

PROFESSIONAL RESPONSIBILITY & LEGAL EDUCATION
GOVERNMENT ETHICS IN PRESIDENT OBAMA'S FIRST YEAR: A PRELIMINARY
ASSESSMENT

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Barack Obama campaigned on a promise to bring ethics to Washington. On January 21, 2009, one day after becoming President, he delivered on this promise by signing an Executive Order that purported to slam shut the revolving door between the private sector and his Administration. He made clear his expectation that members of his Administration are to serve the public free of whatever conflicts of interest might get in the way.

Will government ethics really change for the better under President Obama, or will things get worse? Will it be more of the same? It is too early to tell, but the signs we have seen thus far demonstrate how difficult it will be for the President to make headway against imbedded conflicts of interest in Washington. The President's chances of success in this area will depend on the priority he gives to government ethics over his other policy and political objectives. It is not at all clear where government ethics stands on his priority list relative to the many other promises he made to the people who elected him.

This essay discusses a sampling of important issues in government ethics and an assessment of what the Administration has accomplished in each. A more complete assessment will require more space than this essay will allow and also will require more time to observe what the President is able to accomplish.

A first priority at the beginning of an Administration is appointing senior officials who have demonstrated integrity and sound judgment. Some Presidents get off to a bad start by indiscriminately relying on friends from their home state for senior appointments (recall Bert Lance in the Carter Administration and many others since then). For a President coming from Chicago, indiscriminate home-state appointments could have been an ethical disaster (in the past year the President's Senate seat was added to the long list of things politicians put up for sale in Illinois). Although the President brought some people from Illinois to Washington, fortunately 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). Surprisingly, most of the vetting problems in this Administration have not been with people the President brought from Illinois.

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There have, however, been problems with the vetting process for senior appointments, particularly in the first few months of the Administration. This process—sometimes called a “sex, drugs and rock and roll” review—involves an FBI background check before an appointment is announced and is supposed to ferret out candidates who don't pay their income taxes, don't pay their nanny taxes or hire illegal immigrants, have prior criminal convictions or adverse civil judgments, have problematic corporate or charitable board memberships, have difficulty living in monogamous relationships, or have anything else in their background that could reflect badly on the President. This process—which infamously failed the Bush White House in the Bernie Kerik nomination but rarely since then—appeared to be broken for the Obama team in the months after the 2008 election. Vetting failed to detect problems with at least three cabinet level nominations: the successful nomination of Treasury Secretary Timothy Geithner, who failed to pay some of his taxes; the failed nomination for Health and Human Services Secretary of former Senator Thomas Daschle, who did not pay some of his taxes and who had conflicts of interest within the private sector; and the failed nomination for Commerce Secretary of New Mexico Governor Bill Richardson, who was in the midst of an uncomfortable criminal investigation into awards of state contracts to campaign contributors. There were problems with vetting some lower level appointments as well.

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 dilemma that the President inherited but that, if mismanaged, could damage his Presidency: Afghanistan.

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, was on AIG's compensation committee, which handed out millions in bonuses to executives who brought AIG to disaster, and 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. President Obama has observed that “[n]obody here was responsible for supervising AIG and allowing themselves to put the economy at risk by some of the outrageous behavior that they were engaged in.” The President presumably meant to say that the persons who were responsible were at AIG, and those persons did not do their jobs.

Earlier, Holbrooke also had trouble with a core statute regulating the revolving door between government and the private sector. He left the Clinton Administration to pursue investment banking. 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, charges which were later settled with payment of a \$5000 fine.¹

There is reason to wonder whether a man who could not identify conflicts of interest of his own as a former government employee and then failed again to identify conflicts of interest and business risks at AIG can effectively deal with a geographic region riddled with government corruption, not to mention Al Qaeda and the Taliban. Holbrooke is among those pushing for a larger military commitment in Afghanistan, but is he oblivious to the risk that the region could become a bottomless pit for American money and human lives? Will Holbrooke's tough talk with the Afghan government be enough to turn the situation around, or is it as irretrievable as our alliance in the 1960's with the corrupt government of South Vietnam? Regardless of how one comes down on the merits on these difficult questions, persons of differing views should agree that we want to have confidence in the good judgment and oversight capability of people in charge of our diplomatic and military efforts in Afghanistan. If Holbrooke cannot show better judgment this time around than he has in the past, he should step aside and allow someone else to do the job.

