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# TRUMP INC.

## THE ETHICS CRISIS IN TRUMP'S FIRST 100 DAYS

A REPORT BY

**CREW** | citizens for responsibility  
and ethics in washington

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## EXECUTIVE SUMMARY

Donald Trump spoke often during the presidential campaign of his intention to “drain the swamp” – that is, to clean up the corruption, influence, and cronyism that is too prevalent in Washington. Unfortunately, the first 100 days of the Trump administration has had precisely the opposite effect, bringing in conflicts of interest and ethical and legal problems on a massive scale not seen since at least President Nixon and perhaps ever.

At the core of these problems is President Trump’s decision not to divest from his vast business empire. President Trump controls an organization made up of hundreds of different companies in at least 20 countries. The Trump Organization operates hotels, buildings, golf resorts, and other businesses, and also sells the right to use the Trump name to brand properties and other businesses his companies do not own. Despite numerous bipartisan calls well before his inauguration for President Trump to follow the example of every modern president and sell his interests in these businesses, and in the face of warnings that failure to do so would give rise to intractable conflicts of interest, President Trump has refused to divest. As a result, the American people have no way of knowing whether key decisions in the areas of taxes, regulation, environmental policy, employment and housing discrimination, foreign policy, trade, and many others are being made in the best interest of the country or in President Trump’s own financial interest. And when these businesses receive payments or benefits from foreign or U.S. federal or state governments – as the evidence shows they do day in and day out – President Trump violates our fundamental anti-corruption laws: the Constitution’s foreign and domestic emoluments clauses.

The tone set by President Trump’s unwillingness to curb his own massive conflicts of interest has reverberated through the federal government. Ethics issues confronted nearly all of President Trump’s major cabinet nominees, leading several, including Secretary of the Army nominee Vincent Viola, Secretary of Labor nominee Andrew Puzder, prospective Secretary of the Navy nominee Philip Bilden, and Deputy Secretary of Commerce nominee Todd Ricketts to drop out before even receiving a confirmation hearing. Ethics issues contributed to fierce confirmation battles for others, notwithstanding the President’s party’s majority in the Senate, including Secretary of Education Betsy DeVos, Secretary of Commerce Wilbur Ross, and Secretary of State Rex Tillerson, among others. In some cases, even where a nominee was confirmed, conflicts of interest and ethics issues followed them into office, forcing recusals from participating in significant agency work or, if they do participate, risking the legal validity of that work. For example, Attorney General Jeff Sessions and Administrator of the Environmental Protection Agency Scott Pruitt have already announced significant recusals, although even these recusals may not go far enough in some cases.

Complying with ethics rules also has presented difficulties outside the confirmation process for White House and other executive branch officials, leading to complaints, discipline, and a firing. Director of Strategic Initiatives Chris Liddell appears to have run afoul of the federal criminal conflict of interest statute by attending and possibly organizing at least three meetings between President Trump and business executives from companies in which he held millions of dollars in stock. Nepotism issues have also arisen with President Trump’s hiring of his daughter and son-in-law, Ivanka Trump and Jared Kushner. High-profile White House and executive branch employees have also improperly used their official positions within the first 100 days; in two cases, this was to endorse products, with Counselor to the President Kellyanne Conway endorsing Ivanka Trump’s clothing line on national television and Secretary of the Treasury Steven Mnuchin advising viewers of a live online interview to take their children to see *Lego Batman*, a movie he executive produced. In another case, a White House official appeared to improperly use his official position for politics, in violation of the Hatch Act, when Director of Social Media Dan Scavino, Jr. urged his Twitter followers to defeat a member of Congress who opposed President Trump’s healthcare legislation from an effectively official account. At least one White House official appears to have already violated the ethics pledge each official signs upon being hired — Chief Strategist and Senior Counselor to the President Stephen Bannon reportedly communicated repeatedly with his most recent former employer, Breitbart News Network, about official matters. National

security advisor Michael Flynn resigned after only 24 days on the job after having improper conversations about sanctions with Russian officials during the presidential transition period; afterwards, it was revealed that he had also failed to disclose at least \$68,000 in income from Russian-related organizations on his initial financial disclosure form.

