *See infra* Part III. The average federal employee tenure is 13.51 years. *Profile of Federal Civilian Non-Postal Employees*,

This Article considers whether the current structure of ethics rules and enforcement makes sense from a perspective of both deterring wrongdoing and encouraging public confidence in government. The Article concludes that the problem is not one of substantive laws and rules—rather, it is a deficiency of process.

Given the vast public attention paid to government ethics, in-depth scholarship on the subject has been surprisingly sparse in the past decade.[8] This Article aims to fill that gap by providing a comprehensive overview of the structure of federal ethics regulation and enforcement and discussing possible reforms.

This Article will concentrate on the largest component of American government from both a fiscal and manpower perspective: the federal executive branch. Although subject to many similar standards of behavior, and also the focus of considerable public attention, the courts, Congress, and state and local government will be left for another day. Likewise, although federal lobbying law is a key ethical standard, it primarily governs the activities of private individuals and organizations communicating with government officials,[9] while the focus here is on how the officials themselves are restricted.

OPM (Sept. 30, 2017), https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees [https://perma.cc/WEH5-WMHJ]. There are approximately 2.1 million civilian employees in the executive branch not including postal service employees. JULIE JENNINGS & JARED C. NAGEL, CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 6 (2019).

Accordingly, over the course of an average federal employee's tenure, about 135 civilian executive branch employees—about one in 19,800—will be subject to an enforcement action.

8. For counterexamples, see Alice Bartek-Santiago, *Humanizing Federal Ethics: Motivating and Mobilizing Compliance Through Creative Outreach*, 51 CREIGHTON L. REV. 713 (2018); Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts Of Interest in Government and Business*, 95 MINN. L. REV. 1637 (2011); Kathleen Clark, *Ethics, Employees and Contractors: Financial Conflicts of Interest in and Out of Government*, 62 ALA. L. REV. 961 (2011); and RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE (2009). In addition, the American Law Institute has been developing a set of Principles of the Law on government ethics. The author is a participant in the Members Consultative Group for this Principles project.

A notable, if narrow, exception to the limited recent scholarship on government ethics is a minor explosion of commentary on the Constitution's Emoluments Clause following the election of President Trump. *See, e.g.*, Kathleen Clark, *The Lawyers Who Mistook the President for Their Client*, 52 IND. L. REV. 271 (2019); Don Mayer & Adam Sulkowski, *The U.S. Constitution's Emoluments Clauses: How History, Behavioral Psychology, and the Framers' Understanding of Corruption All Require an End to President Trump's Conflicts of Interest*, 7 BRIT. J. AM. LEGAL STUD. 257 (2018); Kimberly Breedon & A. Christopher Bryant, *Restoring Trust with Trusts: Constructive and Blind Trusts as Remedies for Presidential Violations of the Constitution's Emoluments Clauses*, 11 ALB. GOV'T L. REV. 284 (2018); Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639 (2017); Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 GA. L. REV. 1 (2017).

9. *See generally* 2 U.S.C. §§ 1601–1614; *Lobbying Disclosure Act Guidance*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Jan. 31, 2017), https://lobbying

Part I of this Article provides an overview of the key ethics standards that apply to federal executive branch officials and the three sources they derive from: statutes, regulations, and presidential ethics pledges. Part II describes the federal infrastructure that oversees and enforces ethics standards. Part III discusses the methods of enforcement—regulatory, criminal, and otherwise—and the extent of enforcement. Part IV addresses possible changes to the current enforcement and compliance mechanisms. In particular, it looks at the current ethics system through the lens of criminal deterrence theory and considers whether current processes and practices match up with what deterrence theory tells us are the most—and least—effective ways to discourage wrongdoing and to promote public trust in government officials. This Article focuses not on whether the current ethical standards are substantively good or bad, but rather on whether the system is set up effectively to ensure that government employees follow those standards.

I. THE FEDERAL ETHICAL STANDARDS

The disconnect between the federal government's vast array of ethical standards and the widespread perception that corruption in government is endemic has been observed for decades. As one commentator put it in 1990:

> [O]ver-regulation of government ethics can be harmful to the greater public interest, not merely unnecessary or burdensome to public employees. We may all lose when every encounter with the government becomes an exercise in narrow, "safe" conduct designed to prevent becoming personally trapped in a too wide, but tightly knit, prosecutorial net.[10]

Or, as Kathleen Clark put it nine years later:

> While the amount of ethics regulation has increased, the public's trust in government has decreased. Adding more ethics regulation actually may be counterproductive. It dis-

disclosure.house.gov/amended_lda_guide.html [https://perma.cc/RL2P-MG75]; THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE (Rebecca H. Gordon & Thomas M. Susman eds., 5th ed. 2016) (providing an overview of federal lobbying law).

10. Beth Nolan, *Regulating Government Ethics: When It's Not Enough to Just Say No*, 58 GEO. WASH. L. REV. 405, 414 (1990).

> tracts both government officials and the public from the more general goal of protecting the public trust.[11]

Or, as a government ethics lawyer himself complained a decade after that: "[T]here are numerous criminal and civil statutes addressing corruption and ethics, and there is an extensive and detailed code of conduct for the executive branch that proscribes and prescribes employee conduct in minute and sometimes mind-numbing detail."[12] Rather, as the lawyer continued:

> The ever-present news reports of misconduct by government officials amply illustrate that the government's coercive approach to ethics has neither prevented notorious and outrageous corruption by government officials, nor reduced cynicism about government service. More likely, the government's heavily regulated workplace has led to what [former Bush White House ethics head] Richard Painter has described as "superficial compliance," where employees learn to navigate around the detailed rules instead of complying with the broader ethical principles involved.[13]

Ethics standards for federal executive branch employees derive from three primary sources: statutes, regulations, and executive orders. The key standards are summarized in this Part.

A. *Ethics Statutes*

The modern structure of federal ethics laws can be traced to Congress's enactment in 1962 of criminal statutes on bribery, conflicting financial interests, and other prohibitions.[14] In addition, much of the current legal framework of government ethics derives from the Ethics in Government Act of 1978, enacted in the wake of Watergate.[15] Among other things, the Act created the Office of Government Ethics (OGE), which was in turn empowered to

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11. K. Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 61–62.
12. James M. Lager, *Overcoming Cultures of Compliance to Reduce Corruption and Achieve Ethics in Government*, 41 MCGEORGE L. REV. 63, 64 (2009).
13. *Id.* at 65–66.
14. Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119; *see also* Memorandum from Pres. John F. Kennedy to the Heads of Exec. Dep'ts & Agencies (Jan. 22, 1963).
15. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–599); *see also 35th Anniversary of the Ethics in Government Act*, U.S. OFF. OF GOV'T ETHICS (Nov. 8, 2013), https://oge.gov/Web/oge.nsf/Resources/35th+Anniversary+of+the+Ethics+in+Government+Act [https://perma.cc/G8R7-YZRS].

promulgate an array of ethics regulations.[16] The 1978 Act also required federal officials to submit financial disclosure forms listing their assets, income, and other information.[17] Eleven years later, Congress passed the Ethics Reform Act of 1989, which established additional restrictions on, among other things, the activities of former officials.[18]

The primary federal ethics statutes, and the standards they enforce, are summarized below. The violation of these statutes subjects officials not only to employment discipline and civil penalties but also potential criminal prosecution.

First, perhaps the key ethics statute for current executive branch employees is 18 U.S.C. § 208, which governs financial conflicts of interest.[19] OGE has promulgated extensive regulations implementing and clarifying the meaning and application of § 208.[20] The statute provides that, with certain exceptions, an official who

> participates personally and substantially as a Government officer or employee, . . . in a . . . particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest,

is subject to criminal penalties.[21] The law contains several exceptions,[22] the most notable one since 2016 being that the President is exempt from the law entirely.[23]

Second, the supplementation-of-income statute, 18 U.S.C. § 209, restricts federal employees from receiving—and private parties from providing—additional salary or other income on top of the official's government pay. For example, a wealthy friend of an incoming federal official, proud of the friend's willingness to serve in public service and sympathetic to a civil servant's relatively low pay,

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16. 5 U.S.C. app. §§ 401(a), 402.
17. *Id.* §§ 101–112.
18. Ethics Reform Act of Nov. 3, 1989, Pub. L. No. 101-94, 103 Stat. 1716 (codified as amended in scattered sections of 2, 3, 5, 10, 18, 22, 26, 28, 31, 37, 41, 42 and 50 U.S.C.).
19. *See generally* Adam Raviv, Christopher Babbitt, Blake Roberts & Molly Jennings, *Officials Must Note Financial Conflict of Interest Law*, LAW360 (May 25, 2008), https://www.law360.com/articles/1047300 [https://perma.cc/39E6-66TH] (discussing the application of 18 U.S.C. § 208 to federal officials).
20. 5 C.F.R. §§ 2635.401–403, 2640 (2018).
21. 18 U.S.C. § 208(a).
22. *Id.* § 208(b); 5 C.F.R. § 2640.203–304 (2018).
23. 18 U.S.C. § 202(c).

cannot give his friend an extra $50,000 per year on top of the employee's government salary; under such an arrangement, both the official and the wealthy friend would be violating § 209 even if the friend neither seeks nor receives any official favors in return for the salary bump.

Third, the key ethics statute that applies to former government officials is 18 U.S.C. § 207, the so-called revolving-door statute.[24] The statute and its implementing regulations[25] are aimed at restricting the post-government employment activities of former senior government officials and limiting their ability to profit from the connections they made and the confidential information they learned while in government. The statute contains various prohibitions, some of them time-limited and some of them permanent. For example, the statute prohibits former officials from contacting the federal government with respect to particular matters involving specific parties on which they worked while in government;[26] prohibits former officials from contacting the government for two years on any matters that fell within their "official responsibility" during their last year in government;[27] prohibits certain "senior personnel" from contacting senior officials at their former agencies about any matter for one year after leaving government;[28] and extends a broader two-year restriction to certain "very senior" personnel, generally cabinet-level officers and very senior White House officials.[29] There are also restrictions relating to trade and treaty negotiations and representing foreign governments.[30]

Fourth, the Ethics in Government Act imposes significant financial disclosure requirements on federal officials. Senior executive branch officials must file periodic reports that provide extensive information on their financial holdings, sources of income, liabilities, and transactions, along with those of their immediate family.[31] These reports are made publicly available.[32] Less senior officials must file confidential financial disclosure forms, which are somewhat less detailed.[33]

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24. *See generally* Christopher Babbitt, Thomas W. White & Blake Roberts, *Considerations When Hiring Executive Branch Employees*, LAW360 (Oct. 25, 2016), https://www.law360.com/articles/854042 [https://perma.cc/WN6K-BP36]; PAINTER, *supra* note 8, at 47–59.
25. 5 C.F.R. § 2641 (2018).
26. 18 U.S.C. § 207(a)(1).
27. *Id.* § 207(a)(2).
28. *Id.* § 207(c).
29. *Id.* § 207(d).
30. *Id.* § 207(b), (f).
31. 5 U.S.C. app. §§ 101–103; *see also* 5 C.F.R. §§ 2634.201–311 (2018).
32. 5 U.S.C. app. § 105.
33. *See* 5 C.F.R. §§ 2634.901–909 (2018).

Fifth, two statutes restrict federal officials from privately representing others before the government.[34] First, 18 U.S.C. § 203 prohibits any current government official from acting as a paid representative in any matter where the United States is a party or has a direct and substantial interest—for example, by lobbying the government or acting as counsel to a private client in litigation where the United States is a party.[35] Similarly, 18 U.S.C. § 205 prohibits any federal official from acting "as agent or attorney for prosecuting any claim against the United States" or acting "as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any [particular] matter in which the United States is a party or has a direct and substantial interest."[36]

Finally, bribery is perhaps the archetypal example of public corruption, provides one of the Constitution's grounds for impeachment,[37] and implicates the most basic and intuitive common notions of ethics in government. The federal bribery and gratuity statute, 18 U.S.C. § 201, prohibits anyone from offering, and prohibits a public official from accepting, anything of value in return for or because of an "official act."[38]

B. *Ethics Regulations*

Pursuant to its statutory authority granted in the Ethics in Government Act and elsewhere, OGE has promulgated, and periodically amended, extensive ethics rules for executive branch employees. OGE's ethics regulations are codified primarily at 5 C.F.R. § 2635, which first took effect in 1993 and has undergone a number of amendments since.

Some of the key ethics regulations are summarized below. These are in addition to the regulations that directly implement and interpret the separate ethics statutes.

The *first* subpart of OGE's ethics rules outlines the basic obligations of public officials. It provides that every executive branch employee "has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain," and that "each employee shall respect and adhere to the principles of ethical conduct set forth in

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34. *See* PAINTER, *supra* note 8, at 26–30.
35. *See* 18 U.S.C. § 203.
36. *Id.* § 205(a).
37. U.S. CONST. art. II, § 4.
38. 18 U.S.C. § 201.

this section."[39] It then lists fourteen "general principles" that "apply to every employee and may form the basis for the standards contained in" the ethics regulations.[40] These principles generally require employees to do their jobs diligently and honestly and avoid conflicts of interest.

Second, OGE regulations generally prohibit various ways in which officials might misuse their positions.[41] For example, employees may not use their public office for private gain for themselves or others by, for instance, coercing others to give them financial benefits or endorsing "products, services or enterprises."[42] It also prohibits the equivalent of insider trading, through "a financial transaction using nonpublic information."[43] Officials also may not improperly use government property or use their "official time" except to "perform official duties."[44]

Third, ethics rules restrict the ability of executive branch employees to solicit or accept "gifts" from certain sources.[45] The federal gift rule, most recently amended in 2017, generally provides that an employee may not solicit or accept a gift from certain sources, or from anyone when the gift is "given because of the employee's official position."[46] "Gift" is defined broadly under the rule as encompassing "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value."[47]

Fourth, OGE's impartiality rule generally restricts officials from participating in certain matters where they have a relationship with someone who is or represents a party to that matter.[48] In essence, this regulation provides that an official normally should not participate in a particular matter involving specific parties where (1) the matter will affect the financial interests of a member of the official's household, or (2) someone with whom the official has a "covered relationship" is or represents a party to the matter, if doing so would create an appearance of impropriety in the mind of a

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39. 5 C.F.R. § 2635.101(a) (2018).
40. *Id.* § 2635.101(b).
41. *See id.* §§ 2635.701–705.
42. *Id.* § 2635.702. In 2017, White House counselor Kellyanne Conway ran afoul of this rule when, during a Fox News segment, she spoke positively about presidential daughter Ivanka Trump's clothing line. *See, e.g.*, Valentina Zarya, *Kellyanne Conway's Endorsement of Ivanka Trump's Clothing Line May Be Unethical*, FORTUNE (Feb. 9, 2017), http://fortune.com/2017/02/09/ivanka-trump-nordstrom-kellyanne-conway [https://perma.cc/3F2M-MU98].
43. 5 C.F.R. § 2635.703(a) (2018).
44. *See id.* §§ 2635.704, 2635.705(a).
45. *See id.* §§ 2635.201–206; *see also* PAINTER, *supra* note 8, at 16–26.
46. 5 C.F.R. § 2635.202 (2018).
47. *Id.* § 2635.203(b).
48. *See id.* § 2635.502(a).

"reasonable person" with knowledge of the relevant facts and circumstances.

Fifth, OGE's "extraordinary payment" regulation is effectively an extension of the supplementation-of-income statute to payments made *before* the official entered government. It provides that "an employee shall be disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment from that person prior to entering Government service."[49] The regulation defines "extraordinary payment" as a payment worth over $10,000 that is made to an official "[o]n the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position," and "[o]ther than pursuant to the former employer's established compensation, partnership, or benefits program."[50]

Sixth, the "seeking employment" regulation provides that, with certain exceptions, a federal employee "may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom the employee is seeking employment."[51]

Finally, ethics regulations restrict the ability of federal officials to engage in certain activities outside their government roles.[52] For example, in a restriction similar—and perhaps somewhat redundant—to certain other regulations, an employee cannot "engage in outside employment or any other outside activity that conflicts with his official duties."[53] Presidential appointees and the other senior officials face a more substantial restriction: Presidential appointees cannot "receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment,"[54] and other senior officials' outside earned income is highly restrained.[55]

C. *Presidential Ethics Pledges*

On top of existing ethics statutes and regulations, recent presidential administrations have also issued executive orders that re-

49. *Id.* § 2635.503(a); *see also* PAINTER, *supra* note 8, at 52–53.
50. 5 C.F.R. § 2635.503(b)(1) (2018).
51. *Id.* § 2635.604(a)(1).
52. *See id.* §§ 2635.801–809.
53. *Id.* § 2635.802.
54. *Id.* § 2635.804(a).
55. *See id.* § 2635.804(b).

quired senior officials to sign "ethics pledges."[56] The first was issued by President Clinton in 1993 as Executive Order 12834, entitled "Ethics Commitments by Executive Branch Appointees." It included:

1. A five-year ban on former officials' lobbying of their former agencies;
2. A lifetime ban on former officials' lobbying for or representing foreign governments or political parties in a manner that would require registration under the Foreign Agent's Registration Act; and
3. A five-year ban on former government officials' advising or representing a foreign government, political party, or entity when those officials participated in trade negotiations.[57]

The day after he took office in 2009, President Obama issued Executive Order 13490 and required all full-time political appointees in the administration to sign the Ethics Pledge it contained. In signing the Obama Ethics Pledge, officials made the following primary commitments, most of which were variations on or extensions of existing rules and laws:

1. Not to accept gifts from registered lobbyists or lobbying organizations;
2. For two years after entering government, not to participate personally and substantially in any particular matter involving specific parties "that is directly and substantially related to my former employer or former clients;"
3. Restrictions on the ability of former registered lobbyists to take government roles in areas that they lobbied;
4. An extension of the one-year "revolving door" lobbying ban under 18 U.S.C. § 207(c) to two years;
5. For officials leaving government, agreeing "not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration;" and
6. Agreeing "that any hiring or other employment decisions I

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56. *See generally* JACOB R. STRAUS, CONG. RSCH. SERV., R44974, ETHICS PLEDGES AND OTHER EXECUTIVE BRANCH APPOINTEE RESTRICTIONS SINCE 1993: HISTORICAL PERSPECTIVE, CURRENT PRACTICES, AND OPTIONS FOR CHANGE (2017) (discussing ethics pledges in recent administrations).
57. Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 20, 1993).

