

University of Minnesota Law School

Scholarship Repository

Constitutional Commentary

2010

President Obama's Progress in Government Ethics

Richard W. Painter

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Painter, Richard W., "President Obama's Progress in Government Ethics" (2010). *Constitutional Commentary*. 901.

<https://scholarship.law.umn.edu/concomm/901>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

PRESIDENT OBAMA'S PROGRESS IN GOVERNMENT ETHICS

*Richard W. Painter**

Barack Obama campaigned on a promise to bring ethics to government. He has delivered on this promise by making exceptional progress in several key areas, including curtailing the revolving door between the private sector and his Administration. On January 21, 2009, one day after becoming President, he signed an Executive Order that imposed ethics rules on incoming and outgoing political appointees that were stricter than those in any previous administration.¹ The White House has also taken strong steps to curtail the influence of lobbyists in the Administration.

President Obama's laudable ethics agenda, however, faces two major impediments. One is the explosive growth in the size and responsibilities of government, an acceleration of a trend already established during the terms of William Clinton and George W. Bush. As explained below in more detail, big government and government ethics are a difficult combination. The second trend, which has also accelerated during the past few decades, is an increased entanglement of partisan politics with the everyday work of Executive Branch officials, including the White House staff. Partisan political activity by government officials provides access to government officials to persons who pay for access with campaign contributions. Lobbyists and other paying customers will have undue influence unless Executive Branch involvement in partisan politics is curtailed sharply. So far, President Obama has not done this.

* S. Walter Richey Professor of Corporate Law, University of Minnesota, and former Associate Counsel to the President and chief White House ethics lawyer, 2005-07. In January 2009, Professor Painter published his book *GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE* (Oxford U. Press).

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

THE PRESIDENT'S ACCOMPLISHMENTS

The President's accomplishments in ethics are significant.

First, despite some initial vetting problems with appointees at the outset, the President avoided what could have been disastrous appointments if he had indiscriminately brought into his administration people from the Chicago political machine that had supported him during his formative years in Illinois politics. Despite the President's good intentions, there was reason to worry about having a newly elected President who came from a city and state with so much corruption. It took only weeks for Illinois officials to devise a scheme to sell the President's Senate seat to the highest bidder, leading to the arrest and indictment of Governor Blagojevich. Bipartisan corruption in Illinois has put just about everything up for sale, including truck drivers licenses under Governor George Ryan (he is now serving a prison sentence for corruption) to admission to the University of Illinois (an "independent" commission appointed by Governor Quinn and headed by former judge and Chicago area Congressman Abner Mikva conveniently blamed this scheme on University officials rather than on the politicians who demanded favors from a University dependent on them for financial support). Illinois politics has for a long time been a disaster area for government ethics, and if the President had brought any of this baggage with him to Washington, his administration would have been disastrous as well.

He did not do so. Although the President brought some people from Illinois to Washington, he avoided the more sordid elements in state politics and turned instead to persons who, like himself, keep a respectable distance from corruption. Former Illinois Congressman Rahm Emanuel as White House Chief of Staff, Chicago schools chief Arne Duncan as Education Secretary and Valerie Jarrett as White House director of Intergovernmental Affairs are a few of his better home-state picks.

President Obama will probably be pressured by the Illinois political establishment for additional appointments throughout his administration. The pressure will probably extend to appointments for relatives because, for a long time, Illinois politicians—including otherwise conscientious politicians—have viewed political office and judgeships as a birthright for themselves and their family (the Daley family, the Madigan family and others, for example). It is unclear what if any

leverage Illinois politicians will have with the President when the State clearly will support him in 2012. Nonetheless, the pull of home-state politics is strong when some White House officials, including Chief of Staff Emanuel, may someday return to Illinois to build their careers. The President should resist pressure for home-state appointments that are excessive in number or unjustified on the merits; his allies in the Democratic Party and the "loyal opposition" in the Republican Party should make sure that he does. When Executive Branch positions and judgeships come open, will the nominee be someone with clearly superior qualifications, or will the nominee have questionable credentials or experience and be a child or in-law of Governor Pat Quinn, Mayor Daley, Illinois House Speaker Michael Madigan, former Congressman and Judge Abner Mikva or someone else from the Illinois political establishment? This remains to be seen.

Surprisingly, most of the vetting problems in this Administration have not involved people the President brought from Illinois. The vetting problems for the President's appointees have involved a Treasury Secretary and others who were careless in paying their taxes, and in the case of New Mexico Governor Bill Richardson, who was nominated for Commerce Secretary and then withdrawn, evidence of unlawful political fundraising by subordinates. There is, however, little evidence of genuine corruption on the part of the nominees themselves.