Outside individuals advising President Trump have also faced serious ethics questions. For example, billionaire investor Carl Icahn has been named a special advisor for overhauling the country's regulatory framework, and has reportedly advised President Trump on relevant personnel and policies, including the head of the Environmental Protection Agency and an existing regulation requiring fuel companies to use certain amounts of biofuel. It has been reported that one of Icahn's companies would have saved more than \$200 million in costs last year if his suggested change to the biofuel regulation had been in place; as an outside advisor, however, Icahn has asserted he is not required to follow government ethics rules that would ensure his advice is understood in its proper context.

Administration officials also appear to have failed to comply with basic transparency obligations, such as the legal requirements to maintain presidential records and to properly document who outside the government is advising President Trump. With respect to presidential records, issues include the use of phone apps that automatically delete messages, improper deletion of records such as tweets, and the possible use of private email accounts without proper record-keeping. The issues of transparency relating to who is advising the president include apparent failures to comply with the Federal Advisory Committee Act, which requires basic information be kept and released about any advisory group that includes people outside the government; President Trump has used such groups on matters such as filling a Supreme Court vacancy and setting policy relating to manufacturing sector jobs. President Trump has also rolled back one of his predecessor's major transparency initiatives, releasing White House visitor logs.

Even what little the administration claims to have done to drain the swamp has proved to be more illusory than real. President Trump's ethics executive order included a five-year lobbying ban after leaving the administration, but it intentionally left out the previous ban on lobbyists working at government agencies they recently lobbied. As a result, lobbyists quickly have been hired at several agencies. And less than 100 days in, the administration has already granted at least one waiver of the five-year ban. At the same time, any progress on reducing special interest influence has been undercut by President Trump's own former campaign aides setting up shop as lobbyists with access to the president.

Compounding these problems, the agencies that oversee and monitor government ethics have come under fire during this period. The Trump administration and its supporters sought to discredit the Office of Government Ethics after its director said publicly that President Trump should divest from his businesses, as other modern presidents had. In addition, even before inauguration day, House Republicans sought to gut their own watchdog, the Office of Congressional Ethics, in a secret vote announced only hours before; an unprecedented public outcry forced them to abandon this plan.

Far from draining the swamp, the first 100 days of the Trump administration have illustrated the importance of prioritizing ethics when entering public service – and the negative consequences when a president fails to do so. This failure of leadership resounds through the administration and the government as a whole, and ultimately harms our democracy and the interests of the American people. These lessons should be learned now, before more damage is done.

## PRESIDENT TRUMP'S FAILURE TO DIVEST: THE ROOT OF THE ISSUE

President Trump controls an organization made up of hundreds of companies in at least 20 countries. The Trump Organization operates hotels, buildings, golf resorts, and other businesses, and also sells the right to use the Trump name to brand properties and other businesses his companies do not own.<sup>1</sup> Despite numerous bipartisan calls well before his inauguration for President Trump to follow the example of every other modern president and sell his interests in these businesses,<sup>2</sup> and in the face of warnings that failure to do so would give rise to intractable conflicts of interest, President Trump has refused to divest.<sup>3</sup> As a result, the American people have no way of knowing whether key decisions in the areas of taxes, regulation, environmental policy, employment and housing discrimination, foreign policy, trade, and many others are being made in the best interest of the country or in President Trump's own financial interest. Further, these businesses present opportunities for those who wish to curry favor with the president. And when these businesses receive payments or benefits from foreign or U.S. federal and state governments – as the evidence shows they do day in and day out – President Trump violates our fundamental anti-corruption laws: the Constitution's Foreign and Domestic Emoluments Clauses.<sup>4</sup>

Instead of divesting, President Trump placed his sons Donald, Trump Jr. and Eric Trump and one of his long-time business partners in operational control of the Trump businesses.<sup>5</sup> President Trump retained his interest in the businesses primarily via a revocable trust – a financial arrangement by which the businesses are required to be operated in his financial interest, which he can unilaterally change at any time, and from which he can effectively draw funds at any time.<sup>6</sup> This purely nominal separation leaves all of the relevant financial conflicts in place, and therefore provides no assurance that President Trump's actions as president serve the interests of the public, rather than contribute to his own wealth. Indeed, reports already suggest that President Trump may be receiving regular updates on the businesses from his son.<sup>7</sup>