> make will be based on the candidate's qualifications, competence, and experience."[58]

On taking office in 2017, President Trump issued his own ethics pledge for political appointees. Though announced with great "drain the swamp" fanfare, Trump's ethics pledge borrowed heavily from both the Clinton and Obama pledges. It essentially retained Clinton items #1 and 2 above and Obama items #1, 2, 3, and 6[59] and expanded them slightly in a few respects.[60] Most significantly, the restriction on former officials lobbying senior officials for the remainder of the administration was expanded to cover not only direct lobbying but also "lobbying activities," including behind-the-scenes advice relating to lobbying.[61] As of 2018, according to OGE statistics, 2,559 officials had signed the Trump Ethics Pledge.[62]

In January 2021, as this Article went to press, President Biden issued an Executive Order requiring political appointees to sign an Ethics Pledge similar to the Obama Administration's.[63] And on the final day of his presidency, President Trump rescinded the Executive Order establishing his own Ethics Pledge, thereby releasing his former appointees from their continuing Pledge obligations, including the five-year ban on lobbying their former agencies.[64]

II. THE FEDERAL ETHICS INFRASTRUCTURE

Every law or rule is only as good as the mechanisms for ensuring compliance and addressing violations. Each agency of the federal

58. Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009).

59. Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017).

60. For a comparison of the Obama and Trump ethics pledges, see Kathleen Clark, *Illusory Ethics: Trump's Ethics Executive Order*, 2017 U. ILL. L. REV. ONLINE (Apr. 29, 2017), https://illinoislawreview.org/symposium/first-100-days/illusory-ethics [https://perma.cc/ND94-JBY6].

61. Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017) (restricting "lobbying activities" as defined in the Lobbying Disclosure Act). The Lobbying Disclosure Act defines "lobbying activities" as "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." 2 U.S.C. § 1602(7).

62. U.S. OFF. OF GOV'T ETHICS, CY17 ANNUAL AGENCY ETHICS PROGRAM QUESTIONNAIRE 5 (2018), https://www.oge.gov/Web/oge.nsf/accessdocs_summary-reports (click "Summary Report (CY17) (PDF)") [https://perma.cc/DY45-RBLX].

63. Exec. Order No. 13,989, 86 Fed. Reg. 7027 (Jan. 20, 2021), and: https://www.bloombergquint.com/politics/trump-revokes-lobbying-ban-after-promising-to-drain-the -swamp.

64. Justin Sink, *Trump Revokes Lobbying Ban After Promising to 'Drain the Swamp,'* BLOOMBERG NEWS (Jan. 20, 2021), https://www/bloombergquint.com/politics/trump-revokes-lobbying-ban-promising-to-drain-the-swamp.

government has its own ethics officers; in addition, the OGE oversees ethics generally across the executive branch and issues government-wide ethics regulations such as those discussed in Section I.B above. This Part describes the federal ethics infrastructure as currently organized and operated—and the costs and burdens of this regime.

A. *The Office of Government Ethics*

OGE was established by the Ethics in Government Act of 1978.[65] According to its implementing regulations, "OGE exercises leadership in the executive branch of the Federal Government to prevent conflicts of interest on the part of executive branch employees and resolve those conflicts of interest that do occur."[66]

OGE has about seventy-five employees and is headed by a director who is appointed to a Senate-confirmed, five-year term and reports directly to the President.[67] OGE also has a general counsel's office and various officials who communicate with other executive branch agencies, Congress, and the public regarding ethics polices and rules.[68] In addition, OGE's Compliance Division oversees ethics programs in executive branch agencies and manages aspects of the executive branch public financial disclosure program.[69]

Over the years, OGE has energetically implemented regulations and practices that helped cement its leadership on ethics matters throughout the executive branch.[70] OGE employees frequently interface with ethics officials in agencies throughout the government to discuss the interpretation and implementation of ethical standards.[71] Among other things, they request and compile information

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65. *See generally Our History*, U.S. OFF. OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/about_our-history [https://perma.cc/4KQR-4MLV] (last visited Dec. 28, 2020); PAINTER, *supra* note 8, at 70–77.

66. 5 C.F.R. § 2600.101(a) (2018). For an overview of OGE's function and self-described mission, see U.S. OFF. OF GOV'T ETHICS, STRATEGIC PLAN: FISCAL YEARS 2018-22 1 (2018), https://www.oge.gov/web/OGE.nsf/0/5F2BA63E1DDF407D852585B6005A1E14/$FILE/Finished%202018-22%20Strategic%20Plan.pdf [https://perma.cc/SZS4-JY46].

67. *See generally Organization*, U.S. OFF. OF GOV'T ETHICS, https://www2.oge.gov/web/oge.nsf/Organization [https://perma.cc/W3VN-QYM9] (last visited Nov. 1, 2020); U.S. OFF. OF GOV'T ETHICS, CHIEF FOIA OFFICER REPORT FOR U.S. OFFICE OF GOVERNMENT ETHICS 6 (2012), https://oge.gov/Web/OGE.nsf/Freedom%20of%20Information%20Act%20(FOIA)%20Reports/7274A88249BA0DAF852585B6005A1587/$FILE/chief_foia_ofcr_rpt_2012.pdf?open [https://perma.cc/8GWC-PKS9].

68. *Id.*

69. *Id.*

70. *See generally* 5 C.F.R. ch. XVI (2018).

71. *See generally Mission and Responsibilities*, U.S. OFF. OF GOV'T ETHICS, https://www2.oge.gov/web/oge.nsf/Mission%20and%20Responsibilities [https://perma.cc/KTZ8-VWCT] (last visited Dec. 28, 2020).

on agency ethics programs.[72] OGE also issues numerous public legal advisories on how ethics standards should be applied.[73] Overseeing the executive branch financial disclosure program is also a major component of OGE's work.[74]

OGE's website makes clear what is—and is not—the agency's mission: "The U.S. Office of Government Ethics (OGE) does not handle complaints of misconduct, nor does OGE have investigative or prosecutorial authority. OGE's mission is one of prevention."[75]

After the 2016 presidential election, OGE gained a higher profile than ever before. A few weeks after the election, OGE issued a series of tweets from its official Twitter account that "congratulated" President-Elect Trump for his supposed decision to divest his personal businesses (which he did not, in fact, do). In a tweetstorm on the morning of November 30, 2016, OGE declared:

> .@realDonaldTrump We can't repeat enough how good this total divestiture will be[76]
>
> .@realDonaldTrump Brilliant! Divestiture is good for you, very good for America![77]
>
> .@realDonaldTrump OGE applauds the "total" divestiture decision. Bravo![78]
>
> .@realDonalTrump As we discussed with your counsel, divestiture is the way to resolve these conflicts.[79]
>
> .@realDonaldTrump OGE is delighted that you've decided to divest your businesses. Right decision![80]

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72. *See id.*
73. *See Legal Advisories*, U.S. OFF. OF GOV'T ETHICS, https://www2.oge.gov/web/oge.nsf/Legal%20Advisories [https://perma.cc/6JCY-NF8E] (last visited Dec. 28, 2020).
74. *See* 5 U.S.C. app. § 106; 5 C.F.R. § 2634 (2018).
75. *Where to Report Misconduct*, U.S. OFF. OF GOV'T ETHICS, https://www2.oge.gov/web/oge.nsf/Resources/Where+to+Report+Misconduct [https://perma.cc/8HMQ-DJQK] (last visited Dec. 28, 2020).
76. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:55 PM), https://twitter.com/OfficeGovEthics/status/804020923519012864.
77. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:55 PM), https://twitter.com/OfficeGovEthics/status/804020923548303360.
78. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:55 PM), https://twitter.com/OfficeGovEthics/status/804020923703533568.
79. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:55 PM), https://twitter.com/OfficeGovEthics/status/804020923800158209.
80. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:55 PM), https://twitter.com/OfficeGovEthics/status/804020924089438208.

> .@realDonaldTrump Bravo! Only way to resolve these conflicts of interest is to divest . Good call![81]
>
> .@realDonaldTrump this aligns with OGE opinion that POTUS should act as if 18 USC 208 applies. . . .[82]
>
> .@realDonaldTrump this divestiture does what handing over control could never have done.[83]
>
> .@realDonaldTrump - we told your counsel we'd sing your praises if you divested, we meant it.[84]

It is a matter of judgment whether the tone of these tweets was encouraging or sarcastic. They were later revealed to have been personally authored by OGE's then-Director Walter Shaub, who acknowledged they were deliberately written in the style of President Trump's own tweets.[85]

The outspoken Director was only getting started. At a forum held at the Brookings Institution nine days before Trump's inauguration, Shaub made a thirteen-minute speech in which he criticized Trump's refusal to divest his personal businesses upon taking office and the conflicts of interest that Shaub said would arise as a result of this refusal.[86]

OGE's standoff with the new administration continued after President Trump's inauguration. In April 2017, OGE issued a data call to all executive branch agency heads, Designated Agency Ethics Officials, inspectors general, and the White House. OGE sought copies of ethics waivers and authorizations that had been issued to political appointees over the previous twelve months, including waivers granted under the financial conflict of interest statute, the impartiality regulation, and the Trump and Obama ethics pledg-

81. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:55 PM), https://twitter.com/OfficeGovEthics/status/804020925171646464.

82. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:55 PM), https://twitter.com/OfficeGovEthics/status/804020925893054464.

83. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:57 PM), https://twitter.com/OfficeGovEthics/status/804021426311180288.

84. U.S. Off. of Gov't Ethics (@OfficeGovEthics), TWITTER (Nov. 30, 2016, 12:57 PM), https://twitter.com/OfficeGovEthics/status/804021427565395969.

85. Lisa Rein, *Federal Ethics Chief Blasts Trump's Plan to Break From Businesses, Calling It 'Meaningless,'* WASH. POST (Jan. 11, 2017, 6:45 PM), https://www.washingtonpost.com/news/powerpost/wp/2017/01/11/federal-ethics-chief-blasts-trumps-plan-to-break-from-businesses-calling-it-meaningless [https://perma.cc/65RR-EN6A].

86. Walter M. Shaub, Jr., Dir., U.S. Off. of Gov't Ethics, Remarks at Brookings Institution (Jan. 11, 2017), https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf [https://perma.cc/F7SW-42Z5].

es.[87] In response to the data call, the Director of the White House Office of Management and Budget (OMB) sent OGE a short letter asserting that the data call "appears to raise legal questions regarding the scope of OGE's authorities" and saying that the DOJ "may need to be consulted . . . on the scope of the authorities underlying OGE's data call."[88] OGE responded with a ten-page letter that characterized OMB's letter as "requesting that [OGE] suspend its inquiry into the practices of agency ethics programs and, separately, the activities of individual appointees."[89] The letter went on to provide, in detail, OGE's view of its authority to collect the requested information from the White House.[90] OMB's Director responded with a letter saying the White House would provide the requested information and denying that OGE's authority to request that information had been questioned.[91]

In July 2017, Shaub resigned as OGE Director, saying in an interview that "the current situation has made it clear that the ethics program needs to be stronger than it is."[92] He was replaced as Acting Director by the then-General Counsel of the Office, and a full-time Director was sworn in a year later.[93]

87. Memorandum from Walter M. Shaub, Jr., Dir., U.S. Off. of Gov't Ethics, to Chief of Staff to the President, Agency Heads, Designated Agency Ethics Offs., Inspectors Gen. & Appointees (Apr. 28, 2017), https://www2.oge.gov/web/oge.nsf/All%20Documents/5B5DECAECCE6CB8185258110007ADC76/$FILE/PA-17-02.pdf?open [https://perma.cc/FU5S-ZU98].

88. Letter from Mick Mulvaney, Dir., Off. of Mgmt. & Budget, to Walter M. Shaub, Jr., Dir., U.S. Off. of Gov't Ethics (May 17, 2017), https://assets.documentcloud.org/documents/3727995/OMB-Director-Mulvaney-Letter-to-Office-of.pdf [https://perma.cc/NC7W-ZQ4L]. The letter cc'd all agency general counsels and Designated Agency Ethics Officials.

89. Letter from Walter M. Shaub, Jr., Dir., U.S. Off. of Gov't Ethics, to Mick Mulvaney, Dir., Off. of Mgmt. & Budget 1 (May 22, 2017), https://assets.documentcloud.org/documents/3728657/OGE-Letter-to-OMB-Director-Mulvaney.pdf [https://perma.cc/DT58-PF23].

90. See *id.*

91. Matea Gold, *White House Relents in Fight with Ethics Office over Waiver Disclosure*, WASH. POST (May 27, 2017, 8:53 PM), https://www.washingtonpost.com/news/post-politics/wp/2017/05/27/white-house-relents-in-fight-with-ethics-office-over-waiver-disclosure [https://perma.cc/A5T7-5MNC].

92. Peter Overby & Marilyn Geewax, *Ethics Office Director Walter Shaub Resigns, Saying Rules Need to Be Tougher*, NPR (July 6, 2017, 1:01 PM), https://www.npr.org/2017/07/06/535781749/ethics-office-director-walter-shaub-resigns-saying-rules-need-to-be-tougher [https://perma.cc/3KVC-66KX].

93. U.S. SENATE, 115 CONG., EXECUTIVE CALENDAR NO. 913 (2018), https://www.senate.gov/legislative/LIS/executive_calendar/2018/07_12_2018.pdf [https://perma.cc/3CN2-J9LT].

B. *Agency Ethics Offices*

The vast majority of ethics officials in the federal government are not part of OGE but rather work in individual agencies.[94] As of 2018, federal agencies reported 1,027 employees who spent at least twenty-one hours a week performing "ethics program duties."[95] Another 872 employees worked eleven to twenty hours a week on ethics matters.[96]

OGE regulations provide that "[e]ach agency head must appoint a Designated Agency Ethics Official (DAEO). The DAEO is the employee with primary responsibility for directing the daily activities of the agency's ethics program and coordinating with the Office of Government Ethics."[97] The DAEO must generally be a senior official. For example, in agencies with at least 1,000 employees, the DAEO must at least be at the Senior Executive Service level.[98] DAEOs and those under their supervision are responsible for a wide range of ethics-related areas, including counseling agency employees on ethics laws and regulations, resolving conflicts of interest, administering the public financial disclosure program, and enforcing ethics laws and regulations.[99] To back up the DAEO, agencies also must appoint an Alternate Designated Agency Ethics Official, or ADEAO.[100] At most agencies, the DAEO or ADAEO oversees the other ethics officials.[101]

Most agency ethics officials, who are typically career civil servants, report directly or indirectly to agency general counsel, who are normally political appointees. Richard Painter explains that agency officials typically take a more conservative and cautious approach to ethics issues than their political appointee bosses, and frequently get their way despite their subordinate relationship:

> The dynamic between ethics officers and their general counsels often resembles that between career and political appointees elsewhere in the government. Agency ethics of-

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94. *See generally* PAINTER, *supra* note 8, at 77–80.
95. U.S. OFF. OF GOV'T ETHICS, RESULTS FROM THE 2018 ANNUAL AGENCY ETHICS PROGRAM QUESTIONNAIRE: A SNAPSHOT OF THE EXECUTIVE BRANCH ETHICS PROGRAM 10 (2019), https://www.oge.gov/Web/oge.nsf/accessdocs_summary-reports (click "Summary Report (CY18) (PDF)") [https://perma.cc/S9LS-HCZU].
96. *Id.* More than five thousand employees did some ethics-related work but less than 10 hours per week. *Id.*
97. 5 C.F.R. § 2638.104(a) (2018).
98. *Id.* § 2638.104(b)(4).
99. *Id.* § 2638.104(c).
100. *Id.* § 2638.104(d).
101. U.S. OFF. OF GOV'T ETHICS, *supra* note 95 (summing the total number of agency ethics officials in the executive branch).

> ficials will usually be in the government long after the departure of the political appointees to whom they report. They typically have a conservative approach to interpreting legal rules, a tendency to cast prohibition broadly and interpret exceptions narrowly and a strong preference for avoiding the appearance of impropriety. They may be less likely than lawyers who are political appointees, to give decision makers the widest possible latitude. Most political appointees, nonetheless, are reluctant to overrule ethics officers because of the potentially high political cost of rejecting ethics advice and being wrong.[102]

Agency ethics officials do *not*, however, deal with every policy and personnel matter that could implicate ethical questions. Such topics as "preservation of email and other records, . . . handling of classified information including the identity of covert intelligence operatives, destruction of tape recordings and other documents, coordination between agency officials and their paid surrogates in the media, and the hiring and firing of political and career employees," are generally outside the purview of ethics officials.[103]

C. *Other Officials Responsible for Ethics Breaches*

In addition to OGE and agency ethics offices, other components of the federal government also play an important role in the federal ethics infrastructure.

For example, as with other federal criminal violations, the DOJ has sole authority to prosecute violations of the criminal ethics statutes. It also has sole authority to bring civil enforcement actions against violators. The frequency with which it exercises this authority and the process it follows are discussed below.

Agency inspectors general also play a key role in identifying ethics violations as part of their larger statutory mission to protect agency integrity and efficiency.[104] Because they tend to have greater investigative resources and investigative authority than agency ethics offices, inspectors general offices frequently are on the front lines of detecting—and publicizing—ethics issues.[105]

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102. PAINTER, *supra* note 8, at 77–78.
103. *Id.* at 79.
104. *See generally* Inspector General Act of 1978, Pub L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app. 3); Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4302.
105. Disclosure: the author's spouse is an investigative attorney with a federal inspector general's office.

Finally, the U.S. Office of Special Counsel is a small independent agency focused on four statutes that apply to federal employees: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act.[106] In 2019, the Office of Special Counsel garnered rare front-page attention when it publicly recommended that President Trump fire his counselor Kellyanne Conway after identifying multiple violations of the Hatch Act, which restricts public officials from using their official positions for political activities.[107] The President declined to follow this recommendation.[108]

D. *The Burden of Compliance*

This substantial federal ethics infrastructure creates considerable costs and burdens of compliance. Setting aside the money and resources devoted to employing the thousands of ethics officers across the government, employees subject to the rules are also burdened. The largest, or at least most regularized, ethics-related burden on federal employees is the annual financial disclosure reports each senior executive branch official must submit. As commentators have put it:

> A great deal of effort is expended by government officials, their lawyers, their agencies, and the OGE to determine what does and does not have to be reported on the Form 278 and when investments such as hedge funds and private equity funds have to be broken out on the form into their component parts. For wealthy filers, often political appointees at the highest levels of government, Form 278 can be dozens of pages long.[109]

Or, in the words of Richard Painter:

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106. *See About OSC*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Pages/about.aspx [https://perma.cc/VJ84-HJZP] (last visited Dec. 28, 2020).

107. *OSC Finds Kellyanne Conway Repeatedly Violated the Hatch Act, Recommends Removal from Federal Service*, U.S. OFF. OF SPECIAL COUNS. (June 13, 2019), https://osc.gov/News/Pages/19-10-Kellyanne-Conway-Hatch-Act.aspx [https://perma.cc/UU6Z-T7ZN]; U.S. OFF. OF SPECIAL COUNS., REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT: OSC FILE NOS. HA-19-0631 & HA-19-3395 (KELLYANNE CONWAY) (2019), https://int.nyt.com/data/documenthelper/1169-osc-report-on-kellyanne-conway/11f2a2d73d1e14d197f3/optimized/full.pdf [https://perma.cc/4GFY-PG3T].