One of the President's key appointments has not received much attention as a vetting problem although the facts suggest it was a problem. The appointment lies at the heart of a foreign policy dilemma that the President inherited but that, if mismanaged, could damage his Presidency. Richard Holbrooke is a talented if controversial diplomat with a track record in Kosovo, and he brings this experience to his present position as liaison between the United States and parties interested in the War in Afghanistan. Holbrooke was also, however, a director of AIG between 2001 and 2008, he was on AIG's compensation committee that handed out millions in bonuses to executives who brought AIG to disaster, and he resigned from AIG in the summer of 2008 just as things were falling apart. The badly managed AIG has since become an enormous money pit for federal tax dollars as a cornerstone of the bailout of the financial services industry. Earlier, Holbrooke had trouble with a core ethics statute regulating the revolving door between government and the private sector. He left the Clinton Administration to

pursue investment banking and the Department of Justice subsequently alleged that he violated post-employment rules in a criminal statute by representing back to the State Department on behalf of an investment bank when he was prohibited from doing so. The charges were later settled with payment of a \$5,000 fine.² Hopefully, Ambassador Holbrooke with show better judgment—and a keener ability to recognize conflicts of interest and incompetence—in Afghanistan and Pakistan. The President has sent him to a place that could cost the United States far more than AIG or any other mismanaged company.

On the whole, this White House has also received relatively little criticism for the type of blatant politicization of hiring and firing decisions that characterized the early days of the Clinton Administration when Republican U.S. attorneys were fired en masse and even the White House Travel Office was a vehicle for political patronage (the most noted controversy over politicized firings in the George W. Bush Administration occurred in the second term with the U.S. attorney firings). President Obama so far has avoided this type of controversy.

There has been, however, at least one unfortunate exception: the firing by President Obama of an inspector general—Gerald Walpin at AmeriCorps—in a manner that showed insensitivity to the Inspectors General Reform Act of 2008, a statute that Senator Obama had sponsored in Congress in order to depoliticize hiring and firing of inspectors general. Walpin was a staunch Republican appointed by President Bush. He had offered to resign when President Obama took office but had been asked by the governing Board for AmeriCorps to stay on. For reasons that have been insufficiently explained, the Board then changed its mind. Walpin meanwhile had investigated a prominent political ally of the President. The fact that the firing of this inspector general was delegated to, of all people, the chief White House ethics lawyer, made the episode even more discomfoting (my own work as the chief White House ethics lawyer for President Bush involved recommendations for hiring decisions but not the more politically explosive decisions about firings).³

2. See U.S. OFFICE OF GOV'T ETHICS, 1999 CONFLICT OF INTEREST PROSECUTION SURVEY, DO-00-029, at 4–6 (Aug. 14, 2000) (discussing the facts and resolution of *United States v. Richard Holbrooke*).

3. Gerald Walpin had been appointed by President Bush and confirmed by a Democratic-controlled Senate to be the inspector general for the Corporation for National and Community Service, which oversees AmeriCorps. In 2009, Walpin was a

The President has made a serious effort to limit conflicts of interest that incoming officials bring from the private sector. His Executive Order of January 21 tightened up the rules.⁴ Among other things, the Order requires incoming Administration appointees⁵ to sign a pledge stating that they won't work on particular matters involving specific parties for two years from the date of appointment, including regulations and contracts that are "directly and substantially" related to their former clients or employers.⁶ The Order imposes even stricter rules on incoming

holdover from the Bush Administration and was widely known to be a conservative Republican. The Board of the Corporation complained to the White House in May 2009 that Walpin was ineffective, although board members had spoken positively of Walpin earlier. Walpin had also recently completed an investigation of St. Hope Academy, a nonprofit founded by Kevin Johnson, now Mayor of Sacramento and a political ally of the President. Walpin had referred Johnson for prosecution: the Acting United States Attorney declined to prosecute and instead settled the case with St. Hope Academy, which was required to return hundreds of thousands of dollars to AmeriCorps. The Acting United States Attorney then wrote a letter to the Council of the Inspectors General on Integrity and Efficiency strongly criticizing Walpin for being one-sided and overzealous in the investigation. The Council, however, never got a chance to complete an investigation of the issues raised in the Acting United States Attorney's letter (the Council was established under the 2008 Reform Act and its purpose includes investigating allegations against an IG and recommending appropriate action). The President fired Walpin first.