One financial interest that has loomed large over President Trump's first 100 days in office is the Trump International Hotel in Washington, D.C., located blocks from the White House on property leased from the United States government.<sup>8</sup> In addition to being a major source of potentially illegal foreign emoluments – the hotel even hired a salesperson dedicated to seeking business from foreign diplomats<sup>9</sup> – President Trump's decision to retain his interest in the hotel while holding office violates the conflict of interest provision of the lease that allowed him to build the hotel in the first place.<sup>10</sup> President Trump is now effectively both landlord and tenant, having appointed the official heading the General Services Administration, the agency that manages federal government property.<sup>11</sup> Not surprisingly, when pressed by outside groups and concerned members of Congress to reconcile how President Trump could be permitted to benefit from the lease despite a provision barring exactly that, the agency's explanation lacked a legal or rational basis.<sup>12</sup>

Another remaining potential source of conflict is Trump Tower in Manhattan, particularly its tenants. The Chinese state-owned Industrial & Commercial Bank of China (ICBC) is the largest commercial tenant in the building and is due to renegotiate its lease in October 2019, paying almost \$2 million in rent for its Trump Tower space in 2012.<sup>13</sup> ICBC remains the world's biggest lender when ranked by assets and may be negotiating a lease with President Trump's firm during his administration.<sup>14</sup> At the same time that President Trump is in a business relationship with a Chinese government-owned entity, he also is making U.S. foreign policy toward China. This has resulted in questions about recent policy choices, such as relaxing some of his aggressive campaign rhetoric toward China after taking office.

President Trump's near-weekly visits to properties he owns, including the Mar-a-Lago resort in Florida, have raised a host of concerns about security, proper use of taxpayer funds,<sup>15</sup> and avoiding scrutiny of who meets with the president.<sup>16</sup> President Trump has used the Mar-a-Lago resort to host heads of state, including those

of Japan and China, despite the security concerns associated with hosting meetings at the resort.<sup>17</sup> These concerns were highlighted during an incident in February 2017 when President Trump and Japanese Prime Minister Shinzo Abe discussed a North Korean missile test in view of public guests.<sup>18</sup> A Mar-a-Lago guest also shared photos of this discussion on social media, along with photos of a person the member described as responsible for carrying the Presidential Emergency Satchel, which contains among other things the nuclear launch codes.<sup>19</sup> Additionally, shortly after the election, the Trump Organization doubled Mar-a-Lago's initiation fee to \$200,000, suggesting President Trump is exploiting the presidency for his personal gain.<sup>20</sup> Despite these concerns, President Trump has repeatedly returned to the club and will likely continue to visit his properties through his administration.<sup>21</sup>

President Trump's real estate businesses have continued to expand through the first 100 days of his presidency. Under the direction of his sons, the company has signed at least seventeen letters of intent with potential developers in numerous cities across the United States,<sup>22</sup> and statements by the CEO of Trump Hotels suggest that the company will triple its number of hotels in the United States.<sup>23</sup> While the organization has promised not to begin any new foreign deals during the administration, new domestic projects could create a host of problems, including tax issues, labor disputes and environmental concerns, and conflicts of interest resulting from any or all of those issues.<sup>24</sup> Even the "no new foreign deals" pledge has proven porous. While new foreign deals may have been put on hold, several foreign projects remain ongoing from before his candidacy announcement, including two resorts under construction in Indonesia.<sup>25</sup> The Trump Organization also appears to be considering reviving a resort project in the Dominican Republic where no new buildings have been built for a decade.<sup>26</sup> Additionally, the Trump International Golf Course in Scotland recently announced an expansion and claimed that further expansion of an existing property did not violate President Trump's vow to not commit to new foreign deals.<sup>27</sup> All of these examples continue to raise concerns that President Trump could profit off decisions he makes while in office.

President Trump's real estate holdings are not the only sources of expansion for his businesses. The Trump Organization is reported to have at least 157 trademark applications pending in 36 countries, and both China and Mexico have granted President Trump valuable trademarks in those countries since his election.<sup>28</sup> In February 2017, after more than a decade of denials and court fights, China approved President Trump's application to trademark his name.<sup>29</sup> While this decision was preceded by a provisional approval during the presidential campaign in 2016, China notably decided to provide final approval after President Trump declared he would adhere to the One China Policy.<sup>30</sup> This raises concerns about the impact of his business interests on both this and other aspects of U.S.-China relations, including areas such as human rights, climate change, and maritime disputes in the South China Sea that will require a nuanced and complex approach. Meanwhile, as these policies are being shaped, China recently granted provisional approval for 38 more trademarks associated with the Trump brand.<sup>31</sup>

