COMMENTS

SAFEGUARDING AGAINST DISTORTIONS OF SCIENTIFIC RESEARCH IN FEDERAL POLICYMAKING

by Melissa L. Kelly, Genna Reed, Gretchen T. Goldman, and Jacob M. Carter

Melissa L. Kelly is Staff Director and Attorney at the University of California, Irvine School of Law's Center for Land, Environment, and Natural Resources (CLEANR). Genna Reed is Senior Analyst in the Center for Science and Democracy at the Union of Concerned Scientists (UCS). Gretchen T. Goldman is Research Director of the Center for Science and Democracy at UCS. Jacob M. Carter is a Research Scientist in the Center for Science and Democracy at UCS.

The appropriate use of science in policymaking depends upon integrity in scientific research and in the ways in which that research is communicated and applied throughout the policymaking process. Existing rules and norms concerning conflicts of interest among agency leaders, advisors, federal employees, and lawmakers demonstrate an understanding that sound policy decisions require the independence of scientists and the impartiality of regulators. Conflicts of interest introduce the potential for bias and interference with research and regulation, not only undermining agencies' abilities to develop and implement the best possible science-based policies, but also contributing to the erosion of public confidence in both science and government.

In spite of these enduring concerns, ambiguity regarding what constitutes a conflict of interest in science and policymaking, as well as historically persistent ties between regulatory agencies, advisory committees, lobbying firms, and regulated industries have served as fertile ground for the Donald Trump Administration's unprecedented efforts to sideline scientists, defund and disregard research, and dismantle the institutional means by which science can inform government policy.[1] Long-held rules and norms regarding the barriers that should exist between decisionmakers and industries affected by policy outcomes are eroding, pointing toward a need to strengthen how conflicts of interest are handled in the federal government.

On May 22, 2019, the University of California, Irvine School of Law's Center for Land, Environment, and Natural Resources (CLEANR) and the Center for Science and Democracy at the Union of Concerned Scientists (UCS) convened a roundtable that brought together leading scientists, scholars, advocates, and policymakers to explore potential safeguards to protect scientific research and its use in federal policymaking.[2] The roundtable discussion

Authors' Note: The authors would like to thank Michael Robinson-Dorn, University of California, Irvine School of Law clinical professor of law and member of CLEANR's Advisory Committee, for his critical role in developing the May 2019 roundtable and his invaluable input on this Comment. They also thank all the roundtable participants for their meaningful contributions; participants Martha Kinsella, Brennan Center for Justice, Sidney Shapiro, Wake Forest University School of Law, and Wendy Wagner, University of Texas, Austin School of Law, for their time and thoughtful comments on this Comment; Gabriel Weil, Climate Leadership Council, for his contribution as a roundtable participant and former CLEANR fellow; and University of California, Irvine School of Law student Daniel Kolko and CLEANR research assistant Neil Dy for their research support.

1. Emily Berman & Jacob Carter, *Scientific Integrity in Federal Policymaking Under Past and Present Administrations*, 13 J. Sci. Pol'y & Governance 1 (2018).
2. Participants included Mustafa Santiago Ali (Environmental Justice, Climate, and Community Revitalization, National Wildlife Federation), Jay Austin (Environmental Law Institute), Emily Berman (UCS), Jacob Carter (UCS), Joel Clement (Harvard University Belfer Center for Science and International Affairs; UCS), Anita Desikan (UCS), Holly Doremus (University of California, Berkeley School of Law), Victor B. Flatt (University of Houston Law Center), Robert L. Glicksman (George Washington University Law School), Gretchen Goldman (UCS), Shaina Goodman (National Partnership for Women and Families), James Goodwin (Center for Progressive Reform), Michael Halpern (UCS), Adrienne Hollis (UCS), Rush Holt (American Association for the Advancement of Science), Peter Jenkins (Public Employees for Environmental Responsibility), Melissa Kelly (University of California, Irvine School of Law), Martha Kinsella (Brennan Center for Justice), Lauren Kurtz (Climate Science Legal Defense Fund), David Michaels (George Washington University School of Public Health), Amit Narang (Public Citizen), Genna Reed (UCS), Michael Robinson-Dorn (University of California, Irvine School of Law), Andrew Rosenberg (UCS), Sidney Shapiro (Wake Forest Univer-

focused on agencies tasked with protecting environmental and human health, including the U.S. Environmental Protection Agency (EPA), the U.S. Department of the Interior (DOI), and the National Oceanic and Atmospheric Administration (NOAA). Based on the discussions at that roundtable, CLEANR and UCS offer the following recommendations for the executive branch, the U.S. Congress, and federal agencies to better protect against conflicts of interest, and to secure and advance the role of science in policymaking.

This Comment expands upon the recommendations CLEANR and UCS proposed in the September 2020 fact sheet, Conflicts of Interest at Federal Agencies: Recommendations for 2021 and Beyond.[3] Part I focuses on conflict-of-interest recommendations pertaining to political appointees, Part II on federal advisory committees (FACs), Part III on the scientific peer review process, and Part IV on oversight and enforcement. Part V concludes.

I. Political Appointments

A. *Protect Against the Appointment and Undue Influence of Individuals With Conflicts of Interest*

Political appointments during the Trump Administration have been fraught with conflicts of interest pertaining to the specific individuals appointed.[4] Appointments for powerful DOI positions, for example, went to individuals who have previously lobbied for the fossil fuel industry. Former Interior Secretary Ryan Zinke keynoted a Louisiana Oil and Gas Association luncheon, where he declared, "Our government should work for you, the oil and gas industry."[5]

His successor, Interior Secretary David Bernhardt, also engaged on issues while in office that were part of his portfolio as a lobbyist. For example, before serving as Secretary, Mr. Bernhardt sought to loosen protections for endangered fish as a lobbyist and lawyer for Westlands Water District in California's Central Valley.[6] These are not isolated examples. DOI's Inspector General (IG) investigated the actions of Assistant Secretary Douglas Domenech and found he violated federal ethics requirements when he met with his former employer about matters he previously worked on—directly weakening endangered species protections.[7]

Unfortunately, DOI is not unique in this respect. Across federal agencies under the Trump Administration, conflicted appointments and ethics failures have resulted in policy agendas that prioritize industry preferences over the public interest, with very few checks.

Historically, presidents have understood that certain critical positions require specialized skills or expertise. Although, "[i]n recent years, presidents have increasingly appointed people—often former associates or political allies—without the requisite qualifications for important positions," and the Trump Administration has not only "embraced candidates who lack relevant qualifications," but even those who are "opposed to the objectives of the office or agency they have been tapped to lead."[8] For example, President Trump nominated Sam Clovis as U.S. Department of Agriculture chief scientist despite his lack of a hard science degree, open skepticism of climate science, and statement that President Trump's agriculture policy would focus "heavily on trade and regulatory issues, not the impacts of increased heat waves, droughts and other impacts of rising global temperatures."[9] Most recently, David Legates was hired as NOAA's deputy assistant secretary of commerce for observation and prediction.[10] He holds this high-level position at an agency whose mission is to predict changes in climate, despite his long history of questioning well-founded climate science and his affiliation with the Heartland Institute—a climate denialist think-tank.[11]

The appointment of unqualified individuals to critical government positions undermines the public's faith in government, and politicizes traditionally nonpartisan government functions such as scientific research.[12] Stronger, enforceable protections are needed to address conflicts of interest and protect against the improper influence of scientific research and policymaking. CLEANR and UCS recommend that Congress take the following actions:

sity School of Law), Patrice Simms (Earthjustice), Ciara Torres-Spelliscy (Stetson University College of Law), Wendy E. Wagner (University of Texas at Austin School of Law), Romany Webb (Columbia Law School Sabin Center for Climate Change Law), Pamitha Weerasinghe (UCS), and Gabriel Weil (Climate Leadership Council).