Background investigations for incoming officials may not be the Obama Administration's strong suit, but a related area in which the President has had more success is limiting conflicts of interest that incoming officials bring from the private sector. It is in this area that the President's Executive Order of January 21 tightened up the rules.² Among other things, the Order requires incoming Administration appointees³ to sign a pledge that, for two years, they won't work on particular matters involving specific parties, including regulations and contracts that are "directly and substantially" related to their former clients or employers.⁴ The Order imposes even stricter rules on incoming appointees who are registered lobbyists.⁵ The Order recognizes that the revolving door into government is a serious problem and at least attempts to deal with it.⁶

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.⁷ 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.⁸ Administration appointees who leave to become lobbyists are required to promise not to lobby other Administration appointees for the remainder of the Administration.⁹

There are several difficulties with this approach. First, a pledge of this sort is difficult to enforce vis-à-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 and 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 rule he announces now will remain the rule 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. It remains to be seen whether the President can stay the course or whether exceptions 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 whom the government needs.

The revolving door furthermore is not the only means by which lobbyists and other private sector interests influence government decisions. Partisan politics and campaign contributions are an even bigger factor. 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. Senator John McCain 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.

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.

Norman Eisen, the chief White House ethics lawyer, 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. His access to his office and to government email was cut off immediately. 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 both houses of Congress the reasons for firing or transferring an IG at least 30 days *before* a firing or transfer of an inspector general). A few days later, Eisen wrote a letter to three individual Senators reciting the criticism of Walpin’s conduct by the Acting U.S. 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 and wondered how Walpin could be both overzealous and one-sided and yet “disoriented” and “confused” (Walpin is 77 years old, but by all accounts from colleagues in and out of government, including former White House Counsel Bernard Nussbaum, he is still very sharp¹¹). The fact that he was transferred to 30 days administrative 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.

Regardless of the merit of this firing, or lack thereof, the White House appeared oblivious to the fact that Congress had enacted a law specifically designed to avoid unexplained firings of inspectors general and that Congress had in that same statute demanded a meaningful opportunity to discuss with the President the prospective firing of an inspector general before the President made his final decision. Congress had also intended the Council of the Inspectors General, not the White House, to address in the first instance allegations of misconduct by inspectors general.

Furthermore, firing people does not belong in the White House ethics lawyer’s job portfolio. The ethics lawyer’s job is advising the President and White House staff on ethics, not making or implementing policy or personnel decisions, particularly decisions that appear to have a strong political component. Indeed, the ethics lawyer’s job is to put the brakes on when a proposed White House action raises the appearance of impropriety, for example, by violating the spirit if not the letter of an act of Congress. When someone has to tell the political people in the White House that they cannot do something they want to do, that person is often the White House ethics lawyer. Much of this advice is private, and when the political people decide to do something that is arguably inappropriate, they should not ask the White House ethics lawyer to do it for them.

Here, the best advice would have been for the President to stay as far away from the Walpin situation as possible, until the Council finished its investigation and made a recommendation. Only in the most urgent of circumstances would the White House want to take immediate action. An

allegedly overzealous—or alternatively “disoriented”—IG at Americorps doesn’t come close. Also, if someone were going to take the ill-advised step of calling Walpin and pressuring him to resign, and then explaining this step to upset members of Congress, that person should not be the White House ethics lawyer.

Turning to broader concerns, if there is one aspect of the President’s policies that is worrisome from a government ethics perspective, it 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. 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, and already has, come at the expense of government integrity.