Norman Eisen, the chief White House ethics lawyer, apparently called Walpin on June 10, 2009 and told him to resign within one hour or be fired. Walpin did not resign and was fired later that same day with 30 days paid leave prior to termination. President Obama then sent a brief letter to Congress stating that Walpin had been fired because the President no longer had "confidence" in him. Members of Congress from both parties said this was an insufficient explanation and clamored for the meaningful report of the reasons for the firing contemplated by the 2008 Reform Act (the Act requires the President to report to Congress the reasons for firing an IG at least 30 days before a firing). A few days later, Eisen wrote a letter to Congress reciting the criticism of Walpin's conduct by the US Attorney and also stating that Walpin had appeared "disoriented" and "confused" at a recent AmeriCorps board meeting. Eisen also met with Congressional staff persons to explain the firing. Some Members of Congress were not satisfied with any of these explanations. The fact that he was put on 30 days leave rather than allowed at least 30 days to wrap up his responsibilities also appeared to be, at best, an effort to technically comply with the Reform Act while avoiding its intent.

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

5. Appointee is defined in Section (2)(b) of the Order:

"Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

6. Paragraph 2 of the pledge reads: "2. *Revolving Door Ban—All Appointees Entering Government.* I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and

appointees who are registered lobbyists.⁷ The Order recognizes that the revolving door into government is a serious problem and at least attempts to deal with it.⁸

There could, however, be problems with implementation of the Order. So many senior government officials come in from the private sector that this is a difficult area to regulate. If restrictions are too onerous, people from the private sector will not agree to serve. Indeed there is already controversy over how many waivers from the Executive Order will be granted as well as over whether agency lawyers will interpret the Order narrowly to require recusals from some matters but not others.⁹ If too many waivers are granted or the Order is interpreted too narrowly, its purpose will be compromised.

The President's Order also addresses the revolving door out of government and the excessive influence former government officials can exert on their agencies. For senior Administration officials, the Order lengthens the post-employment ban on "representing back" to their former agencies from one year to two years.¹⁰ Administration appointees who leave to become lobbyists are required to promise not to lobby other

contracts." Particular matters involving specific parties are usually thought to include contracts, investigations, lawsuits and other matters with identifiable parties, but not government regulations that affect an entire industry. The specific reference to "regulation" in this Executive Order, however, implies that its reach could be considerably broader.

7. Paragraph 3 of the pledge reads:

3. *Revolving Door Ban-Lobbyists Entering Government.* If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment: (a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment; (b) participate in the specific issue area in which that particular matter falls; or (c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.

8. The Order has been favorably received by commentators. Dennis Thompson for example has commented favorably on the objectives of the Executive Order while recognizing that the Administration thus far still lacks a coordinated approach to the broader range of ethics problems in government that are not addressed in the Order. See Dennis F. Thompson, *Obama's Ethics Agenda: The Challenge of Coordinated Change*, THE FORUM, Vol. 7, Issue 1, Article 8 (2009).

9. See Kenneth P. Vogel, *Grassley After White House Ethics Waivers*, POLITICO, Jun. 10, 2009 (Senator Chuck Grassley (R-IA) has demanded disclosure of waivers and recusals under the Executive Order).

10. Paragraph 4 of the pledge required under the Order states:

4. *Revolving Door Ban-Appointees Leaving Government.* If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

Administration appointees for the remainder of the Administration.¹¹

There are several difficulties with this approach. First, a pledge of this sort is difficult to enforce vis a vis former Administration officials after they leave the government. It lacks the teeth of the existing law (a one-year ban for senior officials, a two-year ban for very senior officials, and no additional restrictions for lobbyists) in 18 U.S.C. § 207, which although narrower in scope is a criminal statute rather than a pledge. Second, if violations of the criminal statute 18 U.S.C. § 207, which Richard Holbrooke was charged with violating, are not prosecuted as vigorously as they should be and are not considered impediments to future government appointments, it is difficult to envision government officials taking the pledge in the President's Order seriously. The President should have urged the Justice Department to step up enforcement of the existing law (the Public Integrity Division screens complaints and only the most egregious violations are prosecuted). The President also should have categorically barred persons who violated the existing law from serving in his Administration. Third, the pledge will be meaningless if the President releases his appointees from the pledge by rescinding or amending the order at the end of his Administration, which is what President Clinton did with another similar order at the end of his administration. The President should make it clear that this will not happen, that the rules he announces now will remain the rules when his Administration draws to a close and his appointees seek opportunities outside the government. Persons who violate the pledge should not be welcomed back into any future administration.