Mexico similarly granted several trademarks to the Trump Organization in February 2017, again leading to questions about the impact of these business relationships on foreign policy.<sup>32</sup> President Trump made renegotiating NAFTA, the free trade agreement with Mexico and Canada, a priority during the campaign.<sup>33</sup> Overall, the Trump Organization has currently taken out trademarks in over 80 countries.<sup>34</sup> The impact of President Trump's business concerns on his policy decisions may be difficult to discern, but the granting of trademarks by foreign nations demonstrates the potential risk associated with President Trump's foreign entanglements.

We have only begun to see the extent of the conflicts of interest that will shadow President Trump's presidency due to his decision not to divest from his businesses. As the administration makes more policy decisions going forward, the questions surrounding his conflicts of interest will multiply. Already we have seen one example of how these questions might arise even on a seemingly unrelated subject. When President Trump announced his ill-fated "travel ban" designed to temporarily block entrance into the United States by individuals from some majority-Muslim countries, it was quickly noted that while President Trump has business interests in a number of majority-Muslim countries, none of them were on the list.<sup>35</sup> For example,

despite the fact that Turkey had suffered several terrorist attacks in the preceding months before the attempted ban, it was not mentioned in the ban.<sup>36</sup> President Trump has a licensing deal with two buildings in Istanbul.<sup>37</sup> Additionally, the ban did not extend to the United Arab Emirates, where President Trump recently licensed a Dubai golf course, or Saudi Arabia, where the Trump Organization previously incorporated several local firms for a possible expansion in the hotel business.<sup>38</sup> While a direct financial incentive for targeting certain countries would be difficult to demonstrate, the decision to exclude all countries in which the Trump Organization maintains business ties again highlights the potential conflicts of interest that President Trump brings to this administration. These conflicts force the American people to question whether President Trump is acting in their interest, even in the critical area of national security. These are questions we should not have to ask.

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<sup>2</sup> Letters to President-elect Donald Trump from a bipartisan group of organizations and individuals, Dec. 9, 2016 and Jan. 2, 2017, available at <http://www.democracy21.org/wp-content/uploads/2016/12/Trump-letter-on-conflicts-divestiture-and-blind-trust-12-9-16.pdf>; <http://www.democracy21.org/wp-content/uploads/2017/01/Letter-to-Trump-conflicts-of-interest-1-2-17.pdf>.

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<sup>7</sup> Dan Alexander, After Promising Not To Talk Business With Father, Eric Trump Says He'll Give Him Financial Reports, *Forbes*, Mar. 24, 2017, available at <https://www.forbes.com/sites/danalexander/2017/03/24/after-promising-not-donald-talk-business-with-father-eric-trump-says-president-give-him-financial-reports/#6b86d798359a>.

<sup>8</sup> Press Release, GSA Selects the Trump Organization as Preferred Developer for DC's Old Post Office, Feb. 7, 2012, available at <https://www.gsa.gov/portal/content/123671>.

<sup>9</sup> Jonathan O'Connell and Mary Jordan, For foreign diplomats, Trump hotel is place to be, *Washington Post*, Nov. 18, 2016, available at [https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35\\_story.html](https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html).

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## President Trump's Cabinet: Conflicted Nominees, Flawed Process

President Trump's failure to address his own massive conflicts of interest set the tone for many of his key cabinet nominees as well as the confirmation process. Several nominees have not adequately resolved their own ethical issues, while others face serious questions about their honesty and integrity. The Trump cabinet nomination process also presented unique challenges for the Office of Government Ethics (OGE) and agency ethics officials because of the extensive wealth and complexity of several candidates' holdings and the reluctance of some to commit to full divestiture from conflicted assets or to broad, clear, and unambiguous recusals. Additional challenges arose from delays by some nominees in submitting the necessary ethics paperwork to OGE and from the accelerated confirmation hearing schedule.

