

Center for American Progress



# Drain the Swamp

Conflicts of Interest, Lobbying, and Corruption Solutions to Restore Trust in Government that Works for Americans

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By Liz Kennedy January 2017

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# Introduction and summary

Far too many Americans share the widely held view that government is run by and for wealthy and powerful special interests.<sup>1</sup> Strong majorities of Americans have lost confidence that government is run for the benefit “of all the people” and instead believe “a few big interests looking out for themselves” are controlling it.<sup>2</sup> Specifically, CAP research looking at the issue of trust in government shows that 84 percent of respondents think that government works to benefit special interests; 83 percent think it works to benefit big corporations; and 80 percent think it works to benefit the wealthy over the interests of the middle class.<sup>3</sup> Despite that dispiriting outlook, 72 percent of Americans nonetheless believe that with the right kind of leadership, the federal government can be a force for good.<sup>4</sup>

On the campaign trail, Donald Trump promised Americans that he would drain the swamp and overcome the power and influence of special interests and the wealthy few.<sup>5</sup> But as president-elect, his actions of nominating certain executives of some of the largest corporations and his billionaire backers to lead his administration betray that promise.<sup>6</sup> His inner circle now reports that “draining the swamp” is not a priority for Trump.<sup>7</sup> Congressional Republicans sought to go even further in opening the door to abuse and scandal, voting in a secret caucus meeting to kill the independent Office of Congressional Ethics and prevent effective ethics oversight for members of Congress.<sup>8</sup> The Republican majority turned back from this ethics debacle after Americans flooded congressional offices with calls expressing their anger about the proposal.<sup>9</sup> Restoring government to the people remains a priority for Americans: According to exit polls, 69 percent of voters overall said they were dissatisfied or angry with the government.<sup>10</sup>

A democratic government must serve the interests of the people through real actions—not empty words. However, the current rules regulating the use of money to influence elections and government lead to grievous conflicts and distortions in derogation of the duty of fair representation that elected representatives owe their constituents. The role that money plays in our political system is an even bigger problem for a healthy democracy given the massive

wealth inequality in America today. Today's top CEOs, for example, make 300 times more than the average worker.<sup>11</sup> These individuals, the "top 1 percent of 1 percent of the population," dominate campaign giving each election cycle with donation totals that dwarf those made by average Americans.<sup>12</sup> The effect of having elected officials dependent on and aligned with the wealthiest few is reflected in the economic stagnation felt by most Americans, while the gains from the economic recovery in the last eight years since the Great Recession went almost entirely to the top 1 percent of wealthy Americans.<sup>13</sup> Members of Congress and the executive branch must move from being mired in conflicting interests to delivering fair representation that improves the lives of all Americans.

Americans need to see strong, clear proposals that will actually work to stop wealthy special interests from having an improper and anti-democratic amount of influence on the levers of government. A holistic framework with rules for using money in elections and protecting voting rights and access is needed to revitalize our democracy. But for people to see their elected representatives and public officials working for them—and to see their ability to act as agents of change in our political system—Congress needs to clean its own house and demand the executive branch act ethically as well. It must adopt real solutions to address the threats inherent in special interest lobbying, revolving door politics, corruption of public service, and lax ethics and contracting oversight, as well as the major danger of direct conflicts of interest.

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# Conflicts of interest and ethics

President-elect Trump's financial conflicts of interest are dangerous, unprecedented, and unconstitutional.<sup>14</sup> His refusal to resolve them properly threatens America's national security<sup>15</sup> and undermines the norms and rule of law that have worked to preserve democracy in the United States.<sup>16</sup> We have never before faced an incoming president who presents “the prospect that a commander in chief might make policy decisions guided by what is best for his own family's brand and wealth.”<sup>17</sup>

