

Testimony of Rudy A. Mehrbani
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before the

U.S. House of Representatives
Committee on Oversight and Reform

concerning

“Improving Government Accountability and Transparency”

May 3, 2021

Chairwoman Maloney, Ranking Member Comer, and distinguished members of the Committee:

Thank you for the opportunity to submit this testimony in support of efforts to enhance accountability and transparency, improve efficiency, combat waste and fraud, and build public trust in the federal government. Reforms are sorely needed to revitalize and restore faith in our democracy.

This testimony is based on my years of service in government — as a policy advisor at the Department of Housing and Urban Development; as an associate counsel and special assistant to the president; as general counsel for the Peace Corps, an executive branch agency; as an assistant to the president and director of the Presidential Personnel Office in the White House; as a member of the 2016 White House Transition Coordinating Council; and as a member of the J. William Fulbright Foreign Scholarship Committee.

It is also based on my work outside of government at Democracy Fund, an independent and nonpartisan foundation that confronts deep-rooted challenges in American democracy while defending against new threats. Since 2014, Democracy Fund has supported efforts to strengthen our democracy through the pursuit of a vibrant and diverse public square, free and fair elections, effective and accountable government, and a just and inclusive society.

My testimony is also based on my work at the Brennan Center, a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. Officials across the political spectrum have relied on the Brennan Center's research in crafting innovative policies for more than two decades.

These are unprecedented times. In addition to a global pandemic, rising economic inequality, a national reckoning with racial injustice, the aftermath of the January 6 attack on the Capitol, and a climate on the brink of collapse, the Nation is facing a crisis of confidence in its most foundational principle: the rule of law. Some might point to the prior four years as a time of unprecedented abuse by the executive branch, with too many examples of government officials using the levers of powers to pick winners and losers or protecting their own self-interests rather than furthering the public good. But others would rightly point out that presidents and government officials have overreached before and that weaknesses in our system pre-date 2016. Regardless of their origin, the toll that past abuses have taken on Americans' trust in government and their elected officials is well documented.

Throughout our history, bipartisan reforms have followed periods of corruption and abuse. When President Kennedy appointed his brother attorney general and members of Congress sought patronage positions for family members, Congress passed an anti-nepotism law. Following President Nixon's many abuses, a wide array of new laws were adopted, including the Budget and Impoundment Control Act, the War Powers Act, and even a federal campaign finance law, all with broad bipartisan support. In the wake of Watergate and associated scandals, Congress passed and President Carter signed the Ethics in Government Act, the Civil Service Reform Act, and the Presidential Records Act, reaffirming many of the values embodied in the Pendleton Act a century earlier. Each of these measures were passed on a bipartisan basis.

Recent conduct has shown that the system is once again at risk. President Trump broke with longstanding practices and norms — previously defended by members of both parties for decades — by retaining his business interests during his presidency, creating irresolvable conflicts of interest for himself and his family members. His refusal to release his tax returns made it impossible for the public to determine whether his official actions were motivated by a personal financial interest. Unqualified political allies and personal associates were appointed to significant positions while an unprecedented number of other positions were left vacant. Individuals who witnessed wrongdoing and spoke out against it were retaliated against and their reputations attacked by the president and his allies. Senior officials in the White House who used their perches to endorse political campaigns or private products in contravention

of federal laws were rewarded with presidential praise rather than punishment. Subordinates were reportedly instructed to not document controversial or possibly illegal conduct, and other records were hidden from public view to avoid accountability.¹ Expert policy committees were stacked with industry allies willing to provide politically convenient and desirable advice instead of unbiased experts. We saw an uptick in troubling presidential pardons issued outside the standard process and for the reported purpose of furthering partisan narratives or, worse, in exchange for personal favors.

In the face of such widespread abuse, it is no surprise that Americans lack confidence in our government. A recent poll showed only a fifth of Americans trust their government “to do what is right.”² Another found that voters in battleground states cared more about political corruption in 2020 than any issue other than health care.³ This sentiment places our democracy — which depends on an informed and participatory citizenry — at risk and demands a response from Congress.

The commonsense reforms under consideration by this Committee give me hope that Congress will meet the moment. Together, with the ethics reforms in H.R. 1, the For the People Act, they would represent a significant step in ensuring that government officials act for the public interest above private gain. They would close loopholes, strengthen guardrails, and increase transparency and access to government.

Of course, after a period of such widespread abuse, there is much work to be done. I urge this Committee to support the pending reforms and then, without delay, turn to the sweeping anti-corruption legislation introduced in the 116th Congress, The Protecting Our Democracy Act. Numerous good government organizations and experts have endorsed these reforms.⁴ Without action, America’s ability to respond to the competing crises we face will be threatened and the risk of recurrence by a future president with autocratic tendencies will be substantially heightened.

In this moment, as repairs are still being made at the Capitol complex from a domestic insurrection motivated by lies and an undemocratic will to retain power, Congress must respond in defense of democracy by rooting out corruption and bolstering the rule of law. Regardless of party affiliation, we can all agree that unwritten rules and norms no longer serve as sufficient checks against executive abuse.

I. Ensuring Qualified and Accountable Personnel Serve in the Executive Branch

The extent of abuse and corruption within the executive branch, and the likelihood of accountability for bad acts, depend largely on the quality and ethics of the individuals who serve in the executive branch. These officials have awesome responsibilities, with the most senior leading departments responsible for administering justice, evaluating the health and efficacy of medicines and vaccines, and protecting our homeland and our environment. Accordingly, this Committee is considering a suite of reforms that would help ensure these individuals are qualified to serve in their prospective positions and held accountable to elected officials and to the public they serve. In addition, the Committee is considering reforms that would make information about the occupants of key positions in the executive branch more accessible, including whether positions are vacant. It is also considering reforms to increase the transparency into the roles

¹ *Infra*, footnotes 73-77.

² Carroll Doherty, et al., “Americans’ Views of Government: Low Trust, But Some Positive Performance Ratings,” Report, Pew Research Center, September 14, 2020, Accessed April 28, 2021. Available at: <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/>.

³ “New Survey Findings: Corruption and money in politics are key issues for battleground voters,” Memo, Global Strategy Group, July 17, 2019, Accessed April 28, 2021. Available at: <https://www.globalstrategygroup.com/wp-content/uploads/2019/07/ECU-Battleground-Survey-Prez-Memo-F07.17.19.pdf>.

⁴ “Support for the Protecting Our Democracy Act,” Letter to Members of the House of Representatives, October 1, 2020, Accessed April 28, 2021. Available at: https://s3.amazonaws.com/demandprogress/letters/Support_for_the_Protecting_Our_Democracy_Act_H.R._8363.pdf.

that outside experts play in informing government policy. I support each of these reforms for the reasons below.

A. Accountability for Acting Officials

The Constitution extends its system of checks and balances to appointments, making the president's authority to appoint senior officials subject to the Senate's "advice and consent."⁵ Senate confirmation provides a critical accountability mechanism and endows appointees with democratic legitimacy. The Founders recognized that if a president were able to make appointments without Senate confirmation, they "would be governed much more by [their] private inclinations and interests."⁶ In this way, Senate confirmation is intended to serve as a "check upon a spirit of favoritism in the President, and . . . prevent the appointment of unfit characters."⁷ It is an opportunity for the Senate and the public to examine a nominee's qualifications and fitness to serve in a significant position of public trust. In some cases, it is the first opportunity for individual Senators to meet with and discuss substantive issues with nominees. During the confirmation process, nominees may make public commitments to Senators about their policy positions or the frequency with which they will update Congress on their prospective department's or office's programs or policies. These interactions are consequential and impact the officials' conduct once in their new office.