The President deserves credit for taking unprecedented steps in the Executive Order of January 21, 2009 to limit lobbyists' influence on government and to address the more problematic aspects of the revolving door from the private sector in and out of government. The President has also banned lobbyists from being appointed to agency advisory boards and commissions. The President's chief ethics counsel, Norman Eisen, was right to avoid consulting with lobbyists themselves

11. Paragraph 5 of the pledge reads: "5. *Revolving Door Ban—Appointees Leaving Government to Lobby.* In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration."

before advising the President on these rules.¹² Lobbyists were of course upset, and they apparently berated Mr. Eisen at a recent ABA meeting, but he stood firm. There is plenty of precedent for this. Lobbyists tried to fire one of Eisen's predecessors in the Bush Administration, Nanette Everson, when she tried to shut them out of White House meetings where they weren't needed, but she stood firm and kept her job.¹³ At least one of the

12. See Posting of Norman Eisen to the White House Blog, <http://www.whitehouse.gov/blog/Why-We-Bar-Lobbyists-from-Agency-Advisory-Boards-and-Commissions/> (Oct. 21, 2004 12:03 EST).

13. Everson had apparently given an ethics briefing to the White House Intergovernmental Affairs office in which she encouraged direct contact between the White House and Indian tribes without allowing lobbyists to interpose themselves as go betweens. Jack Abramoff and his colleagues were furious. As reported by the House Committee on Government Reform in investigating Abramoff:

It began on March 1, 2003, when Kevin Ring reported to his associates "a disturbing problem" he had heard about from the White House:

Just wanted to let everyone know of a disturbing problem I just learned about at the White House. The Intergovernmental Affairs Office just received their ethics briefing, and when all was said and done, they concluded that they should NEVER call lobbyists anymore—will call tribes directly—and will NEVER have lobbyists sit in meetings, EVEN WHEN the client is meeting with the IGA Office.

* * *

Finally, it is scary that the White House ethics advisor—a Nanette Everson—told the IGA folks that tribes shouldn't even need to have lobbyists, anyway—and that it is wrong for them to pay so much money for lobbyists when people in the government should be meeting with them as needed. Those are fighting words!!!!

Abramoff responded, "This is horrible. Why would they f**k us like this?"

Over the weekend, the team developed a game plan in a series of e-mails to "straighten out" this matter:

Kevin Ring:	It's not about us, but we're included. . . . Neil, this is definitely something Barry Jackson needs to hear about.
Michael Williams:	WH folks are getting really arrogant lately. Not sure who is driving the train but they need to remember who there friends are ... or they risk the fate of Bush I.
Shawn Vasell:	I will talk with Matt as well. This is bulls**t.
Neil Volz:	I will call Barry Jackson with this today. Unacceptable.
Duane Gibson:	1) Find out if there is any basis whatsoever in the advice from the ethics person. Get this in house if possible, not from the WH. 2) Get Everson fired, because I cannot imagine any basis for such advice. 3) Act quickly to find out as much as possible about her. 4) Start a phone bank and give Everson 1000 calls a day from every tribe with a problem.

STAFF OF H. R. COMM. ON GOVERNMENT REFORM, 109TH CONG., STAFF REPORT 50–51 (September 29, 2006) (citations omitted). Everson was not fired and there is no indication that she backed down on this issue. She served longer in the post than any other chief ethics lawyer in this Administration, and after I succeeded her she went on to become the General Counsel of the Commodities Futures Trading Commission.

lobbyists who tried to get her fired, Jack Abramoff, went to jail. President Obama also shows no signs of allowing lobbyists to dictate terms to his administration, particularly about how the Administration interacts with lobbyists.

In more subtle ways, however, it remains to be seen whether the President can stay the course or whether exceptions to the Executive Order and to his ban on lobbyists in the Administration will swallow the rules. It also remains to be seen whether, despite the stricter rules the President has imposed, he can attract to the federal government people with private sector expertise that the government needs.

BIG GOVERNMENT AS AN IMPEDIMENT TO ETHICS REFORM

One aspect of the President's policies that is very worrisome from a government ethics perspective is his acceleration of a trajectory already set by his predecessors toward expanding the size of government and the scope of government's responsibilities. Presidents Clinton and Bush did much the same, although there was sometimes talk of making government smaller, more responsive and more efficient. More money is passing through the hands of government than ever before and government is trying to solve problems in areas as diverse as homeland security, health care, bailouts of failing companies and military support for struggling foreign governments we presumably cannot allow to fail because terrorists will supplant them. In some of these areas government engagement and expenditure is needed, and in others not, policy issues that will not be discussed here. Regardless, expansion of government, particularly rapid expansion of government into new areas of engagement without sufficient attention to conflicts of interest and other ethics issues, can come at the expense of government integrity. It already has.