3. Genna Reed et al., Center for Science and Democracy at UCS & CLEANR, Conflicts of Interest at Federal Agencies: Recommendations for 2021 and Beyond (2020), https://www.law.uci.edu/centers/cleanr/news-pdfs/defense-of-science.pdf.
4. Derek Kravitz et al., *Trump Town*, ProPublica, Oct. 15, 2019, https://projects.propublica.org/trump-town.
5. Louisiana Oil and Gas Association (@LaOilGasAssoc), Twitter (Sept. 18, 2018, 2:00 PM), https://twitter.com/LaOilGasAssoc/status/1042111137603567616.
6. Coral Davenport, *Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client*, N.Y. Times, Feb. 12, 2019, https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html; Coral Davenport, *Trump's Pick for Interior Dept. Continued Lobbying After Officially Vowing to Stop, New Files Show*, N.Y. Times, Apr. 4, 2019, https://www.nytimes.com/2019/04/04/climate/david-bernhardt-interior-lobbying.html.
7. Office of Inspector General, DOI, Investigative Report of Alleged Ethics Violation by the Assistant Secretary for Insular and International Affairs (2019), https://www.doioig.gov/sites/doioig.gov/files/WebRedacted_AllegedEthicsViolationsASIIA.pdf.
8. National Task Force on Rule of Law and Democracy, Proposals for Reform Volume II, at 22 (2019), https://www.brennancenter.org/sites/default/files/2019-09/2019_10_TaskForce%20II_0.pdf.
9. Kavya Balaraman, *Trump Adviser: No Need to Deal With Climate in Farm Policy*, E&E News, Oct. 20, 2016, https://www.eenews.net/climatewire/stories/1060044564; *see also* Amy Mayer, *Trump's Nominee to Be USDA's Chief Scientist Is Not a Scientist*, NPR, Sept. 4, 2017, https://www.npr.org/2017/09/04/547934012/trumps-nominee-to-be-usdas-chief-scientist-is-not-a-scientist.
10. Rebecca Hersher & Joe Palca, *Longtime Climate Science Denier Hired at NOAA*, NPR, Sept. 12, 2020, https://www.npr.org/2020/09/12/912301325/longtime-climate-science-denier-hired-at-noaa.
11. *Id.*
12. National Task Force on Rule of Law and Democracy, *supra* note 8, at 23.

- *Establish statutory job qualifications for certain high-level positions that warrant specific expertise, experience, or educational background*[13]*:*
    - *On a position-by-position basis.* For example, the director of the U.S. Fish and Wildlife Service must be "by reason of scientific education and experience, knowledgeable in the principles of fisheries and wildlife management."[14]
    - *Through agencywide threshold qualifications.* The U.S. Department of Defense, for example, requires civilian status for most top leadership positions.[15]
- *Address conflict-of-interest issues pertaining to the revolving door.* Conflict-of-interest laws restrict the activities of individuals who leave government service for employment in the private sector—the revolving door.[16] Despite these existing federal restrictions, abuses of the revolving door and the conflicts of interest that come with those abuses compromise the integrity of federal policymaking. To slow the revolving door, Congress should:
    - *Bar political appointees from lobbying their agencies after they leave government service for the duration of the administration in which they serve,*[17] *but no less than two years.* The cooling-off period during which appointees should not be influencing government should be no less than two years. Two years covers a full legislative cycle, and allows for turnover of officials and staff before a former political appointee is permitted to lobby after leaving office.[18]
    - *Close the "strategic consulting" loophole by prohibiting "any lobbying activity to facilitate any communication to or appearance before" any officer or employee of the agency in which the former political appointee served.*[19] Existing revolving door restrictions specify that the type of activity prohibited is lobbying contacts and communications with government officials.[20] Currently, former political appointees can easily get around this restriction through "strategic consulting" arrangements in which the former official directs a lobbying team without directly making the lobbying contact.[21] This recommendation would bring strategic consulting arrangements under the types of lobbying activity prohibited.
- *Enhance transparency by requiring the Office of Personnel Management to maintain an online public directory of all political appointee roles, including acting officials, and requiring agencies to regularly update information they provide for this directory.*[22]

Agencies' conflict-of-interest policies and practices also need to be improved. CLEANR and UCS recommend that agencies' policies include the following provisions:

- *Bar political appointees with financial interests that would be affected by policies on which they work from holding decisionmaking authority on those issues or otherwise having undue influence on policy outcomes.*
    - *Establish criteria for issuing conflict-of-interest waivers.*[23]
    - *Stipulate in all conflict-of-interest waivers the parameters of permitted participation, and release this information to the public for comment before major decisions are made.*[24]
- *Require political appointees to recuse themselves from policy decisions involving any party that was their employer or client during the previous two years, regardless of whether they maintain financial ties to that party. Enforce recusals by:*
    - *Requiring senior political officials to regularly report to agency ethics officers the agenda items from which they recuse themselves.*
    - *Establishing protocols for employees to report breaches of ethics agreements to IGs for further investigation and to ensure the anonymity of reporting employees.*

13. *Id.* at 24; Henry B. Hogue, Congressional Research Service, RL33886, Statutory Qualifications for Executive Branch Positions 12, 15-17 (2015).
14. 16 U.S.C. §742(b).
15. Hogue, *supra* note 13, at 15.
16. 18 U.S.C. §207.
17. Martha Kinsella et al., Brennan Center for Justice, Executive Actions to Restore Integrity and Accountability in Government 11 (2020), https://www.brennancenter.org/sites/default/files/2020-10/ExecutiveActionsReport.pdf.
18. Craig Holman & Caralyn Esser, Public Citizen, Slowing the Federal Revolving Door 3 (2019), https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/Slowing-the-Federal-Revolving-Door-Report.pdf.
19. For the People Act of 2019, H.R. 1, 116th Cong. §8005(a) (2019) (proposing revolving door restrictions on employees moving into the private sector).
20. *E.g.*, 18 U.S.C. §207(c)(1) (providing that senior-level employees in the executive branch may not make advocacy contacts or representations, or any appearance before officers or employees of their former departments or agencies, for one year after the senior employees leave their agency/department); *id.* §201(d)(1) and (2) (providing very senior officials in the executive branch may not for two years make representations or advocacy contacts on any matter before their former agencies, or to any person in certain executive-level positions in any department/agency of the entire executive branch); Holman & Esser, *supra* note 18, at 4; Jack Maskell, Congressional Research Service, R42728, Post-Employment, "Revolving Door," Laws for Federal Personnel 4 (2014).
21. Holman & Esser, *supra* note 18, at 4-5.
22. *See* PLUM Act of 2020, H.R. 7107, 116th Cong. (2020).
23. *See* Kinsella et al., *supra* note 17, at 11; Bipartisan Policy Center, Improving the Use of Science in Regulatory Policy 23 (2009), https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Science-Report-fnl.pdf.
24. Center for Science and Democracy at UCS, Preserving Scientific Integrity in Federal Policymaking: Lessons From the Past Two Administrations and What's at Stake Under the Trump Administration 31 (2017), https://www.ucsusa.org/sites/default/files/attach/2017/01/preserving-scientific-integrity-in-federal-policymaking-ucs-2017.pdf.