Moreover, the confirmation process provides an opportunity for the Senate to vet nominees to ensure they are suitable for their prospective positions. The last administration made clear that the Senate cannot take for granted that a White House will sufficiently vet its nominees to ensure they are able to comply with federal ethics laws or satisfy security clearance and other suitability requirements.⁸ Having led the White House vetting operation during President Obama's administration and closely observed the track record of the Trump administration's vetting process, I know that a White House's ability to thoroughly vet nominees depends entirely on the president's and the administration's commitment to it. The Senate should not leave it to chance.

The most fundamental purpose of Senate confirmation is to ensure nominees are qualified. Unfortunately, this too cannot be taken for granted. Examples abound of presidents from both parties nominating unqualified individuals to significant positions.⁹ Again, the last administration provides the most egregious

⁵ [The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *The Constitution of the United States*. Art. II, Sec. 2, Cl. 2.

⁶ Alexander Hamilton in the Federalist Papers explained that Senate confirmation "would be an excellent check upon a spirit of favoritism in the President, and would . . . prevent the appointment of unfit characters from State prejudice, family connection, from personal attachment, or from a view to popularity. . . . It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests . . ." Hamilton, Alexander. *The Federalist Papers No. 76*.

⁷ *Ibid.*

⁸ See, e.g., Rudy Mehrbani, "The White House still has no idea how to vet Brett Kavanaugh," *The Washington Post*, October 2, 2018, Accessed April 28, 2021. Available at: <https://www.washingtonpost.com/outlook/2018/10/02/white-house-still-has-no-idea-how-vet-brett-kavanaugh/>; See also Aaron Blake, "The lengthy list of allegations against Ronny Jackson, annotated," *The Washington Post*, April 25, 2018, Accessed April 28, 2021. Available at: <https://www.washingtonpost.com/news/the-fix/wp/2018/04/25/the-list-of-allegations-against-ronny-jackson-annotated/>; See also Yuki Noguchi, "Trump Labor Nominee Andrew Puzder Withdraws, First Cabinet Pick To Fall," *NPR*, February 15, 2017, Accessed April 28, 2021. Available at: <https://www.npr.org/2017/02/15/515425370/trump-labor-pick-andrew-puzders-nomination-appears-in-jeopardy>; See also Adam Cancryn and Jennifer Haberkorn, "Why the CDC director had to resign," *Politico*, January 31, 2018, Accessed April 28, 2021. Available at: <https://www.politico.com/story/2018/01/31/cdc-director-resigns-fitzgerald-azar-380680>.

⁹ Judy Pasternak and Chuck Neubauer, "Political Connection Led Chief to FEMA," *Los Angeles Times*, September 4, 2005, Accessed April 28, 2021. Available at: <https://www.latimes.com/archives/la-xpm-2005-sep-04-na-brown4-story.html>; See also Aaron Blake, "No, Obama's ambassador picks aren't qualified. But that's nothing new.," *The Washington Post*, February 14,

examples, with President Trump even nominating individuals opposed to the missions of their prospective agencies.¹⁰ Most concerning, President Trump removed several of the independent watchdogs at agencies, inspectors general, after claiming to have lost confidence in them, and then replaced them with unqualified or conflicted acting officials.¹¹

Unfortunately, and for myriad reasons, presidents have increasingly pursued workarounds to the Senate's confirmation process and relied on the use of "acting officials" to fill positions, while leaving many vacant for extended periods of time. An analysis found that positions requiring Senate confirmation were on average vacant for a quarter of an administration's tenure from President Carter to President George W. Bush.¹² The problem substantially worsened during President Obama's administration, in part as a result of unprecedented intransigence by the Senate.¹³ Bipartisan recognition of the slow pace of the Senate's confirmation process resulted in a 2011 law that reduced the number of executive branch positions requiring Senate confirmation.¹⁴

President Trump, unlike his predecessors, apparently reveled in his ability to fill vacant positions with acting officials, saying on multiple occasions, "I like acting [officials]. . . it gives me more flexibility."¹⁵

2014, Accessed April 28, 2021. Available at <https://www.washingtonpost.com/news/the-fix/wp/2014/02/14/no-obamas-ambassador-picks-arent-qualified-but-thats-nothing-new/>.

¹⁰ Amy Mayer, "Trump's Nominee To Be USDA's Chief Scientist Is Not A Scientist," *NPR*, September 4, 2017, Accessed April 28, 2021. Available at: <https://www.npr.org/2017/09/04/547934012/trumps-nominee-to-be-usdas-chief-scientist-is-not-a-scientist>; See also Andrew Restuccia, "Trump's pick for NOAA chief causes a storm," *Politico*, October 12, 2017, Accessed April 28, 2021. Available at: <https://www.politico.com/story/2017/10/12/trump-noaa-chief-accuweather-barry-myers-243735>; See also Darius Dicon and Eric Wolff, "Contrite Perry regrets calling for abolishing Energy Department," *Politico*, January 19, 2017, Accessed April 28, 2021. Available at: <https://www.politico.com/story/2017/01/rick-perry-confirmation-hearing-233835>.

¹¹ For example, in May 2020, President Trump removed the Inspector General of the U.S. Department of State, Steve Linick, and replaced him with Amb. Steven Akard as acting Inspector General. Akard was simultaneously serving as the director of the Office of Foreign Service at the time. He was previously chief of staff for the Indiana Economic Development Corporation under then-governor Pence. Nahal Toohsi and Meredith McGraw, "Trump ousts State Department watchdog," *Politico*, May 15, 2020, Accessed April 28, 2021. Available at: <https://www.politico.com/news/2020/05/15/state-department-inspector-general-fired-261536>; The conflict of interest raised by his "dual-hatted" roles was criticized by members of both parties; "White House Responds To Grassley Call For Details On IG," Press Release, Office of Senator Chuck Grassley, May 26, 2020, Accessed April 28, 2021. Available at: <https://www.grassley.senate.gov/news/news-releases/white-house-responds-grassley-call-details-ig-terminations>.

¹² Anne J. O'Connell, "Vacant Offices: Delays in Staffing Top Agency Positions," *Southern California Law Review*, Vol. 82, No. 5, 2009, pp. 913-1000, Accessed April 28, 2021. Available at: <https://southerncalifornialawreview.com/2009/07/03/vacant-offices-delays-in-staffing-top-agency-positions-article-by-anne-joseph-oconnell/>.

¹³ From 2009 to 2013, there were 82 cloture motions filed on President Obama's nominations, compared to the 86 cloture motions that had ever been filed on nominations prior to 2009; United States, Congressional Research Service, "Nominations with Cloture Motions, 2009 to the present," Memo, Prepared by Richard S. Beth and Elizabeth Rybicki, November 21, 2013. Accessed April 28, 2021. Available at: <https://www.documentcloud.org/documents/838702-crs-filibuster-report.html>; Moreover, the confirmation process for President Obama's nominees was on average longer than any of his predecessors, and nearly twice as long as it was for President Reagan's nominees; Anne J. O'Connell, "Acting Leaders: Recent Practices, Consequences, and Reforms," Report, Brookings Institution. July 22, 2019, Accessed April 28, 2021. Available at: <https://www.brookings.edu/research/acting-leaders/>.

¹⁴ United States, Congress, Public Law 112-166, August 10, 2012, Accessed April 28, 2021. Available at: <https://www.congress.gov/112/plaws/publ166/PLAW-112publ166.pdf>; See also United States, Congress, Senate "Report of the Committee on Homeland Security and Governmental Affairs, United States Senate, to accompany S. 679 to Reduce the Number of Executive Positions Subject to Senate Confirmation (S. Rept. No. 112-24)," 112th Congress, 1st Session, pp. 4-5, June 21, 2011, Accessed April 28, 2021. Available at <https://www.congress.gov/congressional-report/112th-congress/senate-report/24>.