As the United States most recently learned in Iraq, wars pose enormous risk to the ethics of government officials. Billions of dollars are spent, and conflicts of interest and other problems plague relationships between the United States government and its own civilian and military employees. Part of the problem is the number of outside entities we rely upon to do jobs we cannot do or don’t want to do to achieve military and political objectives, including private companies such as Halliburton and Blackwater, nongovernmental organizations (NGOs), and foreign governments that purport to be our allies. This is nothing new. The American Revolution,¹² 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 the government spent on those wars. President Obama’s most immediate engagement is Afghanistan, 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 Southeast Asia are also concerns. If the United States addresses these concerns unilaterally or as a principal protagonist, in addition to the fact that United States dollars and soldiers will be more at risk than those of other nations, there will 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 it is currently. These problems, however, like other problems in war, are sometimes difficult to predict.

After expenditures on 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. Much of corporate America is apparently too big to fail, and the 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.¹³ The risk of politicized decisions, conflicts of interest, insider trading, and other ethics problems is acute. The United States 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 will 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 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 the government officials who determine who pays what and who gets paid what in the new plan. There may be other reasons to proceed with 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 is so general that much of the detail is being supplied by Congress (at this point, there are several different versions of a plan being proposed). 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 which 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.

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 this President or any other will confront.

Endnotes

1 See Memorandum to Designated Agency Ethics Officials and Inspectors General, from Stephen D. Potts, Director of OGE, dated August 14, 2000 DO-00-029 (1999 Conflict of Interest Prosecution Survey, discussing at pages 3-4 the facts and resolution of *United States v. Richard Holbrooke*).

2 Exec. Order No. 13,490, Ethics Commitments by Executive Branch Personnel, January 21, 2009, available at http://www.whitehouse.gov/the_press_office/ExecutiveOrder-EthicsCommitments.

3 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.

4 Paragraph 2 of the pledge, intended for "All Appointees Entering Government," reads: "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 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.

5 Paragraph 3 of the pledge reads:

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.

6 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 : Iss. 1, Article 8 (2009 Berkeley Electronic Press).

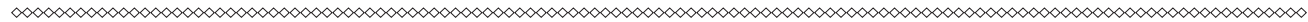
7 See Kenneth P. Vogel, *Grassley After White House Ethics Waivers*, Politico, June 10, 2009 (Senator Chuck Grassley (R-IA) has demanded disclosure of waivers and recusals under the Executive Order).

8 Paragraph 4 of the pledge required under the Order states:

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.

9 Paragraph 5 of the pledge reads: "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."

10 See Letter dated June 17 2009 from the Board of the Corporation for National and Community Service to Senator Charles Grassley (stating that Walpin was ineffective as Inspector General, but not providing further explanation as to how or why Walpin was ineffective, and stating that the Board supported the President's decision to remove Walpin). An agency inspector general is charged with oversight of all agency personnel, including its head and its board members, if any, making a request from an agency head or board to remove an inspector general an awkward request from the vantage point of the White House. Complicating matters further in this instance, the chairman and vice chairman of the board and another board member had only a few months before commented favorably on Walpin's performance; for whatever reason, they appeared to have changed their minds (the Board had recently objected to both Walpin's Johnson/St. Hope report and another report by Walpin finding waste in millions of dollars in grants by a recipient organization). The legislative history of the 2008 Reform Act reflects Congressional intent that inspectors general be independent of their agencies, an objective that is undermined if the White House does not scrutinize carefully—and demand specifics in—complaints about inspectors general coming from agencies. Absent a pressing crisis, it also would be more appropriate for the White House to wait to act until specific allegations are investigated thoroughly by the Council



for the Inspectors General.

11 See Letter dated June 23, 2009 from 145 lawyers from the New York bar, including the author of this essay, to Senator Joseph Lieberman and other Senators vouching for Walpin's abilities ("[W]e have never seen Mr. Walpin to be 'confused, disoriented [or] unable to answer questions.'").

12 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, published by the University of Chicago Law School) (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).

13 See Richard W. Painter, *Bailouts: An Essay on Conflicts of Interest and Ethics When Government Pays the Tab* (September 2009), posted on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1470910.