As discussed in greater detail on the following pages, cabinet nominees such as Secretary of Education Betsy DeVos, Administrator of the Environmental Protection Agency Scott Pruitt, and Secretary of Commerce Wilbur Ross failed to adequately address serious conflicts of interest through divestiture or broad and unambiguous recusal commitments. OGE and agency ethics officials apparently were unsuccessful in their attempts to persuade these nominees (and the senior White House and transition officials overseeing the nominations) to accept outcomes other than very narrow recusals. These recusals only meet the minimal legal standards, can often be meaningless in practice, and do not adequately address the larger and more serious ethics concerns presented. The nominees' problems were compounded by an apparent lack of ethical leadership or awareness on the part of the Trump administration at a political level to require its candidates to make the appropriate ethics commitments as a condition of their nomination.

Other nominees presented fundamental questions of veracity and integrity. For example, Secretary of Health and Human Services Tom Price agreed to divest his stock holdings in conflicting health care companies but failed to adequately address the clear conflicts of interest and allegations of insider trading that plagued his initial purchase of some of these stock holdings while serving on committees in Congress with significant responsibility over health care matters. In the case of Attorney General Jeff Sessions, his testimony during his confirmation hearing raised serious doubts about his honesty and veracity with regard to his communications with Russian officials during the 2016 presidential campaign. As the possibility of coordination by the Trump campaign with the Russian government was at the time, and continues to be, the subject of several investigations, including by the Federal Bureau of Investigation, his failure to be fully forthcoming raises serious concerns about his integrity and judgment as the most senior law enforcement official in the U.S. government.

In contrast, Secretary of State Rex Tillerson has in at least one case committed to a recusal above and beyond that which is technically required under the Standards of Ethical Conduct for Employees of the Executive Branch to address an apparent conflict of interest. In that case, which involved the Keystone XL pipeline, Secretary Tillerson recused himself from participating even though his former employer was not technically a party to the matter, but would likely benefit if the project were to be approved. While this measure alone does not represent a commitment to recuse from every foreign policy matter affecting his former employer's financial interests, it demonstrates an awareness of the need to be sensitive to ethics concerns.

The nomination process also presented challenges for OGE and agency ethics officials because of the failure of several nominees to fully complete their ethics paperwork prior to their hearings being scheduled.<sup>1</sup> This was no mere procedural issue. A rush to jam nominations through can have a disruptive impact on the ability of the Senate to meaningfully advise and consent and the ability of government ethics officials to meet their legal obligations without feeling unduly compromised. This approach also stands in contrast with prior

transitions' efforts to resolve nominees' conflicts of interest with OGE in advance of the confirmation hearings.<sup>2</sup>

In past transitions, OGE reported that the public financial disclosure report and ethics agreement for a nominee were fully completed prior to the nominee's announcement in the "overwhelming majority" of cases.<sup>3</sup> By contrast, in some cases during the Trump transition, OGE had not received even the initial draft financial disclosure reports for nominees whose hearings had been scheduled.<sup>4</sup> The failure to complete the necessary ethics paperwork left some Trump nominees with "potentially unknown or unresolved ethics issues shortly before their scheduled hearings."<sup>5</sup>

President Trump has sent 62 nominations to the Senate, of which 27 nominees were confirmed by the Senate as of April 25, 2017.<sup>6</sup> Other modern presidents have been more successful in getting nominations through the Senate in their first 100 days.<sup>7</sup> The slow pace with which some of President Trump's nominees completed the necessary ethics paperwork (possibly due to the complexity of their holdings) may have impacted the total number of nominations the Trump administration sent to the Senate during the first 100 days, as well as the number of nominees who were then able to be confirmed.

In response to concerns expressed by OGE, the Senate delayed hearings previously scheduled for several Trump cabinet nominees.<sup>8</sup> Senate committee hearing dates were pushed back for Secretary DeVos, Secretary of Labor nominee Andrew Puzder, and Director of the Central Intelligence Agency Mike Pompeo, to allow "for more time to collect and review the standard background checks the nominees traditionally undergo before their hearings commence."<sup>9</sup> Secretary of Commerce Wilbur Ross also had his hearing delayed because his ethics agreement had not been completed.<sup>10</sup>

It should be noted that some Trump cabinet nominees, such as Director Pompeo, Secretary of Defense James Mattis, Secretary of Homeland Security John Kelly, and United Nations Representative Nikki Haley, made it through the confirmation process unscathed and were confirmed with a minimum of ethics issues. Notably, these individuals all had prior federal or state government experience. Other nominees suffered from a lack of being fully vetted for conflicts of interest and other issues prior to being nominated and were ultimately withdrawn, such as Mr. Puzder, Vincent Viola, and Todd Ricketts. Several others were confirmed, but without bipartisan support due to serious ethics issues that had not been adequately addressed during the confirmation process. A discussion of some of these nominees and their notable ethics issues follows.