¹⁵ See e.g., Bennett, John, "Frustrated by 'my generals,' Trump turns to 'my actings,'" *Roll Call*, January 14, 2019, Accessed April 28, 2021. Available at: <https://www.rollcall.com/2019/01/14/frustrated-by-my-generals-trump-turns-to-my-actings/>; See also Samuels, Brett, "Trump learns to love acting officials," *The Hill*, April 14, 2019, Accessed April 28, 2021. Available at: <https://thehill.com/homenews/administration/438660-trump-learns-to-love-acting-officials>; See also Stark, Liz, "Trump says he's 'in no hurry' to name permanent Cabinet replacements," *CNN*, January 6, 2019, Accessed April 28, 2021. Available at: <https://www.cnn.com/2019/01/06/politics/trump-acting-officials-cabinet/index.html>.

Indeed, President Trump relied on acting officials to serve in Cabinet positions more in his first three years than each of the previous five presidents had during their entire presidencies.¹⁶ Over three and a half years into the Trump Administration, the Partnership for Public Service's appointment tracking data revealed that almost 30 percent of key Senate-confirmed positions in the executive branch were either vacant or filled by an acting official.¹⁷ Shockingly, eight of the fifteen Cabinet-level agencies were without Senate-confirmed appointees for more than a third of their senior posts.¹⁸

The consequences of these vacancies trickle throughout all segments of our federal workforce. For example, the Government Accountability Office's 2021 High-Risk List report warned that the chronic absence of Senate-confirmed leadership in the Office of Personnel Management during the Trump Administration impeded "attention from the highest levels needed to address long-standing and emerging skills gaps."¹⁹ The same report — examined closely by this Committee in a hearing earlier this year — cited similar leadership vacuums in other agencies as a contributing factor for 22 of 35 high-risk areas identified across government.²⁰ And at the height of the pandemic last year, watchdog organizations repeatedly warned that widespread vacancies were hindering the federal government's pandemic response.²¹

While the costs and benefits of utilizing acting officials for certain roles or for periods of time can be debated,²² it is undisputed that Congress should protect its constitutional role in ensuring the most senior positions within government are held by qualified and accountable appointees. On a bipartisan basis, Congress has sought to preserve the Senate's advice and consent authority while also giving presidents a degree of flexibility to fill vacancies.²³ The Federal Vacancies Reform Act (FVRA) was a direct response to perceived attempts by the president to use the Vacancies Act as an end run around the Senate's

¹⁶ Anne J. O'Connell, "Actings." *Columbia Law Review* Vol. 120 No. 3, 2020, pp. 613-728, Accessed April 28, 2021. Available at: https://columbialawreview.org/wp-content/uploads/2020/04/OConnell_Actings.pdf.

¹⁷ As of August 17, 2020, only 70 percent of 757 key Senate-confirmed positions tracked by the Partnership for Public Service were filled with confirmed officials. "The Replacements: Why and How Acting Officials are Making Senate Confirmation Obsolete," The Partnership for Public Service, September 2020, p. 8, Accessed April 28, 2021. Available at: <https://ourpublicservice.org/wp-content/uploads/2020/09/The-Replacements-1.pdf>.

¹⁸ *Ibid.*

¹⁹ United States, Government Accountability Office, "High-Risk Series: Dedicated Leadership Needed to Address Limited Progress in Most High-Risk Areas," Report, March 2021, Accessed April 28, 2021. Available at: <https://www.gao.gov/products/gao-21-384t>.

²⁰ *Ibid.*

²¹ Lia Russell, "Federal vacancies hamper government response to COVID-19, groups allege," *Federal Computer Week*, April 15, 2020, Accessed April 28, 2021. Available at: <https://fcw.com/articles/2020/04/15/vacancies-covid19-letter-russell.aspx>; See also Martha Kinsella et al., "Trump Administration Abuses Thwart US Pandemic Response," Resource, The Brennan Center for Justice, August 6, 2020, Updated January 21, 2020, Accessed April 28, 2021. Available at: <https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response#s3>; See also Rudy Mehrbani, Trump gutted his personnel office. Now it's doomed to fail when we need it most., " *The Washington Post*, April 7, 2020, Accessed April 28, 2021. Available at: <https://www.washingtonpost.com/outlook/2020/04/07/covid-19-white-house-personnel-fauci-birx-atkinson/>.

²² *Ibid.*, footnote [16]. (Noting costs and countervailing factors associated with various types of acting appointments and the circumstances that may surround them).

²³ Congress passed the Vacancies Act in 1868 to provide "breathing room in the constitutional system for appointing officers to vacant positions" while recognizing that there are "political and legal consequences of staffing high positions with non-appointed 'acting' officials." United States Court of Appeals, District of Columbia Circuit, *Doolin Sec. Bank, F.S.B. v. Office of Thrift Supervision*, No. 139 F.3d 203, 211, September 1, 1998. Superseded on other grounds by statute, Federal Vacancies Reform Act of 1998, *as recognized by* Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 2019 WL 1430505 (D.C. Cir. Apr. 1, 2019). For further discussion, see Preet Bharara, Christine Todd Whitman, et al., "Proposals for Reform Volume II: National Task Force on Rule of Law & Democracy," Report, Brennan Center for Justice, October 2019, p. 16, Accessed April 28, 2021. Available at: <https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-volume-ii-national-task-force-rule-law-democracy>.

confirmation process.²⁴ Congress recognized the danger in allowing a president to fill a position with an “acting” official in perpetuity. With more than two decades since the FVRA’s passage, and four presidential administrations operating under its provisions, Congress now has an ample record upon which to evaluate the bill. The evidence argues in favor of the reforms under consideration by this Committee.

1. *Congress should further limit the president’s authority to designate acting agency heads.*

Presidents should be limited in their flexibility to appoint unqualified acting officials to lead agencies for extended periods of time. Exploiting loopholes in the FVRA for these leadership positions raise the most substantial concerns about democratic accountability and legitimacy. When President Trump designated former chief of staff Matthew Whitaker acting attorney general following Jeff Sessions’ resignation, ostensibly pursuant to the FVRA, it raised questions about how the FVRA interacted with the Department of Justice’s own succession statute²⁵ as well as the Constitution’s requirement that the Senate confirm Cabinet-level positions. The acting attorney general’s supervision of the ongoing investigation by the special counsel into any links between the Russian government and President Trump’s campaign heightened the concerns. In addition to creating credibility issues for Mr. Whitaker, the appointment was challenged in ongoing litigation against the government.²⁶

Mr. Whitaker’s designation as acting attorney general was not the first time President Trump relied on the FVRA to install an acting agency head. When the former director of the Consumer Financial Protection Bureau (CFPB), Richard Cordray, resigned President Trump designated the then-director of the Office of Management and Budget, Mick Mulvaney, as the acting director of the CFPB. The designation was made despite the CFPB’s organic statute’s mandate that the deputy director “shall . . . serve as acting director in the absence or unavailability of the director.”²⁷ Again, the appointment was subject to controversy and litigation.²⁸ Mr. Mulvaney remained as acting director of the CFPB and director of OMB for more than one year.²⁹

In a more egregious example of sidestepping the FVRA, President Trump installed someone from wholly outside of government to serve as the acting director of U.S. Citizenship and Immigration Services (USCIS). After the former director departed, the Department of Homeland Security (DHS) created a new

²⁴ Congress passed the FVRA following President Clinton’s decision to install Bill Lann Lee as the acting assistant attorney general for civil rights at the Department of Justice after Senate Republicans refused to confirm him. Mr. Lee served in an acting capacity for two and a half years before President Clinton appointed him permanently to that role during a congressional recess. John M. Broder, “Clinton, Softening Slap at Senate, Names ‘Acting’ Civil Rights Chief,” *The New York Times*, December 16, 1997, Accessed April 28, 2021. Available at: <https://www.nytimes.com/1997/12/16/us/clinton-softening-slap-at-senate-names-acting-civil-rights-chief.html>; See also Christopher Marquis, “Clinton Sidesteps Senate to Fill Civil Rights Enforcement Job,” *The New York Times*, August 4, 2000, Accessed April 28, 2021. Available at: <https://www.nytimes.com/2000/08/04/us/clinton-sidesteps-senate-to-fill-civil-rights-enforcement-job.html>.

