



Executive Branch Ethics and Financial Conflicts of Interest: Disqualification

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Newly [proposed legislation](#) in the 116th Congress concerns government ethics reform, including conflicts of interest among executive branch officials. Federal officials have a [basic duty](#) not to allow private gain to influence their government service, which includes “not hold[ing] financial interests that conflict with the conscientious performance of duty.” [Federal statutes](#), as well as a [code of conduct](#) for executive branch employees, make this principle part of a federal regulatory scheme intended to prevent officials from benefiting personally from their offices. The current federal statutory scheme regulating conflicts between an official’s personal financial interests and his or her official duties has three prongs: [disclosure](#), disqualification, and divestiture (i.e., a 3-D system). This discussion of the disqualification requirement, also known as recusal, is the second in a three-part series examining conflicts of interest in the executive branch.

Disqualification Requirements in the Executive Branch

The principal disqualification statute for executive branch officials—[18 U.S.C. § 208](#) (section 208)—imposes [criminal penalties](#) for executive branch officials who fail to recuse themselves when their official role would conflict with their financial interests. Section 208 broadly applies to “officers and employees” within executive branch agencies regardless of the officials’ seniority or rate of pay. It also expressly applies to [special government employees](#) (SGE) who serve in temporary or intermittent government roles. Although the statute was originally silent regarding its applicability to the President and Vice President, Congress later amended it to exclude those officials by [definition](#).

The Office of Government Ethics (OGE) has promulgated regulations [interpreting](#) section 208 and [adopting](#) its prohibition as part of the executive branch’s code of conduct. According to those regulations, section 208 [prohibits](#) officials from “participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him ...

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has a financial interest, if the particular matter will have a direct and predictable effect on that interest.” An official’s participation is *personal* when he or she has a direct and active role and is *substantial* when the official’s “involvement is of significance to the matter.” *Particular matters* include a decision, approval, disapproval, recommendation, advice or investigation when such an action is taken in the context of a proceeding, application, ruling, contract, claim, controversy, charge, accusation, or arrest. OGE [summarizes](#) these examples as “encompass[ing] only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.” Disqualification is [not necessary](#), however, when the official considers or adopts a broad policy position relating to interests of a large, diverse group of individuals.

Section 208 requires disqualification for financial interests held by the official individually as well as by persons or entities who are close enough to the official that their interests may be “imputed” to the official. Imputed interests include those held by spouses, minor children, general partners, organizations in which the official serves or is employed, and organizations with whom the official has or is arranging future employment. According to [OGE regulations](#), such interests disqualify an official’s involvement only when the involvement has a “direct and predictable effect on that interest.” In other words, there must be “a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest” as well as “a real, as opposed to a speculative possibility that the matter will affect the financial interest.”

Separately, the [STOCK Act](#) requires certain senior executive branch officials (i.e., [those who file](#) public financial disclosure reports, which includes the President and Vice President) who negotiate for or agree to any future employment or compensation while still in office to recuse “whenever there is a conflict of interest, or appearance of a conflict of interest, for such individual with respect to the subject matter [of the negotiations or agreement].” OGE [guidance](#) has [affirmed](#) that this recusal requirement [applies](#) to the President and Vice President as officials who are required to file financial disclosure reports under the Ethics in Government Act, including.

Additional OGE [regulations](#) adopted as part of the executive branch’s code of conduct require officials to disqualify themselves “to avoid an appearance of loss of impartiality in the performance of . . . official duties.” This disqualification requirement applies to involvement in “a particular matter involving specific parties” that either is “likely to affect the financial interest of a member of [the official’s] household” or involves a person, with whom the official has a [covered relationship](#), who is also a party or represents a party in the matter. Thus, this regulatory disqualification requirement applies to a narrower set of matters than section 208, but imputes the interests of a broader range of interests to the official. The impartiality disqualification requirement [applies](#) generally to executive branch officers and employees, including special government employees, but, like section 208, excludes the President and Vice President.

Constitutionality of Disqualifying the President

The constitutionality of applying disqualification requirements to the President and Vice President has never been litigated. Some Members of Congress questioned whether section 208 applied to the President and Vice President when considering Nelson Rockefeller’s confirmation as Vice President in 1974. In response, then-Acting Attorney General Laurence H. Silberman [concluded](#) that “serious doubt as to constitutionality urges against an interpretation which would render Section 208 applicable to the President; and it seems almost certain that the President and Vice President were intended to be treated alike.” OGE reiterated the Department of Justice’s (DOJ’s) opinion in a 1983 [advisory letter](#), agreeing that “the President and Vice President are not legally subject” to conflict of interest laws including section 208, but simultaneously stated that “as a matter of policy, the President and Vice President should conduct themselves as if they are so bound.” Consistent with DOJ’s interpretation, in 1989 Congress excluded the President and Vice President from section 208 by expressly limiting the definition of covered officials.