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<sup>1</sup> Ted Barrett, Schumer Warns GOP Against Jamming Trump Nominees Through Senate, CNN, Jan. 18, 2017, available at <http://www.cnn.com/2017/01/18/politics/chuck-schumer-donald-trump-nominees-senate/>.

<sup>2</sup> Caroline Chambers, Trump's Cabinet Lags Disclosing Conflicts - Just Like Their New Boss, *The Hill*, Jan. 9, 2017, available at <http://thehill.com/blogs/pundits-blog/the-administration/313307-trumps-cabinet-picks-lag-on-disclosing-conflicts-just>. By comparison, during the Obama transition, the seven nominees confirmed on January 20, 2009 had submitted OGE certified ethics agreements and financial disclosure forms to the Senate between six days and three weeks in advance of their Senate confirmation hearings. *Id.*

<sup>3</sup> Letter from OGE Director Walter M. Shaub, Jr. to Sens. Charles E. Schumer and Elizabeth Warren, Jan. 6, 2017, available at [https://www.oge.gov/web/oge.nsf/All%20Documents/0437F8D4CF89B7B7852580A30066A775/\\$FILE/Response%20to%20Senators%20Schumer%20and%20Warren%20\(Schumer\).pdf?open](https://www.oge.gov/web/oge.nsf/All%20Documents/0437F8D4CF89B7B7852580A30066A775/$FILE/Response%20to%20Senators%20Schumer%20and%20Warren%20(Schumer).pdf?open).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (asserting OGE was not aware of any occasion in the four decades since its establishment of a Senate committee holding a confirmation hearing before the nominee had completed the ethics review process).

<sup>6</sup> See <https://www.senate.gov/legislative/nominations.htm>. This figure excludes career ambassadors, multiple nominations such as those for international financial institutions, and three nominations that have been withdrawn.

<sup>7</sup> Susan Page, Ronald Reagan to Donald Trump: Comparing first 100 days of last six presidents, *USA Today*, April 23, 2017, available at <https://www.usatoday.com/story/news/politics/2017/04/23/ronald-reagan-donald-trump-first-100-days-compared-bush-obama/100036750/>. For example, in the first 100 days, President Barack Obama had formally submitted 190 nominations and had 69 nominees confirmed; President George W. Bush had formally submitted 85

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nominations and had 35 nominees confirmed; President Bill Clinton had formally submitted 176 nominations and had 49 nominees confirmed; President George H.W. Bush had formally submitted 95 nominations and had 50 nominees confirmed; and President Ronald Reagan had formally submitted 128 nominations and had 80 nominees confirmed.

<sup>8</sup> Jennifer Steinhauer and Steve Eder, Republicans, Facing Pressure, Delay Hearings for 4 Trump Cabinet Nominees, *New York Times*, Jan. 10, 2017, available at <https://www.nytimes.com/2017/01/10/us/politics/donald-trump-cabinet-nominations.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

## Betsy DeVos - Secretary of Education

Not unlike President Trump, Betsy DeVos started her tenure as Secretary of Education with a significant unresolved conflict of interest. She also received an inadequate and objectionable confirmation process which seemed designed to shield her from questions about her knowledge, qualifications, and potential conflicts of interest.

In her public financial disclosure report and ethics agreement, Secretary DeVos reported assets valued at between \$583 million and \$1.5 billion, and she committed to divest 102 holdings and resign from approximately 20 outside positions.<sup>1</sup> She continues to have a potential conflict of interest, however, from a controversial investment in Neurocore, a brain performance center company in which she and her husband are the chief investors and that she valued at between \$5 million and \$25 million.<sup>2</sup> In addition to her investment in the company, Neurocore is listed with its logo and a link on the website of the DeVos-owned investment management company, Windquest Group. The investment and links raise significant ethical concerns.<sup>3</sup>

Neurocore claims to have worked with 10,000 children and adults to overcome problems with attention deficit disorder (ADHD), autism, sleeplessness, and stress.<sup>4</sup> It claims remarkable success rates of 91 percent for patients with depression, 90 percent for patients with attention deficit disorder, and 90 percent for patients with anxiety.<sup>5</sup> Experts consulted by *Education Week*, however, asserted that current scientific evidence based on American Academy of Pediatrics clinical guidelines does not support the claims made by Neurocore that its technology can “fix” problems such as ADHD or has “proven and long-lasting” positive effects on children with autism.<sup>6</sup>