²⁵ 28 U.S.C. § 508.

²⁶ United States District Court of Maryland, *Maryland v. U.S.*, No. ELH-18-2849, February 1, 2019, Accessed: April 28, 2021. Available at <https://law.justia.com/cases/federal/district-courts/maryland/mddce/1:2018cv02849/432688/52/>; See also Charlie Savage, “Whitaker’s Appointment as Acting Attorney General Faces Court Challenge,” *The New York Times*, November 13, 2018, Accessed April 28, 2021. Available at: <https://www.nytimes.com/2018/11/13/us/politics/matt-whitaker-lawsuit-illegal-appointment.html>.

²⁷ 12 U.S.C § 5491(b)(5)(B).

²⁸ Ian Wren, “Clash For Control Of Consumer Financial Protection Bureau Heads To Court,” *NPR*, April 12, 2018, Accessed April 28, 2021. Available at: <https://www.npr.org/2018/04/12/601965298/legal-battle-over-who-runs-consumer-bureau-continues>.

²⁹ Glenn Thrush and Alan Rappeport, “Appeals Court Questions Dual Roles of Consumer Bureau’s Director,” *The New York Times*, April 12, 2018. Accessed April 28, 2021. Available at: <https://www.nytimes.com/2018/04/12/us/politics/mulvaney-consumer-financial-protection-bureau.html>.

first assistant position and then appointed former Virginia attorney general Ken Cuccinelli to fill it,³⁰ despite the fact that Mr. Cuccinelli had never served in the federal government and many Senators opposed Mr. Cuccinelli's potential nomination as director.³¹ Ostensibly pursuant to the FVRA, Mr. Cuccinelli was able to operate as the acting director of USCIS,³² and was later designated as the senior official performing the duties of deputy secretary of DHS.³³ Significantly, a federal district court held that Mr. Cuccinelli's designation as acting director was invalid, and the Government Accountability Office separately found that Mr. Cuccinelli's designation as the senior official performing the duties of deputy secretary was improper.³⁴

The Accountability for Acting Officials Act, proposed in the 116th Congress by Rep. Katie Porter, would prevent similar abuses in the future and clarify existing provisions in the FVRA. It would limit the length of time that acting agency heads can serve (from 210 days to 120 days); prevent the designation of a "first assistant" as an acting official if they do not meet a minimum tenure requirement at their agency;³⁵ and clarify that agency succession statutes supersede the FVRA.³⁶ These changes would help protect the Senate's role in appointments and provide democratic accountability for acting officials, while also preserving flexibilities for the executive. I urge this Committee to consider and advance this bill, if reintroduced during this session of Congress.

2. *Congress should protect the independence of inspectors general and ensure acting inspectors general are qualified for their roles.*

Congress should prohibit presidents from installing conflicted political appointees or unqualified acting officials to serve as inspectors general. The Inspector General Act of 1978 created a system of independent, nonpartisan watchdogs charged with promoting economy, efficiency, and effectiveness, and detecting fraud and abuse in the programs and operations within their agencies.³⁷ Some inspectors general oversee Cabinet-level or other agencies and require nomination by the president and confirmation by the Senate;³⁸ others are appointed by agency heads. All are required to be appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."³⁹ Unlike other executive branch appointees, and to preserve their independence,

³⁰ Eric Katz, "Trump Skirts Vacancies Law with Selection of Acting Agency Director," *Government Executive*, June 10, 2019, Accessed April 28, 2021. Available at: <https://www.govexec.com/management/2019/06/trump-skirts-vacancies-law-selection-acting-agency-director/157598/>.

³¹ Jordain Carney, "Republicans Warn Cuccinelli Won't Get Confirmed by GOP Senate," *The Hill*, June 10, 2019, Accessed April 28, 2021. Available at: <https://thehill.com/homenews/senate/447804-republicans-warn-cuccinelli-wont-get-confirmed-by-gop-senate>.

³² Steve Vladeck, "Ken Cuccinelli and the Federal Vacancies Reform Act of 1998," Blog, The Lawfare Institute, June 10, 2019, Accessed April 28, 2021. Available at: <https://www.lawfareblog.com/ken-cuccinelli-and-federal-vacancies-reform-act-1998>.

³³ Tanvi Misra, "Suddenly, Ken Cuccinelli is No. 2 at DHS," *Roll Call*, November 14, 2019, Accessed April 28, 2021. Available at: <https://www.rollcall.com/2019/11/14/suddenly-ken-cuccinelli-is-no-2-at-dhs/>.

³⁴ United States District Court for the District of Columbia, *L.M.-M. v. Cuccinelli*, No. 442 F. Supp. 3d 1 (D.D.C. 2020); See also United States, Government Accountability Office, Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security, 2020, (GAO Publication No. B-331650), Accessed April 28, 2021. Available at: <https://www.gao.gov/products/b-331650>.

³⁵ As recognized elsewhere in the FVRA, incoming presidential administrations face a high number of vacancies and require additional flexibilities. Accordingly, I suggest Congress consider creating an exception for new presidential administrations from the tenure requirement for first assistants proposed in the Accountability for Acting Officials Act.

³⁶ United States, Congress, House of Representatives, "H.R.6689 — Accountability for Acting Officials Act," 116th Congress, 2nd Session, April 20, 2020, Accessed April 28, 2021. Available at: https://porter.house.gov/uploadedfiles/vacancy_act_xml_final.pdf.

³⁷ 5 U.S.C. App. § 2.

³⁸ 5 U.S.C. App. § 3(a).

³⁹ *Ibid.*

inspectors general have reporting obligations not just to their agency head, but also to Congress, the public and, in some cases, the attorney general.⁴⁰

President Trump's unprecedented actions against the independence of inspectors general revealed a glaring gap in the Inspector General Act and the FVRA.⁴¹ As written, the FVRA allows a president to appoint individuals to serve as acting inspectors general without regard to the qualification requirements in the Inspector General Act, and regardless of whether they have real or perceived conflicts of interest. Indeed, after removing the former inspector general of the State Department, President Trump selected an official serving in another Senate-confirmed position in the State Department to serve as the acting inspector general.⁴² This placed the individual in the awkward position of providing oversight over himself, which is a far cry from the kind of independence Congress envisioned when it passed the Inspector General Act. Such an arrangement could also create conflicts of interest if whistleblower disclosures are submitted to the acting inspector general; more likely, it would deter whistleblowers from coming forward in the first place.

Representative Porter's bill and the IG Independence and Empowerment Act⁴³ respond to these weaknesses in the Inspector General Act and the FVRA by requiring acting inspectors general to satisfy the minimum qualifications required of permanent inspectors general. The bills would also limit the individuals eligible to serve as acting inspectors general to the first assistant in the office with the vacancy, or another senior official serving within an office of inspector general. I strongly urge Congress to pass this important legislation.