Thus, although the Constitution may afford Congress some authority to impose certain ethics rules on the President (e.g., Ethics in Government Act's disclosure requirements, STOCK Act), the differing approaches Congress has adopted reflect the lack of clear constitutional limits on Congress's authority.

Should Congress revisit disqualification requirements, DOJ's [analysis](#) of section 208's legislative history and potential constitutional questions may inform its consideration. That analysis, and the underlying legislative history of section 208 upon which it relied, cited an outside report assessing federal conflict of interest laws that acknowledged the President's central role in the executive branch, but viewed the President and Vice President's potential conflicts of interest as distinct from those of other executive branch officials. That report stated that "the conflict of interest problems of the President and the Vice President as individual persons must inevitably be treated separately from the rest of the executive branch," citing the President's unique position as an official who regularly receives symbolic gifts and characterizing disqualification of the President from policy decisions as "inconceivable." Relying upon this legislative history, DOJ concluded that the disqualification requirement could be applied only to officials appointed by the President and "those subordinate officials who are employed by departments and agencies in the executive branch."

Noting the canon of [statutory construction](#) requiring avoidance of interpretations that would raise constitutional questions, DOJ's [analysis](#) identified two possible grounds upon which potential application of the disqualification requirement to the President and Vice President could be unconstitutional. First, applying a disqualification requirement to the President (or Vice President), according to DOJ, could "disable him from performing some of the functions prescribed by the Constitution." For example, among other constitutional duties falling exclusively within the purview of the Presidency, the President is the sole official vested with [constitutional authority](#) to sign legislation, which is required for it to take effect. The President's disqualification on particular matters would preclude the President from fulfilling these executive branch functions for which he has the sole authority to act. Second, according to DOJ, applying a disqualification requirement to the President could "establish a qualification for his serving as President ... beyond those contained in the Constitution." [Article II, section 1, clause 5](#) of the U.S. Constitution sets three qualifications for the Presidency: age, residency, and citizenship. Although the Supreme Court has not ruled specifically on this clause, it has [indicated](#) in related cases involving the qualifications for Members of Congress that the Constitution provides the "[exclusive source of qualifications](#)." It is unclear, however, whether the Court would necessarily agree with either of the DOJ's arguments.

Methods of Compliance and Options for Congress

Although current law generally requires officials to recuse when their financial interests conflict with their official duties, some officials may retain those financial interests if the official qualifies for an exemption or seeks a waiver. In addition to an [exemption](#) for certain interests involving American Indian birthrights, Section 208 authorizes OGE to issue [regulations](#) to exempt certain [categories](#) of interests from disqualification that are "too remote or too inconsequential to affect the integrity of the [official's service]." Alternatively, an appointing official may waive certain conflicts on an individual basis if, after full disclosure of the financial interest and the nature of the particular matter, he or she determines that "the interest is not so substantial as to be deemed likely to affect the integrity of the [official's service]." Similarly, officials who appoint SGEs to advisory committees may issue waivers allowing the SGE to retain financial interests if the appointing official "certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved." If an official does not recuse and does not qualify for an exemption or receive a waiver, civil and criminal [penalties](#), including fines of up to \$50,000 per violation or up to five years' imprisonment, may apply.

OGE has issued [guidance](#) regarding the availability and issuance of waivers. [Section 208](#) and [OGE regulations](#) respectively provide for public availability of copies of exemptions granted and waivers

issued by agencies upon request, but neither provides an enforcement mechanism to compel public disclosure. Toward that end, OGE has solicited [information](#) from executive agencies about their issuance of waivers and authorizations under several authorities including section 208. Following [reports](#) of a dispute regarding OGE's authority to request such information, some Members of [Congress](#) and [commentators](#) have called for greater disclosure of the use of these methods of compliance.

Conclusion

Generally, Congress has applied disqualification—or recusal—requirements to nearly all executive officials, regardless of seniority or pay. Consistent with a DOJ legal analysis that raised constitutional questions about potential interference of disqualification requirements with the President's constitutional duties and qualifications, however, Congress has not applied the primary disqualification requirement—section 208—to the President and Vice President. The constitutionality of applying such requirements to the President and Vice President has not been litigated, leaving the parameters of Congress' constitutional authority in this area unclear. Alternatively, as discussed in a [separate Sidebar](#), Congress has applied ethics rules requiring transparency through [disclosure requirements](#). Should Congress revisit disqualification requirements for executive officials, the exact parameters of such requirements and exemptions will inform the constitutional analysis.