United States Senate
WASHINGTON, DC 20510

June 10, 2009

The Honorable Robert I. Cusick
Director
Office of Government Ethics
1201 New York Avenue, N.W., Suite 500
Washington, DC 20005

Dear Director Cusick:

The work of the Government is the work of the people and it should be public and available for all to see. It has been said that sunlight is the best disinfectant and that opening up the business of the Government will ensure that the public trust is not lost. As a senior member of the United States Senate, I have consistently worked to ensure that the business of the Government is done in as open and transparent manner as possible.

President Obama issued Executive Order 13490, *Ethics Commitments by Executive Branch Personnel,* (herein Order) on January 21, 2009, to much fanfare. The White House Press Secretary said the Executive Order was signed because the American people "deserve more than simply an assurance that those coming to Washington will serve their interests. They deserve to know that there are rules on the books to keep it that way."[1]

The Order requires that "every appointee in every executive agency" shall sign a pledge that: (1) prohibits them from obtaining gifts from registered lobbyists or lobbying organizations, (2) limits appointees from working on matters involving specific parties that are directly and substantially related to former employers or former clients, including regulations or contracts, (3) limits individuals that were registered lobbyists in the two years before the appointment from participating in a matter or specific issue area that they lobbied on prior to their appointment for two years and restricts them from being employed by any executive agency they lobbied. These provisions, known as the gift ban and revolving door bans, are the heart of the Executive Order and were designed, "as a downpayment on the change [President Obama] has promised to bring to Washington.[2]

I have watched with interest the implementation and enforcement of the Order. However, the implementation of the Order has not matched the promises of openness and transparency that were made supporting it when it was signed. I write today to request that the Office of Government Ethics (OGE) take immediate action under its authority granted in the Ethics in Government Act of 1978, as amended, (herein Act) to ensure that all waivers issued under Section 3 of the Order be consolidated and publicly displayed on the OGE website.

Specifically, Section 3 provides that the Director of the Office of Management and Budget (OMB), or his or her designee, the authority to grant "a written waiver of any restrictions

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[1] Press Release, Office of the Press Secretary, Statement from the Press Secretary on the President's Signing of Two Executive Orders and Three Memoranda (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/StatementfromthePressSecretaryonthePresidentssigningoftwoExecutiveOrdersandthreeMe/ (last visited 6/8/09).

[2] *Id.*

contained in the pledge signed by such an appointee."[3] Section 3 also states that the Director of OMB, or his or her designee, must certify in writing "(i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver."[4] In a February 23, 2009, memorandum to all "Agency Heads and Designated Agency Ethics Officials" you wrote that OMB Director Peter Orszag delegated his authority to issue Section 3 waivers to each Designated Agency Ethics Official (DAEO) of each executive agency, in consultation with the Counsel to the President.[5] You added that "[i]t is the President's intention that waivers will be granted sparingly and that their scope will be as limited as possible."[6] Your memorandum also outlined that the "advance consultation with the Counsel to the President remains and is to be strictly enforced."[7]

I am concerned that Section 3 could be used to gut the ethical heart of the Order. Each day, new nominees to key Government positions are reported. Many of these nominees have been nominated despite the fact that they have previously served as lobbyists or in a manner that would preclude their participation under the Order absent a Section 3 waiver. For example, I publicly objected to a waiver for the nomination of William Lynn to be the Deputy Secretary of Defense because, among other things, of his previous role as the principle Department of Defense lobbyist for Raytheon Company—a large defense contractor. Further, it was announced just a few weeks ago that the nomination of Charles Bolden for Administrator of NASA will require a waiver because of his work as a lobbyist for a NASA contractor.[8] Other examples include the waivers granted Jocelyn Frye who was a registered lobbyist prior to her service in the Office of the First Lady[9], and Cecilia Munoz who was a lobbyist prior to serving in the White House Office of Intergovernmental Affairs.[10] These are just a couple of the public examples of those who either received waivers or were forced to recuse themselves from working on issues related to their former employment—as was the case for Mark Patterson, the Chief of Staff to Treasury Secretary Timothy Geithner who previously served as a lobbyist for Goldman Sachs.[11]

In a February 17 letter to OMB Director Orszag, I requested information regarding any and all waivers and recusals issued under the Order. On March 3, 2009, Counsel to the President, Gregory B. Craig attached a memorandum prepared by Norman Eisen, Special Counsel to the President that said this information will not be available until the annual report required by the Order is published. That is unacceptable and the American people deserve this information in real time. That memorandum also stated that the White House has, "asked the Office of Government Ethics (OGE) to take the lead in developing and promulgating guidance with respect to the handling and disclosure of waivers in addition to the annual report [outlined by the