President-elect Trump's business organization—with its far-flung and intertwined foreign businesses and foreign business partners—needs to be sold through a blind trust to resolve his conflicts of interest.<sup>18</sup> The business could be sold to a private equity firm, or the business could go through a public offering and sell shares, divesting his ownership to the public. The profits and proceeds from these sales would go to Trump and his family. Whatever the solution, Trump, as president, cannot have ownership in any business that receives payments from foreign governments or their agents—through his hotels or otherwise—without violating the anti-foreign corruption clause of the U.S. Constitution, known as the Emoluments Clause.<sup>19</sup> The Office of Government Ethics, which oversees the executive branch, has written that “transferring operational control of a company to one's children would not constitute the establishment of a qualified blind trust” or eliminate conflicts of interest.<sup>20</sup>

Cabinet officials and other executive branch employees are required to sell assets that present conflicts of interest.<sup>21</sup> While this specific law does not directly apply to the president, the Office of Government Ethics has concluded that “the President and the Vice President should conduct themselves as if they were so bound” by them.<sup>22</sup> Congress should strengthen the nation's laws that apply to all high-level public servants—including public disclosure of tax records—to cover the president and vice president in ways that are appropriate and protect the interests of Americans.

The federal government's ethics watchdogs in Congress and the executive branch should also be strengthened to ensure the interests of the American people are protected and that their representatives at the highest levels are working for them and not for wealthy special interests. Instead, on the eve of the new Congress, House Republicans voted 119-74 to amend the House Republicans' rules package and destroy the Office of Congressional Ethics.<sup>23</sup> While they ultimately walked back the attack for now, this attempt to eliminate the only independent watchdog with authority to investigate members of Congress' ethics violations is unacceptable.<sup>24</sup> It presents a bleak future for oversight and accountability mechanisms under the unified Republican majority government in the incoming Trump administration.

Congress should immediately:

- Require that the president, vice president, and their families resolve their conflicts of interest by selling their assets using a truly independent asset manager to invest the profits in ways that do not create conflicts of interest, such as through a true blind trust.<sup>25</sup>
- Require disclosure of tax records for the president.<sup>26</sup>
- Prohibit presidential appointees from participating in matters that directly involve the financial interests of the president and his or her family.
- Prohibit executive branch appointees from accepting gifts from lobbyists, codifying President Barack Obama's executive order.
- Prevent the destruction of the Office of Congressional Ethics and the Office of Government Ethics and strengthen them with greater independence and authority, including subpoena power.

# Lobbying

Business groups and trade associations dominate lobbying. In the past two decades the amount of money spent to lobby members of Congress has doubled: More than \$3.2 billion was spent on federal lobbying in 2015, and large businesses and business associations are by far the largest spenders.<sup>27</sup> Business-related lobbying makes up nearly three-quarters of all lobbying spending, while public interest lobbying comprises only 16 percent.<sup>28</sup>

The current system has too many loopholes that allow people to engage in influence peddling for wealthy special interests without transparency or accountability. Oftentimes, elected officials are dependent for campaign funds on the same people who are lobbying them for special treatment for their wealthy clients.<sup>29</sup> According to the American Bar Association Task Force on Federal Lobbying Laws, current law can lead to dependence due to the “leverage that lobbyists can acquire, and the unseemly appearances they create, when they participate in campaign fundraising for the same Members of Congress whom they also lobby.”<sup>30</sup>

American interests are not best served in an environment where their representatives are aligned with wealthy special interests instead of being able to fairly represent all of their constituents. To curb the undue influence of lobbying, policies must be implemented to:

- Ban people engaged in lobbying for special interests from political fundraising and bundling for political campaigns and parties.<sup>31</sup> This includes banning registered foreign lobbyists from fundraising.
- Achieve effective transparency by changing the definition of who reports as a “lobbyist” so those working to influence government are not able to hide in the shadows. For example, a person would be required to disclose their influence activities if they were paid a large amount of money for working to advance

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the interests of a particular client or if a person makes two or more lobbying contacts on behalf of a client over a two year period.<sup>32</sup>

- Disclosure requirements would apply to people engaged in lobbying support for special interests, such as political and messaging strategy and outreach.
- Update the form and content of lobbying disclosures to provide more detailed information about the activities taken to influence government policy and require that information to be filed electronically in a public, searchable database.
- Require congressional offices and the executive branch to publish their lobbying contacts and publicly disclose whom they meet with and the subject of the meeting, particularly where specific legislation or policy matters are addressed.