In general, allowing the Secretary of Education to hold a significant financial interest in a program targeted at children may result in a conflict of interest.<sup>7</sup> Secretary DeVos’s continued investment also may produce a more specific conflict of interest as a result of her department’s role in analyzing state and local school improvement plans. Under the Every Student Succeeds Act, the Department of Education reviews accountability plans submitted by the states.<sup>8</sup> The “question of what kind of evidence companies [such as Neurocore] can use to justify claims of effectiveness will continue to grow in importance” since the law “requires states and districts to provide evidence to support their approaches to school intervention and turnaround.”<sup>9</sup>

Secretary DeVos also may be improperly endorsing Neurocore. Taken together, the significant backing of the company by Secretary DeVos and her husband, the continued promotion of Neurocore on the DeVos-owned investment company website, the population targeted by the company (*e.g.*, parents of children with ADHD), and the lack of scientific evidence to support the company’s claims, may constitute an improper endorsement in violation of the standards of ethical conduct.<sup>10</sup>

Past administrations likely would have required an incoming Secretary of Education to divest his or her interest in a company like Neurocore.<sup>11</sup> They would not have considered the recusal required under Secretary DeVos’s ethics agreement sufficient to address the apparent endorsement issues arising from her and her husband’s continued investment in Neurocore.<sup>12</sup> The Trump administration instead took the opposite approach.

Issues involving Secretary DeVos’s nomination could not be adequately addressed during her confirmation hearing due to the unusual and flawed process the Senate followed. The hearing itself was characterized as a “remarkable affair” because Secretary DeVos seemed “unable to answer basic questions” and because of her “rather startling statements.”<sup>13</sup> From an ethics perspective, she made troubling claims that “strain credulity”<sup>14</sup> when she denied she had a role with the Edgar and Elsa Prince Foundation, a nonprofit founded by her mother that made controversial donations worth more than \$10 million to organizations that supported anti-

women and anti-LGBT causes.<sup>15</sup> Incredibly, after having been listed as the foundation’s vice president for 13 years on its tax forms, she took no responsibility for her role as an officer and attributed the listing to a “clerical error.”<sup>16</sup>

Secretary DeVos’s nomination also highlights the challenges and delays faced by the Office of Government Ethics (OGE) in reviewing and addressing conflicts arising from a complex financial portfolio and meeting a compressed hearing schedule.<sup>17</sup> In a letter dated January 9, 2017,<sup>18</sup> OGE Director Walter Shaub, Jr. noted, in an apparent reference to Secretary DeVos, that some nominees find it “difficult to untangle their complex financial investments and employment arrangements quickly, especially if they wish to do so without incurring otherwise avoidable financial losses.”<sup>19</sup> In light of these concerns, the ethics reviews process can “take weeks and, in the case of extremely wealthy individuals, sometimes months.”<sup>20</sup> Following receipt of Director Shaub’s letter, Secretary DeVos’s hearing date was postponed a week in the hope that additional time would allow her to complete the OGE paperwork.<sup>21</sup> Despite the delay, Secretary DeVos’s ethics paperwork was not completed until two days after her January 17 hearing.<sup>22</sup> As a result, members of the Senate Health, Education, Labor and Pensions Committee considering her nomination had no opportunity to review her 108-page public financial disclosure report and ethics agreement before the hearing, and therefore had no basis to adequately question her about potential conflicts of interest during the hearing itself. This concern was further compounded by the compressed hearing schedule in which questioning was limited to one round, with each member allotted only five minutes to question the witness.<sup>23</sup> Since Secretary DeVos’s confirmation vote had been initially scheduled for January 24, committee members were permitted to follow up with written questions, resulting in more than 800 questions being delivered to Secretary DeVos for response.<sup>24</sup>

The committee vote on Secretary DeVos’s nomination was postponed a week to give members additional time to review her ethics paperwork.<sup>25</sup> Her nomination was voted out of Committee on January 31, and she was confirmed as Secretary of Education a week later, on February 7.<sup>26</sup> While she survived confirmation, Secretary DeVos emerged with historically-weak support for a Secretary of Education. She received no Democratic votes and was opposed by two Republican Senators, Lisa Murkowski of Alaska and Susan Collins of Maine.<sup>27</sup> Her lack of support set up a 50-50 tie for a Secretary of Education nominee that was broken by the vote of Vice President Mike Pence.<sup>28</sup>