108. John Wagner & Michelle Y.H. Lee, *Trump Says He Won't Fire Kellyanne Conway over Hatch Act Violations*, WASH. POST (June 14, 2019), https://www.washingtonpost.com/politics/trump-says-he-wont-fire-kellyanne-conway-over-hatch-act-violations/2019/06/14/76f31a94-8e9f-11e9-adf3-f70f78c156e8_story.html [https://perma.cc/E4ZC-947N].

109. Hill & Painter, *supra* note 8, at 1663–64.

> Ethics professionals at OGE and executive branch agencies spend a lot of time determining whether long lists of investments held by wealthy officials and nominees are properly disclosed, even when the likelihood that these investments would influence official decision making is extremely remote.[110]

According to OGE, in 2018, federal employees submitted 25,935 public financial disclosure forms and 353,300 confidential financial disclosure forms.[111] The "Public Burden Information" on the relevant forms estimates that filling out public financial disclosure form 278e takes an average of ten hours and filling out confidential financial disclosure form 450 takes three hours.[112] By this calculus, in 2018, federal employees spent more than 1.3 million hours filling out financial disclosure forms. One commentator has estimated that the total annual cost of complying with financial disclosure requirements, in terms of federal employee time, "could easily exceed $5 billion."[113]

The financial disclosure program forms a major part of the work of federal ethics offices. In a 2017 survey, thirty-four agencies said that their ethics offices spent more than a quarter of their time on the confidential financial disclosure program, and twenty-six said the same about their public financial disclosure program.[114] Likewise, financial disclosure ranked second, after gift acceptance, as the ethics topic which agencies reported being asked about most frequently.[115]

Notably, former OGE Director Walter Shaub, who has been otherwise outspoken about how government ethics infrastructure is not tough enough in many respects,[116] has highlighted the excessive burden of financial reporting. In particular, he has argued that

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110. PAINTER, *supra* note 8, at 15.
111. U.S. OFF. OF GOV'T ETHICS, *supra* note 95, at 23, 25.
112. U.S. OFF. OF GOV'T ETHICS, OGE FORM 278E (2020), https://www.oge.gov/Web/OGE.nsf/OGE%20Forms?openview (select "OGE Form 278e (July 2020 508 PDF version)") [https://perma.cc/PEY4-C54Z]; U.S. OFF. OF GOV'T ETHICS, OGE FORM 450 (2020), https://www.oge.gov/Web/OGE.nsf/OGE%20Forms?openview (select "OGE Form 450 (Aug. 2020 508 PDF version)") [https://perma.cc/M25U-WUN2]. A minority of confidential filers are permitted to fill out OGE-approved alternative forms, though the information required to be reported is generally the same and the burden is unlikely to be substantially different. U.S. OFF. OF GOV'T ETHICS, *supra* note 62, at 30. In addition, employees with *no* new financial interests from a previous filing may fill out a short form called a Confidential Certificate of No New Interests, form 450-A. In 2017, 50,014 employees filled out a form 450-A. *Id.*
113. Lager, *supra* note 12, at 76.
114. U.S. OFF. OF GOV'T ETHICS, *supra* note 62, at 13.
115. *Id.* at 23.
116. *See supra* Sections II.A, IV.D.

"Congress should eliminate the requirement to disclose income from publicly traded assets registered with the SEC."[117]

Financial disclosure is not the only burdensome aspect of the federal ethics compliance program. Federal regulations also require an ethics orientation for new employees in addition to annual training.[118] As James Lager argues: "Mandatory ethics training about the rules, more properly termed 'compliance training,' is also very expensive, not just to pay for the trainers, facilitators, and materials, but for the time public officials must spend to attend—but not necessarily learn the content delivered in—annual ethics presentations."[119]

III. Enforcement of Government Ethics Standards: Methods and Practice

The federal executive branch ethics infrastructure devotes itself overwhelmingly to compliance rather than punishment. As one ethics attorney put it in a recent article, "the federal ethics program focuses on prevention rather than enforcement."[120] Likewise, former OGE Director Walter Shaub explains that "the existing ethics program is, through and through, a prevention mechanism."[121]

In fact, government ethics attorneys have *no* direct authority to penalize violators of the rules. Even if ethics officers have identified what they believe to be a violation, other components of an employee's agency, and possibly officials outside the agency, must weigh in before any kind of administrative discipline or civil or criminal liability is possible:

> Neither agency ethics officials nor the OGE have authority to enforce federal statutory and regulatory ethics laws. Instead, agency ethics officials refer potential violations to the agency's [Office of Inspector General] for investigation. When employees violate the ethics laws, the OIG may rec-

117. Letter from Walter M. Shaub, Senior Dir., Ethics, Campaign Legal Ctr., to Trey Gowdy, Chairman, House Comm. on Oversight & Gov't Reform, & Elijah E. Cummings, Ranking Member, House Comm. on Oversight & Gov't Reform 16 (Nov. 9, 2017), https://campaignlegal.org/sites/default/files/W%20Shaub%20Legislative%20Proposal%20-%209%20November%202017_0.pdf [https://perma.cc/REF9-BPJF]

118. 5 C.F.R. § 2638.701 (2009).

119. Lager, *supra* note 12, at 75.

120. Bartek-Santiago, *supra* note 8, at 726.

121. Shaub, *supra* note 117, at 14.

> ommend disciplinary action or, if the violations carry criminal penalties, refer matters to the Department of Justice.[122]

This Part describes how federal ethics standards are designed to be enforced and how often that actually happens.

A. *Regulatory Enforcement Options*

When compliance efforts fail, enforcement measures become necessary. OGE regulations describe the administrative enforcement of violations of various ethics rules. Two overall types of enforcement are possible: "corrective action" and "disciplinary action."[123]

"Corrective action" is the less severe of the two. It is defined broadly as "any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution, change of assignment, disqualification, divestiture, termination of an activity, waiver, the creation of a qualified diversified or blind trust, or counseling."[124] Although some of these measures might be unwanted, embarrassing, or inconvenient, none of them amount to outright professional penalties.

"Disciplinary action" is potentially more severe. It "include[s] but [is] not limited to reprimand, suspension, demotion, and removal."[125] The most extreme possible outcome for a violation of these regulations (assuming the conduct does not also violate a criminal statute) is the employee's termination. The only possible financial penalty (other than a salary reduction resulting from a demotion or suspension) is the corrective action of restitution for ill-gotten gains.

Financial disclosure in particular allows for a variety of remedial measures when a conflict has been identified. According to OGE's annual survey of federal agencies in 2018, 540 public financial disclosure filers "took specific remedial actions" because of information on a report.[126] These actions included "divestiture, resignation from outside position, written disqualification, 18 U.S.C. § 208 waiver, reassignment, etc."[127] The most common remedial actions (which are not forms of discipline at all but rather preventive measures) were recusal from particular matters, followed by divest-

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122. Bartek-Santiago, *supra* note 8, at 726.
123. 5 C.F.R. § 2635.106(a) (2018).
124. *Id.* § 2635.102(e).
125. *Id.* § 2635.102(g).
126. U.S. OFF. OF GOV'T ETHICS, *supra* note 95, at 18.
127. *Id.*

iture.[128] Smaller numbers of employees resigned from outside positions, and 117 full-time employees received § 208 waivers.[129]

Importantly, disciplinary and corrective actions are ultimately the province of an employee's own agency rather than OGE or some other independent body. OGE's regulations provide: "It is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases. However, corrective action may be ordered or disciplinary action recommended by the Director of the Office of Government Ethics. . . ."[130] So, the more severe measure of "disciplinary action" can only be recommended by OGE, with the final decision made by the employing agency. And at most, OGE can "order" the lesser corrective action, but that action is ultimately implemented by the employing agency.

The applicable regulations also limit OGE's own consideration of potential violations.[131] They provide that OGE's "Director may make such recommendations and provide such advice to employees or agencies as the Director deems necessary to ensure compliance with applicable government ethics laws and regulations."[132]

In multiple places, the regulations contemplate that it will be a "rare" case that an agency will fail to take action against an employee after OGE notifies the agency of possible misconduct.[133] Nonetheless, the regulations establish procedures when OGE "determines . . . that an agency head has not conducted an investigation within a reasonable time" notwithstanding OGE's recommendation that the agency conduct an investigation.[134] But ultimately, OGE's actions are limited to (1) issuing "a nonbinding recommendation that appropriate disciplinary or corrective action be taken against the employee;"[135] (2) issuing "an order directing the employee to take specific action to terminate the violation, provided that the employee has been afforded [notice] and an opportunity for a hearing" before an administrative judge;[136] and (3) notifying the President of the issue.[137]

These alternative procedures are rarely used and exist more as a theoretical safeguard when OGE determines that an agency has

128. *Id.*
129. *Id.* at 18–19.
130. 5 C.F.R. § 2635.106(b) (2018).
131. *Id.* §§ 2638.501–504.
132. *Id.* § 2638.503.
133. *Id.* §§ 2638.501, 2638.504.
134. *Id.* § 2638.504(a).
135. *Id.* § 2638.504(e)(2).
136. *Id.* § 2638.504(e)(3), (f), (g).
137. *Id.* § 2638.504(a), (e)(2).

conspicuously failed to take proper action against one of its employees.[138] Among other things, the process is only possible when OGE has notice of a potential violation.[139] An agency head who refuses to take disciplinary or corrective action may also be unlikely to inform OGE of employee misbehavior.

The regulations also specify that OGE does not have the authority "to make a finding" as to whether a criminal law has been violated.[140] This prohibition extends even to criminal statutes such as the financial conflict-of-interest laws that empower OGE to issue implementing regulations.[141] Rather, if OGE's "Director has information regarding the violation of a criminal law by an individual employee, the Director will notify an Inspector General or the Department of Justice."[142]

Nor, among the numerous guidance documents it has issued to federal agencies, has OGE provided express recommendations on what measures are warranted to address any types of violations. There is no official—or even publicly available unofficial—equivalent of sentencing guidelines for disciplinary or corrective measures.[143]

Agency ethics officials likewise cannot normally impose discipline themselves. Rather, they make recommendations to other senior officials who have the final word on what action to take against an employee. This division of power is borne out in the regulations that govern DAEOs.[144] The regulations specify a host of responsibilities for an agency DAEO, but none authorize the DAEO or other ethics officials to make a final disciplinary decision. Rather, the DAEO is charged with "[a]ssisting the agency in its enforcement of ethics laws and regulations when *agency officials* . . . [t]ake disciplinary or corrective action."[145]

Similarly, agency inspectors general cannot impose disciplinary measures or take other action against employees who violate ethics

138. *See id.* § 2638.504 (providing that "[i]n the rare case" that OGE's consultation with agency ethics offices or individual officials do not resolve an issue, OGE itself may initiate proceedings). OGE's own description of the organizational structure of the executive branch ethics program explains that potential violations "are primarily investigated by the thousands of Inspectors General staff members across the executive branch." U.S. OFF. OF GOV'T ETHICS, *supra* note 66, at 2.

139. 5 C.F.R. § 2638.501 (2018).

140. *Id.* § 2638.502.

141. 18 U.S.C. § 208; *see also supra* Section I.A.

142. 5 C.F.R. § 2638.502 (2018).

143. *See generally* 5 U.S.C. § 6 (listing the authority of inspectors general).

144. *See* 5 C.F.R. § 2638.104(c) (2018).

145. *Id.* § 2638.104(c)(9)(ii) (emphasis added).

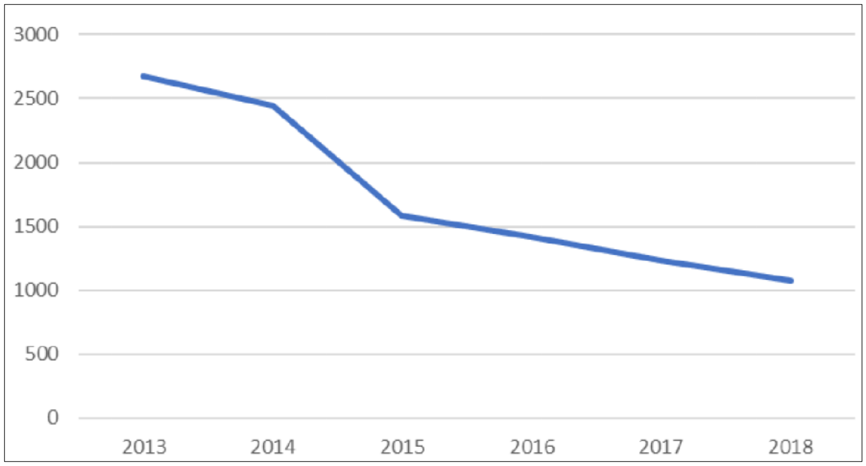
rules and laws. Inspectors general can, of course, "conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of their respective agencies.[146] And unlike OGE and agency ethics officials, inspectors general have subpoena power and the power to take sworn testimony.[147] But inspectors general do not themselves carry out enforcement of violations. They cannot require disciplinary action against any federal employee.[148] And with regard to the "prosecution of participants in . . . fraud or abuse," all they can ultimately do is "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law."[149]

B. *The (In)Frequency of Employee Discipline*

In 2018, federal agencies reported 1,077 "disciplinary actions" based in part or in whole on violations of OGE's "Standards of Conduct" regulations.[150] This figure was lower than any prior annual number since OGE began compiling statistics. In fact, the number of disciplinary actions dropped every year from 2011 to 2018. A chart of available numbers shows a steady pattern of decline:[151]

146. 5 U.S.C. app. § 4(a)(1).
147. *Id.* § 6(a)(4), (5).
148. *See id.* § 6.
149. *Id.* § 4(d).
150. U.S. OFF. OF GOV'T ETHICS, *supra* note 95, at 26. "Disciplinary action" was defined for this purpose as "removals, demotions, suspensions, and written reprimands or their equivalents." *Id.*
151. *Id.*; U.S. OFF. OF GOV'T ETHICS, *supra* note 62, at 33; U.S. OFF. OF GOV'T ETHICS, CY16 ANNUAL AGENCY ETHICS PROGRAM QUESTIONNAIRE RESULTS: A SUMMARY OF THE EXECUTIVE BRANCH ETHICS PROGRAM 23 (2017), https://www.oge.gov/Web/oge.nsf/accessdocs_summary-reports (click "Summary Report (CY16) (PDF)") [https://perma.cc/PV8F-9K64]; U.S. OFF. OF GOV'T ETHICS, CY15 ANNUAL AGENCY ETHICS PROGRAM QUESTIONNAIRE RESULTS: A SNAPSHOT VIEW OF THE EXECUTIVE BRANCH ETHICS PROGRAM 23 (2016), https://www.oge.gov/Web/oge.nsf/accessdocs_summary-reports (click "Summary Report (CY15) (PDF)") [https://perma.cc/T9QZ-5WCQ]; U.S. OFF. OF GOV'T ETHICS, CY14 ANNUAL AGENCY ETHICS PROGRAM QUESTIONNAIRE RESULTS: A SNAPSHOT VIEW OF THE EXECUTIVE BRANCH ETHICS PROGRAM 6, 23 (2015), https://www.oge.gov/Web/oge.nsf/accessdocs_summary-reports (click "Summary Report (CY14) (PDF)") [https://perma.cc/F2YV-THPK]. In addition, for 2013, OGE published a "Highlights" document that included a chart that did not provide exact numbers but showed larger numbers of disciplinary actions in every year from 2004-2013, including more than 3,500 in each of 2006 and 2009. U.S. OFF. OF GOV'T ETHICS, THE EXECUTIVE BRANCH ETHICS PROGRAM ANNUAL AGENCY QUESTIONNAIRE: HIGHLIGHTS CY 2013 5 (2014), https://www2.oge.gov/web/oge.nsf/Resources/Annual+Agency+Questionnaire+%E2%80%93+Highlights+(CY+2013) (click on "link to PDF version") [https://perma.cc/Y9Q8-YW4Z].

FEDERAL EMPLOYEE DISCIPLINARY ACTIONS, 2013–2018



Of the disciplinary actions taken in 2018, by far the most common basis, comprising fifty-eight percent of the instances, was the "misuse of position" rule.[152] As discussed in Section I.B, that rule can encompass such misdeeds as using public office for private gain, use of nonpublic information, improper use of government property, and misuse of official time.[153] Many of these actions may simply have involved people not working when they should have been. For example, in 2016, the Patent and Trademark Office experienced a serious scandal involving time and attendance fraud by patent examiners.[154]

The second most common rule cited in disciplinary actions, comprising thirty-two percent of actions, was subpart A of 5 C.F.R. § 2635.[155] This subpart includes the fourteen "general principles" of ethics that apply to government employees, and OGE's survey of agencies did not get more granular as to which particular principles were allegedly violated by the disciplined employees.

Because nearly ninety percent of disciplinary actions were based on these two broad-based rules, the "misuse of position" rule and the "general principles," it is hard to ascertain exactly what the most common type of sanctioned violation was. It is likely that many of these disciplinary actions involved general misconduct of the kind that could lead to discipline at any private or public

152. U.S. OFF. OF GOV'T ETHICS, *supra* note 95, at 26.
153. 5 C.F.R. §§ 2635.701–05 (2018).
154. *See* U.S. DEP'T OF COMMERCE, OFF. OF INSPECTOR GEN., REP. NO. 14-0990, INVESTIGATIVE REPORT: U.S. PATENT AND TRADEMARK OFFICE: ANALYSIS OF PATENT EXAMINERS' TIME AND ATTENDANCE (2016), https://www.oig.doc.gov/OIGPublications/14-0990.pdf [https://perma.cc/BP2C-AS4A].
155. U.S. OFF. OF GOV'T ETHICS, *supra* note 95, at 26.

workplace—for example, not showing up for work, mistreating colleagues, or misusing the employer's property—rather than violations of the standards that apply uniquely to federal employees.