As the United States most recently learned in Iraq, wars pose enormous risk to the ethics of government officials. Billions of dollars are spent in war and billions more on reconstruction after war. Meanwhile, conflicts of interest and other problems plague relationships between the United States government and its civilian and military employees as well as others government enlists to do its business. Part of the problem is the number of outside entities government relies upon to do jobs government cannot do or does not want to do in order to achieve military

and political objectives. These include private companies such as Haliburton and Blackwater, nongovernmental organizations (NGOs) and foreign governments that purport to be our allies. This is nothing new. The American Revolution,¹⁴ the Civil War, World War II and just about every other war saw not only a rise in patriotism but private profiteering by persons eager for a share of the money government spent on those wars.

President Obama's most immediate engagement is in Afghanistan and Pakistan, but that conflict could easily spill over into other countries in the region. The United States also is not finished in Iraq. Iran, Korea, a growing number of terrorism cells in Africa, and instability in South East Asia are also concerns. If the United States addresses these concerns unilaterally or as a principal protagonist, United States dollars and soldiers will be more at risk than those of other countries. There will also probably be greater risk to the integrity of our government than when our country is at peace. Preparedness for conflicts of interest and other ethics problems should be a much greater part of military preparedness than they are. These problems, however, like other problems in war, are sometimes difficult to predict.

After expenditures on war and other foreign engagements, the next most pressing concern is expenditures on bailing out private companies. Here also, the Obama Administration is making relatively minor adjustments to the interventionist approach that emerged in the last few months of the Bush Administration. Part of corporate America is apparently too big to fail, and government won't let some companies fail. As I have explained elsewhere in an essay on bailouts and government ethics, this role for government is inconsistent with fiduciary obligations government officials have in managing public funds.¹⁵ The risk of politicized decisions, conflicts of interest, insider trading, and other ethics problems is acute. The United States

14. See Richard W. Painter, *Ethics and Corruption in Business and Government: Lessons from the South Sea Bubble and the Bank of the United States*, 2006 Maurice and Muriel Fulton Lecture in Legal History at the University of Chicago Law School (May 11, 2006), available at <http://ssrn.com/abstract=920912> (discussing a fraudulent scheme to use the South Sea Company through 1720 to fund England's national debt from wars with Spain, and then the 1789 plan of Alexander Hamilton for the United States government to assume the Revolutionary War debt of the individual states which led to profiteering by speculators using inside information about the plan to buy up state notes at a fraction of par value).

15. See Richard W. Painter, *Bailouts: An Essay on Conflicts of Interest and Ethics When Government Pays the Tab* (Minn. Legal Studies Research Paper No. 09-37, 2009), available at <http://ssrn.com/abstract=1470910>.

may not be able to continue to have a revolving door between the private sector and top echelons of government—and benefit from the experience that it brings into government—if government officials not only regulate entire industries but also pick winners and losers among particular companies. These problems can be mitigated to some extent with stricter ethics rules, more systematized approaches to bailouts and other strategies for preparedness, but here also preparedness will only go so far. Government ethics, along with the economic system in general, would be better off if the United States could find alternatives to bailing out companies that fail.

Then there is economic stimulus. I will not debate here the policy merits of using government expenditures versus tax cuts to stimulate the economy. It should be pointed out, however, that tax cuts need not be a “regressive” approach to economic stimulus—tax cuts and rebates for middle and low income earners including cash payments to people too poor to pay taxes could stimulate the economy. The stimulus plan recently enacted by Congress—almost \$1 trillion—whatever its substantive merits, was an enormous invitation to earmarking or the functional equivalent of earmarking¹⁶ and the special interest lobbying that comes with it. The stimulus plan was a much-needed boost to K-Street and the other “middlemen” who thrive whenever the government spends money. Regardless of what happens to the rest of the economy, the Washington lobbying industry has been stimulated a great deal.