The IG Independence and Empowerment Act contains other reforms that have garnered bipartisan support in the past.⁴⁴ For example, it would require the president to provide more than just lip service when notifying Congress of an inspector general's removal,⁴⁵ and it would protect inspectors general from removal by presidents without sufficient cause. It would also grant inspectors general the authority to

⁴⁰ United States, Congress, Senate, "Report of The Committee on Governmental Affairs United States Senate to Accompany H.R. 8588," Senate Committee on Governmental Affairs, 92nd Congress, 2nd Session, Senate Report, No. 95-1071, p. 6, Government Printing Office, 1978, Accessed April 28, 2021. Available at:

https://docs.pogo.org/document/2021/HR_8588_Cmte_Governmental_Affairs_OIG_Report.pdf.

⁴¹ President Trump removed five inspectors general from their positions over the course of his presidency. In several cases, the removals were for overtly political or retaliatory reasons. For example, Michael Atkinson, the Intelligence Community Inspector General, was fired by President Trump after he informed Congress (as he was required to do) about the whistleblower report that triggered the Ukraine scandal. Benjamin Wittes, "Why Is Trump's Inspector General Purge Not a National Scandal?," Blog, The Lawfare Institute, April 8, 2020, Accessed April 21, 2021. Available at: <https://www.lawfareblog.com/why-trumps-inspector-general-purge-not-national-scandal>. In another example, President Trump removed Glenn Fine, the acting Inspector General of the Department of Defense, who was poised to become the chairman of the Pandemic Response Accountability Committee, which was overseeing the \$2.2 trillion in expenditures related to the coronavirus relief bill. Charlie Savage and Peter Baker, "Trump Ousts Pandemic Spending Watchdog Known for Independence," *The New York Times*, April 7, 2020, Accessed April 21, 2021. Available at: <https://www.nytimes.com/2020/04/07/us/politics/trump-coronavirus-watchdog-glenn-fine.html>.

⁴² Ibid, footnote [11].

⁴³ United States, Congress, House of Representatives, "H.R.2662 — IG Independence and Empowerment Act," 117th Congress, 1st Session, April 19, 2021, Accessed April 28, 2021. Available at: <https://www.govtrack.us/congress/bills/117/hr2662/text>.

⁴⁴ United States, Congress, House of Representatives, "H.R.4917 — IG Subpoena Authority Act," 115th Congress, 2nd Session, September 27, 2018, Accessed April 28, 2021. Available at: <https://www.congress.gov/bill/115th-congress/house-bill/4917/text>.

⁴⁵ "Grassley, McCaskill press for more on IG firing," *Politico*, June 17, 2009, Accessed April 28, 2021. Available at: <https://www.politico.com/blogs/under-the-radar/2009/06/grassley-mccaskill-press-for-more-on-ig-firing-019178> (concerning President Obama's notification to Congress following the removal of the inspector general for the Corporation for National and Community Service). "Trump removes State Department inspector general," *The New York Times*, May 16, 2020, available at: <https://www.nytimes.com/2020/05/16/us/politics/trump-state-dept-inspector-general.html> (concerning President Trump's removal of the inspectors general for the intelligence community and the Department of State, as well as the acting inspector general at the Department of Defense).

issue subpoenas to compel testimony from former government employees,⁴⁶ which has impeded recent investigations into corruption.⁴⁷

The threat of a subpoena has proven effective in persuading cooperation with an investigation, but as a check against potential abuse, the Act would require a panel of three other inspectors general to approve a subpoena before its issuance. To provide more legitimacy and oversight, I would recommend that one or more Article III judges review and approve subpoenas instead.

Moreover, as recommended by the bipartisan National Task Force on Rule of Law and Democracy (National Task Force) established by the Brennan Center, I believe Congress should expand the jurisdiction of agency inspectors general to expressly include investigations into improper interference in law enforcement functions.⁴⁸ This would serve as an effective and direct response to past efforts by political officials to influence the decision of prosecutors, and reports by whistleblowers that officials in the prior administration sought to alter sentencing and prosecutorial decisions in specific cases for political or personal reasons.⁴⁹

3. *Congress should consider additional reforms to limit the prevalence of acting officials.*

Given the extent that recent administrations have relied on acting officials, Congress should consider additional reforms to limit the prevalence of acting officials. There is no shortage of proposals offered by scholars and practitioners.⁵⁰ Importantly, Congress should consider creating stronger incentives for the President to nominate permanent officials and for the Senate to act on those nominations. One way to achieve this goal is to impose additional limits on the class of people who may serve as acting officers or perform the duties of a vacant Senate-confirmed office *until* the president nominates a permanent replacement. Presidents could also be required to first choose an eligible official from within the same agency as the vacant office before selecting an official from an outside agency to minimize disruption. Once a formal nomination is submitted to the Senate, the president would then be free to select an acting official from the broader class of individuals currently eligible to serve as acting officials in the FVRA. This proposal would strike a balance by creating an incentive for presidents to nominate permanent

⁴⁶ Currently, only the DOD IG and the Pandemic Response Accountability Committee hold the power to compel testimony from former government employees; 5 U.S.C. App. § 8 (i)(1) (2020) and 15 U.S.C. § 9053 (2020).

⁴⁷ For example, the Inspector General of the Environmental Protection Agency (EPA) is currently unable to subpoena former EPA Administrator, Scott Pruitt, who resigned in July 2018. The investigation into Pruitt was spurred by his improper use of security, large raises to aides, and frequent use of First Class on the taxpayer's dime; Dino Grandoni, "The Energy 202: Scott Pruitt is still under investigation by EPA watchdog," *The Washington Post*, July 13, 2018, Accessed April 28, 2021. Available at: <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/07/13/the-energy-202-scott-pruitt-is-still-under-investigation-by-epa-watchdog/5b479d131b326b3348adde90/>.

⁴⁸ Preet Bharara, Christine Todd Whitman, et al., "Proposals for Reform: National Task Force on Rule of Law & Democracy," Report, Brennan Center for Justice, October 2018, pp. 20-21, Accessed April 28, 2021. Available at: <https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-national-task-force-rule-law-democracy>.

⁴⁹ Carrie Johnson, "Politics Influenced Justice Department In Roger Stone Case, DOJ Lawyer Tells Hill," NPR, June 23, 2020, Accessed April 28, 2021. Available at: <https://www.npr.org/2020/06/23/882379916/politics-influenced-justice-department-in-roger-stone-case-doj-lawyer-tells-hill>; See also Aaron Blake, "5 takeaways from the scathing testimony about William Barr's Justice Department," *The Washington Post*, June 24, 2020, Accessed April 28, 2021. Available at: <https://www.washingtonpost.com/politics/2020/06/24/takeaways-zelinsky-testimony-barr/>.