- *Require all political appointees to make timely public disclosure of conflicts of interests and to issue recusal statements.*

- *Require timely public posting of agency visitor logs and calendars of political appointees, except for information subject to Freedom of Information Act (FOIA) exemptions.*

These recommendations for Congress and agencies would strengthen protections against conflicts of interest and limit the influence that political appointees with such conflicts of interest may have, both while in office and after leaving government.

B. Address the Shortcomings of the Federal Vacancies Reform Act

The Appointments Clause of the U.S. Constitution requires that the president appoint agency officials with the advice and consent of the U.S. Senate.[25] With more than 1,200 positions requiring Senate confirmation to fill, acting officials and vacancies are not uncommon.[26] However, the Trump Administration stands apart from prior administrations in its use of acting officials and vacancies rate.[27]

In the fourth year of the Trump Administration, of the 757 key positions requiring Senate confirmation, almost 30% remained unfilled. Forty-three percent of EPA positions and 28% of DOI positions were still vacant,[28] and as of October 2020, 13 Senate-confirmed science positions across agencies remained unfilled.[29] Trump explicitly stated that he likes filling vacancies with acting officials because it gives him flexibility—that is, he can fill high-level positions without Senate advice and consent.[30]

While the Federal Vacancies Reform Act (FVRA)[31] attempts to preserve the Senate's advice and consent authority by limiting the individuals authorized to serve as acting officials to three classes of employees[32] and limiting the number of days an acting official can serve to 210 days,[33] presidents have still been able to exploit loopholes in FVRA and, in some cases, completely ignore its requirements.[34] Specifically, presidents have circumvented FVRA's 210-day limit by delegating the responsibilities of agency heads to subordinates who can carry out those responsibilities indefinitely, rather than select acting officials.[35] Additionally, a president's submission of a nomination to the Senate allows an acting official to serve while the Senate considers the nomination.[36] Thus, the Senate can stall making a decision on a nomination to extend the time during which the acting official serves beyond FVRA's 210-day limit.

On an unprecedented level, Trump Administration acting officials have been "quietly dropping 'acting' from their titles"[37] and holding their positions for well beyond the 210-day limit.[38] A district court judge ruled in September 2020 that acting Bureau of Land Management (BLM) Director William Perry Pendley had unlawfully served in his temporary position for 424 days, in violation of FVRA and the Constitution.[39] While awaiting Mr. Pendley's Senate confirmation hearing, rather than officially designate him as acting director, Interior Secretary Bernhardt delegated all "functions, duties, and responsibilities" of the BLM director to Mr. Pendley, which Mr. Pendley had been performing since July 2019.[40]

In issuing an order barring Mr. Pendley from continuing to exercise the authority of the acting BLM director, the district judge stated that "[p]residents cannot avoid their constitutional obligation to appoint Officers on advice and consent of the Senate by making 'temporary' delegations with evasive titles and delegations."[41] In October 2020, the same judge invalidated three Montana land management plans on the grounds that Mr. Pendley oversaw the plans while serving unlawfully as acting BLM director.[42] This order opened up the potential for numerous legal challenges to other land management decisions made by Mr. Pendley,[43] the first of which was filed in Colorado, challenging a revised land management plan that would expand oil and gas development on hundreds of thousands of acres of land.[44]

25. U.S. Const. art. II, §2, cl. 2.
26. *See*, *e.g.*, National Task Force on Rule of Law and Democracy, *supra* note 8, at 16-17; Partnership for Public Service, The Replacements: Why and How "Acting" Officials Are Making Senate Confirmation Obsolete 1 (2020), https://ourpublicservice.org/publications/the-replacements/.
27. *See, e.g.*, National Task Force on Rule of Law and Democracy, *supra* note 8, at 16; Partnership for Public Service, *supra* note 26, at 1.
28. *See* Partnership for Public Service, *Political Appointee Tracker*, https://ourpublicservice.org/political-appointee-tracker/ (last visited Nov. 3, 2020).
29. *See id.*; National Academy of Sciences et al., Science and Technology for America's Progress: Ensuring the Best Presidential Appointments in the New Administration 15-16 (2008).
30. *See* Brian Naylor, *An Acting Government for the Trump Administration*, NPR, Apr. 9, 2019, https://www.npr.org/2019/04/09/711094554/an-acting-government-for-the-trump-administration; Joel Rose, *How Trump Has Filled High-Level Jobs Without Senate Confirmation Votes*, NPR, Mar. 9, 2020, https://www.npr.org/2020/03/09/813577462/how-trump-has-filled-high-level-jobs-without-senate-confirmation.
31. 5 U.S.C. §§3345-3349(d).
32. These three classes are (1) the first assistant to the vacant office; (2) another senate-confirmed official in the executive branch; or (3) a senior official who has been serving in the same agency as the vacant office for at least 90 of the previous 365 days. *Id.* §3345.
33. *Id.* §3346.
34. *See*, *e.g.*, National Task Force on Rule of Law and Democracy, *supra* note 8, at 18; Rebecca Jones, *The Dangers of Chronic Federal Vacancies*, Project on Gov't Oversight, Aug. 6, 2019, https://www.pogo.org/analysis/2019/08/the-dangers-of-chronic-federal-vacancies/.
35. *See*, *e.g.*, Rose, *supra* note 30.
36. 5 U.S.C. §3345; *see also* Margaret Taylor, *Is It Time to Reform the Federal Vacancies Reform Act?*, Lawfare, Mar. 10, 2020, https://www.lawfareblog.com/it-time-reform-federal-vacancies-reform-act.
37. David Dayen, *Trump's Acting Directors Are Quietly Dropping "Acting" From Their Titles*, Intercept, Nov. 29, 2017, https://theintercept.com/2017/11/29/trump-administration-acting-director-cfpb-mick-mulvaney.
38. *E.g.*, Hannah Northey, *"Acting" Titles Vanish Across Trump Admin*, E&E News, Nov. 27, 2017, https://www.eenews.net/greenwire/stories/1060067353/feed.
39. Order at 34, Bullock v. U.S. Bureau of Land Mgmt., No. 4:20-cv-00062-BMM, 50 ELR 20226 (D. Mont. Sept. 25, 2020).
40. *Id.* at 4.
41. *Id.* at 28.
42. Order at 10, Bullock v. U.S. Bureau of Land Mgmt., No. 4:20-cv-00062-BMM, 50 ELR 20238 (D. Mont. Oct. 16, 2020).
43. Scott Streater, *Wave of Lawsuits Coming Over Pendley's BLM Decisions*, E&E News, Oct. 19, 2020, https://www.eenews.net/greenwire/stories/1063716529/search?keyword=pendley.
44. Scott Streater, *First Pendley Lawsuit Targets BLM Colo. Land Use Plan*, E&E News, Oct. 27, 2020, https://www.eenews.net/assets/2020/10/27/docu-

Despite some effective enforcement of FVRA, many argue FVRA's enforcement mechanisms are weak and ineffective.[45] FVRA relies on agencies to self-report vacancies.[46] Self-reporting often results in delayed reporting such that any lawsuit that may have been brought to address unlawful conduct is rendered moot.[47]

Leaving key positions vacant and failing to appoint permanent officials creates instability and undermines effective policymaking.[48] To address the shortcomings of FVRA and better protect against conflicts of interest in filling positions that require Senate confirmation, CLEANR and UCS recommend the following:

- To close the gap of 13 unfilled science positions, *the executive should commit to filling open science leadership positions with individuals who have specialized training or experience and who meet the limits set forth by FVRA.*[49] The scientific leadership of these chief science officers is critical for the effective and strategic oversight of agency science that informs policymaking decisions.[50]
    - Specifically, the president should:
        - *Appoint a widely respected scientist to the position of science advisor to the president and nominate that person to direct the Office of Science and Technology Policy (OSTP).*
        - *Issue an Executive Order requiring all science agencies that do not have an Office of the Chief Scientist to have chief science officers.*[51]
    - *Congress should pass legislation establishing an Office of the Chief Scientist in all science agencies.*
- Rather than allowing vacancies to be filled by an individual in any of the three classes identified in FVRA, *Congress should establish a succession statute that requires the president to first fill a vacancy with an acting official from within the same agency as the vacancy who has served for a minimum period of time in the federal government.*[52] *Once the president has submitted a formal nomination to the Senate, the president would be able to install an acting official from any of the three classes identified in FVRA.*[53]
- *Congress should clarify that when a president terminates an official in a position requiring Senate confirmation, FVRA applies and the vacant position should be filled in accordance with the succession delineated in the recommendation above.*
- *Congress should reduce the time period during which acting officials can serve.*[54]
- To promote transparency and accountability, *Congress should require agencies to regularly report vacancies and appointments made pursuant to FVRA and make this information publicly available online.*[55]

These recommendations would strengthen FVRA and address the political gamesmanship fueled by conflicts of interest that can surround decisions regarding whether and how to fill key vacant positions.

C. Distinguish Science From Policy

Even where vacancies are promptly filled by individuals free of conflicts of interest, the integrity of scientific research and resulting policy decisions can be compromised if there is not a clear understanding among political officials and staff concerning the distinction between scientific judgments and judgments based on policy matters and values.[56]

Policy matters and values should not dictate scientific research outcomes.[57] Similarly, science can inform, but cannot answer, questions of precisely how much risk to human and environmental health should be permissible.[58]

To preserve the integrity of scientific research, there must be "barriers between political appointees who view their mission as the single-minded advancement of the President's policy agenda and career employees charged with providing scientific advice or analysis."[59] Trump Administration political officials have interfered with science in numerous ways since the start of the Administration. For example, DOI halted National Academies of Sciences, Engineering, and Medicine studies on improving

ment_gw_10.pdf.

45. National Task Force on Rule of Law and Democracy, *supra* note 8, at 19.
46. Jones, *supra* note 34.
47. *Id.*
48. *See*, *e.g.*, National Task Force on Rule of Law and Democracy, *supra* note 8, at 15-16.
49. For reference, the U.S. Department of Agriculture's statutory requirements for its chief scientist position are as follows: "The Under Secretary shall be appointed by the President, by and with the advice and consent of the Senate, from among distinguished scientists with specialized training or significant experience in agricultural research, education, and economics." 7 U.S.C. §6971.
50. *See* UCS et al., Restoring Science, Protecting the Public: 43 Steps for the Next Presidential Term 4 (2020), https://ucs-documents.s3.amazonaws.com/science-and-democracy/restoring-science-protecting-the-public.pdf; National Academy of Sciences et al., *supra* note 29.
51. UCS et al., *supra* note 50, at 4.
52. National Task Force on Rule of Law and Democracy, *supra* note 8, at 19.
53. *Id.*
54. *E.g.*, Geof Koss, *Democrats Eye Post-Trump Oversight, Agency Reforms*, E&E News, Sept. 24, 2020, https://www.eenews.net/eedaily/2020/09/24/stories/1063714535 (reporting that U.S. House of Representatives Democrats introduced the Protecting Our Democracy Act, which aims to strengthen congressional oversight of the executive branch by, among other provisions, limiting acting agency heads' tenure to 120 days).
55. National Task Force on Rule of Law and Democracy, *supra* note 8, at 20.
56. *See* Bipartisan Policy Center, *supra* note 23, at 15; Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 Tex. L. Rev. 1601 (2008); Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth "Science" Strategies*, 68 Duke L.J. 1719, 1787-89 (2019).
57. Bipartisan Policy Center, *supra* note 23, at 15.
58. *Id.*
59. McGarity & Wagner, *supra* note 56, at 1785 (citing Doremus, *supra* note 56, at 1640).

safety inspections of offshore drilling[60] and the potential health risks of surface coal mining.[61] EPA's Strengthening Transparency in Regulatory Science rule[62] restricts the use of science in policymaking, and the Agency has been moving it forward during an unprecedented global pandemic, despite opposition from the scientific community.[63]

This is not the first administration in which political officials have meddled in scientific research.[64] Under the George W. Bush Administration, for example, Julie MacDonald, former deputy assistant secretary for fish, wildlife, and parks at DOI, interfered countless times with listing and critical habitat decisions, pressuring staff to change findings, editing scientific reports from the field, and releasing nonpublic information to private-sector sources.[65] An Office of Inspector General (OIG) investigative report disclosed that she had been described as "lean[ing] more toward the question of: 'Does the science fit the policy?'"[66]

To help distinguish science from policy judgments, and to prevent political appointees from interfering with scientific research, CLEANR and UCS recommend the following actions:

- *The president should require agencies to distinguish between scientific questions and policy questions in notices of proposed rules and guidance that are informed by science.*[67] There is precedent for this, as recommended for risk assessment by the National Academy of Sciences (NAS).[68] NAS suggests that the "scientific findings and policy judgments embodied in risk assessments" and "the political, economic, and technical considerations that influence the design and choice of regulatory strategies" are distinguishable.[69] NAS recommends separating the regulatory process into two distinct components: (1) risk assessment, which is primarily "based on scientific considerations, but . . . also requires [policy] judgments to be made when the available information is incomplete"; and (2) risk management, which uses the risk assessment to determine the appropriate regulatory response and "includes the application of value judgments to reach a policy decision."[70] Although NAS concludes that it is not possible to eliminate policy considerations from the risk assessment component, NAS suggests integrity can be preserved by *"development of a procedure to ensure that judgments made in risk assessments, and the underlying rationale for such judgments are made explicit*."[71]

- *The president should require agencies to develop guidance to help ensure that their syntheses of scientific literature underlying significant, science-intensive decisions are conducted by agency scientists who are firewalled from political staff and external interest groups.*[72]

    - *Direct agency political staff to identify the questions that scientific research is expected to inform. Scientific staff should conduct a publicly available literature search as the first step in the decisionmaking process. This search and other parts of the decisionmaking process (e.g., the development of artificial intelligence or computational models) should be protected from political influence.*

    - *Record and make public scientific synthesis documents before they go to political staff.*

    - *Log and publish, as part of the administrative record, all communications between staff and political officials and/or interest groups concerning these scientific syntheses in the decisionmaking process.*[73] The limited scope of the recommendation would ensure it is not overly burdensome so long as communications are warranted.[74]

- *Congress should pass legislation codifying the above recommendations regarding establishment of a firewall between agency scientists and political staff/external interest groups.*[75] *This legislation should also require agencies to provide assurances that assessments integrating scientific information have been analyzed by agency scientists who have been firewalled from political staff.*[76]

- *Congress should pass legislation barring the following conduct of political appointees and requiring that agencies include these principles in scientific integrity policies:*