Increased government regulation is yet another area that benefits lobbyists, and the conflicts of interest they thrive upon. In some areas, such as financial services, new regulations may be needed, and other regulations may be outmoded and need to be repealed. The prospect of dramatic change in the regulatory climate, however, has led many companies and industry groups to spend whatever it takes to be well represented by lobbyists who promise to achieve for their clients the best possible results—by exploiting connections in the Administration and other means. Lobbyists with ties to the Democratic Party in particular are in high demand at the moment, just as Republican lobbyists were in high demand a few years ago. Change in the

16. As I point out in my book, the executive branch engages in the functional equivalent of earmarking when agencies include in their budgetary requests proposed expenditures that benefit supporters of the President and his political party. See RICHARD W. PAINTER, *GETTING THE GOVERNMENT AMERICA DESERVES* 153–61 (2009).

regulatory climate may be a good thing, but the President must be aware that change creates opportunities for people to gain an upper hand by thwarting the intent of government ethics laws. If the President is not vigilant to protect the public interest, we could end up with regulatory change that only the least scrupulous lobbyists and their clients can believe in.

The most dramatic example of a policy area where government expenditure and regulation both come to bear is health care. It would be naive to assume that restructuring such a massive portion of the American economy can be accomplished without conflicts of interest and other ethics problems for government officials who determine who pays what and who gets paid what in the new plan. Arguments over collateral issues such as medical malpractice reform and abortion bring yet more special interests and their lobbyists into the fray (to date, trial lawyers have been successful in thwarting efforts to save costs by limiting medical malpractice suits).

There are policy reasons to proceed with some version of health care reform, but this part of the cost should not be underestimated. Mitigating conflicts of interest and other ethics problems is possible, if they are honestly acknowledged by the Administration and Congress, but these problems cannot be eliminated. The President's plan also may make the problems worse because it is so general that much of the detail is being supplied by Congress. Allowing Congress rather than the White House to fill in the details avoids one of the political pitfalls of the Clinton health plan that in 1993 was sent in a near "finished" state to a Congress that refused to enact it. President Obama's approach of giving Congress a freer hand, however, could give lobbyists the upper hand as they use their relationships with hundreds of Members of Congress to exert influence over the final product.

Neither this President nor any other can avoid the fact that the more money flows through government, the larger will be the already sizeable industry that seeks to direct that money to particular ends. Government officials will not stop that industry and are highly unlikely to enact effective ethics rules that distance themselves from it because government officials themselves share in its profits, whether through campaign contributions, post-government employment opportunities for themselves and their staff, benefits for friends and family or other advantages. Public choice theorists call these things "rents" that government officials extract for themselves from

their public charge.¹⁷ These rents grow with the size of government and it is extraordinarily difficult to reduce them without taking some steps to reduce the size of government.

Given that the size and scope of government are not likely to diminish in the near future, there are some measures that at least could limit the damage to government ethics. The President is right to distance his Administration from registered lobbyists. This will not help, however, if he exerts so little control over his legislative proposals that large parts of the final product are drafted by lobbyists through their allies in Congress, as may have happened with parts of the recent health care bill. The President is also right to tighten up on rules regulating the revolving door between the private sector and government. His Administration, however, needs to consider implementing specialized ethics rules in areas such as bailouts of private companies. Elsewhere, I have suggested ethics rules that could limit conflicts of interest in bailouts including: rules barring government officials who participate in bailout decisions from accepting employment with a bailed out company for two years; post-employment rules prohibiting government officials who participate in bailout decisions from representing private interests back to the government not only about those same bailouts (this is currently prohibited¹⁸), but also about other bailouts implemented at or about the same time as part of the same “package” of bailouts; and rules prohibiting government officials who participate in bailouts decisions from attending political fundraisers until they are no longer involved in bailouts.¹⁹ A “one size fits all” approach to ethics—applying the same rules to over one million

17. See generally FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION AND POLITICAL EXTORTION* (1997). Whatever the merits of arguments for or against curbs on campaign contributions and lobbying, public choice theory offers insights on why effective legislation curing either is not likely to happen. In a 1992 essay evaluating First Amendment issues, Jonathan Macey observed that politicians often favor free political speech because it encourages formation of more interest groups, which in turn provide increased contributions and other support for political campaigns. Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and “Other” Rights under the United States Constitution*, in *ECONOMIC RIGHTS* 141, 141–70 (E.F. Paul, F.D. Miller & J. Paul eds., 1992).

18. See 18 U.S.C. § 207(a) (2009) (prohibiting a former government employee from representing back to the government on behalf of a private party with intent to influence a government decision involving a particular matter involving specific parties if the former employee had substantial personal responsibility for the same matter while in government service, but not prohibiting the former government employee from representing back to the government with respect to similar matters that are not the same matter).

19. See Painter, *supra* note 15.

federal employees irrespective of function—may not work when some federal employees are deeply entangled in activities affecting the private sector while others are not. There are already special rules for government procurement officers, and other functions such as bailouts may require similar attention.