# The revolving door

Our government cannot have the foxes guarding the hen house. When people move between working in government service and private business and special interest lobbying, often repeatedly, it raises great risks that the interests of business will remain paramount and given priority consideration in government decisions. As it now stands, ex-government staffers can bring their personal connections in government to their new roles as lobbyists for private business interests. And ex-business people can go into a new role leading a government agency overseeing their former industry.

Laws govern when federal employees move to the private sector and vice versa. These laws recognize the inherent dangers of conflicts of interest.<sup>33</sup> The Lobbying Disclosure Act, or LDA,<sup>34</sup> and the Foreign Agent Registration Acts, or FARA,<sup>35</sup> require people engaged in certain activities to register and disclose and bar former officials from engaging in other activities. For example, former congressional members are restricted from entering the floor of the House or Senate if they are registered as lobbyists under the LDA or FARA.<sup>36</sup> Other post-employment restrictions apply to Congress. In the House, former representatives and senior staff face a one-year ban on lobbying Congress.<sup>37</sup> In the Senate, former senior staff also face a one-year ban, and senators are barred from lobbying members or legislative branch employees for two years.<sup>38</sup>

For the executive branch, there is a lifetime ban on working on the other side of a deal on a matter involving specific parties if the federal employee was engaged on that matter while in government, and a two-year ban on switching sides on a broader range of matters formerly within the employee's responsibility.<sup>39</sup> Stronger restrictions apply to higher-level executive branch officials: Senior administration officials are barred from making lobbying contacts to their former departments and agencies for one-year, and very-senior officials are barred from lobbying or attempting to influence other high-ranking official throughout the executive branch for two years after leaving office.<sup>40</sup> Moreover, they are also not allowed to represent or advise foreign governments and political parties for one year.<sup>41</sup>

President Obama imposed further ethics and revolving door restrictions on executive branch personnel with an executive order that prohibited executive branch personnel from working on matters that involved issues related to former clients or employers for two years and expanded the ban on senior officials contacting former agencies to the duration of the administration.<sup>42</sup> The order also prohibited gifts from registered lobbyists.

President-elect Trump should extend these restrictions to cover the executive branch personnel in his administration. There are still stronger measures that should be taken in order to build a wall between acting for private financial interests and working in public service on behalf of all Americans:

- Enact a lifetime ban on special interest lobbying for members of Congress.
- For congressional and executive senior staff members, a five-year ban on special interest lobbying should be imposed.
- Bar members of Congress and congressional and executive senior staff from representing the interests of a foreign government.
- Ban private payments for public service. People going into public service should not be given huge bonuses from their employers when they leave their company to join the government. These types of bonus payments raise financial conflicts of interest and casts doubts on the fairness of public servants' decisions.<sup>43</sup>
- Bar government appointees involved in policy decisions from working for private entities that have benefitted from those policy decisions for at least two years.
- Require government employees to recuse themselves from cases involving their former employers for two years, expanded from the current one-year ban.
- Require members of Congress to more effectively publically disclose future job seeking while they're in office and change the process so that determinations of conflicts of interest are not be left up to the individual member.