60. *Another National Academy of Sciences Study Halted*, Union Concerned Scientists, Dec. 18, 2017, https://www.ucsusa.org/resources/attacks-on-science/another-national-academy-sciences-study-halted.
61. *Department of Interior Halts Study on Health Risks of Coal*, Union Concerned Scientists, Aug. 18, 2017, https://www.ucsusa.org/resources/attacks-on-science/department-interior-halts-study-health-risks-coal.
62. U.S. EPA, *Strengthening Transparency in Regulatory Science*, https://www.epa.gov/osa/strengthening-transparency-regulatory-science (last updated Apr. 2, 2020).
63. Aristos Georgiou, *EPA Accused of Trying to Push Through Censored Science Rule During Pandemic*, Newsweek, June 23, 2020, https://www.newsweek.com/epa-push-censored-science-rule-pandemic-1512590.
64. *See* Berman & Carter, *supra* note 1, at 2.
65. Office of Inspector General, DOI, Investigative Report on Allegations Against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife, and Parks 2 (2006), https://www.doioig.gov/sites/doioig.gov/files/Macdonald.pdf.
66. *Id*. at 5.
67. Bipartisan Policy Center, *supra* note 23, at 15.
68. Commission on Life Sciences, National Research Council of the National Academies, Risk Assessment in the Federal Government: Managing the Process (1983).
69. *Id*. at 151.
70. *Id*. at 48, 151.
71. *Id*. at 49.
72. McGarity & Wagner, *supra* note 56, at 1785-800; *see also* Commission on Life Sciences, *supra* note 68, at 152.
73. *See* Kinsella et al., *supra* note 17, at 13.
74. *See* National Task Force on Rule of Law and Democracy, Proposals for Reform 19-20 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_TaskForceReport_2018_09.pdf (arguing that requiring law enforcement log contacts with the White House pertaining to U.S. Department of Justice and other federal agency enforcement-specific matters would deter inappropriate communications and not be overly burdensome).
75. McGarity & Wagner, *supra* note 56, at 1786-87.
76. *Id*. at 1736.

- *Editing or censoring of research findings for personal, financial, ideological, or partisan political gain*.[77]

- *"[D]irecting the dissemination of scientific information that the directing [appointee] knows is false or misleading."*[78]

- *Retaliating or discriminating against researchers "for the development or dissemination of scientific research or analysis that the researchers reasonably believe to be accurate and valid."*[79]

These recommendations would help ensure that policy decisions have been informed by impartial, scientific research uninfluenced by political appointees' agendas. This, in turn, would also better instill public confidence in federal policymaking.

II. Federal Advisory Committees

To ensure that policy decisions are science-based and publicly accountable, the federal government has long relied on the advice of external scientists serving on FACs. FACs play a critical role in shaping federal policy. The Federal Advisory Committee Act (FACA) governs the establishment and operation of FACs.[80] FACA requires that FACs "be fairly balanced in terms of the points of view represented and the functions to be performed," and not "inappropriately influenced by the appointing authority or by any special interest."[81]

The U.S. General Services Administration (GSA) oversees implementation of FACA, and develops regulations and guidance regarding the establishment of advisory committees under FACA.[82] The Office of Government Ethics (OGE) issues guidance and regulations for agencies pertaining to conflict-of-interest statutes.[83] In addition, executive branch departments and agencies are responsible for continually reviewing FACs' performance and compliance with the FACA, FOIA, and related regulations.[84] Each agency also develops its own policies and procedures for following FACA requirements.[85]

Since the start of the Trump Administration, science advisory committees have been neglected, disbanded, or sidelined.[86] This is especially the case at EPA. The Agency, for example, disbanded the Particulate Matter Review Panel, prevented the Scientific Advisory Committee on Chemicals from advising on certain decisionmaking processes, and replaced committee members with individuals who have clear conflicts of interest.[87] In particular, after issuing a memo barring scientists with EPA grants from serving on advisory committees, the Agency announced Louis Anthony Cox Jr. as the new chair of its Clean Air Scientific Advisory Committee (CASAC).

EPA officials had advised former EPA Administrator Scott Pruitt against appointing Mr. Cox due to possible financial conflicts of interest, lack of impartiality, and lack of relevant scientific expertise.[88] Mr. Pruitt ignored staff recommendations and appointed Mr. Cox despite his lack of relevant credentials, fringe scientific views on the role of causal analysis in ambient air quality standards, and long history of questioning the scientific basis for proposed public protections on behalf of regulated industries.[89]

Mr. Cox's proposals as chair of CASAC have endangered public health protections, eroding public confidence in government.[90] Experts in the scientific community have expressed concern that he has compromised the Agency's ability to obtain adequate scientific advice and set a health-protective standard on particulate matter.[91]

Under Mr. Pruitt, political officials consistently and inappropriately influenced the FAC member selection process.[92] Recently, the U.S. Government Accountability

77. National Task Force on Rule of Law and Democracy, *supra* note 8, at 10; *see* Scientific Integrity Act, H.R. 1709, 116th Cong. §3(a) (2019).
78. National Task Force on Rule of Law and Democracy, *supra* note 8, at 10.
79. *Id*.
80. 5 U.S.C. app. 2 §§1-16.
81. *Id.* §5(b)(2)-(3).
82. GSA, *Federal Advisory Committee Act (FACA) Management Overview*, https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-act-faca-management-overview (last reviewed Jan. 28, 2018); U.S. Government Accountability Office, GAO-08-611T, Issues Related to the Independence and Balance of Advisory Committees 1 (2008).
83. OGE, *What We Do*, https://www.oge.gov/web/OGE.nsf/about_what-we-do (last visited Nov. 3, 2020).
84. U.S. Government Accountability Office, *supra* note 82, at 4; GSA, *supra* note 82.
85. U.S. Government Accountability Office, *supra* note 82, at 4.
86. Genna Reed et al., Center for Science and Democracy at UCS, Abandoning Science Advice: One Year in, the Trump Administration Is Sidelining Science Advisory Committees 9 (2018), https://www.ucsusa.org/sites/default/files/attach/2018/01/abandoning-science-advice-full-report.pdf.
87. *Id*. at 5.
88. Letter from Thomas R. Carper, Ranking Member, U.S. Senate, and Sheldon Whitehouse, Senator, U.S. Senate, to Gene L. Dodaro, Comptroller General of the United States, U.S. Government Accountability Office (Feb. 14, 2018), https://www.epw.senate.gov/public/_cache/files/9/2/92393cc8-538a-4631-ad4c-0a57f8b8e676/3BC9F5D8E67D5EA1329CFE774AAA5228.carper-whitehouse-send-new-internal-epa-documents-to-gao.pdf; Press Release, U.S. Senate Committee on Environment and Public Works, After Pruitt Bars Scientists With EPA Grants From Advisory Committees, Carper and Whitehouse Highlight Concerns With New EPA Appointees' Conflicts of Interest (Jan. 9, 2018), https://www.epw.senate.gov/public/index.cfm/2018/1/after-pruitt-bars-scientists-with-epa-grants-from-advisory-committees-carper-and-whitehouse-highlight-concerns-with-new-epa-appointees-conflicts-of-interest.
89. Gretchen T. Goldman & Francesca Dominici, *Don't Abandon Evidence and Process on Air Pollution Policy*, 363 Science 1398, 1399-400 (2019).
90. *See*, *e.g.*, *id*. at 1400.
91. Letter from H. Christopher Frey, Glenn E. Futrell Distinguished University Professor, North Carolina State University et al., to Louis Anthony Cox Jr., President, Cox Associates, and Chair, Clean Air Scientific Advisory Committee, EPA (Dec. 10, 2018), https://yosemite.epa.gov/sab/sabproduct.nsf/086D8B853E0B63AE8525835F004DC679/%24File/PMRP+Letter+to+CASAC+181210+Final+181210.pdf; Jonathan M. Samet, Comments Concerning EPA's Integrated Science Assessment (ISA) for Particulate Matter (2018) (external review draft), *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/02F0FC7F714CAAF08525836000638F9C/$File/CASAC_ISA_PM_Comment-samet.pdf; Goldman & Dominici, *supra* note 89, at 1398-400.
92. *See*, *e.g.*, Mark Hand, *Government Watchdog to Investigate Scott Pruitt's Shake-up of EPA Advisory Boards*, ThinkProgress, Mar. 7, 2018, https://archive.thinkprogress.org/gao-investigating-epa-advisory-boards-b615407c3644//; Warren Cornwall, *Trump's EPA Has Blocked Agency Grantees From Serving on Science Advisory Panels. Here Is What It Means*, AAAS Sci. Mag., Oct. 31, 2017, https://www.sciencemag.org/news/2017/10/trump-s-epa-has-blocked-agency-grantees-serving-science-advisory-panels-here-what-it.