⁵⁰ See, e.g., Steve Vladeck, "Good Governance Paper No. 7: Executive Branch Agencies," Just Security, October 22, 2020, Accessed April 28, 2021. Available at: <https://www.justsecurity.org/72980/good-governance-paper-no-7-executive-branch-vacancies/>; See also Anne J. O'Connell, "Acting leaders: recent practices, consequences, and reforms," Report, Brookings Institution, July 22, 2019, Accessed April 28, 2021. Available at: <https://www.brookings.edu/research/acting-leaders/>; See also "The Replacements: Why and How Acting Officials are Making Senate Confirmation Obsolete," The Partnership for Public Service, September 2020, p. 8, Accessed April 28, 2021. Available at: <https://ourpublicservice.org/wp-content/uploads/2020/09/The-Replacements-1.pdf>; See also Rudy Mehrbani, Tess Byars, and Louis Katz, "A Time to Serve: Proposals for Renewing the Civil Service," Report, The Great Democracy Initiative, August 2020, pp. 42-45, Accessed April 28, 2021. Available at: <https://greatdemocracyinitiative.org/wp-content/uploads/2020/08/Personnel-Policy-Final-Copy.pdf>.

replacements for vacant positions, while also preserving the president's appointment prerogatives when a nomination is pending with the Senate. It is an approach that has been endorsed by the bipartisan National Task Force.⁵¹

Congress should also consider reforms that increase the efficiency of the Senate confirmation process and reduce partisan obstruction. To be clear, it is true that the prevalence of acting officials and vacancies is not the fault of the Senate alone. For the White House's part, it can be due to a president's preference for acting officials, but more often it is due to delays in the White House's recruitment, selection, and vetting process. But Senate obstruction is also to blame, with senators sometimes tying political nominations to unrelated policy and oversight goals.⁵² Other delays are the result of duplicative paperwork and inefficiencies in the confirmation process.⁵³ Reasonable proposals have been put forward and agreed upon by a diverse set of groups, including the National Task Force, the Partnership for Public Service, and a Working Group on Streamlining Paperwork for Executive Nominations established by legislation in 2011.⁵⁴ I believe reforms to the FVRA should be coupled with such improvements to the Senate's process.

B. Transparency into Political and other Senior Positions

To aid Congress and the public's efforts to hold officials accountable for vacancies and for the qualifications of appointees, there should be a public directory of the president's appointees and other senior positions in government. According to the Government Accountability Office, "there is no single source of data on political appointees serving in the executive branch that is publicly available, comprehensive, and timely."⁵⁵ Instead, the United States Government Policy and Supporting Positions (known as the Plum Book) is currently published just once every four years. The quadrennial publishing usually occurs between Election Day and Inauguration Day, based on a snapshot of data from five months prior to publication.⁵⁶ As a result, the Plum Book fails to account for changes in position titles, vacancies, or new appointments that occur during the transition to a new administration or a president's second term.

This outdated method of collecting and publishing data on the most powerful positions within government warrants bipartisan criticism. Fortunately, commonsense legislation has been introduced to bring the federal government's personnel reporting into the 21st century. The Periodically Listing Updates to Management Act (the PLUM Act), sponsored by Chairwoman Maloney, Subcommittee Chairman

⁵¹ Preet Bharara, Christine Todd Whitman, et al., "Proposals for Reform Volume II: National Task Force on Rule of Law & Democracy," Report, Brennan Center for Justice, October 2019, p. 19, Accessed April 28, 2021. Available at: <https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-volume-ii-national-task-force-rule-law-democracy>.

⁵² Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks*, Basic Books, New York, 2016, pp. 98-100; See also Kristine Simmons, "Why do presidential nominees languish in the Senate?" Blog, Partnership for Public Service, February 22, 2019, Accessed April 28, 2021. Available at: <https://ourpublicservice.org/blog/why-do-presidential-nominees-languish-in-the-senate/>.

⁵³ For more detail on delays in the Senate confirmation process and proposed reforms, see *Ibid.* footnote [51] pp. 21-22.

⁵⁴ See *Ibid.* footnote [51] pp. 20-21; See also Courtney Bubl , "The Senate Confirmation Process is Twice As Long Today As It Was During the Reagan Era," *Government Executive*, January 21, 2020, Accessed April 28, 2021. Available at <https://www.govexec.com/management/2020/01/senate-confirmation-process-twice-long-today-it-was-during-reagan-era/162546/>; See also United States, Executive Office of the President, Working Group on Streamlining Paperwork for Executive Nominations, "Streamlining Paperwork for Executive Nominations: Report to the President and the Chairs and Ranking Members of the Senate Committee on Homeland Security & Government Affairs and the Senate Committee on Rules & Administration," November 2012, pp. 18-22, 29-33, Accessed April 28, 2021. Available at: [https://oge.gov/web/OGE.nsf/0/018B7C7EC03481F5852585B6005A1306/\\$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf](https://oge.gov/web/OGE.nsf/0/018B7C7EC03481F5852585B6005A1306/$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf).

⁵⁵ United States, Government Accountability Office, "Federal Ethics Programs: Government-wide Political Appointee Data and Some Ethics Oversight Procedures at Interior and SBA Could Be Improved," Report, March 2019, Accessed April 28, 2021. Available at: <https://www.gao.gov/products/gao-19-249>.

⁵⁶ *Ibid.*

Connolly, and Rep. Sarbanes would require the Office of Personnel Management to establish a website containing a directory of data on the president's appointees and other senior positions, including positions within the Executive Office of the President. Like the bipartisan coalition of groups and experts who applauded the PLUM Act's introduction,⁵⁷ I urge the Committee to take prompt action on this legislation.

The database would be more than a tracking tool. It would likely increase pressure on a president to fill vacant offices and allow Congress and the public to more easily assess a multitude of issues, such as: the number of political appointees serving at a given agency; the number of senior positions excepted from competitive service; the attrition rate at a given agency; and the identity of individuals and offices responsible in the Executive Office of the President for informing a given policy decision. The public and Congress should not be expected to spend hours on research and written requests to OPM to piece together this data.

Importantly, I believe an accessible public database of political and other senior positions would help diversify the talent pool of candidates for these positions. Too often political positions are reserved for "insiders" who have unique access or knowledge about the political appointments process. During my time as director of the Presidential Personnel Office, I routinely spoke to young people who had never heard of the Plum Book and no sense of where to begin their search for a political position in the executive branch. The PLUM Act would help change that by demystifying the vacancies and positions within the executive branch. In the last Congress, it was advanced out of this Committee with unanimous support; it warrants bipartisan support again.

If enacted, I would look forward to working with this Committee to ensure regular oversight over the accuracy and timeliness of data produced by the executive branch, which will be critical to the Act's success.

C. Transparency and Accountability for Federal Advisory Committees

The federal government relies on hundreds of scientific and technical advisory committees composed primarily of individuals from outside of government to provide expert advice to policymakers.⁵⁸ They are intended to supplement the government's existing expertise with unbiased perspectives that are consistent with prevailing professional standards. As presidents from both parties have observed, impartial science grounded in facts and reality is essential to effective government policy.⁵⁹ Nothing underscores this point more than the federal government's turbulent and uneven response to the COVID pandemic in 2020.⁶⁰

⁵⁷ "Re: Support for Periodically Listing Updates to Management Act (The PLUM Act)," Letter to House Oversight and Reform Committee, March 16, 2021, Accessed April 28, 2021. Available at:

https://s3.amazonaws.com/demandprogress/letters/Letter_Plum_Book_Transparency_2021-03-16.pdf.

⁵⁸ For example, the Science Advisory Committee on Chemicals is intended to provide advice to the Environmental Protection Agency on chemicals regulated under the Toxic Substances Control Act. A particularly influential advisory committee is the Secretary of Energy Advisory Board, which has produced reports on high-speed computing, the future of energy technologies, and the effectiveness of the national labs. See also "Abandoning Science Advice: One Year in, the Trump Administration Is Sidelining Science Advisory Committees," Report, The Center for Science and Democracy at the Union of Concerned Scientists, January 18, 2018, Accessed April 28, 2021. Available at:

<https://www.ucsusa.org/sites/default/files/attach/2018/01/abandoning-science-advice-full-report.pdf>.