# Corruption of public service

In a survey on the impact of corporate political spending in American elections, 85 percent of Americans said it is corruption when financial supporters have more access to and influence over members of Congress than average Americans—57 percent said such access is “very corrupt.”<sup>44</sup> Along those same lines, 90 percent of Americans believe that government is corrupted when a member of Congress does a “favor” for a business or individual that provided that member with financial support, such as a campaign contribution; 89 percent believe government is corrupted when a member of Congress acts in the interests of financial supporters instead of in the interests of constituents; and 87 percent see government corrupted when a member of Congress acts in the interests of financial supporters instead of in his or her best judgment.<sup>45</sup> A significant majority of Americans believe that government pays more attention to the interests of their financial supporters than the interests of their constituents, which comports with the fact that many people believe American government has a problem with corruption.<sup>46</sup>

Seventy-five percent of Americans believe that corruption in government is widespread, and yet, in a time of cratering trust in government, the nation’s laws against public corruption have been inappropriately undermined.<sup>47</sup> For example, the recent U.S. Supreme Court’s decision in *McDonnell v. United States*<sup>48</sup> narrowed the application of the basic bribery, extortion, and illegal gratuities laws under which former Virginia Gov. Robert McDonnell (R) had been convicted. As Lyle Denniston of SCOTUSblog explains, “[B]y a sharp cutback of what kind of ‘official act’ will be treated as corrupt when done in return for money or gifts, the [McDonnell] ruling poses a major challenge to prosecutors seeking to police official misconduct.”<sup>49</sup> Congress must respond by clarifying that it is illegal to take official actions to advance the interests of financial supporters in return for cash, loans, or gifts.

The Supreme Court had already cut back tools to prosecute public corruption and corporate fraud in *Skilling v. United States* in 2010.<sup>50</sup> The U.S. Department

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of Justice has asked Congress to restore its ability to prosecute cases of public corruption by restoring the honest services doctrine's prohibitions on secretly benefitting one's own financial interests, explaining, "[A] public official who conceals his financial interests and then takes official action to advance those interests engages in behavior every bit as corrupt as if he accepts a clear bribe from a third party."<sup>51</sup>

The fundraising demands placed on public officials also create pressure on elected representatives because the current system for financing campaigns requires them to spend nearly half their time raising money for re-election rather than working on behalf of both their constituents and the country.<sup>52</sup> Rules for using money in politics need to be radically reoriented so public officials are dependent on, and thus responsive to, the public. The interests of elected officials must be aligned with the general public rather than wealthy special interests. A full exploration of solutions is beyond the scope of this brief, but at the minimum, the public has a right to know how much of their elected representatives' time is spent raising money for elections.

It is time to restore laws prohibiting corruption amongst government officials in order to prevent private wealth from being used to dominate public service:

- All elected representatives should be required to publically disclose the amount of time they spend engaged in fundraising and attending fundraising events.
- The federal bribery and illegal gratuities statute should be amended to show that a corrupt payment or more than one "thing of value" can be made to influence more than one official act. In addition, an "official act" can be a single act or a course of conduct and should cover every action "within the range of official duty" of a public official.<sup>53</sup>
- Public officials should be prohibited from secretly acting in their own financial self-interest at the expense of the public as part of their duty to provide honest services.<sup>54</sup> We must restore the honest services doctrine for public service, as there is no place in a healthy representative democracy for undisclosed self-dealing.<sup>55</sup>

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# Government contracting and oversight

The federal government spends hundreds of billions of dollars on contracts for goods and services each year, with 462 billion dollars spent in contracts in 2016.<sup>56</sup> But many Americans believe that their taxpayer money is being wasted and that contractors are not being held accountable.<sup>57</sup> In the past, companies awarded government contracts have been found to overcharge the government, violate specific contract requirements, and falsify documents.<sup>58</sup> In 2013, around 40 percent of all federal contracting dollars went to contractors that broke a variety of laws, including health, safety, and wage regulations.<sup>59</sup>

Existing federal pay-to-play laws ban government contractors from contributing directly to candidate campaigns, political parties, and political committees.<sup>60</sup> But after *Citizens United v. FEC*,<sup>61</sup> government contractors, just like any corporation, are able to spend unlimited sums of money through outside spending groups such as super PACs and tax-exempt nonprofits. Government contractors and their officials and representatives should not engage in political spending—at least not spending that affects elections for positions that oversee a contractor’s business or industry. Laws need to be strengthened to protect the people’s business from pay-to-play corruption and misuse of public funds.