Office (GAO) found that EPA failed to follow its own protocol of documenting "staff input on the best qualified and most appropriate candidates for achieving balanced committee membership before appointing . . . members."[93]

A. Strengthen Protections Against Conflicts of Interest in FACs

Appointing individuals with conflicts of interest to advisory committees can have direct policy and public health consequences. To address conflicts of interest on FACs and protect the scientific integrity of the advice provided by FACs, Congress should pass legislation:

- *Barring those with conflicts of interest from serving on committees unless conflicts are unavoidable.* For example, when an individual's experience and technical qualifications are particularly relevant to the topic the committee will address, and the agency cannot identify another individual with comparable qualifications who does not have a conflict of interest.[94]
    - *If an agency determines conflicts are unavoidable, require it to provide an explanation for the determination as well as a plan for mitigating the known conflict.*
    - *Establish criteria for issuing conflict-of-interest waivers.* Currently, a conflict-of-interest waiver can be issued if "the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved."[95] The recommendation would replace this with the more rigorous NAS standard.[96]
    - *Stipulate in all conflict-of-interest waivers the extent and conditions of permitted participation, and release this information to the public for comment before major decisions are made.*[97]
- *Barring certain types of conflicts.* For example, a National Academies conflict-of-interest policy prohibits specific types of conflicts of interest pertaining to access to confidential information.[98] Types of conflicts to consider may include where an individual is an employee or is funded by a company whose product is under review by the FAC.[99]
- *Establishing educational and professional requirements for some members of specific FACs.*[100]
- *Requiring that the committee makeup of science advisory committees be representative of the relevant scientific disciplines, not views.*[101]
- *Addressing vacancies by establishing*[102]*:*
    - *A default selection process for vacancies that are not promptly filled.*
    - *Staggered terms such that no more than one-third of the FAC members' terms expire within a single fiscal year.*[103]
    - *For-cause removal protections.*

OGE should explicitly define what constitutes a conflict of interest, and provide examples of actions that would breach the appearance of impartiality. OGE should ensure that none of the following constitute a conflict of interest, because none of these characteristics precludes an objective assessment of scientific information presented to a committee:

- *Taking a public position on issues or having a point of view on policy.*
- *Receiving federal research grants and other government funding for scientific work.*[104]
- *Being a member of a scientific association, even if that association has a stated policy agenda.*

Agencies also need to improve and enforce conflict-of-interest policies for FACs by:

- *Ensuring the proper level of scrutiny of conflicts of interest occurs.*
- *Developing rules regarding which questions are appropriate for science advisory committee review and when in a decisionmaking process committee input is most helpful.*[105]

93. GAO, EPA Advisory Committees: Improvements Needed for the Member Appointment Process, GAO-19-280, at 32 (2019), *available at* https://www.gao.gov/assets/710/700171.pdf.
94. Bipartisan Policy Center, *supra* note 23, at 23.
95. 18 U.S.C. §208(b)(3).
96. National Academies, Policy on Committee Composition and Balance and Conflicts of Interest 4 (2003), *available at* https://www.nationalacademies.org/_cache_9122/content/bi-coi_form-0-48857700000 79783.pdf.
97. Center for Science and Democracy at UCS, *supra* note 24, at 31.
98. National Academies, *supra* note 96, at 5.
99. Bipartisan Policy Center, *supra* note 23, at 22.
100. National Task Force on Rule of Law and Democracy, *supra* note 8, at 11.
101. *See* Bipartisan Policy Center, *supra* note 23, at 22, 27.
102. National Task Force on Rule of Law and Democracy, *supra* note 8, at 11.
103. *Id.* (citing the Environmental Research, Development, and Demonstration Act of 1983, S. 2577, 97th Cong. (1982); H.R. 6323, 97th Cong. (1982)).
104. Relatedly, in the February 2020 decision in *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, the U.S. district court judge held that EPA's 2017 Strengthening and Improving Membership on EPA Federal Advisory Committees directive banning EPA grant recipients from serving on EPA FACs was arbitrary and capricious because EPA had failed to provide an explanation for its departure from prior EPA policy. 438 F. Supp. 3d 220, 50 ELR 20038 (S.D.N.Y. 2020).
105. See discussion in Section I.C on distinguishing questions of science from questions of policy.

To enhance transparency and better promote accountability in FACs:

- *Congress should require agencies to disclose:*
  - *Committee formation and member selection criteria, including how agencies screen members and assess the scientific representativeness of committees, and which political officials are involved in the process.*
  - *The roster of the first round of candidates and allow public comments.*
  - *Committee members' qualifications, historical agency and industry affiliations, recent funding history, and any conflict-of-interest waivers granted.*[106]
  - *When and why a FAC charter is not renewed or is disbanded before its charter ends.*[107]
- *Congress should pass legislation instituting a formal petition process for the public to request agencies to assemble FACs for specific issues based on a set of criteria.*
- *Agencies should clearly state the tasks that are required of each FAC, and make public time lines and workplans accordingly.*
- *Agencies should solicit public input on advisory committee charters.*
- *Agencies should announce and enforce relevant conflicts and recusals at every advisory committee meeting.*

These recommendations for Congress and agencies would help protect the scientific integrity of FACs by strengthening conflict-of-interest laws and agency policies and by enhancing transparency through mandatory disclosures and increased public input.

B. Prevent Circumvention of FACA Requirements

FAC members can be appointed as special government employees (SGEs) or representatives. An SGE is an

> officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days.[108]

A representative is "[a]n individual who *is not* a [f]ederal employee ([f]ederal employee who is attending in a personal capacity), who is selected for membership on a [f]ederal advisory committee for the purpose of obtaining the point of view or perspective of an outside interest group or stakeholder interest."[109] Only SGEs are subject to federal conflict-of-interest laws.[110]

Some agencies appoint most or all FAC members as representatives, as opposed to SGEs, and, thus, these FAC members have not undergone reviews for conflicts of interest.[111] OGE has expressed concern that agencies "may be purposely designating their committee members as representatives to avoid subjecting them to financial disclosure statements required for [SGEs] and may not be conducting conflict-of-interest reviews for some committee members when they should have been conducted."[112] OGE further found that some agencies appointed "members as representatives even when the members [were] called on to provide advice on behalf of the government on the basis of their judgment, rather than to represent views of outside organizations."[113]

To prevent inappropriate designation of FAC members:

- *Congress should extend conflict-of-interest disclosure requirements that apply to members designated as SGEs to those designated as representatives.*
  - *Disclosure requirements should include disclosure of past employers and research funding.*[114]
  - *Designated agency ethics officials should evaluate the quality of financial disclosure reviews as part of the periodic reviews of agency ethics programs.*
- *Agencies should issue and enforce policies that representative status is designated when an FAC member is asked to represent the position of a stakeholder or other outside interest group, as opposed to the FAC member's own, individual opinions.*
- *For committees with a mission solely to provide neutral scientific advice (as opposed to those designed to gather input from diverse stakeholders), agencies should ensure that*