The third most commonly cited basis for discipline of federal employees was the restriction on outside activities.[156] In contrast with disciplinary actions based on the two above-mentioned rules, disciplinary actions based on the rules restricting gifts, financial conflicts of interest, the appearance of impropriety, or seeking other employment were few and far between.[157] For example, there were twenty-three disciplinary actions based on outside gifts and nineteen based on financial conflicts.[158]

In addition, there were eighteen disciplinary actions taken for violations of the *criminal* financial conflict statute, 18 U.S.C. § 208, as opposed to the financial conflict regulations.[159] *Zero* disciplinary actions were taken for violations of any other criminal ethics provision.[160]

Agencies' own reports of the time that ethics officials spent on enforcement confirm that it is a small part of their duties. OGE's 2017 agency ethics offices survey asked agencies to rate, on a scale of one to five, how much time they spend on various functions. Out of 136 responding agencies, exactly one said that the time spent on the "[d]isciplinary process for violations" rated a five.[161] By contrast, fifty-seven agencies gave a five to "[a]dvice and counseling" and twenty-seven agencies rated a five for both the "[c]onfidential financial disclosure program" and the "[p]ublic financial disclosure program."[162]

C. *Ethics Pledge (Non-)Enforcement*

For all the public attention they have received, presidential ethics pledges have proven a paper tiger when it comes to enforcement. The Obama and Trump ethics pledges included similar, limited enforcement mechanisms. First, anyone found to have violated their pledge could, after notice and hearing, be barred from lobbying their former agency for five years.[163] (Such lobbying was pro-

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156. *Id.*; 5 C.F.R. §§ 2635.801–09 (2018).
157. U.S. OFF. OF GOV'T ETHICS, *supra* note 95, at 26.
158. *Id.*
159. *Id.*
160. *Id.*
161. U.S. OFF. OF GOV'T ETHICS, *supra* note 62, at 12.
162. *Id.*
163. Exec. Order No. 13,490, 74 Fed. Reg. 4673 § 5(b) (Jan. 21, 2009); Exec. Order No. 13,770, 82 Fed. Reg. 9333 § 5(b) (Feb. 3, 2017).

hibited anyway by the Trump pledge.[164]) Second, the pledges empowered the DOJ to initiate a civil action against the violator in which the government could seek (1) injunctive relief to prevent further violations, and (2) "establishment of a constructive trust for the benefit of the United States" that required the offending official to disgorge whatever income the official earned through the violation of his pledge obligations.[165]

As of this writing, the grand total of enforcement actions of any kind taken against violators of either the Obama or Trump ethics pledges is zero.[166] There have been no actions to bar a former official from lobbying his or her former agency for five years and no civil actions seeking injunctive relief or a constructive trust.[167] In any event, the penalty for violating the ethics pledge would be, at most, disgorgement of the profits the employee earned by breaching the pledge. So, other than reputational harm, the worst outcome from a breach would, financially, be a net neutral.[168]

Some critics of the Trump administration have argued that certain officials violated the Trump pledge. For example, Citizens for Responsibility and Ethics in Washington argues that then-White House advisor Steve Bannon, by communicating with his former employer Breitbart News Network about its coverage of the administration, violated the two-year ban on participating in "particular matters involving specific parties" where his former employer was a party.[169] On another occasion, Democratic Senator Sheldon Whitehouse suggested that EPA Assistant Administrator Bill Wehrum, a former "energy industry lawyer," violated the pledge by

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164. Exec. Order No. 13,770, 82 Fed. Reg. 9333 § 1(1) (Jan. 28, 2017). As discussed above, President Trump rescinded this requirement on his last day in office.

165. Exec. Order No. 13,490, 74 Fed. Reg. 4673 § 5(c)–(d) (Jan. 21, 2009); Exec. Order No. 13,770, 82 Fed. Reg. 9333 § 5(c)–(d) (Jan. 28, 2017).

166. *See, e.g.*, *Dealing with Trump Administration Appointees? Watch Out for These Major New Restrictions in the "Drain the Swamp" Executive Order*, COVINGTON ALERT (Jan. 31, 2017), https://www.cov.com/-/media/files/corporate/publications/2017/01/dealing_with_trump_administration_appointees_watch_out_for_these_major_new_restrictions.pdf ("As far as we know, there were no enforcement actions brought against alleged violators of the Obama Ethics Pledge. Whether that will be the case in the Trump Administration remains to be seen.").

167. *See id.*

168. The official would presumably also incur attorneys' fees in connection with the litigation.

169. Letter from Noah Bookbinder, Exec. Dir., Citizens for Responsibility & Ethics in Washington, to Donald F. McGahn, White House Couns. (Mar. 30, 2017), https://www.citizensforethics.org/wp-content/uploads/legacy/2017/03/McGahn-Bannon.pdf [https://perma.cc/BMM7-KQFU]; *see also* Lachlan Markay, *Bannon May Have Violated Ethics Pledge by Communicating with Breitbart*, DAILY BEAST (Apr. 10, 2017, 2:01 PM), https://www.thedailybeast.com/bannon-may-have-violated-ethics-pledge-by-communicating-with-breitbart [https://perma.cc/K8B6-DYC4]. If CREW's analysis was correct, Bannon's actions would also have violated the appearance-of-propriety regulation. *See* 5 C.F.R. § 2635.502 (2018).

meeting with various former clients in his official capacity.[170] No action was taken against Bannon or Wehrum.[171]

D. *Criminal and Civil Enforcement*

The "nuclear option" when an ethics law has been violated is a criminal prosecution or a civil enforcement action by the DOJ. The potential penalties under most of the ethics statutes, including the revolving door, financial conflict of interest, and supplementation of income statutes, depend on whether the offense was "willful." Willful offenses can carry penalties up to five years, while non-willful offenses are limited to up to one year of imprisonment.[172] Fines are available in either instance, and civil actions for penalties up to $50,000 are also possible.[173] Finally, reporting willfully false information in a financial disclosure form can lead to up to one year of imprisonment, and willfully filing false reports, or willfully failing to file a report at all, can also lead to civil fines.[174]

Federal law nominally requires executive branch agencies to report any violations of criminal law by agency employees to the DOJ:

> Any information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency. . . .[175]

Federal ethics regulations also nominally require OGE to notify the DOJ or an inspector general "[i]f the Director has information re-

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170. Press Release, Off. of Sen. Sheldon Whitehouse, Whitehouse Calls Out Wehrum for Flaunting Trump Ethics Pledge (Oct. 20, 2018), https://www.whitehouse.senate.gov/news/release/whitehouse-calls-out-wehrum-for-flaunting-trump-ethics-pledge [https://perma.cc/L975-L5S2].

171. Press Release, Off. of Sen. Sheldon Whitehouse, Senators Question Steve Bannon, White House Ethics Official on Violations of Trump Ethics Pledge (Apr. 20, 2017), https://www.whitehouse.senate.gov/news/release/senators-question-steve-bannon-white-house-ethics-official-on-violations-of-trump-ethics-pledge [https://perma.cc/M6YQ-KYBH]; Derek Kravitz, *The Trump Administration Says It Has Violated Its Own Ethics Pledge*, GOV'T EXEC. (Oct. 23, 2019), https://www.govexec.com/management/2019/10/trump-administration-says-it-has-violated-its-own-ethics-pledge/160814 [https://perma.cc/39GR-9X8C].

172. 18 U.S.C. § 216(a).

173. *Id.* § 216(a), (b).

174. 5 U.S.C. app. § 104(a)(2).

175. 28 U.S.C. § 535(b).

garding the violation of a criminal law by an individual employee. . . ."[176]

It is uncommon for ethics officials to make criminal referrals, and most referrals that do happen do not result in prosecution. (The latter fact may well be a cause of the former.) In 2018, federal agencies made fifty-six referrals to the Department of Justice (DOJ) for potential violations of the ethics laws.[177] Of those, three were accepted for prosecution.[178] The previous year, agencies made sixty-nine referrals to the DOJ, of which nine were accepted for prosecution.[179] Anecdotally, agency lawyers who have worked on referrals will say that DOJ will decline to prosecute in all but the most clear-cut cases involving the most egregious actions.

OGE annually surveys and compiles information on prosecutions and civil enforcement actions involving ethics statutes.[180] These surveys indicate that prosecutions are few and far between, given the millions of federal employees who are subject to these laws.

By far the most common type of enforcement action was based on a failure of financial reporting. As discussed above, the reporting statute itself provides criminal penalties for "knowingly and willfully" reporting false or incomplete information.[181] DOJ, however, virtually never prosecutes a person criminally under this statute. Rather, prosecutions for reporting violations are brought under 18 U.S.C. § 1001, which generally prohibits false statements to the government and carries more severe penalties than the financial reporting statute.[182] From 2017 through 2019, the DOJ charged eight government officials under this statute based on reporting violations in their financial disclosures. The examples are instructive:

- In the most high-profile case, Corrine Brown, a longtime member of Congress, was alleged to have participated in a "conspiracy and fraud scheme" in which she and others solicited donations for an educational charity with the false

176. 5 C.F.R. § 2638.502 (2018).
177. U.S. OFF. OF GOV'T ETHICS, *supra* note 95, at 27.
178. *Id.*
179. U.S. OFF. OF GOV'T ETHICS, *supra* note 62, at 34.
180. *See Conflict of Interest Prosecution Surveys*, U.S. OFF. OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (last visited Jan. 7, 2020).
181. 5 U.S.C. app. § 104(a)(2).
182. The maximum prison sentence under the financial disclosure statute is one year, while the penalty for violation of § 1001 is up to five years. 5 U.S.C. app. § 104(a)(2)(B)(i); 18 U.S.C. § 1001(a). The penalty under § 1001 can be up to eight years if the offense involves terrorism. 18 U.S.C. § 1001(a).

representation that the money would be used "for college scholarships and school computer drives, among other causes." In fact, more than $300,000 of the money was used to hold events hosted by or honoring the Congresswoman. Brown was charged with numerous counts of conspiracy, mail fraud, wire fraud, concealment, and filing false tax returns, as well as failure to report income on her annual financial disclosure statement in violation of 18 U.S.C. § 1001. The case went to trial and she was convicted on eighteen counts, including § 1001. She was sentenced to five years imprisonment, plus restitution of $515,166.86 and ordered to forfeit $664,292.39. The conviction was upheld on appeal.[183]

- An official in the Public Health Services/Indian Health Services section of the Department of Health and Human Services pleaded guilty to one count of violating § 1001 for failing to disclose a $5,000 check she had received from an Indian Health Services doctor. The doctor had been accused by multiple people of sexually abusing minors, and the official was allegedly aware of the accusations. She was sentenced to twelve months unsupervised probation.[184]
- A Securities and Exchange Commission employee failed to disclose various options transactions he had made and the gains from those trades. His failure to report these transactions violated not only federal financial reporting rules but also additional reporting and conflict rules that applied to SEC employees in particular. Both the DOJ and the SEC brought actions against him. In the criminal action, he pleaded guilty to violating one count of 18 U.S.C. § 1001. He was sentenced to twelve months' probation including six months of home confinement, and fines and special assessments totaling $1,100. In the SEC action, he was ordered to pay restitution, civil penalties, and interest totaling just under $110,000.[185]
- A federal employee in Washington, D.C., was implicated in a conspiracy to defraud a mortgage lender of $337,000. He faced charges under various federal statutes and eventually

183. U.S. OFF. OF GOV'T ETHICS, LA-18-09, 2017 CONFLICT OF INTEREST PROSECUTION SURVEY 9–10 (2018), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2017 Conflict of Interest Prosecution Survey") [https://perma.cc/B5TX-4VA3] [hereinafter 2017 CONFLICT SURVEY]; United States v. Brown, 947 F.3d 655 (11th Cir. 2020).
184. 2017 CONFLICT SURVEY, *supra* note 183, at 6–7.
185. *Id.* at 7–8.

pleaded guilty to charges of bank fraud, aiding and abetting, and false statements in violation of 18 U.S.C. § 1001. He was sentenced to imprisonment for twelve months and one day and required to pay restitution.[186]

- A contracting officer with the Centers for Disease Control and Prevention received payments from a company that was seeking to do business with the agency, and the officer approved a single-source contract. The officer also failed to report any outside income on his annual financial disclosure statement. He pleaded guilty to two counts of violating § 1001 and was sentenced to three months imprisonment and other penalties.[187]
- A safety inspector with the Federal Aviation Administration received over $15,000 in payments from an avionics company in return for tipping it off in advance of FAA inspections, providing confidential information on competitors, and failing to report the company's legal violations. The inspector also failed to report those payments on his financial disclosure forms. A jury found him guilty of bribery, false statements, and various other charges. He was sentenced to 75 months imprisonment and ordered to pay fines, restitution, and special assessments totaling over $160,000.[188]
- A contract specialist with the Department of State received more than $500,000 in cash from the owner of a Turkish construction firm in exchange for favorable contracting decisions. He failed to report those payments on his financial disclosure forms. A jury found him guilty of bribery and false statements, and he was sentenced to 87 months imprisonment plus financial penalties.[189]
- A civilian employee with the U.S. Navy Public Works Department gave various types of favorable treatment to Navy vendors in exchange for more than $850,000 in kickbacks. He failed to report those payments on his financial disclosure forms. He was charged with bribery, violating 18

186. *Id.* at 8–9.
187. U.S. OFF. OF GOV'T ETHICS, LA-19-05, 2018 CONFLICT OF INTEREST PROSECUTION SURVEY 9–10 (2019), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2018 Conflict of Interest Prosecution Survey") [https://perma.cc/8LKS-S9XB] [hereinafter 2018 CONFLICT SURVEY].
188. U.S. OFF. OF GOV'T ETHICS, LA-20-05, 2019 CONFLICT OF INTEREST PROSECUTION SURVEY 1–2 (2020), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2019 Conflict of Interest Prosecution Survey") [https://perma.cc/D3Y4-EPPR] [hereinafter 2019 CONFLICT SURVEY].
189. *Id.* at 2–3.

U.S.C. § 1001, and various other charges, and pleaded guilty to conspiracy and tax charges. He was sentenced to 70 months imprisonment and ordered to pay restitution of over $1 million.[190]

These eight prosecutions have in common that none of them involved simply a willful failure to accurately report financial holdings or income. Rather, they all evinced a broader pattern of criminality or corruption. Congresswoman Brown and the D.C. employee were implicated in large-scale fraudulent conspiracies, and the financial reporting charge was just one of many they faced. The public health official, the charges strongly suggested, was bribed to look the other way by a doctor facing multiple abuse allegations. The SEC employee engaged in what was likely suspected to be insider trading. And the CDC, FAA, and State Department officials were, either explicitly or in essence, accused of bribery. In each case, the financial reporting violation was incidental to the larger offense.

The other 2017, 2018, and 2019 prosecutions and civil actions against government officials based on government ethics statutes involved a similar pattern:

- A Navy official was accused of conspiring with a contractor to steer government contracts to it and received $86,000, funneled through two other companies, for doing so. He was charged with receiving an illegal gratuity under the bribery and gratuity statute, a conflict of interest in violation of 18 U.S.C. § 208, and wire fraud conspiracy. He pleaded guilty to the wire fraud charge and was sentenced to three years imprisonment, supervised release, and $1 million in restitution.[191]
- A contracting officer for the Department of Agriculture awarded a $22,500 contract to a company of which his wife was a part owner. He pleaded guilty to violating § 208 and was sentenced to three years' probation and a $10,000 fine.[192]
- An engineer for a Navy maintenance center attempted to conceal a financial relationship with a defense contractor whose subcontracts he was involved in administering. He

190. *Id.* at 3.
191. 2017 CONFLICT SURVEY, *supra* note 183, at 3–4.
192. *Id.* at 4–5.

pleaded guilty to violating § 208 and was sentenced to three years' probation and a $10,000 fine.[193]

- A Bureau of Prisons employee was accused of acting as a paid "consultant" to a company that paid him in exchange for favorable treatment in the contracting process, including providing the company with nonpublic information that helped it in the bidding process. The employee was accused of violating 18 U.S.C. § 209, the supplementation-of-income statute, as well as various other statutes relating to fraud and contracting practices. He entered into a civil settlement with the DOJ in which he agreed to pay $50,000.[194]
- A civilian employee of the Army was responsible for overseeing the performance of a contract for hazardous waste and materials management, while simultaneously acting as an employee of the contractor itself. She was charged with violating both 18 U.S.C. § 208 and 18 U.S.C. § 203, one of the "representational" statutes, and pleaded guilty to the latter charge. She was sentenced to probation and $354,499 in restitution.[195]
- A special agent with Immigrations and Customs Enforcement was accused of using his position to facilitate the entry of an inadmissible alien and of accepting financial benefits from the alien for doing so. He was charged with an array of offenses, including the "representational" statute 18 U.S.C. § 205. At trial he was convicted on multiple counts and was sentenced to one year and one day in prison.[196]
- An employee of the United States Postal Service was involved in awarding a power washing contract to a company owned by her husband. She pleaded guilty to violating 18 U.S.C. § 208 and was sentenced to probation and a fine.[197]
- A civilian Defense Department employee was involved in decisions affecting the finances of an information technology company owned by her husband, which was a departmental subcontractor. She pleaded guilty to violating 18 U.S.C. § 208 and was sentenced to probation and a fine.[198]

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193. *Id.* at 5–6.
194. *Id.* at 6. The company and its owner also agreed to pay a settlement of $2,475,000.
195. 2018 CONFLICT SURVEY, *supra* note 187, at 1–2.
196. *Id.* at 2–3.
197. *Id.* at 4–5.
198. *Id.* at 5–6.

- An oceanographer with the National Oceanic and Atmospheric Administration was charged with violating 18 U.S.C. § 209, the supplementation-of-income statute, for receiving payments from a Chinese university and using his position at NOAA to benefit the university's students.[199]
- An employee of the Food and Drug Administration helped a company get selected as a vendor for building maintenance and janitorial work in exchange for payments and various other benefits. He was charged with, *inter alia*, bribery and violation of 18 U.S.C. § 208 and pleaded guilty to a § 208 violation. He was sentenced to probation.[200]
- The head of a post office in Scotland County, North Carolina awarded a cleaning services contract to her husband. She pleaded guilty to violating 18 U.S.C. § 208 and was sentenced to probation.[201]
- An Air Force official simultaneously served as a paid consultant for an aviation company and recommended that company as a subcontractor on a contract he oversaw. He pleaded guilty to two counts of violating 18 U.S.C. § 208 and was sentenced to home confinement, probation, and restitution.[202]
- A U.S. Navy captain secretly provided paid public relations services to Malaysian defense contractor Leonard Francis, including advising Francis on his dealings with Navy officials. As part of the Navy's much larger "Fat Leonard" scandal, the captain pleaded guilty to violating 18 U.S.C. § 208 and was sentenced to six months imprisonment and other penalties.[203]
- A field examiner with the Department of Veterans Affairs was assigned to assist a veteran in drafting a will and deceived the veteran into designating the examiner as the sole beneficiary of the accounts in the estate, worth over $680,000. The examiner was charged with an array of violations, including 18 U.S.C. § 208. A jury found him guilty

199. *Id.* at 7.
200. 2019 CONFLICT SURVEY, *supra* note 188, at 4.
201. *Id.* at 6.
202. *Id.* at 6–7.
203. *Id.* at 7–8; *see also* Geoff Ziezulewicz, *Navy Captain Who Moonlighted as Fat Leonard's PR Man Is Going to Prison*, NAVY TIMES (Feb. 8, 2019), https://www.navytimes.com/news/your-navy/2019/02/09/navy-captain-who-moonlighted-as-fat-leonards-pr-man-is-headed-to-prison [https://perma.cc/8A3J-XC4E].

on all counts, and the court sentenced him to eight years imprisonment.[204]

Except for the last case, all of these cases amounted to accusations that an official was improperly favoring a company or individual to which the official had secret ties. In substance, these were likely bribery cases where the government could not quite prove the elements required under the bribery statute, 18 U.S.C. § 201, or the defendant was able to plead down to a lesser charge. Again, as with the financial-reporting violations, the financial conflict or supplementation-of-income charge was incidental to what was perceived as more serious wrongdoing. It may be going too far to describe the ethics statutes violations as afterthoughts, but they were plainly fallbacks and add-ons. They were the equivalent of Al Capone being prosecuted for tax evasion.