⁵⁹ United States, Executive Office of the President [Barack Obama] Memorandum for the Heads of Executive Departments and Agencies, Subject: Scientific Integrity, March 9, 2009, Accessed April 28, 2021. Available at:

<https://obamawhitehouse.archives.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09>;

See also President George H.W. Bush, Speech, Annual Meeting of the National Academy of Sciences, National Academy of Sciences Building, Washington, DC, April 23, 1990, Accessed April 28, 2021. Available at: [youtube.com/watch?v=fqaPhCXZm0](https://www.youtube.com/watch?v=fqaPhCXZm0).

⁶⁰ See, e.g., Martha Kinsella et al., "Trump Administration Abuses Thwart US Pandemic Response," Resource, The Brennan Center for Justice, August 6, 2020, Updated January 21, 2020, Accessed April 28, 2021. Available at:

<https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response#s4b>.

The Federal Advisory Committee Act (FACA) was passed with bipartisan support in 1972 in response to the growing influence of private industry over government policy, as well as the perception that advisory committees were inefficient and lacked adequate oversight.⁶¹ FACA requires that advisory committees are fairly balanced in the views represented, insulated from inappropriate outside influence or special interests, and transparent about their activities and their recommendations to executive branch officials. Notwithstanding these requirements, advisory committees have been subject to politicization by administrations of both parties.⁶² Most recently, after disbanding advisory committees created to offer advice on environmental issues⁶³ and stacking other committees with political allies and industry representatives,⁶⁴ President Trump issued an executive order arbitrarily mandating that all agencies reduce their number of advisory committees by one-third and establishing a cap of 350 total advisory committees,⁶⁵ a move that was widely criticized by the scientific community.⁶⁶ President Biden revoked the executive order on his first day in office.⁶⁷

These past actions have given life to proposals previously considered and supported on a bipartisan basis by Congress to strengthen federal advisory committees.⁶⁸ The Federal Advisory Committee Transparency Act⁶⁹ contains a number of provisions to increase public access to information about

⁶¹ United States, Congressional Research Service, “Federal Advisory Committees: An Introduction and Overview (R44253),” Report, Prepared by Wendy Ginsberg and Casey Burgat, October 27, 2016, p. 3, Accessed April 28, 2021. Available at: <https://fas.org/sgp/crs/secrecy/R44253.pdf>.

⁶² Preet Bharara, Christine Todd Whitman, et al., “Proposals for Reform Volume II: National Task Force on Rule of Law & Democracy,” Report, Brennan Center for Justice, October 2019, Appendix of Scientific Integrity Issues, Accessed April 28, 2021. Available at: <https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-volume-ii-national-task-force-rule-law-democracy> (Listing examples of abuses by Republican and Democratic administrations).

⁶³ Michael Doyle and Brittany Patterson, “Climate Advisory Group Died Quietly,” *E&E News*, August 17, 2017, Accessed April 28, 2021. Available at: <https://www.eenews.net/stories/1060058869>; See also Lisa Friedman, “E.P.A. to Disband a Key Scientific Review Panel on Air Pollution,” *The New York Times*, October 11, 2018, Accessed April 28, 2021. Available at: <https://www.nytimes.com/2018/10/11/climate/epa-disbands-pollution-science-panel.html>.

⁶⁴ See, e.g., Suzy Khimm and Andrew Rafferty, “Pruitt Makes EPA Science Board More Industry Friendly,” *NBC News*, Nov. 3, 2017, Accessed April 28, 2021. Available at: <https://www.nbcnews.com/politics/white-house/pruitt-makes-epa-science-board-more-industry-friendly-n817276>; See also “Secretary Perry Announces Members of the Secretary of Energy Advisory Board,” Press Release, Department of Energy, February 20, 2019, Accessed April 28, 2021. Available at: <https://www.energy.gov/seab/articles/secretary-perry-announces-members-secretary-energy-advisory-board>.

⁶⁵ United States, Executive Office of the President [Donald J. Trump]. Executive order 13875: Evaluating and Improving the Utility of Federal Advisory Committees, June 14, 2019, Federal Register, Vol. 84, No. 118, June 19, 2019, pp. 28711-28713, Accessed April 28, 2021. Available at: <https://www.federalregister.gov/documents/2019/06/19/2019-13175/evaluating-and-improving-the-utility-of-federal-advisory-committees>.

⁶⁶ Eric Katz, “Trump Orders Agencies to Slash Federal Advisory Panels,” *Government Executive*, June 17, 2019, Accessed April 28, 2021. Available at: <https://www.govexec.com/management/2019/06/trump-orders-agencies-slash-federal-advisory-panels/157784/>.

⁶⁷ United States, Executive Office of the President [Joseph R. Biden]. Executive order 13992: Revocation of Certain Executive Orders Concerning Federal Regulation, January 20, 2021, *Federal Register*, Vol. 86, No. 14, January 25, 2021, pp. 7049-7050, Accessed April 28, 2021. Available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-revocation-of-certain-executive-orders-concerning-federal-regulation/>.

⁶⁸ President Biden has also taken action to restore the integrity of scientific advisory committees by ordering agencies to assess their needs for advice from current and future committees, to include a review of the composition of advisory committees to ensure they are sufficiently diverse and filled with qualified experts. United States, Executive Office of the President [Joseph R. Biden] Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, January 27, 2021, Accessed April 28, 2021. Available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/memorandum-on-restoring-trust-in-government-through-scientific-integrity-and-evidence-based-policymaking/>. Though President Biden should be lauded for taking these steps, the reforms under consideration by this Committee still warrant your support. Congress should not have to hope that a future president has a similar commitment to protecting advisory committees from politicization and abuse.

⁶⁹ United States, Congress, Senate, “S.790 — Federal Advisory Committee Transparency Act,” 117th Congress, 1st Session, March 17, 2021, Accessed April 28, 2021. Available at: <https://www.govinfo.gov/content/pkg/BILLS-117s790is/pdf/BILLS-117s790is.pdf>; See also United States, Congress, House of Representatives, “H.R.1930 — Federal Advisory Committee

advisory committee members and their work and to protect against politicization of these committees. For example, it requires agencies to solicit recommendations for potential members from the public at least every two years, provide explanations on how and why members were selected, and publish on agency websites information about advisory committees, including their membership and meeting minutes. It explicitly prohibits the selection of members based on political affiliation or campaign activity. Further, the legislation enhances ethics requirements and requires public disclosure of any conflicts of interest by committee members, and it extends the bill's requirements to subcommittees and federal contractors who establish advisory committees. I thank Chairwoman Maloney and Ranking Member Comer, and your colleagues Senators Portman and Hassan, for introducing this meaningful bipartisan legislation to bolster the accountability and transparency of federal advisory committees. I hope it is a sign of future bipartisan cooperation to bolster accountability mechanisms.

II. Preserving Presidential Records

Presidential records provide Congress and the public with information about how the executive branch has functioned and should function. The records inform current and future policy discussions and provide accountability for past officials' conduct and performance at the highest levels. They serve a critical role in preserving and strengthening American democracy. Indeed, in response to President Nixon's efforts to conceal and destroy documents from his time in the White House, Congress passed legislation to seize those documents⁷⁰ and then, four years later, passed the Presidential Records Act (PRA) to apply to all future presidents.⁷¹

Recent history has shown that Congress cannot take for granted that a White House will make and preserve records documenting officials' decision-making. It is well-documented that former President Trump and his closest advisers did not always create and maintain records. For example, public reports indicate that President Trump routinely tore up documents after he was done reading them, requiring a federal employee to tape the documents back together to comply with the law.⁷² Reports also show the president attempted to prevent certain records from being created, including once asking an interpreter to hand over notes from a meeting with Russian President Vladimir Putin and not sharing the contents of other private conversations with Mr. Putin with other U.S. officials.⁷³ As a result, there are reportedly no detailed records of President Trump's conversations with the Russian leader from five separate interactions over two years.⁷⁴ Reports also indicate that other White House officials during the Trump administration, including the president's son-in-law, Jared Kushner, routinely used encrypted messaging applications — capable of making messages disappear entirely — to conduct official government business.⁷⁵ Concerns around the president's commitment to following the PRA and other records laws

Transparency Act," 117th Congress, 1st Session, March 16, 2021, Accessed April 28, 2021. Available at <https://www.govtrack.us/congress/bills/117/hr1930/text>.