Nonetheless, it will be very hard for ethics rules to keep up with the explosive growth in the size and scope of government. New rules also mean new restrictions on government employees, and these restrictions have a cost.

I do not suggest here that the only means of achieving good ethics in government is to have no government. I do suggest that when government expands the scope and size of its responsibilities and commensurate expenditures, government ethics problems are likely to expand as well. This cost, as well as the other costs of government activism and intervention, needs to be taken into account when policy makers deliberate about what the responsibilities of government should be. Unbridled growth of government itself could be the biggest threat to government ethics that the President will confront and so far, he has not proposed a plan to stop it.

PARTISAN POLITICAL ACTIVITY AS AN IMPEDIMENT TO ETHICS REFORM

Partisan politics and campaign contributions are a big impediment to government ethics. As I pointed out in my recently published book on government ethics, it makes little sense to regulate small favors given to government officials (gifts, meals, sporting event tickets) yet tolerate what amounts to de-facto bribery through campaign contributions. Given the First Amendment²⁰ and practical difficulties with campaign finance reform, particularly absent massive government subsidies for political campaigns, it is crucial for the President to minimize entanglement of Executive Branch functions with the partisan political process.

From this perspective, it is troubling that the President has retained the White House Office of Political Affairs (OPA). OPA was for much of the George W. Bush Administration run by Karl Rove; President Clinton had a number of people in charge of this office. OPA was very active in both the Clinton

20. See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. ____ (2010) (holding that the First Amendment prevents limitations on corporate funding of political broadcasts in elections).

and Bush Administrations and in both administrations it was a very difficult arrangement that led to real and perceived scandals.

Senator John McCain realized this problem and promised in the 2008 Presidential campaign to abolish the OPA and move most of its functions over to the Republican National Committee. The issue, however, received little attention and Senator Obama was not forced to match or even address this campaign promise. Under President Obama, OPA has been taken over by Patrick Gaspard, a labor union advisor from New York. From the extensive White House involvement in 2009 political campaigns, including primaries, around the country, it appears that OPA is as active as ever. Regardless of the President's good intentions, the work of OPA will, as Senator McCain understood, bring nothing but trouble.

Admittedly, political advisors have a long history in the White House. Beginning in the Reagan Administration, they worked within a separate OPA with its own head. A number of factors, including the so called "permanent campaign" that began in the Clinton years and lasts all four years of a President's term, demand for campaign contributions, and the enhanced role of lobbyists and interest groups in elections, have drawn OPA into purely partisan politics, not only for the President's reelection, but for Members of Congress and now with the President's involvement in the New York Governor's race, candidate selection in races for state office.

The work of OPA staff members is twofold. First, they advise the President on the political viability of Administration policies. Second, on "personal" time, they moonlight for the President's political party—among other things, speaking at campaign events, coordinating strategy with candidates, and coordinating "personal capacity" campaign travel by other Administration officials. OPA is not the only office in the White House that considers politics in formulating official policy positions; OPA staff members are not the only White House officials who engage in partisan political activity. OPA, however, coordinates both official and unofficial politics for the White House and for the entire Executive Branch.

The theory behind this dual role is that a beneficial synergism will result. Political work is not part of the official duties of White House staff members, but it puts them in contact with candidates, grass roots political organizations, and pollsters.

Presumably, knowledge gained thereby informs official-capacity political advice to the President.

There are, however, ethical and practical problems with this arrangement.

The first problem is legality. The Hatch Act prohibits government officials from engaging in political activity using official titles or at government expense. Most government officials may not participate in political activity while on government property or during working hours. An exception, however, allows senior political appointees to do so provided they do not use their official titles or incur additional expense for the government.

This exception permits some people to do both official and political work in the same office, provided they purport to distinguish between the two. Numerous gadgets—BlackBerry smartphones, cell phones, computers—are thus provided by the RNC or the DNC to OPA staff and some other Administration officials. Modern technology makes it easier than it once was to coordinate with political campaigns. Calls coming from White House officials on DNC cell phones and emails sent on DNC BlackBerry smartphones are, legally, not coming from the White House at all. They are merely “personal capacity” communications by persons who happen to be White House staff.

These distinctions are more theoretical than real. In most administrations, OPA staff members use the same internal reporting structure to coordinate political activity that they use for official duties. When they make phone calls or send email, everyone knows where they work. When they speak at campaign events, everyone knows who they are. Calling partisan political activity by White House staff “personal” rather than “official” is a legal fiction.