Other critical tools for the public to exercise accountability over government also need to be strengthened. For example, strengthening whistleblower protections can help lead to contractor or public misconduct being exposed. The Freedom of Information Act, or FOIA,<sup>62</sup> requires agencies to make basic information publically available as well as release requested information. FOIA is a necessary part of a democratic system, and it needs to be brought up to date in order to work effectively for all Americans. Furthermore, the need for effective inspectors general at executive agencies has grown in importance, and they have a critical role to play in ensuring an efficient, accountable government that works for all Americans.

Overall, policies should increase government's public reporting so Americans know what government agencies and offices are doing and how taxpayer money and America's resources are being used. Government contracting and oversight provisions must:

- Expand the ban on political spending by government contractors so it covers both direct contributions and political spending through new so-called “independent” channels such as 501(c)(4) and other dark money groups that hide donor identities.
- Until ban on government contractor political spending is expanded to cover new channels, require government contractors and their control groups to disclose all of their currently allowed political spending.
- Enforce the recently passed Inspectors General Empowerment Act to provide inspectors general at agencies within the executive branch more access, independence, and authority and take further steps to enable inspectors general to provide effective oversight and hold their agencies accountable.<sup>63</sup>
- Impose stricter penalties for contractors who violate their agreements or federal law by making the process for suspension and debarment referrals and reviews more efficient as well as by maintaining the recovery provisions in the False Claims Act.
- Increase whistleblower protections for government contractors, particularly in the intelligence community, to deter taxpayer waste and contractor abuse and for private-sector whistleblowers as a means to incentivize reports of fraud, along the lines of the False Claims Act.
- Subject the system of secret law developed in the executive branch to more public transparency and oversight.
- Reform process of defense spending and military acquisition and enhance public transparency for defense budgeting, as well as increase Department of Defense accountability for proper financial accounting.
- Maintain and improve the USASpending.Gov database to track all federal spending information and make it publicly available, accessible, and understandable.

- Reform the process of determining and collecting royalties, revenues, and fees from companies that extract natural resources from public lands to prioritize the interests of Americans instead of extractive industries.
- Modernize FOIA by narrowing exemptions, fixing loopholes, reducing fees, and strengthening the presumption of openness by codifying a requirement that agencies stop withholding information without a genuine reason to withhold. For example, no member of Congress should be prevented from accessing information due to a FOIA exemption.
- Make the FOIA system itself more transparent, efficient, and accountable to the public and allow for the tracking of requests.

# Conclusion

Americans voted for change in our federal political system and throughout the country at the state and local level.<sup>64</sup> It is crucial that the political system respond. At this moment, too many of our fellow citizens are mired in cynicism and doubt that anything will ever work to break the power of wealthy and special interests over public policy. Disturbingly, some politicians have launched a calculated and cynical effort to deploy reform language to capture and centralize power in the hands of these very interests. That is why it is imperative that progressives and all those who care about preserving American democracy use this moment to set forth clear policies and a real agenda to clear the toxic undergrowth of paid private influence peddling that threatens to drag down representative government. We can, and must, drain the swamp to achieve the freedom of effective and honest self-government through fair representation.

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## About the author

**Liz Kennedy** is the Director of Democracy and Government Reform at the Center for American Progress.

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As progressives, we believe America should be a land of boundless opportunity, where people can climb the ladder of economic mobility. We believe we owe it to future generations to protect the planet and promote peace and shared global prosperity.

And we believe an effective government can earn the trust of the American people, champion the common good over narrow self-interest, and harness the strength of our diversity.

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We develop new policy ideas, challenge the media to cover the issues that truly matter, and shape the national debate. With policy teams in major issue areas, American Progress can think creatively at the cross-section of traditional boundaries to develop ideas for policymakers that lead to real change. By employing an extensive communications and outreach effort that we adapt to a rapidly changing media landscape, we move our ideas aggressively in the national policy debate.