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[3] Exec. Order No. 13490, Ethics Commitments by Executive Branch Personnel (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Ethics-Commitments-By-Executive-Branch-Personnel/ (last visited June 4, 2009).
[4] *Id.*
[5] Memorandum from Robert I. Cusick, Director, U.S. Office of Government Ethics, to Designated Agency Ethics Officials DO-09-008, (Feb. 23, 2009).
[6] *Id.*
[7] *Id.*
[8] Kenneth Chang, *Former Astronaut Nominated to Lead NASA*, THE NEW YORK TIMES, May 24, 2009.
[9] Waiver Pursuant to Section 3 of Executive Order 13490, (Feb. 20, 2009), *available at* http://www.whitehouse.gov/assets/documents/frye_waiver_final_2009.pdf (last visited June 5, 2009).
[10] Waiver Pursuant to Section 3 of Executive Order 13490, (Feb. 20, 2009), *available at* http://www.whitehouse.gov/assets/documents/munoz_waiver_final_2009.pdf (last visited June 5, 2009).
[11] Fredreka Schouten, *Geithner Names Ex-lobbyist as Treasury Chief of Staff*, USA TODAY, Jan. 27, 2009.

Order]."[12] Further, the memorandum noted that the White House Counsel is, "in the process of working with OGE to determine the most appropriate method for disclosing recusal information and…expect[s] a uniform procedure for this to be addressed in the…OGE guidance."[13]

The current decentralized system delegating Section 3 waiver authority to each agency DAEO has created a situation where the transparency and accountability touted by the White House are lost because there is no comprehensive database of the waivers and recusals granted. Instead, the White House has chosen to selectively publish Section 3 waivers on the White House website and wait for an annual report to produce a full accounting of all waivers and recusals. As the Director of OGE, you are in the position to immediately change this and bring the transparency promised by the Obama Administration.

In addition to the authority granted to you in the Order and the guidance requested by the White House Counsel, the Ethics in Government Act provides the Director of OGE a number of authorities to bring sunlight upon Section 3 waivers issued by DAEOs. Specifically, the Act explicitly provides the Director of OGE the authority to, among other things, "interpret rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements."[14] The Act also provides the Director of OGE the authority to require "such reports from executive agencies as the Director deems necessary."[15] Further, the Act authorizes the Director to prescribe regulations that requires each executive agency to submit to OGE a report containing "any other information that the Director may require in order to carry out the responsibilities of the Director under this title."[16] Finally, the Act is clear that when the Director makes a request to an executive agency, the agency shall furnish "all information and records in its possession which the Director may determine to be necessary for the performance of his duties."[17]

Based upon these existing statutory authorities you have the authority to require each DAEO to provide OGE with an accounting of all waivers and recusals issued. The existing statutory authority also allows you to provide that information to Congress in your biennial Report to Congress required under the Act.[18] In addition to the statutory authority granted your office, Executive Order 13490 also requires that you provide an "annual public report on the administration of the pledge and this order."[19] Taken together these provisions provide you with the authority to account for all waivers and recusals issued by executive agencies. I also believe that OGE should utilize any and all authority to consolidate all waivers and recusals pursuant to the Order and make them public on the OGE website as soon as possible—not simply wait for an annual report.

Accordingly, I call upon you in your capacity as Director to immediately implement policies and procedures to collect all waivers granted by DAEOs and recusals by former lobbyists. As my previous request to OMB went unanswered, I ask that you provide me a full accounting of all waivers and recusals since January 21, 2009, including: (1) the name of the individual, (2) the agency employing the individual, (3) the reason and justification for granting any waiver, (4) the

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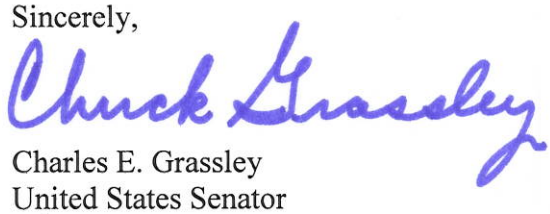
[12] Memorandum for Gregory B. Craig, Counsel to the President, from Norman Eisen, Special Counsel to the President, 2 (March 3, 2009).
[13] *Id.*
[14] 5 U.S.C. App. 4 § 402(b)(6) (2006).
[15] 5 U.S.C. App. 4 § 402(b)(10) (2006).
[16] 5 U.S.C. App. 4 § 402(e)(1)(C) (2006).
[17] *See* 5 U.S.C. App. 4 § 403 (a) (2006).
[18] 5 U.S.C. App. 4 § 408 (2006).
[19] Exec. Order No. 13490, Sec. 4(c)(5), *supra* note 3.

name of the DAEO that issued any waiver, and (5) a description of any and all issue areas from which the employee is recused.

The American people deserve a full accounting of all waivers and recusals to better understand who is running the Government and whether the Administration is adhering to its promise to be open, transparent, and accountable. I urge you to take immediate action to make any waivers and recusals public and ask for your response to my requests no later than June 19, 2009.

Sincerely,



Charles E. Grassley
United States Senator

Cc: The Honorable Peter Orszag
Director, Office of Management and Budget

Gregory B. Craig
Counsel to the President

Norm Eisen
Special Counsel to the President for
Ethics and Government Reform