As with the 2017 and 2018 prosecutions discussed above, earlier prosecutions under the financial conflict of interest statute, § 208, focused on instances where the federal official did not merely have a financial interest in a matter under their authority but clearly abused that authority to give advantages to the financial interest. For example:

- A supervisor with the District of Columbia Water and Sewage Authority controlled a company that was paid to help applicants seeking permits from DC Water; he then, in his capacity as supervisor, approved and issued those permits to his clients. He was sentenced to twelve months' probation.[205]
- An assistant at the VA Medical Center requested that the Medical Center purchase an antimicrobial dressing manufactured by a company that had offered her a job, and whose distributor had paid her for consulting services, even after receiving an ethics opinion advising her to recuse herself from such matters. She was convicted at trial and sentenced to one year's probation, including three months of home confinement.[206]
- A Lieutenant Colonel and spinal surgeon for the U.S. Army was involved in a laundering and kickback scheme to

204. 2018 CONFLICT SURVEY, *supra* note 187, at 6.
205. U.S. OFF. OF GOV'T ETHICS, LA-17-08, 2016 CONFLICT OF INTEREST PROSECUTION SURVEY, at 3–4 (2017), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2016 Conflict of Interest Prosecution Survey") [https://perma.cc/XW5G-3LX9] [hereinafter 2016 CONFLICT SURVEY].
206. *Id.* at 4–5.

cause army hospitals to purchase surgical tools and spinal implants from a company that was secretly paying him. He pleaded guilty and was sentenced to 12 months imprisonment, another year of supervised release, and a $15,000 fine.[207]

- A postmaster in Wisconsin awarded contracts to a cleaning business of which he was a part owner. He was sentenced to one year's probation and also agreed to pay $50,000 in a separate civil settlement.[208]
- A civilian employee of the United States Army Research Laboratories arranged to award contract business to a company in which he and his wife were secretly involved. He was sentenced to forty-two months imprisonment and three years of supervised release. He was also ordered to pay $750,000 in restitution.[209]

In all of these § 208 prosecutions, the offender did not merely "participate personally and substantially" in a matter in which he or she "has a financial interest."[210] Rather, in each case, the official affirmatively steered business to or otherwise helped a company in which he or she had an interest. In most cases, the officials' connection to the business in question was deliberately concealed. In none of these cases was the effect of the official's participation in the matter neutral or negative as to the affected financial interest.

The financial conflict statute plainly prohibits personal and substantial *participation* in a matter likely to affect a financial interest, even if the official's participation does not actually benefit the financial interest. As discussed above, although the number of executive branch officials who are disciplined for violating the financial conflict law is not particularly large, it dwarfs the number who are criminally prosecuted.[211] The lack of prosecution in such instances raises the question whether the broader prohibition in the statute is, as a practical matter, extraneous, when the only offenses that lead to prosecution are those in which the official actually pursues financial benefit for his or her interests. DOJ effectively treats the statute as one prohibiting abuse of one's government position for

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207. *Id.* at 6–7.
208. U.S. OFF. OF GOV'T ETHICS, LA-16-05, 2015 CONFLICT OF INTEREST PROSECUTION SURVEY, at 5–6 (2016), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2015 Conflict of Interest Prosecution Survey") [https://perma.cc/S3A9-4L8E] [hereinafter 2015 CONFLICT SURVEY].
209. *Id.* at 6–7.
210. 18 U.S.C. § 208(a).
211. *See supra* Section III.B.

private gain, rather than the broader prohibition of conflicts of interest.

DOJ's treatment of these cases suggests a recognition of a distinction between the appearance of impropriety and actual impropriety. Section 208 is designed not just to punish officials who use their office for private gain, but also to avoid the decay of trust in government that can result if officials are even allowed to be in a position to potentially realize such gain.

2017, 2018, and 2019 were fairly typical years for ethics-law-based prosecutions. An overall review of government ethics-related prosecutions and civil enforcement actions in the past decade is instructive. The chart below lists the number of prosecutions and civil enforcement actions based on OGE's survey from 2010 through 2019:[212]

Offense	Total reported enforcement actions, 2009–18
18 U.S.C. §§ 203, 205 (acting as representative before government)	6
18 U.S.C. § 207 (revolving door statute)	9
18 U.S.C. § 208 (financial conflicts)	52
18 U.S.C. § 209 (supplementation of income)	9
18 U.S.C. § 1001 (or 1018) (false reporting)	25
5 U.S.C. app. 4, § 104 (financial disclosure)	3

212. 2019 CONFLICT SURVEY, *supra* note 188; 2018 CONFLICT SURVEY, *supra* note 187; 2017 CONFLICT SURVEY, *supra* note 183; 2016 CONFLICT SURVEY, *supra* note 205; 2015 CONFLICT SURVEY, *supra* note 208; U.S. OFF. OF GOV'T ETHICS, LA-15-10, 2014 CONFLICT OF INTEREST PROSECUTION SURVEY (2015), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2014 Conflict of Interest Prosecution Survey") [https://perma.cc/N25X-S7DG] [hereinafter 2014 CONFLICT SURVEY]; U.S. OFF. OF GOV'T ETHICS, LA-14-07, 2013 CONFLICT OF INTEREST PROSECUTION SURVEY (2014), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2013 Conflict of Interest Prosecution Survey") [https://perma.cc/QS67-U84T] [hereinafter 2013 CONFLICT SURVEY]; U.S. OFF. OF GOV'T ETHICS. LA-13-12, 2012 CONFLICT OF INTEREST PROSECUTION SURVEY (2013), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2012 Conflict of Interest Prosecution Survey") [https://perma.cc/HL69-DHV8]; U.S. OFF. OF GOV'T ETHICS, LA-12-06, 2011 CONFLICT OF INTEREST PROSECUTION SURVEY (2012), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2011 Conflict of Interest Prosecution Survey") [https://perma.cc/Y8AV-HY22]; U.S. OFF. OF GOV'T ETHICS, LA-11-08, 2010 CONFLICT OF INTEREST PROSECUTION SURVEY (2011), https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys (click "2010 Conflict of Interest Prosecution Survey") [https://perma.cc/6FBM-73RR] [hereinafter 2010 CONFLICT SURVEY].

A total of 103 individuals, out of a federal workforce of over two million, were subject to criminal or civil enforcement actions during this ten-year period.[213] The total number of actions stayed fairly consistent from year to year, with no year during this decade-long period having more than thirteen actions or fewer than seven.[214] The most common actions were for financial conflicts of interest and for violations of the false reporting statutes based on financial disclosures.

During this period the DOJ invoked the financial reporting statute in just three reported cases, as it generally preferred to prosecute financial reporting violations under the general false-statements statute, 18 U.S.C. § 1001 (or § 1018).[215] In all three cases, the offense in question was not a false filing, but rather a willful failure to file a required report.[216] And all three cases were civil actions rather than criminal: In this ten-year period, the federal government brought no criminal charges under the financial disclosure statute.[217] Two of the three civil cases were settlements in which the offender failed to file a termination report after leaving government.[218] The defendants were fined $1,000 and $4,000, respectively.[219]

The one fully litigated action under the financial disclosure law was against an employee of Congress rather than the Executive Branch. The employee, a former chief of staff for a member of Congress, also refused to file a termination report when he left Congress.[220] He failed to respond to DOJ's civil complaint against him, and the court eventually entered judgment against him, requiring him to pay a $25,000 penalty.[221] And in 2019, the DOJ brought a civil action against a former White House official who failed to file a termination report: onetime *Apprentice* contestant Omarosa Manigault Newman.[222]

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213. *See* sources cited *supra* note 212; *Historical Federal Workforce Tables: Executive Branch Civilian Employment Since 1940*, OPM.GOV, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/ [https://perma.cc/QHK8-NVNE] (last visited Dec. 28, 2020).
214. *See* 2013 CONFLICT SURVEY, *supra* note 212 (reporting thirteen new prosecutions for violations of ethics statutes or for false financial disclosures); 2010 CONFLICT SURVEY, *supra* note 212 (reporting seven new such prosecutions).
215. 2015 CONFLICT SURVEY, *supra* note 208; 2014 CONFLICT SURVEY, *supra* note 212.
216. *See* sources cited *supra* note 212.
217. *See* sources cited *supra* note 212.
218. 2015 CONFLICT SURVEY, *supra* note 208, at 11–12.
219. *Id.*
220. 2014 CONFLICT SURVEY, *supra* note 212, at 8–9.
221. *Id.*
222. Complaint at ¶ 1, United States v. Manigault Newman, No. 19-CV-01868 (D.D.C. June 25, 2019).

The relative lack of priority given to the criminal government ethics statutes is also evident in the DOJ's written guidance for prosecutors. DOJ's Justice Manual (formerly called the United States Attorneys' Manual) is a comprehensive document that contains "publicly available [DOJ] policies and procedures."[223] It provides guidance on dozens of areas of criminal law, ranging from copyright law to money laundering to employee benefit plan kickbacks.[224] The section on "Protection of Government Integrity" discusses bribery of public officials, interference with federally protected activities (for example, voter intimidation), campaign finance laws, federal patronage crimes, election corruption, and purchase and sale of public office.[225] This section says nothing about the financial conflict of interest law, the revolving door statute, or the other government ethics statutes.

DOJ's even more extensive Criminal Resource Manual provides prosecutors with summaries and guidance on hundreds of federal criminal laws.[226] Seven sections of the Criminal Resource Manual deal with the federal bribery and gratuity statute.[227] Zero sections deal with other government ethics statutes.

E. *Why So Little Enforcement?*

There are at least three ways to interpret the disconnect between the large regulatory apparatus of ethics compliance and the dearth of active enforcement of these laws. The first is to conclude that the system is working as intended: because many regulators are on the job, providing guidance and policing employees, the number of actual violations requiring disciplinary action or more severe sanctions is relatively minimal. The second possible conclusion is that the system is, in fact, overregulated: with so few apparent violations, the resources devoted to compliance are far greater than necessary, and the system of compliance for things like financial disclosure is far too burdensome. And finally, one may conclude that we are in the worst of both worlds: Taxpayers fund an army of

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223. U.S. DEP'T OF JUST., JUSTICE MANUAL § 1-1.100 (2018), https://www.justice.gov/jm/jm-1-1000-introduction [https://perma.cc/8AXK-Z9Q7].
224. *Id.* tit. 9, https://www.justice.gov/jm/title-9-criminal [https://perma.cc/9XHR-9B2U].
225. *Id.* § 9-85.000, https://www.justice.gov/jm/jm-9-85000-protection-government-integrity [https://perma.cc/4X84-ZJ5M].
226. U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL (2020), https://www.justice.gov/archives/jm/criminal-resource-manual [https://perma.cc/3APZ-CR38].
227. *Id.* §§ 2041–47, https://www.justice.gov/jm/criminal-resource-manual-2001-299 [https://perma.cc/P7EN-3VQX].

ethics officials throughout the federal government, but those officials fail to pursue more than a handful of violators.

It is impossible to know which one of these conclusions is the correct one, or if some combination is at work. Is an ounce of prevention worth a pound of cure, or are there too many cops on the beat?

At any rate, there is little reason to believe the few instances of enforcement are an indication that ethics violations are uncommon. One study of corporate crime made the epistemological point that "official observations are limited to illegal acts recorded by enforcement agents and neglect those acts that do not come to the attention of authorities."[228] Rather, it is most likely absence of evidence rather than evidence of absence: Just because we do not know of wrongdoing does not mean that it is not there.

Some comparisons with other agencies' civil enforcement and administrative actions may be an effective comparator:

- The Securities and Exchange Commission filed 490 standalone enforcement actions in 2018 and 446 in 2017.[229]
- In fiscal year 2017, the EPA referred 110 civil enforcement cases to the DOJ, filed 80 civil complaints in court, and filed 1,220 administrative penalty order complaints.[230]
- In fiscal year 2018, the Federal Election Commission closed 167 matters under review.[231]
- In fiscal year 2017, the Commodity Futures Trading Commission (CFTC) brought 49 enforcement actions.[232]

These numbers all dwarf the number of civil and criminal actions taken to enforce government ethics laws, even where—as with a specialized agency like the CFTC—the universe of regulated parties is much smaller than the federal workforce. In 2017, there were approximately 2,675,924 civilian employees in the federal ex-

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228. Sally S. Simpson, Carole Gibbs, Melissa Rorie, Lee Ann Slocum, Mark A. Cohen & Michael Vandenbergh, *An Empirical Assessment of Corporate Environmental Crime-Control Strategies*, 103 J. CRIM. L. & CRIMINOLOGY 231, 234 (2013).

229. SEC, DIV. OF ENF'T, ANNUAL REPORT 9 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf [https://perma.cc/LVH2-BDVU].

230. *Enforcement Annual Results Numbers at a Glance for Fiscal Year 2017*, EPA, https://archive.epa.gov/epa/enforcement/enforcement-annual-results-numbers-glance-fiscal-year-2017.html [https://perma.cc/D2GH-R9H2] (last visited Dec. 29, 2020).

231. FED. ELECTION COMM'N, ENFORCEMENT STATISTICS FOR FISCAL YEARS 1977-2018 (2018), https://transition.fec.gov/em/enfpro/enforcestatsfy1975-2018.pdf [https://perma.cc/YF32-JY9N].

232. Press Release, Commodity Futures Trading Comm'n, CFTC Releases Annual Enforcement Results for Fiscal Year 2017 (Nov. 22, 2017), https://www.cftc.gov/PressRoom/PressReleases/7650-17 [https://perma.cc/4NEV-GBUU].

ecutive branch.[233] Federal ethics regulations and statutes applied to nearly all of them. Counting uniformed military personnel, to whom the ethics statutes generally apply, the total number of executive branch employees jumps to 4,059,488.[234]

Counting just the civilian employees, in 2018, fewer than one in 2,000 employees was disciplined in some way for violating federal ethics rules. Of these incidents of discipline, as discussed above, most of them likely involved general misconduct of the kind that could occur at any workplace, rather than violation of the ethics rules specific to the federal government.

A total of 167 disciplinary actions were taken for violation of the restrictions on gifts, financial conflicts, impartiality in performing official duties, seeking other employment, and outside activities.[235] This means that fewer than one in ten thousand civilian employees was disciplined in 2018 for violating one of these rules. To put that number in perspective, the U.S. Department of State has approximately 11,000 civil service employees.[236] By this metric, exactly one of them would have been disciplined in 2018 for one of these violations.

And of course, formal enforcement actions, in the form of civil suits or criminal prosecution, were far rarer.[237] In a federal workforce of more than two million, fewer than one in 200,000 executive branch officials per year is charged with any civil or criminal violation under the government ethics statutes.

IV. THE PROBLEMS WITH THE CURRENT SYSTEM AND A WAY FORWARD

As shown in Parts I and II, the federal government has an extensive system of ethical standards and a substantial infrastructure of compliance-focused officials that imposes considerable costs and burdens on the federal workforce. But as Part III demonstrated, the consequences for violating these standards are few and far between.

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233. JENNINGS & NAGEL, *supra* note 7.

234. *Id.* Enlisted uniformed military personnel are exempt from the general executive branch ethics regulations. *See* 5 C.F.R. § 2635.103 (2018).

235. U.S. OFF. OF GOV'T ETHICS, *supra* note 95, at 26. The total number of individuals disciplined based on violations of these provisions may have been lower because the same person may have been found to have violated more than one of them.

236. *Mission*, U.S. DEP'T OF STATE, https://careers.state.gov/learn/what-we-do/mission/ [https://perma.cc/U7RY-UX2W] (last visited Nov. 1, 2020).

237. *See supra* Section III.D.

Ultimately, the federal tilt toward prevention and compliance, and away from active enforcement, excessively burdens the officials who are most likely to be compliant in any event while it minimizes the deterrent effect on potential rule breakers. The officials who pay scrupulous attention to bulletins from their agency DAEO, and who call their ethics office for guidance on whether they can accept a particular gift, are not the ones who are likely to get into ethics trouble. Rather, it is the employee who flies under the ethical radar that can create a problem.

This Part first assesses the current low-enforcement model of government ethics from the perspective of criminal deterrence theory. It then considers and proposes several possible reforms to the federal government's ethics regime to address the inadequate deterrence created by the current system.

A. *Enforcement and Deterrence*

Laws and rules rarely enforced are unlikely to foster compliance. As discussed in this section, voluminous scholarship on the deterrence of crime confirms that when (1) a particular type of crime is rarely sanctioned, (2) there is no *perception* that that type of crime is likely to be punished, and (3) any punishment that does happen will only occur after a long and protracted process, then (4) deterrence is minimized. These factors all work against effective deterrence in the government ethics sphere.