106. *See* National Task Force on Rule of Law and Democracy, *supra* note 8, at 11-12; Sidney Shapiro, *Closing the Door on Public Accountability*, Center for Progressive Reform, July 2009, http://progressivereform.net/perspFACA.cfm; *see also* Federal Advisory Committee Act Amendments of 2019, H.R. 1608, 116th Cong. §4(a) (2019). This requirement would not be overly burdensome so as to chill participation because scientists are regularly required to disclose this information in other contexts such as journal submissions and research grants.
107. Genna Reed & Gretchen Goldman, Center for Science and Democracy at UCS, Scientific Integrity of Federal Advisory Committees 4 (2020), https://www.ucsusa.org/sites/default/files/2020-09/si-of-federal-advisory-committees.pdf.
108. 18 U.S.C. §202(a).
109. Wendy Ginsberg & Casey Burgat, Congressional Research Service, R44253, Federal Advisory Committees: An Introduction and Overview 12 n.67 (2016), https://fas.org/sgp/crs/secrecy/R44253.pdf (emphasis added) (citing FACA database definition).
110. GAO, Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance 18 (2004), *available at* https://www.gao.gov/assets/250/242039.pdf.
111. *Id.* at 18, 20.
112. *Id.* at 20, 21 (describing an OGE study of agencies, including DOI, that appointed all or almost all members as representatives).
113. *Id.* at 21.
114. National Task Force on Rule of Law and Democracy, *supra* note 8, at 11-12; *see also* Kinsella et al., *supra* note 17, at 15.

members are appointed as SGEs and vetted for financial conflicts of interest and biases.[115]

Further, FACA requirements do not apply to "[a]ny committee or group created by non-[f]ederal entities (such as a contractor or private organization), provided that these committees or groups are not actually managed or controlled by the executive branch."[116] Courts have held that "groups formed by private contractors that are not subject to direct management or control by an administrative agency are not 'utilized' by the agency so as to trigger FACA."[117] *Congress should eliminate the ability of federal agencies to circumvent FACA requirements by utilizing nonfederal entities to establish advisory committees by extending FACA rules to advisory committees organized by federal contractors.*[118]

These recommendations would eliminate loopholes in FACA that have been exploited to avoid disclosing conflicts of interest.

III. Scientific Peer Review Process

Peer review is an essential component of the scientific process, ensuring the quality and integrity of scientific research used to inform policy decisions.[119] As stated in the Office of Management and Budget's (OMB's) 2005 peer review bulletin, peer review "is one of the most important procedures to ensure that the quality of published information meets the standards of the scientific and technical community."[120] Peer review practices and purposes differ across agencies. Generally, however, peer review is used to assess the validity and quality of research at different stages throughout the research process,[121] in order to make decisions about "journal publication, grant funding, and information dissemination."[122]

Peer review can improve agency decisionmaking by increasing the "technical quality and credibility of regulatory science,"[123] and by enhancing the transparency surrounding the science on which an agency bases its decision.[124] Thus, agencies should *affirm that scientific peer review is the appropriate standard for ensuring the quality of agency scientific information.*

The peer review process has been proven vulnerable to undue influence from individuals with conflicts of interest. For example, a 2004 EPA study found that "the injection of hydraulic fracturing fluids into coal-bed methane wells poses little or no threat to USDWs [underground sources of drinking water]."[125] However, a whistleblower revealed that five of the seven members of the peer review panel appeared to have conflicts of interest, and that earlier drafts of the study had found potential threats to drinking water.[126]

Building upon the OMB peer review bulletin, *Congress should require agencies to develop clear guidance for using peer review in scientific assessments. OSTP should ensure that agencies apply peer review guidance consistently.*[127]

To address conflicts of interest and protect the integrity of the scientific peer review process, agencies should:

- *Bar those with financial ties to institutions or entities potentially affected by the review—including reviewers, government contractors, and agency staff administering the process—from involvement in the peer review process.*
    - *Establish criteria for issuing conflict-of-interest waivers.*
    - *Stipulate in all conflict-of-interest waivers the extent and conditions of permitted participation and release this information to the public for comment before major decisions are made.*[128]
    - *Require that scientists involved in a peer review of agency scientific documents be technically qualified and that agencies use at least one peer reviewer external to the agency whenever possible.*[129] "External experts often can be more open, frank, and challenging to the status quo than internal reviewers, who may feel constrained by organizational concerns."[130]

To promote transparency and accountability, agencies should:

- *Make public the process used for peer review in each situation, including:*
    - *How potential reviewers were identified.*

115. Center for Science and Democracy at UCS, Presidential Recommendations for 2020, at 11 (2020), *available at* https://www.ucsusa.org/sites/default/files/2020-01/presidential-recommendations-for-2020_0.pdf.
116. 41 C.F.R. §102-3.40(d) (West 2020).
117. Administrative Conference of the United States, Administrative Conference Recommendation 2011-7: The Federal Advisory Committee Act—Issues and Proposed Reforms (2011), https://www.acus.gov/sites/default/files/documents/Recommendation-2011-7-Federal-Advisory-Committee-Act.pdf (citing Byrd v. U.S. Envtl. Prot. Agency, 174 F.3d 239, 246-47, 29 ELR 21150 (D.C. Cir. 1999); Food Chem. News v. Young, 900 F.2d 328, 333 (D.C. Cir. 1990)).
118. Bipartisan Policy Center, *supra* note 23, at 25.
119. *See*, *e.g.*, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2666 (Jan. 14, 2005); GAO, Peer Review Practices at Federal Science Agencies Vary, GAO/RCED-99-99 (1999).
120. 70 Fed. Reg. at 2665.
121. GAO, *supra* note 119, at 6.
122. 70 Fed. Reg. at 2666.
123. Sarah Grimmer, *Public Controversy Over Peer Review*, 57 Admin. L. Rev. 275, 281 (2005).
124. *See* J.B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 84 Wash. U. L. Rev. 1, 8 (2006).
125. Gretchen Goldman et al., Center for Science and Democracy at UCS, Toward an Evidence-Based Fracking Debate 17 (2013) (citing U.S. EPA, Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs Study (2004)), https://www.ucsusa.org/sites/default/files/2019-09/fracking-report-full_0.pdf.
126. *Id.*
127. *Id.* at 5.
128. Center for Science and Democracy at UCS, *supra* note 24, at 31.
129. Center for Science and Democracy at UCS, *supra* note 115, at 5.
130. 70 Fed. Reg. at 2669 (citing National Research Council of the National Academies, Peer Review in Environmental Technology Development Programs: The Department of Energy's Office of Science and Technology 3 (1998)).

- *Why specific individuals were selected among the larger set of candidates.*
- *Who in the agency makes the selection of the individual peer reviewers and the basis for his or her decision.*
- *Whether the decisionmaker is or is not a scientific expert on the matter.*

- *Require that peer reviewers' substantive comments on scientific documents and agency responses to those comments be made publicly available, while protecting the anonymity of reviewers.* "The credibility of the final scientific report is likely to be enhanced if the public understands how the agency addressed the specific concerns raised by the peer reviewers."[131]

These recommendations to protect against conflicts of interest within the peer review process will contribute to the scientific soundness of research and findings that inform federal policymaking.