The second problem is conflict of commitment. There is no way of knowing how much time is spent on politics instead of official duties because time records for senior political employees are not required. Presumably, records of reimbursements they receive from campaigns for travel expenses are filed with the FEC, but this information is difficult for the public to obtain. Little is known, for example, about how many trips are taken by OPA staff and who pays for them.

The third problem is conflict of interest. Many contacts made in partisan politics are with fundraisers and donors. The

Hatch Act allows government employees to speak at fundraisers provided they do not explicitly ask for money (another legal distinction with little grounding in reality). White House staff and other Administration officials are highly sought-after speakers because they fill the room with paying customers.

These customers usually want something in return. Lobbyists are among the most frequent attendees (some fundraisers are hosted by lobbyists). Government officials learn at these events what contributors want. Official-capacity advice based on these views reflects a well-heeled segment of the President's political party, but does not necessarily encapsulate what is best for the Country or even politically viable.

Concurrent political and official roles thus put government officials in an untenable position. Critics often blame OPA staff members for the resulting problems and claim things would be better if another political party controlled the White House. These problems, however, are inevitable.

Retaining the White House OPA can work for the Obama Administration, but ethical quagmire will be inevitable unless the role of OPA changes. OPA Staff, along with other White House staff and senior administration officials, should not personally participate in partisan politics. OPA staff should not pressure cabinet members and other Administration political appointees to attend fundraisers and participate in partisan politics. The President should be assisted by a staff with undivided loyalties to the government and not beholden to the supporters of a political party.

CONCLUSION

On the whole, the President had made a strong start on his efforts to improve government ethics. He has avoided importing to Washington the worst elements of the Chicago political establishment that launched him on his career. He has taken bold and decisive action to limit the revolving door in and out of government and to limit the influence of lobbyists. He has avoided repetition of the bad judgment calls that led to the scandal-plagued first year of the Clinton Administration. He has shown a willingness to learn from the mistakes of others, including Presidents Clinton and Bush. It remains to be seen how, as his administration matures, he will handle the more difficult task of admitting and learning from his own mistakes. Acknowledging error and reversing course is difficult for

Presidents to do, but the failed presidencies of Lyndon Johnson and Richard Nixon, among others, demonstrate how important it is.

The current military engagement in Afghanistan is the most obvious pitfall for this administration. The situation may be one in which there are no genuinely good options and we can only try to avoid the worst outcome. Alternatively, it may be possible that good military and diplomatic policy can achieve a happy outcome. Regardless of the substantive merits, it is critical that the President and his advisors be honest with the American people, and with themselves, about the facts on the ground and our chances for success. The President should insist that his generals be honest with him and not just tell him what he wants to hear; the generals should in turn insist on accurate factual reports from their subordinates (the “don’t ask-don’t tell” approach to bad military news that made things worse in Vietnam will make things worse here as well²¹). Government ethics rules should also more effectively address conflicts of interest that arise in war and post-war reconstruction. Ethics rules will be pointless, however, if government officials lie about the war itself.

As pointed out above, the greatest threat to government ethics in this administration will come from the enormous size and responsibility of government itself. An earmark laden economic stimulus plan, bailouts of private companies determined by government officials who have worked for or will work for those companies, a health plan the White House has allowed to be designed by Members of Congress and their lobbyists, and far flung military engagements dependent upon private contractors all pose a genuine threat not only to the public purse but to the integrity of government. It may be impossible to design government ethics laws that remove unacceptable conflicts of interest but do not bring the functions of government to a halt. Scaling back the role of the federal

21. The “don’t ask-don’t tell” policy toward gays in the military does not set a good example in that it encourages soldiers to lie to their commanding officers, even if about a matter that is irrelevant to their military service. It is common knowledge in Washington—and has been common knowledge in the White House since the policy began—that “don’t ask-don’t tell” exists to please “socially conservative” interest groups at home and has little to do with military effectiveness. To the extent the policy promotes a culture of dishonesty in the military—dishonesty that can spill over into highly relevant areas such as procurement policy and military intelligence—military effectiveness is undermined. Because the policy has been imposed by Congress, the President has limited options, but he should do what he can to change it.

government in at least some of these areas may be the only realistic alternative.

President Obama wisely avoided importing the worst elements of Chicago City Hall to Washington. Our country will be no better off, however, if he continues the growing trend of importing to Washington the concept of Chicago City Hall—a government that does everything for everybody while everybody looks the other way on matters of ethics. To make the government more ethical, the President will need to acknowledge that government itself has its limits.