1. Deterrence and the Certainty of Punishment

A great irony of the federal government's sparse enforcement of its ethical standards is that the government itself has acknowledged that misconduct with a low probability of punishment is unlikely to be deterred, even if the potential sanctions are severe. In 2016, the DOJ's National Justice Institute released a publication titled "Five Things About Deterrence," which summarized key research findings on the topic.[238] The stated purpose of the publication was "to help those who make policies and laws that are based on science."[239] Number one on the list stated: "The certainty of being caught is a vastly more powerful deterrent than the punishment. Research shows clearly that the chance of being caught is a vastly

238. NAT'L INST. OF JUST., FIVE THINGS ABOUT DETERRENCE 1 (2016), https://www.ncjrs.gov/pdffiles1/nij/247350.pdf [https://perma.cc/V8T6-2883].
239. *Id.* at 2.

more effective deterrent than even draconian punishment."[240] Item number three said: "Police deter crime by increasing the perception that criminals will be caught and punished."[241] A supplemental discussion explained that "it is the certainty of being caught that deters a person from committing crime, not the fear of being punished or the severity of the punishment. Effective policing that leads to swift and certain (but not necessarily severe) sanctions is a better deterrent than the threat of incarceration."[242]

Deterrence scholars Daniel Nagin and Greg Pogarsky have similarly concluded: "punishment certainty is far more consistently found to deter crime than punishment severity, and the extra-legal consequences of crime seem at least as great a deterrent as the legal consequences."[243] Another literature review found that "[t]he current research, confirming earlier correlational and quasi-experimental studies, indicates that there are consistent and significant negative correlations between likelihood of conviction and crime rates."[244] And a summary by Nagin explained that "[t]he perceptual deterrence literature consistently finds that perceived certainty of punishment is associated with reduced self-reported or intended offending."[245]

Another literature review summarized the link between deterrence and certainty of punishment as follows: "Deterrence in general, whether contextualized as specific or general, depends on an offender or would-be offender's perceptions of sanction threats, the probability of apprehension, and the like."[246] And one summary of the relevant research concluded: "[I]n reviewing macrolevel studies that examine offense rates of a specific population, the researchers found that an increased likelihood (certainty) of appre-

240. *Id.* at 1.
241. *Id.*
242. *Id.* at 2.
243. Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 865 (2001).
244. ANDREW VON HIRSCH, ANTHONY BOTTOMS, ELIZABETH BURNEY & P-O WILKSTROM, CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 47 (1999).
245. Daniel S. Nagin, *Deterrent Effects of the Certainty and Severity of Punishment*, *in* 7 ADVANCES IN CRIMINOLOGICAL THEORY 157, 158 (Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson eds., 2018).
246. Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, FED. PROBATION, Dec. 2016, at 34. *But see id.* at 35 ("The impact of certainty of punishment for criminal acts is just as murky as the research on severity of punishment. Some studies indicate perceived certainty of sanction threats has very little effect on re-offense rates, whereas other research claims it does have an effect on some people but not others." (citations omitted)).

hension and punishment was associated with declining crime rates."[247]

Another review specified that when the likelihood of punishment is low, deterrence is virtually nonexistent: "at a 10 per cent punishment rate, almost no suppression [of wrongdoing] was observed."[248] Importantly, it is the likelihood of apprehension—almost regardless of the severity of the legal consequences—that is a significant indicator of deterrent effects:

> The empirical studies seem to agree that increasing the probability of punishment provides a better chance of strengthening deterrence than increasing the severity of punishment. Establishing some base expectation of a meaningful chance of punishment is a necessary condition to any deterrent effect. Yet, we have previously noted just how low is the perceived probability of punishment—a perception that results from the very low actual rates of punishment, and is further exacerbated by the human tendency to heavily discount a future event.[249]

For non-violent crimes, research also shows that certainty of apprehension is a significant deterrent:

> People who perceive that sanctions are more certain tend to be less likely to engage in criminal activity. Scenario-based research using self-reports that examine the effect of certainty of punishment on individual behavior has shown that as the perceptions of the risk of arrest for petty theft, drunk driving, and tax evasion increases, individuals report they would be less likely to offend.[250]

Similarly, Nagin and Pogarsky surveyed college students to determine how different factors would affect their willingness to drink and drive. They found that a ten percent increase in the likelihood of sanction (whether a criminal penalty or a license suspension) "reduces subjects' probability of driving drunk by 3.3 [percent]."[251]

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247. VALERIE WRIGHT, THE SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 4 (2010) (citing VON HIRSCH ET AL., *supra* note 244).
248. Paul. H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 183 (2004).
249. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 992–93 (2003).
250. WRIGHT, *supra* note 247, at 4–5.
251. Nagin & Pogarsky, *supra* note 243, at 877.

2. Deterrence and the Speed of Punishment

The lengthy process of criminal prosecution also works against deterrence: as one review put it, "a delay between violation and punishment can dramatically reduce the perceived cost of the violation. Even if the punishment is certain, the more distant it is, the more its weight as a threat will be discounted."[252] Or, as another commentator explained: "Even a greater likelihood of being caught will not have much impact in deterring a violation if the timing of a prosecution is delayed long enough so that the miscreant discounts the effect of any punishment."[253]

The "celerity" of punishment—"the criminogenic consequences of how swift a punishment is implemented"[254]—may also be a significant factor in deterrence. Although the evidence is mixed on whether celerity is a consistent factor in criminal deterrence,[255] substantial amounts of research indicate that in controlled environments, it is a significant factor that may be applicable to the wider world.[256]

The problem is that, as scholars of celerity and deterrence put it, "*implementing celerity of punishment into the criminal justice system in a meaningful way is a practical impossibility.*"[257] This is because "[t]he criminal justice system is not built for speed."[258]

3. Deterrence and White-Collar Crime

When it comes to white-collar offenses in particular—which government ethics violations can properly be considered[259]—

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252. Robinson & Darley, *supra* note 249, at 954.

253. Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 28 WAYNE ST. L. REV. 27, 41 (2015).

254. Travis C. Pratt & Jillian J. Turanovic, *Celerity and Deterrence*, *in* 7 ADVANCES IN CRIMINOLOGICAL THEORY, *supra* note 245, at 187.

255. *See id.* at 191.

256. *See id.* at 191–93.

257. *Id.* at 193.

258. *Id.*

259. The FBI describes white-collar crimes as follows:

> [T]he term white-collar crime is now synonymous with the full range of frauds committed by business and government professionals. These crimes are characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage.

White Collar Crime, FBI, https://www.fbi.gov/investigate/white-collar-crime [https://perma.cc/83FB-3JTK] (last visited Nov. 1, 2020). One study of white collar versus other crime defined it as "planned crimes that involve cheating or lying that usually occur in the course of employment." DONALD J. REBOVICH, & JENNY LAYNE, NATIONAL WHITE-COLLAR CRIME CTR., deterrence scholarship reaches the same conclusions.[260] As two authors put it: "A wealth of studies suggest, perhaps especially in the case of white-collar offenders but also more generally, that it is the certainty of punishment, i.e., the certainty of being caught, that deters more than the extent of punishment once caught."[261]

This conclusion is bolstered by a meta-analysis of studies on the analogous subject of whether internal corporate codes of ethics are effective deterrents to wrongdoing. The meta-analysis concluded that "individuals agreeing with the statement that their companies punish unethical behavior tend to work in companies that commit fewer unethical acts."[262] In short, and unsurprisingly, the perception that unethical acts will be punished matters.

White collar crimes are especially difficult to deter because violators *perceive* the odds of getting caught as particularly low. An analysis of data from the National Public Survey on White-Collar Crime conducted in 2000 concluded that "perceptions of sanction certainty were much higher for robbery (75 percent likely to get caught) compared to fraud (22 percent likely to get caught)."[263] Moreover, the survey respondents were not uniform across demographic lines. In particular, the more educated and higher-income respondents were less likely than others to believe that the white-collar criminal would be caught.[264] Similarly, a recent environmental crime survey posited that "[r]egulators may be able to discourage offending by publicizing actual cases of noncompliance or beyond-compliance behaviors."[265]

THE NATIONAL PUBLIC SURVEY ON WHITE-COLLAR CRIME 6 (2000), https://www.ncjrs.gov/pdffiles1/Digitization/181968NCJRS.pdf [https://perma.cc/NU9B-FYX3].

260. *See generally* Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie & Mariel Alper, *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIMINOLOGY & PUB. POL'Y 387 (2016).

261. Carlton Gunn & Myra Sun, *Sometimes the Cure is Worse Than the Disease: The One-Way White-Collar Sentencing Ratchet*, 38 HUM. RTS. 9, 12 (2011) (citing other literature); *see also* L.E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723, 739–40 (2013) (discussing certainty of punishment and deterrence in the context of white-collar crime).

262. Natalie M. Schell-Busey, The Deterrent Effects of Ethics Codes for Corporate Crime: A Meta-Analysis 90 (2009) (Ph.D. dissertation, U. Md. College Park).

263. Andrea Schoepfer, Stephanie Carmichael & Nicole Leeper Piquero, *Do Perceptions of Punishment Vary Between White-Collar and Street Crimes?*, 35 J. CRIM. JUST. 151, 157 (2007). In particular, survey respondents were asked: "Who do you think is more likely to get caught by the authorities, someone who commits robbery and steals $1,000 or someone who commits fraud and steals $1,000?" *Id.* at 156.

264. *See id.* at 158–59 ("[E]ducation and income were robust predictors of certainty and severity perceptions indicating that more educated respondents and those with higher incomes were more likely to perceive that street crimes, such as robbery, were more likely to be detected and punished more severely than white-collar crimes, such as fraud.").

265. Melissa L. Rorie, Sally S. Simpson, Mark A. Cohen & Michael P. Vandenbergh, *Examining Procedural Justice and Legitimacy in Corporate Offending and Overcompliance: The Efficacy of Direct and Indirect Regulatory Interactions*, 40 L. & POL'Y 172, 184–85, 187 (2018).

The conclusions of the reviewers of survey data from the National Public Survey on White-Collar Crime are also instructive:

> More educated and wealthier individuals were less likely to view white-collar crimes as being more certain of detection and less likely to be punished than street crimes, especially with regard to how they perceived the criminal justice system currently operated. Although this might be due to the two crimes studied herein, one wonders whether this was due to the fact that for white-collar/corporate employment, (advanced) education tends to be a requirement. Or it could be that more educated and wealthier individuals happen to have more experience with the (successful) commission of fraud and perceive that the crime goes largely undetected.
> . . . [T]he data revealed that those with greater education and income perceived there to be less certainty and severity of punishment for white-collar offenses than street crimes. This suggested that those most likely to have access to white-collar crime opportunities believed there was little chance of getting caught and receiving a severe penalty.[266]

The effectiveness of white-collar deterrence through regulation is also questionable. A review of the deterrent effect of administrative agencies on corporate crime concluded that

> [i]f we take a strict definition of deterrence . . . , then the threat of regulatory sanction and the subsequent fear that derives from this threat are relatively miniscule. Reactive enforcement, small budgets and staff, agency capture, few punitive options, and so forth mitigate the likelihood that firm illegality will be discovered (certainty) and harshly sanctioned (severity).[267]

Another, more recent review of corporate compliance with environmental standards observed that "[e]mpirical research findings on the subject of large firm corporate environmental compliance are inconsistent. Some studies show that regulatory activity (such as monitoring and inspections) reduces corporate environmental noncompliance, but others fail to find a deterrent effect or find that deterrence matters only in certain settings."[268] Another study

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266. Schoepfer et al., *supra* note 263, at 160.
267. SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 97 (2002).
268. Melissa L. Rorie et al., *supra* note 265, at 175 (citations omitted).

of corporate environmental compliance found that internal compliance mechanisms do not affect compliance levels and "had no significant impact on behavioral intentions."[269]

By contrast, one factor that has been found to contribute substantially to deterrence of corporate crime is the perceived risk of *informal* sanctions such as reputational harm.[270] Indeed, "informal sanctions may be a more salient and direct influence on behavior than formal sanctions."[271] Of course, the converse is also true: authorities that lack the power or wherewithal to impose informal sanctions will not have this deterrence arrow in their quiver.

A recent review of the literature on corporate crime deterrence found that the most effective way to deter white collar crime is with a *combination* of governing law, punitive sanctions, and regulatory policy.[272] And, in particular, regulatory policy was found to have "produced a significant deterrent effect" when the policy in question "provided for inspections/inquiries and enforcement."[273]

All that said, uncertainty abounds in this area. As one study observed: "Little is known about what works, what's promising, and what doesn't in the prevention and control of corporate crime."[274]

4. Deterrence Theory and Government Ethics

This review of deterrence scholarship suggests that the current system of ethics compliance and enforcement is, bluntly put, an example of what not to do. An environmental crime study concluded that "[i]n general, the risk of environmental crime appears least likely when there is a credible legal threat for noncompliance and/or when one perceives informal consequences associated with offending, such as losing the respect of one's significant others, to be certain and costly."[275] This is almost the exact opposite of the reality facing government officials inclined to engage in wrongdo-

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269. Simpson et al., *supra* note 228, at 263, 265.
270. *See generally* SIMPSON, *supra* note 267, at 106–11.
271. SALLY S. SIMPSON, DEBRA L. SHAPIRO, CHRISTINE M. BECKMAN & GERALD S. MARTIN, PREVENTING AND CONTROLLING CORPORATE CRIME: THE DUAL ROLE OF CORPORATE BOARDS AND LEGAL SANCTIONS 12 (2020), https://www.ncjrs.gov/pdffiles1/nij/grants/254622.pdf; *see also* Simpson et al., *supra* note 228, at 261 ("Informal sanctions exert a strong inhibiting effect on offending; individuals who perceive the informal costs associated with violating environmental law to be more certain and severe are significantly less willing to violate.").
272. *See* Schell-Busey et al., *supra* note 260, at 389.
273. *Id.* at 404.
274. SIMPSON ET AL., *supra* note 271, at 9; *see also* N. Craig Smith, Sally S. Simpson & Chun-Yao Huang, *Why Managers Fail to Do The Right Thing: An Empirical Study Of Unethical & Illegal Conduct*, 17 BUS. ETHICS Q. 633 (2007) (providing an overview of the literature on corporate crime deterrence).
275. Simpson et al., *supra* note 228, at 266.

ing. Despite an elaborate set of laws and rules, actual enforcement actions are extremely rare. Because there is little reason to fear being caught and punished, the fear of consequences is accordingly lessened. Though few government employees will have any idea of the actual (low) number of criminal or disciplinary actions, they will perceive little evidence of actual enforcement around them. And because enforcement is so rare, most employees will not only not know anyone personally who has been subject to enforcement, they also will not know *of* any such person.[276] Finally, ethics officials have very limited authority to engage in the inspections and investigations that provide for effective regulatory deterrence or to take actions that amount to informal sanctions.[277]

Moreover, to the extent the speed of apprehension and punishment is a factor in deterrence, it is very much one that works against the effectiveness of government ethics laws and rules. Of course, the criminal justice system works no faster for government ethics prosecutions than for other complex white-collar matters. For example, the prosecution of Corrine Brown's alleged criminal conspiracy stretched back to 2012,[278] but Rep. Brown's sentence did not begin until 2018.[279] The Securities and Exchange Commission branch chief discussed above pleaded guilty in 2017 to reporting violations that began in 2002.[280]

Furthermore, even the more common non-criminal sanctions for violations of ethics rules typically result from a long process. Federal ethics officials—whether from OGE, agency ethics offices, or inspectors general offices—cannot personally sanction employees even after they identify a violation. Rather, they must bring the matter to the attention of the relevant supervisor, who must determine whether to take any action against the employee. In addition, an employee has a right to challenge adverse personnel actions through the Merit Systems Protection Board. Those cases, if fully contested, typically take up to a year to reach resolution be-

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276. For a discussion of the gap between actual punishment rates and perceived punishment rates, see generally R. Paternoster, *Perceptual Deterrence Theory*, *in* 23 DETERRENCE, CHOICE, AND CRIME: CONTEMPORARY PERSPECTIVES 81 (Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, eds. 2018).

277. *See* Schell-Busey et al., *supra* note 260, at 407.

278. Indictment at ¶ 15, *United States v. Brown*, No. 3:16-cr-00093-TCJ-JRK (M.D. Fla. July 6, 2016).

279. *Former Congresswoman Corrine Brown Reports to Prison on Fraud, Other Charges*, ATLANTA J. CONST. (Jan. 28, 2018), https://www.ajc.com/news/national/former-congresswoman-corrine-brown-reports-prison-fraud-other-charges/U8YLfFxAwNzRaqYl7lulZK/ [https://perma.cc/K9NV-G62G].

280. 2017 CONFLICT SURVEY, *supra* note 183, at 7–8.

fore an administrative judge.[281] And, even then, the disciplined employee can appeal.

Moreover, in the absence of formal legal or disciplinary consequences, government ethics regulators have a highly limited ability to impose *informal* sanctions. With rare exceptions involving high-profile figures,[282] suspected offenders' names are rarely publicized—either internally within the agency or externally—when no formal punishment is meted out. Indeed, even publicly available inspector general reports that recount wrongdoing within an agency frequently redact or use aliases in place of the names of the wrongdoers pursuant to the federal Privacy Act.[283]

It is conceivable that the government's massive ethics infrastructure may serve a deterrent effect not just by training and guiding officials on proper compliance but also by serving as a metaphorical, visible "police presence." As Daniel Nagin has explained, "[T]here is substantial evidence that increasing the visibility of the police by hiring more officers and allocating existing officers in ways that materially heighten the perceived risk of apprehension deters crimes."[284] But this is a highly imperfect analogy when applied to government ethics laws and rules because government ethics officials are not police or prosecutors. Their ability to pursue wrongdoers is highly constrained, and their ability to punish wrongdoers is nil.[285] The simple fact that a governmental department might include an ethics office—even a large and expensive one—is very different from a potential car thief who sees police constantly patrolling a crime-ridden neighborhood. Moreover, the deterrent effect of regulatory agencies is questionable.[286]

As discussed above, in the exceptional cases where criminal charges are brought, they usually operate as supplemental charges to instances of blatant bribery or abuse of power.[287] "Run-of-the-mill" ethics violations, even ones that implicate the criminal statutes, typically go unaddressed. If certainty of being caught is the

281. *See, e.g.*, Mike Ivancie, *Q & A with a Merit Systems Protection Board Representative*, IVANCIE L. (Feb. 12, 2016), https://www.ivancielaw.com/federal-employment-law/q-a-with-a-merit-systems-protection-board-representative/ [https://perma.cc/T5YZ-KQ8Y].

282. *See supra* Section II.C (discussing Kellyanne Conway).

283. *See* 5 U.S.C. § 552(a). *See generally* DEP'T OF DEFENSE, INSPECTOR GENERAL INSTRUCTION 5400.11 (Jan. 29, 2010) (implementing the Privacy Act as applied to the Inspector General's office); U.S. DEP'T OF INTERIOR, OFF. OF THE INSPECTOR GEN., Report No. 20-0099 (Sept. 1, 2020) (investigative report using aliases such as "GSA Official 1" in place of names).

284. Nagin, *supra* note 245, at 158.

285. *See* discussion *supra* Part III.

286. *See* SIMPSON, *supra* note 267, at 98.

287. *See supra* Section III.D.

key factor in deterrence, then there must be very little deterrence indeed.