IV. Oversight and Enforcement

The recommendations in Parts I through III above cannot adequately safeguard the use of science in federal policymaking without independent oversight and effective enforcement. Oversight and enforcement of conflicts of interest is placed in a number of different hands—Congress' implied powers include that of oversight and investigation, OGE was created to oversee executive branch compliance with conflict-of-interest and other ethics laws,[132] and IGs have the authority to conduct investigations.[133] The following recommendations are intended to improve oversight and strengthen enforcement of conflict-of-interest laws and policies.

A. Preserve Independent Oversight of IGs

The independence and integrity of each agency's OIG is essential for the effective oversight and enforcement of government ethics regulations. Individuals serving in OIG leadership roles must be qualified to identify, investigate, and deal with waste, fraud, and abuse, including conflicts of interest and the appearance of impropriety.

In 2020, the Trump Administration fired two Senate-confirmed IGs and replaced several acting IGs under questionable circumstances—five IGs over the course of six weeks—including some who were actively investigating Administration officials.[134] The Trump Administration has also left key oversight positions unfilled by Senate-vetted appointees, and allowed sometimes unqualified acting officials to serve for extended periods.[135] To preserve independent oversight by OIGs:

- *The president should nominate qualified individuals to lead OIGs and fill vacant Senate-confirmed positions that are currently filled by acting IGs.*[136] *While confirmations of nominees are pending, the president should ensure that all acting IGs are qualified for their positions, as required by the Inspector General Act, and free of conflicts of interest.*[137]

- *Congress should require the Council of the Inspectors General on Integrity and Efficiency to create and make public a list of recommended IG nominees.*[138]

- *Congress should only allow removal of a Senate-confirmed IG from office for substantial cause,*[139] *and should require that the president provide Congress and the public with substantial justification and explanation of cause for removing an agency IG.*[140]

B. Use Congressional Oversight

Although not explicit in the Constitution, Congress' oversight and investigative powers are implied,[141] and the U.S. Supreme Court has confirmed the legal basis of this authority.[142] The U.S. House of Representatives and Senate have "largely delegated [their] constitutional oversight powers to [their] standing committees."[143] Committees thus exercise this oversight through investigations into executive actions.[144] *Congress should use its congressional oversight authority to hold the Administration accountable for decisionmakers with conflicts of interest.*

There are many ways in which Congress may choose to exercise its oversight authority. Examples of this include commissioning GAO reports on relevant topics; penning letters to agencies requesting information or clarification

131. *Id.* at 2670.
132. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1825 (codified as amended at 5 U.S.C. app. §401).
133. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app.).
134. Joe Davidson, *Trump Is Allergic to Independent Oversight. The Inspectors Must Be Protected*, Wash. Post, May 23, 2020, https://www.washingtonpost.com/politics/trump-is-allergic-to-independent-oversight-the-inspectors-must-be-protected/2020/05/22/5ce644f4-9c4b-11ea-b60c-3be060a4f8e1_story.html.
135. *Inspector General Vacancy Tracker*, Project on Gov't Oversight, May 5, 2020, https://www.pogo.org/database/inspector-general-vacancy-tracker.
136. Jones, *supra* note 34; *see* Kinsella et al., *supra* note 17, at 7.
137. *See* Pub. L. No. 95-452, 92 Stat. 1101; Kinsella et al., *supra* note 17, at 7.
138. Letter from Chuck Grassley, Chairman, Senate Finance Committee, and Ron Wyden, Ranking Member, Senate Finance Committee, to Michael E. Horowitz, Chair, Council of Inspectors General on Integrity and Efficiency (Apr. 14, 2020), https://www.finance.senate.gov/imo/media/doc/2020-04-14%20CEG%20and%20RLW%20to%20CIGIE%20(IG%20noms).pdf.
139. *E.g.*, Press Release, U.S. House of Representatives Permanent Select Committee on Intelligence, House Democrats Introduce Landmark Reforms Package, the Protecting Our Democracy Act (Sept. 23, 2020), https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=1075 ("Permits only the President or the head of an agency to remove or place on administrative leave any Inspector General (IG), including IGs of the Intelligence Community (IC), and only for cause").
140. Press Release, Office of Sen. Chuck Grassely, Grassley Leads Bipartisan Bill to Bolster Inspector General Protections (June 18, 2020), https://www.grassley.senate.gov/news/news-releases/grassley-leads-bipartisan-bill-bolster-inspector-general-protections; *see* Kinsella et al., *supra* note 17, at 7.
141. *See* U.S. Const. art. 1, §1.
142. McGrain v. Daugherty, 273 U.S. 135 (1927).
143. Congressional Research Service, R45442, Congress's Authority to Influence and Control Executive Branch Agencies 31 (2018).
144. Congressional Research Service, R41079, Congressional Oversight: An Overview 9 (2010).

regarding concluded, ongoing, or planned activities; submitting requests for documents or information; introducing legislative solutions; holding congressional hearings; requesting NAS studies; requesting IG studies to examine allegations of waste, fraud, or abuse at agencies; or issuing subpoenas.[145]

C. Strengthen OGE's Enforcement Authority

While OGE's mission is to "provide overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest,"[146] it is not structured to adequately enforce conflict-of-interest laws.[147] OGE does not have "investigative or prosecutorial authority"—"OGE's mission is one of prevention."[148] To strengthen effective enforcement of conflict-of-interest laws, Congress should:

- *Grant OGE the authority to "initiate and conduct investigations of alleged ethics violations in the executive branch on referral from another government body or on its own initiative."*[149]

- *Create a separate enforcement division within OGE to separate enforcement staff from other staff functions.*[150]

These recommendations on oversight and enforcement would ensure that the conflict-of-interest laws and policies in place are effective. Effective oversight and enforcement is critical to the scientific integrity of research used in federal policymaking.

V. Conclusion

The Trump Administration has highlighted the vulnerabilities in the federal system by which science-based decisions are made, particularly where conflicts of interest are present. Safeguards to protect against distortions of scientific research and resulting federal policies are long overdue. Where federal policy decisions must be informed by scientific evidence, we need qualified, independent individuals who are unencumbered by conflicts of interest and able to make decisions that benefit the public. In contrast to those who are hand-selected for specific policy agendas that undermine science-informed decisionmaking and heighten distrust of the federal government, the public interest is best served by political appointees and advisory committees that are free from financial or ideological interests.

These recommendations for political leaders, agency career staff, and Congress are intended to improve conflict-of-interest disclosure and management policies surrounding political appointments, FACs, and the scientific peer review process, and aim to enhance oversight and enforcement to protect against such conflicts in the future. Enactment of such recommendations will help restore trust, and bolster opportunities for the public to hold decisionmakers accountable. In turn, such steps will help ensure that federal decisions are informed by scientific evidence, free of financial, ideological, or political conflicts of interest.

145. *E.g.*, Congressional Research Service, IF10015, Congressional Oversight and Investigations 2 (2014); Congressional Research Service, RL30240, Congressional Oversight Manual 26-30 (2020).
146. OGE, Strategic Plan: Fiscal Years 2018-2022 (2018), https://www.oge.gov/web/OGE.nsf/0/5F2BA63E1DDF407D852585B6005A1E14/$FILE/Finished%202018-22%20Strategic%20Plan.pdf.
147. National Task Force on Rule of Law and Democracy, *supra* note 74, at 12.
148. OGE, *Resources for Reporting Misconduct*, https://www.oge.gov/web/oge.nsf/about_reporting-misconduct (last visited Nov. 17, 2020).
149. National Task Force on Rule of Law and Democracy, *supra* note 74, at 13, 15.
150. *See id*. at 15.