⁷⁰ David S. Ferriero, "NARA's Role under the Presidential Records Act and the Federal Records Act," *Prologue Magazine*, Summer 2017, Vol. 49, No. 2, Accessed April 28, 2021. Available at: <https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra>.

⁷¹ United States, Congressional Research Service, "The Presidential Records Act: An Overview (R46129)," Report, Prepared by Meghan M. Stuessy, December 17, 2019, Accessed April 28, 2021. Available at: <https://fas.org/sgp/crs/secrecy/R46129.pdf>.

⁷² Annie Karni, "Meet the guys who tape Trump's papers back together," *Politico*, June 10, 2018, Accessed April 28, 2021. Available at: <https://www.politico.com/story/2018/06/10/trump-papers-filing-system-635164>.

⁷³ Greg Miller, "Trump has concealed details of his face-to-face encounters with Putin from senior officials in administration," *The Washington Post*, January 13, 2019, Accessed April 28, 2021. Available at: https://www.washingtonpost.com/world/national-security/trump-has-concealed-details-of-his-face-to-face-encounters-with-putin-from-senior-officials-in-administration/2019/01/12/65f6686c-1434-11e9-b6ad-9cfd62dbb0a8_story.html.

⁷⁴ *Ibid.*

⁷⁵ Alana Abramson, "Jared Kushner Used Encrypted App to Communicate With Foreign Leaders, Democrats Claim," *Time*, March 21, 2019, Accessed April 28, 2021. Available at: <https://time.com/5556373/jared-kushner-ivanka-trump-private-email-whatsapp/>.

were so significant that House Committees, including this Committee, sent dozens of letters to federal agencies and the White House requesting records be preserved.⁷⁶

The Presidential Records Preservation Act would strengthen the PRA. It would make clear the requirement that presidential records be preserved and would require adequate and proper documentation of official activities.⁷⁷ The Act also directs the White House to create records management controls to ensure that electronic messages are captured and readily accessible. Passing the Act would help ensure that records of the current and future administrations are properly preserved for the American public.

III. Providing Federal Employees Access to Information

The Freedom of Information Act (FOIA) is a key pillar of government transparency and accountability. It enables anyone, from a high school student to a reporter at *The New York Times*, to request documents, emails, and other communications from the federal government. FOIA has empowered everyday people and our society's watchdogs to reveal corruption and wrongdoing in government—paving the way for accountability when these abuses occur.

Through the use of FOIA, intrepid individuals and organizations have uncovered policies and actions within government that may have never seen the light of day otherwise. In the last few years alone, the use of FOIA has revealed information about issues of significant public interest, such as:

- A series of reports, memos, and communiqués from government officials spanning 14 years showing there was no clearly defined mission in the war in Afghanistan and that positive public statements about the war's progress did not match facts on the ground.⁷⁸
- A memo showing the former Secretary of the Department of Homeland Security, Kristjen Nielsen, signed off on policy that led to the separation of parents from their children at the U.S. border with Mexico, despite insistence that no such policy existed.⁷⁹
- Records from branches of the U.S. military showing inadequate tracking of white supremacy within their ranks and documents showing a pattern of some branches of the military quietly discharging personnel involved with extremism in a way that limited public attention.⁸⁰

Despite these achievements, there remain significant barriers to the full promise of freedom of information. Passing the Federal Employee Access to Information Act is a small but positive step in the right direction. This bill would make clear that federal employees enjoy the same rights to file FOIA requests as those high schoolers, watchdog groups, and *The New York Times* reporters. It would do so

⁷⁶ United States, Congress, House of Representatives, "Compiled list of Letters Committee Chairs Sent Directing White House and Federal Agencies to Preserve Documents," November 2020, Accessed April 28, 2021. Available at: <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-11-10%20Cmte.%20Chairs%20to%20White%20House%20and%20Agencies.pdf>.

⁷⁷ United States, Congress, House of Representatives, "H.R.1929 — Presidential Records Preservation Act," 117th Congress, 1st Session, March 16, 2021, Accessed April 28, 2021. Available at: <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Presidential%20Records%20Preservation%20Act.pdf>.

⁷⁸ Craig Whitlock, Leslie Shapiro, and Armand Emamjomeh, "The Afghanistan Papers: A Secret History of the War," *The Washington Post*, December 9, 2019, Accessed April 28, 2021. Available at: <https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/documents-database/>.

⁷⁹ "Newly released memo reveals secretary of homeland security signed off on family separation policy," Blog, Open the Government, September 24, 2018, Accessed April 28, 2021. Available at: <https://www.openthegovernment.org/newly-released-memo-reveals-secretary-of-homeland-security-signed-off-on-family-separation-policy/>.

⁸⁰ "The U.S. Military's Pattern of Failing to Confront White Supremacy Within its Ranks," Blog, American Oversight, April 13, 2021, Accessed April 28, 2021. Available at: <https://www.americanoversight.org/the-u-s-militarys-pattern-of-failing-to-confront-white-supremacy-within-its-ranks>.

by making it a prohibited personnel practice to retaliate against a federal employee making a FOIA request or pursuing an administrative or judicial action related to a request.⁸¹

But more needs to be done. The backlog of FOIA requests across government agencies has grown significantly, leading to years-long delays in providing records. And even if those records are eventually delivered, they often contain excessive and arbitrary redactions.⁸² Reforms need to be made now to address these issues. This Committee should look to recommendations laid out by government transparency experts, including expansion of proactive disclosure of information that is in the public interest, stopping the over-reliance on redactions and exemptions, and strengthening judicial remedies when requests are delayed, denied, or overly redacted.⁸³

FOIA has been, and will continue to be, an essential tool in the toolbox of every American to ensure that their government is working in the best interest of the nation. Passing the Federal Employee Access to Information Act and additional reforms will ensure is FOIA continues to serve as a powerful anti-corruption tool.

⁸¹ United States, Congress, House of Representatives, “H.R.7936 — Federal Employee Access to Information Act,” 117th Congress, 1st Session, March 18, 2021. Accessed April 28, 2021. Available at: https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Federal%20Employee%20Access%20to%20Information%20Act_0.pdf.

⁸² See e.g., Nick Schwellenbach and Sean Moulton, “The ‘Most Abused’ Freedom of Information Act Exemption Still Needs to Be Reined In,” Blog, Project on Government Oversight, February 6, 2020, accessed April 30, 2021. Available at <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/>.

⁸³ See e.g., “Accountability 2021: Recommendations for Restoring Accountability in the Federal Government,” Report, Open the Government, Accessed April 30, 2021. Available at <https://www.openthegovernment.org/wp-content/uploads/2020/11/Accountability-2021-Agenda.pdf>. See also, “Re: Oversight and Hearings on FOIA at Federal Agencies,” Letter to Senate Judiciary Committee Chairman Dick Durbin and Ranking Member Chuck Grassley, April 19, 2021, Accessed April 28, 2021. Available at: <https://www.openthegovernment.org/wp-content/uploads/2021/04/Letter-to-Sen-Judiciary-re-FOIA-Hearings-1.pdf>.