The complexity of the applicable rules also creates a barrier to reliable compliance. One commentator, himself a government ethics lawyer, has argued:

> Expecting new government employees to read these rules—let alone understand and remember them—is akin to expecting consumers to read and understand "click-through" licenses for new software. Even if read, there is also rarely any effort to test whether employees can recall or understand the rules. Distributing a lengthy tome on the rules of conduct—particularly if done along with a slew of other documents and forms to be read and completed—is an ineffective way to assure that employees know that they are expected to behave ethically.[288]

The same commentator has questioned the efficacy of ethics training programs in particular in fostering compliance with the rules:

> Though good training can effectively transfer knowledge of those rules that are malum prohibitum, the benefit in terms of fostering ethics or reducing corruption is slim . . . . Indeed, the lack of training or knowledge of the rules does little to explain ethical failure. According to a 2005 ethics survey, improper training or ignorance that a particular action was unethical is only the fifth most likely cause of ethical lapse, behind pressure to meet unrealistic goals, the desire for career enhancement, assuring continued employment, and working in an environment with poor morale.[289]

B. *The Limits of OGE*

The central repository of ethics in the federal government is—or is supposed to be—OGE. But OGE, as currently structured, focuses almost entirely on preventing ethics violations rather than identifying and addressing past violations. OGE's organization consists of the Office of the Director, the Internal Operations Division, the General Counsel and Legal Policy Division, the Program Counsel

288. Lager, *supra* note 12, at 73.
289. *Id.* at 74.

Division, and the Compliance Division.[290] *All* of these divisions deal with compliance, education, and oversight of federal agency ethics programs.[291] None of them focus on enforcement, investigation, or auditing. Simply put, OGE is not equipped to be, and does not function as, the ethics police of the federal government.

Should it? It is striking that the federal government has no division of investigation or enforcement with respect to government ethics laws and rules. This is in marked contrast to various other areas of federal regulation, which have dedicated agency enforcement. To give ten prominent examples:

- The Securities and Exchange Commission's Division of Enforcement investigates and prosecutes civil suits for violations of federal securities law.[292]
- The Federal Trade Commission's Division of Enforcement litigates a variety of consumer protection matters.[293]
- The Federal Communications Commission's Enforcement Bureau is "responsible for enforcing the provisions of the Communications Act, the Commission's rules, orders, and various licensing terms and conditions."[294]
- Different offices at the Environmental Protection Agency pursue a variety of enforcement actions for violations of environmental law.[295]
- The Commodity Futures Trading Commission's Division of Enforcement "investigates and prosecutes alleged violations of the Commodity Exchange Act . . . and Commission regulations."[296]

290. *Organization*, *supra* note 67.

291. *General Counsel & Legal Policy Division*, U.S. OFF. OF GOV'T ETHICS, https://www2.oge.gov/Web/OGE.nsf/Organization/General%20Counsel%20&%20Legal%20Policy%20Division [https://perma.cc/L8SC-2D8S] (last visited Nov. 1, 2020); *Program Counsel Division*, U.S. OFF. OF GOV'T ETHICS, https://www2.oge.gov/Web/OGE.nsf/Organization/Program%20Counsel%20Division [https://perma.cc/DB76-YS8U] (last visited Nov. 1, 2020); *Compliance Division*, U.S. OFF. OF GOV'T ETHICS, https://www2.oge.gov/Web/OGE.nsf/Organization/Compliance%20Division [https://perma.cc/4T4K-UXMU] (last visited Nov. 1, 2020).

292. *Division of Enforcement*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/page/enforcement-section-landing [https://perma.cc/EFC2-VA2R] (Nov. 1, 2020).

293. *Division of Enforcement*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-enforcement [https://perma.cc/7AEC-4BNE] (last visited Nov. 1, 2020).

294. *Enforcement*, FED. COMMC'N COMM'N, https://www.fcc.gov/enforcement [https://perma.cc/ZP9T-9E4H] (last visited Nov. 1, 2020).

295. *Enforcement*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement [https://perma.cc/FT2T-SC6S] (last visited Nov. 1, 2020).

296. *Enforcement*, COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/LawRegulation/Enforcement/index.htm [https://perma.cc/45BV-D9Q5] (last visited Nov. 1, 2020).

- The Federal Election Commission's Enforcement Division "investigates alleged violations of the law, . . . directly negotiates conciliation agreements, which may include civil penalties and other remedies," and its Litigation Division pursues enforcement actions in court.[297]
- The Federal Energy Regulatory Commission's Office of Enforcement "[i]nitiates and executes investigations of possible violations of the Commission's rules, orders, and regulations" and "pursues remedies through negotiation or litigation."[298]
- The Federal Aviation Authority's Enforcement Division "initiates legal enforcement actions to address noncompliance by regulated entities and persons."[299]
- U.S. Immigration and Customs Enforcement's Office of Enforcement and Removal Operations's stated mission is "[t]o identify, arrest, and remove aliens who present a danger to national security or are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of our immigration laws and our border control efforts."[300]
- The Department of Housing and Urban Development's Departmental Enforcement Center enforces "the Department's statutory and regulatory requirements," including through "various sanctions, including suspension and debarment from Government business," civil penalties, "abat[ing] owners' federal subsidy payments and, if necessary, foreclos[ure] on properties."[301]

Ultimately, OGE is an almost uniquely powerless federal agency in terms of its ability to enforce the laws it oversees. All of the regulatory agencies listed above have formal investigative authority, in many cases including subpoena powers, and all have the ability to litigate against alleged violators. OGE does not even have the abil-

297. *Associate General Counsel for Enforcement*, FED. ELECTION COMM'N, https://transition.fec.gov/about/offices/OGC/AGC_enforcement.shtml#enf [https://perma.cc/QAQ5-8FP4] (last visited Nov. 1, 2020).
298. *Office of Enforcement*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/about/offices/office-enforcement-oe [https://perma.cc/E5BA-GHXU] (last visited Nov. 1, 2020).
299. *Legal Enforcement Actions*, U.S. FED. AVIATION ADMIN., https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/enforcement/enforcement_actions/ [https://perma.cc/ET4K-6ERU] (last visited Nov. 1, 2020).
300. *Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/ero#wcm-survey-target-id [https://perma.cc/97CY-TNZE] (last visited Nov. 1, 2020).
301. *DEC Frequently Asked Questions*, U.S. DEPT. OF HOUS. & URB. DEV., DEPARTMENTAL ENF'T CTR., https://www.hud.gov/program_offices/enforcement/faq [https://perma.cc/565S-H5UT] (last visited Nov. 1, 2020).

ity to require disciplinary action against a violator. It is quite unusual for an agency with primary oversight responsibility over a particular area of law and regulation, and the foremost expertise in that area within the government, to have no enforcement power whatsoever. OGE's complete lack of enforcement authority and highly limited independent investigative authority constrain its ability to combat ethics violations.[302]

Nor do federal agency ethics offices or agency inspectors general fill this gap. Agency ethics officials and inspectors general have at most the ability to make recommendations. They have only the authority to recommend to senior agency officials that disciplinary action be taken against a violator. And they, like OGE, have no enforcement authority at all with respect to the ethics statutes; that responsibility falls solely to the DOJ, which pursues criminal or even civil actions only in exceptional cases.[303]

One might counter that complaints about OGE's limited enforcement and investigative powers misunderstand OGE's purpose. OGE does have significant rule-writing, educational, advisory, information-gathering, and public outreach functions.

But the question is whether the status quo is preferable to possible alternatives. Under current law and practice, OGE's authority is confined to advisory, educational, preventive, consultative, and rulemaking functions. The limits of its power are illustrated by former Director Shaub's extraordinary tweetstorm and other public statements critical of President Trump in early 2017.[304] These actions can reasonably be read as the head of an independent agency chafing at the constraints of his office. Because Shaub had little ability to take concrete action against what he perceived as a flouting of the rules and norms of government ethics, he instead took to Twitter to try to publicly shame—or at a minimum get the attention of—both the President and the press through highly unusual sarcasm and criticism. Lacking a cudgel, OGE's Director instead resorted to the megaphone through these attention-seeking tactics.

Moreover, a highly decentralized system of agency-specific ethics offices may not make sense for enforcing rules and laws that are largely uniform across the executive branch. To the extent individual agencies are charged with enforcing ethics rules for their particular employees, there is a risk of disparate enforcement and punishment for the same violations. Not only is this potentially unfair, it is also legally risky for the government. An employee chal-

302. *See* discussion *supra* Section II.A.
303. *See* discussion *supra* Sections II.B–C.
304. *See supra* Section II.A.

lenging a disciplinary action, termination or otherwise, would certainly point to differing levels of punishment across agencies for the same types of violations. This varied treatment could form the basis for a challenge to the action before the Merit Systems Protection Board.[305] It almost certainly would also lead to some allegations that the disparate treatment was based on the employee's membership in a protected class.[306]

C. *When Ethics Officials Do Have Power: A Brief Case Study*

In government, as in life, leverage matters. And federal ethics officials' leverage is at its strongest in one circumstance: when a presidential administration is seeking to nominate an individual for a position requiring Senate confirmation. Under current executive branch practice and procedures, the White House will not normally nominate someone until OGE has "precleared" that person's financial disclosures. This means that before the President formally nominates the candidate by submitting her name to the Senate, the potential nominee will submit her draft 278e financial disclosure form to the government.[307] The draft 278e form is reviewed by ethics officials at the nominee's future agency and at OGE.[308] One hundred percent of the time,[309] the ethics officials will have follow-up questions about the 278e, with inquiries about the person's assets, income, and positions. Necessary edits are made to the draft 278e before it is finalized. From that finalized form, agency ethics officials (often with input from OGE) will identify the asset divestitures, resignations, and other actions the future nominee must take in order to avoid conflicts of interest.[310]

Ethics officials, based on their review of the nominee's financial disclosures and perhaps other communications with the nominee, will then draft an "ethics agreement" or "ethics letter" for the nom-

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305. *See generally Jurisdiction*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/About/jurisdiction.htm [https://perma.cc/82PM-BZBZ] (last visited Jan. 10, 2021).

306. *See generally Federal Employees & Job Applicants*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/federal-employees-job-applicants [https://perma.cc/PRW5-ME5V] (last visited Jan. 10, 2021).

307. U.S. OFF. OF GOV'T ETHICS, PUBLIC FINANCIAL DISCLOSURE GUIDE § 4.10 (2019), https://www.oge.gov/Web/278eGuide.nsf/2cf9ac792bc0654a85257ea1005f838a/2bbfa649c57bbcae85258361007016e0?OpenDocument [https://perma.cc/JX73-YH3B].

308. *Id.*

309. The one hundred percent number is an approximation but is consistent with the author's experience representing clients being considered for presidential appointments.

310. *See* 5 C.F.R. §§ 2634.801–805; Dale Christopher, *Ethics Agreements: Where Ethics Obligations Become Action*, U.S. OFF. OF GOV'T ETHICS (July 24, 2019), https://www.oge.gov/web/oge.nsf/Resources/Ethics+Agreements:+Where+Ethics+Obligations+Become+Action [https://perma.cc/B7E8-7TTB].

inee's signature.[311] In this agreement, the future nominee affirms her understanding of various ethics laws and rules, agrees to abide by those laws and rules, and commits to take certain actions and refrain from certain actions in order to ensure compliance. For example, a letter may say: "Within 90 days of confirmation, I will divest all my interests in Los Pollos Hermanos Company." Or it may say: "Upon confirmation, I will resign from my position as a Director of Vandelay Industries."

Only after the 278e form and the ethics agreement are finalized to the satisfaction of OGE will OGE notify the White House that the person has been precleared for nomination.[312] Although the White House is not legally prohibited from forwarding a nomination before preclearance, in practice all recent administrations have been reluctant to do so.

Part of this leverage is based on OGE's statutory authority with respect to certification of nominee 278e reports. The Ethics in Government Act provides that a nominee must submit a financial disclosure statement within five days of her Senate nomination.[313] Moreover, the report must be made "current" no later than the date of the nominee's Senate confirmation hearing.[314] OGE's Director is then authorized to review the report and to determine whether "the individual submitting such report is in compliance with applicable laws and regulations."[315] If OGE's review leads it to conclude that "additional information is required to be submitted, [it] shall notify the individual submitting such report what additional information is required and the time by which it must be submitted."[316] OGE essentially has full independence in determining whether to certify a report—or not.[317]

The same statute gives OGE equal authority to refuse to certify the annual reports of officials already in government, but by that point OGE's leverage is mostly gone. For example, after identifying inaccuracies in the Secretary of Commerce's financial reporting for 2018, OGE refused to certify his annual financial disclosure report.[318] But the Secretary remained in the job with no disciplinary measures or direct adverse consequences to his role.[319]

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311. 5 C.F.R. §§ 2634.801–805 (2018). For DOJ nominees, the letter is signed by a senior Department ethics official rather than by the nominee herself, but the nominee will separately confirm her commitment to abide by the terms of the letter.

312. U.S. OFF. OF GOV'T ETHICS, *supra* note 307, at §4.10.

313. 5 U.S.C. App. § 101(b)(1).

314. *Id.*

315. *Id.* § 106(b)(1).

316. *Id.* § 106(b)(2)(A).

317. *Id.* § 106(b)(2); 5 CFR § 2634.605(b)(3) (2018).

318. Letter from Emory A. Rounds, Dir., U.S. Off. of Gov't Ethics, to David Maggi, Designated Agency Ethics Off. & Chief of the Ethics L. and Program Divs., Off. of the Gen.

OGE's power in this particular unique circumstance—its ability to hold up a nominee for high office—provides broader lessons for enhancing the clout of federal ethics officials generally. For example, if it identifies ethics violations by a particular official, OGE could be given the authority to block an official's promotion, or even to enjoin her continued employment, pending resolution of the issue. An affected official could be afforded due process protections similar to those allowed through the Merit Systems Protection Board, but giving OGE the authority to prevent an agency from promoting or continuing to employ a rule-breaking official, would make it a significantly more powerful organization.

D. *Proposed Reforms*

While criticisms of the existing federal ethics regime abound, actual detailed reform proposals are harder to find. Indeed, the presidential ethics pledges are notable for how they only incrementally expand federal officials' existing ethics obligations, and how they are virtually never enforced.[320]

When reforms to the existing laws and rules have been proposed, they have tended to be either marginal changes to existing substantive ethics standards, or—in clear response to widely reported perceived abuses—focused on the President's individual ethical obligations. Most reform proposals have not focused on the federal *system* of ethics compliance and enforcement.

For example, in 2018, Senator and then-presidential candidate Elizabeth Warren proposed the Anti-Corruption and Public Integrity Act.[321] The ethics component of the Act would do such things as "require senior government officials and White House staff to divest from privately-owned assets that could present conflicts, including large companies and commercial real estate," and "require most executive branch employees to recuse from all issues that might financially benefit themselves or a previous employer or cli-

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Couns. (Feb. 15, 2019), https://www2.oge.gov/web/OGE.nsf/0/955C1F75C94F1D1F852583A60074C4CB/$FILE/Letter%20to%20Commerce%20DAEO.pdf [https://perma.cc/L7Q7-FN8R].

319. *See e.g.*, Carrie Levine, *'Not In Compliance': Wilbur Ross, The Trump Official Who Keeps Watchdogs Up at Night*, NPR (Feb. 27, 2019), https://www.npr.org/2019/02/27/696824206/not-in-compliance-wilbur-ross-the-trump-official-who-keeps-watchdogs-up-at-night [https://perma.cc/BYA8-U543].

320. *See supra* Sections I.C, III.C.

321. *Anti-Corruption and Public Integrity Act*, WARREN.SENATE.GOV, https://www.warren.senate.gov/imo/media/doc/Master%20Summary%20of%20Anti%20Corruption%20Act%20-%20FINAL.pdf [https://perma.cc/465N-NJAS] (last visited Nov. 1, 2020) (bill summary).

ent from the preceding 4 years."[322] The former proposal is essentially identical to the existing financial conflict of interest statute, 18 U.S.C. § 208, and the latter simply extends OGE's impartiality rule as applied to officials' former employers from one year to four years.[323]

Likewise, a report from the Brennan Center for Justice advocated for closing "the loophole exempting the president and vice president from the general standards of conduct established under federal conflict of interest law" and expanding financial disclosure requirements for senior officials, particularly the President.[324] As noted above, the presidential exemption to the conflict-of-interest laws has only been a significant issue for a single President,[325] and financial disclosure requirements under current law are already quite burdensome.

Former OGE Director Walter Shaub himself has advanced a number of reform proposals.[326] For example, he argues for changing the law so that the President may only remove OGE's Director for cause.[327] Though a potentially effective prophylactic measure to safeguard the agency's independence, it would address a threat that is more theoretical than real. In practice, agency ethics officials and others who deal with OGE know that it already does operate as a quite self-contained and fiercely independent agency, and its employees—composed almost entirely of career officials rather than political appointees—tend to jealously guard the Office's mission and prerogatives. Indeed, the possibility that Shaub himself would be fired did not stop him from going to war with the White House in 2017.[328]

Shaub also argues for the establishment of "a Special Inspector General for Small Executive Agencies . . . with regular jurisdiction over the many small agencies in the executive branch that lack Inspectors General and special jurisdiction to conduct ethics investigations."[329] But this is essentially a gap-filling measure to cover the small minority of federal agency employees who are not subject to the dozens of existing inspectors general.

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322. *Id.* at 1.

323. *See supra* Section I.A (discussing 18 U.S.C. §208).

324. DANIEL I. WEINER, BRENNAN CTR. FOR JUST., STRENGTHENING PRESIDENTIAL ETHICS LAW 7–8 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Strengthening%20Presidential%20Ethics%20Law.%20Daniel%20Weiner.pdf [https://perma.cc/C9DY-YZJ2].

325. *See supra* Section I.A.

326. *See* Shaub, *supra* note 117, at 1.

327. *Id.* at 3.

328. *See supra* Section II.A.

329. Shaub, *supra* note 117, at 13–14.

Shaub also supports increased public access to such information as officials' compliance with ethics rules, use of government aircraft, officials' interest in discretionary trusts, and the ethics transition plans of presidential candidates.[330] But again, these changes would all be marginal adjustments to requirements already in place.

One exception to the trend toward incremental reform is the advocacy group Issue One, which has proposed several potentially major changes to the Executive Branch ethics program. One would be to "[a]uthorize OGE to investigate allegations of ethics violations for high-ranking employees (Presidential appointments with and without Senate confirmation, SES and Schedule C)."[331] As discussed in Section II.A, OGE already has the authority to investigate any agency employee of any level, at least when the Director determines that an agency investigation "has not been conducted within a reasonable time."[332] The regulation itself, though, acknowledges that it will be a "rare case" in which these procedures prove necessary.[333] A reform that allows OGE to self-initiate investigations of high-level officials, without first having to go through agency ethics officers, could streamline the process and make it more regularized.

Perhaps more profoundly, Issue One also proposes additional investigative powers for OGE: "Clarify that the Director of OGE has the authority to conduct investigations, subpoena witnesses, compel production of documents and issue civil penalties for violations for high-ranking officials."[334] This would be a significant change because OGE does not currently have subpoena power or any other way to compel documents from government officials or anyone else. Likewise, neither OGE nor agency ethics officials have the power to issue civil penalties for violations of ethics rules.

Another pair of recommendations would allow OGE to engage in random oversight of agency ethics offices and individual employees.

First, Issue One recommends that rules be changed to "[a]uthorize OGE to conduct random reviews of decisions by ethics officials for each agency."[335] To allow random reviews of agency ethics decisions would, in part, allow OGE to function as an overall

330. *Id.* at 17–25.
331. Memorandum from Issue One to Ed. Bds. 6 (May 23, 2017), https://www.issueone.org/wp-content/uploads/2017/08/IO-OGE-Edit-Memo-2017.pdf [https://perma.cc/837X-2YPQ].
332. 5 C.F.R. § 2638.504(b) (2017).
333. *Id.* § 2638.504.
334. Memorandum from Issue One to Ed. Bds., *supra* note 331, at 2.
335. *Id.* at 7.

inspector general for the federal executive branch. Or, in effect, act as an inspector general to inspectors general, insofar as agency IG offices themselves play a role in policing employee ethics. But ultimately, if OGE cannot *override* those decisions, its role is limited to a hortatory one and is duplicative of agency inspectors general, who can already effectively do the same thing when notified of a problem.

Second, Issue One recommends: "Authorize OGE to conduct random audits of public and confidential financial disclosures to ensure the accuracy of the document."[336] To allow random audits of financial disclosure reports would allow OGE to function as an IRS for federal employees. In practice, agency ethics officials tend to pay close attention to the financial disclosure reports of high-level agency officials. But even in those instances where ethics officials review and provide feedback and questions on an official's public financial disclosure report, they almost never ask for actual documentation of an employee's assets and income. Agency ethics officials do not have subpoena or formal audit power over agency employees. It is questionable whether a reform that gives OGE the power to randomly and formally audit federal officials' financial statements would substantially deter officials from engaging in wrongdoing. Moreover, financial disclosure is already by far the most onerous ethics requirement for executive branch employees from a compliance standpoint.[337]

As for avoiding and deterring financial conflicts of interest, perhaps a more effective solution would be to facilitate information sharing between the IRS and OGE. Under current law, the IRS is generally prohibited from sharing individuals' tax information outside the agency, including with other government agencies.[338] Tax return information can be shared with other federal agencies for a variety of purposes if the necessary conditions are met,[339] but none of these exceptions expressly allow the IRS to share return information with OGE or agency ethics officials for the purpose of determining whether the employees have violated ethics rules.[340] A

336. *Id.*
337. *See supra* Section II.D.
338. 26 U.S.C. § 6103(a).
339. *See id.* § 6103(h)–(l).
340. The closest exception is a section that allows disclosure to

> officers and employees of any Federal agency who are personally and directly engaged in . . . preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party, or . . . any investigation which may result in such a proceeding.

change in the law to allow OGE to request information from the IRS could go a long way toward ensuring that officials are not reporting one thing to tax authorities—which do have broad investigative and enforcement powers—and another to ethics authorities.

Another set of reform proposals comes from the National Task Force on the Rule of Law & Democracy, an initiative of the Brennan Center for Justice at NYU School of Law that is co-chaired by former New Jersey Governor Christine Todd Whitman and former Southern District of New York United States Attorney Preet Bharara. As part of a broader set of public policy reforms, the Task Force sets forth six proposals regarding government ethics.[341] Three of the proposals deal with financial disclosure; one advocates stricter means for enforcing the Emoluments Clauses of the Constitution; and one advocates extending the federal conflict of interest laws to the President and Vice-President.[342] As with some other reform proposals discussed above, these proposals target issues specific to President Trump.

The Task Force's sixth proposal, however, focuses on a series of reforms to OGE. The first such reform would be to "[s]pecify that the president cannot remove OGE's director during his or her statutory term except for good cause."[343] As mentioned, though, OGE already functions as a highly independent agency and the threats to that independence have been purely hypothetical. But perhaps more significantly, the Task Force recommends a number of other changes to enhance OGE's authority, including expanded investigative and enforcement power.[344] As discussed later in Section IV.F, these types of reforms, if implemented, would be more likely to have widespread deterrent effects.

Finally, in early 2019, the newly installed Democratic majority of the House of Representatives passed H.R. 1,[345] a wide-ranging series of changes to federal election and ethics laws. Most of the ethics sections of the bill dealt with the President, Congress, the courts,

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Id. § 6103(i)(A). However, criminal statutes are only a subset of the federal ethics infrastructure. Moreover, OGE and agency ethics officials are expressly prohibited from "mak[ing] a finding as to whether . . . any . . . criminal law of the United States . . . has been or is being violated." 5 C.F.R. § 2638.502 (2018). Accordingly, it is doubtful whether the IRS currently has the ability to share federal officials' tax return information with OGE, or for that matter any agency ethics officials.

341. PREET BHARARA, CHRISTINE TODD WHITMAN, MIKE CASTLE, CHRISTOPHER EDLEY, JR., CHUCK HAGEL, DAVID IGLESIAS, AMY COMSTOCK RICK, DONALD B. VERRILLI, JR., NAT'L TASK FORCE ON RULE OF L. & DEMOCRACY, PROPOSALS FOR REFORM 4–15 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_TaskForceReport_2018_09.pdf [https://perma.cc/NKK6-YWXN].

342. *Id.* at 5–10.

343. *Id.* at 13.

344. *Id.* at 13, 15.

345. H.R. 1, 116th Cong. (2019).

and lobbying disclosure.[346] One section of the bill, however, titled the Executive Branch Comprehensive Ethics Enforcement Act of 2019, addressed OGE.[347] In addition to reauthorizing the office, the bill also would have made the Director removable only for cause and clarified OGE's rights with respect to ethics matters in the White House.[348] But perhaps most significantly in the long run, the bill would have enhanced OGE's investigative authority by giving it subpoena power.[349] The Senate never took up H.R. 1.

E. *A Modest Reform: Ethical "Sentencing Guidelines"*

As discussed in Section IV.A.1 of this Article, the certainty of punishment is a key factor in the deterrence of wrongdoing. Where punishment, if any, for a given violation is uncertain, people will feel less incentive to comply with the rule in question than if they know that breaking it will lead to a specific consequence. And that is exactly the case for disciplinary violations of government ethics rules. In the rare cases where wrongdoing leads to discipline, the severity of punishment can vary across and within agencies.

One possible stopgap solution to the decentralized and sometimes haphazard enforcement of ethics rules is for OGE to issue "sentencing guidelines" for various violations of ethics rules. A uniform set of prescribed punishments for ethical breaches, applicable across the executive branch, would provide guidance for agency ethics officials and other officials as to how to respond to identified violations.

Such guidelines could be issued as a legal advisory or as formal rulemaking. Since OGE frequently issues legal advisories on a host of topics relating to government ethics laws and rules, guidance on the proper level of punishment for violations might be welcome. OGE has express statutory authority to issue such opinions.[350] A counterargument might be that these advisories do not have any force of law, and an employee subject to sanction under the OGE disciplinary guidelines might challenge it as such.

A formal act of rulemaking would be a much more significant undertaking, as it would require OGE to engage in a notice-and-comment period and other requirements under the Administrative

346. *Id.* tit. VII–X.
347. *Id.* tit. VIII, subtit. D.
348. *Id.* §§ 8032–34.
349. *Id.* § 8034(d)(2)(B).
350. 5 U.S.C. app. § 402(b)(8).

Procedure Act. OGE does, however, engage in significant formal rulemaking, most recently in its amendments to the outside gift rule, which went into effect at the start of 2017.[351]

OGE likely has the statutory authority to issue guidelines for appropriate disciplinary levels through formal rulemaking. The Ethics in Government Act provides that OGE's Director is responsible for "developing . . . rules and regulations to be promulgated by the President or the Director pertaining to conflicts of interest and ethics in the executive branch."[352]

Disciplinary guidelines could be detailed and focus not only on the type of violation but also its severity. These are analogous to the so-called *Douglas* factors generally used in federal Merit Systems Protection Board employment cases to determine if the disciplinary sanction imposed on an employee is appropriate.[353] For example, the disciplinary level for a violation of the gift rule could be based on some of these factors:

- The value of the prohibited gift.
- Whether the employee actively solicited the gift.
- Whether there was a clear and deliberate connection between the employee's official position and the gift.
- Whether the employee did anything in his official capacity in return for the gift.
- Whether the employee sought advice from ethics officials or others before accepting the gift.
- Whether this is a repeat offense.

Likewise, the disciplinary level for a violation of the financial conflict of interest rule could consider the following factors:

- The value of the conflicting asset.
- Whether the asset is owned personally by the employee or is imputed through the ownership of another person.
- Whether the employee took any action that was likely to enhance the value of the conflicting asset.
- The actual or expected financial effect of the employee's actions or decisions on the affected asset.

351. Standards of Ethical Conduct for Employees of the Executive Branch; Amendment to the Standards Governing Solicitation and Acceptance of Gifts from Outside Sources, 81 Fed. Reg. 81,641 (Nov. 18, 2016).

352. 5 U.S.C. app. §402(b)(1).

353. *See* Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981); *Determining the Penalty*, U.S. MERIT SYS. PROT. BD., https://www.mspb.gov/studies/adverse_action_report/10_DeterminingthePenalty.htm [https://perma.cc/5T5W-9MMP] (last visited Nov. 1, 2020).

- Whether the employee sought advice from ethics officials or others before accepting the gift.
- Whether this is a repeat offense.

As detailed above, possible disciplinary actions that can be imposed on an employee include "reprimand, suspension, demotion, and removal."[354] There is less of a continuous spectrum in disciplinary actions than there is for criminal or civil penalties, where monetary fines, prison sentences, and length of probation can be adjusted upward or downward with mathematical precision. Among the types of discipline, there could be some variation in the length of a suspension or the severity of a demotion, though there are limits. Once a suspension becomes long enough, it is effectively equivalent to termination. Similarly, a person can only be demoted up to a point; it is not practical to demote a senior agency executive to the custodial staff.

F. *An Immodest Reform: Empower Federal Ethics Officials to Investigate and Enforce Ethics Standards*

The foregoing discussion has shown that (1) criminal and civil enforcement actions for violations of government ethics laws are rare and typically take years, (2) agency disciplinary measures against employees are also quite uncommon, (3) ethics officials at OGE and individual agencies have very limited investigative authority and no enforcement authority, and, finally, (4) punishment for wrongdoing that is unlikely and slow in coming does not act as an effective deterrent.

One solution to this conundrum is to create a more focused and streamlined enforcement process for ethics rules and to confer that authority upon an agency with a specific focus on the laws and rules in question.[355] This agency could either be a new "investigation and enforcement division" within OGE, or—as considered below—a separate and independent ethics agency. The agency could be called, for instance, the Ethics Investigation and Enforcement Agency (EIEA).

First, EIEA could be given the investigative tools that other law enforcement agencies have: in particular, the ability to conduct audits, issue subpoenas, and compel testimony. Some of this power

354. 5 C.F.R. § 2635.102(g) (2020).

355. Some of the potential reforms discussed in this section share common elements with high-level proposals by the National Task Force on the Rule of Law & Democracy. *See* BHARARA ET AL., *supra* note 341, at 13, 15.

would be duplicative of the current authority of agency inspectors general, but the EIEA would be dedicated solely to government ethics violations, unlike the broader mandate of inspectors general, and would investigate possible violations across the executive branch rather than focus on a single agency as inspectors general do.

Second, and even more radically, the EIEA could be given the authority to directly impose discipline on federal officials, notwithstanding any action—or lack thereof—taken by the official's own employing agency. This would be an extension of OGE's existing, but rarely exercised, authority to independently recommend disciplinary action:[356] the EIEA could override a decision by the employee's own superiors not to impose discipline. And, after due process, the EIEA could actually impose the discipline itself. These consequences could include, potentially, demotion, suspension, or termination. The employee, if a career official, could then challenge such an action through the Merit Systems Protection Board, just as if the employee had been disciplined by his own agency.

To be sure, if the EIEA has the independent authority to impose discipline on an official of the Executive Branch even when the official's own agency declines to do so, it could lead to inter-agency disputes. Imagine, for instance, if the Office of Special Counsel had directly been able to fire, rather than just recommend the firing of, Kellyanne Conway, contrary to the White House's wishes.[357] Beyond that, actions to discipline high-level—even potentially Cabinet-level—officials could lead to immense public attention and raise Constitutional questions with respect to political appointees. These possibilities weigh in favor of a narrow construction of the ethics agency's disciplinary power to cover only instances where the violations of specific ethics standards are clear-cut and the ethics agency has a good faith basis to believe that the other agency's response has been inadequate. In fact, the knowledge that EIEA may second-guess the laxity of an agency's response to an ethical violation might also spur agency officials themselves to be more vigilant about addressing wrongdoing by their employees.

One step further would be to allow EIEA to pursue civil penalties for significant violations. This power could take two general forms, not mutually exclusive to each other. First, EIEA could be authorized to impose fines through internal administrative actions, perhaps allowing a hearing before an administrative judge. A

356. 5 C.F.R. §§ 2635.501, 504 (2002).
357. *See supra* Section II.C.

number of federal agencies, such as the SEC,[358] the FEC,[359] the EPA,[360] the FCC,[361] and FERC,[362] have power to impose fines through administrative actions.

Second, EIEA could be permitted to bring civil enforcement actions in court, as many other federal agencies do.[363] All five agencies mentioned above, among others, have the authority to bring civil actions in court against violators of the laws that they respectively enforce.[364] In addition to referring violations to the DOJ—which, as shown above, rarely leads to prosecution—agency ethics officials could also refer such cases to the EIEA for civil enforcement actions.

Importantly, EIEA's authority to impose civil penalties would have to go beyond the employee's federal employment; otherwise many violators could—and would—avoid the penalties simply by resigning their positions. Accordingly, EIEA's jurisdiction would have to extend to former executive branch employees. This expansion of power would not necessarily be so drastic: for example, OGE currently has the authority to require former officials to file "termination" financial disclosure reports within 30 days of their departure.[365]

Any of these changes would require either substantial changes to OGE's statutory authority, structure, and professional staff, or the creation of a completely new agency. Enforcement attorneys and litigators, and perhaps administrative judges, would have to be hired. It would be a considerable expansion of OGE's current

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358. *See Administrative Proceedings*, U.S. SEC. EXCH. COMM'N, https://www.sec.gov/litigation/admin.shtml [https://perma.cc/H3KA-ZK2J] (last visited Nov. 1, 2020).

359. *See* 11 C.F.R. §§ 111.30–46; *Administrative Fines*, FED. ELECTION COMM'N, https://www.fec.gov/legal-resources/enforcement/administrative-fines/ [https://perma.cc/3G49-UPXR] (last visited Nov. 1, 2020).

360. *See Basic Information on Enforcement*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/basic-information-enforcement [https://perma.cc/R7LR-MM5F] (last visited Nov. 1, 2020).

361. *See Enforcement Primer*, FED. COMMC'N. COMM'N, https://www.fcc.gov/general/enforcement-primer [https://perma.cc/F7FC-J9KY] (last visited Nov. 1, 2020).

362. *See Civil Penalties*, U.S. FED. ENERGY REGUL COMM'N, https://www.ferc.gov/enforcement-legal/enforcement/civil-penalties [https://perma.cc/R4PM-DERR].

363. *See also* WEINER, *supra* note 324, at 9 ("It is also essential that OGE or another body be given real civil enforcement authority parallel to that of most other independent regulatory agencies.").

364. *See Litigation Releases*, U.S. SEC. EXCH. COMM'N, https://www.sec.gov/litigation/litreleases.shtml [https://perma.cc/4CJS-H9QA] (last visited Nov. 1, 2020); *Court Cases*, U.S. FED. ELECTION COMM'N, https://www.fec.gov/legal-resources/court-cases/ [https://perma.cc/453P-CJW9] (last visited Nov. 1, 2020); *Basic Information on Enforcement*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/basic-information-enforcement [https://perma.cc/PTG8-6T3L] (last visited Nov. 1, 2020); *Orders to Show Cause Proceedings*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/enforcement-legal/enforcement/civil-penalties/orders-show-cause-proceedings [https://perma.cc/22MR-FJ4N] (last visited Jan. 10, 2021).

365. 5 U.S.C. app. 4 § 101(e); 5 C.F.R. § 2634.201(e) (2020).

makeup of compliance and advisory attorneys. But if visible and efficient enforcement is an important component of deterrence, it could be a worthwhile investment.

CONCLUSION: A SOLUTION IN SEARCH OF A PROBLEM?

One question is whether a dramatic expansion of the investigative and enforcement powers of federal ethics officials is really necessary. What purpose would it serve? It is unknown and perhaps unknowable whether the current ethics infrastructure is largely successful in preventing and, where necessary, addressing violations of government ethics rules. But the application of deterrence theory to the federal ethics regime strongly suggests that many violations are going undetected or at least unpunished.

Of course, just because OGE and agency ethics officials are unable to directly enforce ethics statutes does not make those laws irrelevant. The DOJ has the authority to bring civil and criminal actions for violating these laws.[366] That authority, however, is exercised in only exceptional cases—approximately ten such actions per year over the past decade, and almost invariably as a peripheral component of a larger case involving bribery or other blatant criminality. The scant level of enforcement—quite reasonably—undermines public confidence that the laws are effective.

To be sure, not every technical violation of ethics laws should lead to criminal or civil enforcement. This is particularly the case for financial disclosure misreporting because the reporting requirements are complex and amendments due to inadvertent errors are extremely common. Just as amendments to IRS returns rarely lead to criminal tax evasion charges, fixes to financial disclosures should not necessarily mandate punishment.

Or, take the example of the former Director of the Centers for Disease Control and Prevention, who resigned from her position in 2018 when it was discovered she had improperly purchased shares in tobacco, drug, and food companies while in office.[367] The trades in question were a very small part of her net worth and may have been made by a portfolio manager trading on her behalf without her advance knowledge.[368] In such a case, where there was no evi-

366. *See supra* Section II.C; 18 U.S.C. § 216 (prescribing DOJ's authority to bring criminal and civil enforcement actions for violations of various ethics statutes).

367. Sheila Kaplan, *Dr. Brenda Fitzgerald, C.D.C. Director, Resigns Over Tobacco and Other Investments*, N.Y. TIMES (Jan. 31, 2018), https://www.nytimes.com/2018/01/31/health/cdc-brenda-fitzgerald-resigns.html [https://perma.cc/RVP3-RGYL].

368. *Id.*

dent corruption or concealment, and the official lost her job as a result of the activity, little purpose would be served by additional legal proceedings.

The current system is arguably the worst of all worlds: substantial government resources, and the time of all affected government employees and would-be employees, are devoted to technical compliance, while actual disciplinary measures are rare and direct enforcement of the various supposedly important criminal statutes is even rarer. At the same time, the public's perception—correct or not—that government officials are not playing by the rules has only increased. To mix a playground metaphor, a tilt in the compliance and enforcement seesaw more toward the latter's seat could paradoxically help the public believe—correctly—that the playing field is a level one.