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<sup>1</sup> Letter from Elizabeth Prince DeVos to Marcella Goodridge-Keiller, Designated Agency Ethics Official, U.S. Department of Education (“Ethics Agreement”), Jan. 19, 2017, *available at* [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/E2461CB47CF5A473852580C1002C7A3B/\\$FILE/DeVos,%20Elisabeth%20P.%20%20finalAMENDEDEEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/E2461CB47CF5A473852580C1002C7A3B/$FILE/DeVos,%20Elisabeth%20P.%20%20finalAMENDEDEEA.pdf); Betsy DeVos, Public Financial Disclosure Report, Jan.19, 2017, *available at* [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/E554507378A61BDF852580AE002C70E1/\\$FILE/DeVos,%20Elisabeth%20P.%20%20final278.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/E554507378A61BDF852580AE002C70E1/$FILE/DeVos,%20Elisabeth%20P.%20%20final278.pdf). *See also* Matthew Goldstein, Steve Eder, and Sheri Fink, *Betsy DeVos Won’t Shed Stake in Biofeedback Company, Filings Show*, *New York Times*, Jan. 20, 2017, *available at* <https://www.nytimes.com/2017/01/20/business/dealbook/betsy-devos-neurocore.html>.

<sup>2</sup> Goldstein, Eder and Fink, *New York Times*, Jan. 20, 2017; Sheri Fink, Steve Eder, and Matthew Goldstein, *Betsy DeVos Invests in a Therapy Under Scrutiny*, *New York Times*, Jan. 30, 2017, *available at* <https://www.nytimes.com/2017/01/30/us/politics/betsy-devos-neurocore-brain-centers.html>.

<sup>3</sup> Norman Eisen and Richard Painter, *The Ethics Case Against Betsy DeVos*, *The Hill*, Feb. 6, 2017, *available at* <http://thehill.com/blogs/pundits-blog/the-administration/317975-the-ethics-case-against-betsy-devos>.

<sup>4</sup> Goldstein, Eder, and Fink, *New York Times*, Jan. 20, 2017.

<sup>5</sup> *Id.*

<sup>6</sup> Benjamin Herold, *DeVos-Backed Company Questioned on ADHD, Autism*, *Education Week*, Feb. 7, 2017, *available at* <http://www.edweek.org/ew/articles/2017/02/08/devos-backed-company-questioned-on-adhd-autism.html>. (Ken Koedinger, a professor of psychology and human-computer interaction at Carnegie Mellon University in Pittsburgh, in an interview with *Education Week*, stated that “it’s worrisome that the country’s new education secretary nominee would remain closely tied to a company that has apparently made exaggerated and misleading claims about its service.”)

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<sup>7</sup> Eisen and Painter, *The Hill*, Feb. 6, 2017 (Allowing the Secretary of Education to continue to hold an investment in “a science and research brain-based program” that produces “life-changing results” targeted to children is “a departure from precedent and common sense.”).

<sup>8</sup> Every Student Succeeds Act, 20 U.S.C. § 6301, et seq.; Herold, *Education Week*, Feb. 7, 2017.

<sup>9</sup> *Id.*

<sup>10</sup> 5 C.F.R. § 2635.702.

<sup>11</sup> Eisen and Painter, *The Hill*, Feb. 6, 2017.

<sup>12</sup> Under 18 U.S.C. § 208, Secretary DeVos is required to recuse from participating in any particular matter that would have a direct and predictable effect on Neurocore.

<sup>13</sup> Valerie Strauss, From Start to Finish, the DeVos Education Confirmation Hearing was Rather Remarkable, *Washington Post*, Jan. 19, 2017, available at [https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/19/from-start-to-finish-the-devos-education-confirmation-hearing-was-rather-remarkable/?utm\\_term=.a91257430554](https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/19/from-start-to-finish-the-devos-education-confirmation-hearing-was-rather-remarkable/?utm_term=.a91257430554).

<sup>14</sup> Eisen and Painter, *The Hill*, Feb. 6, 2017.

<sup>15</sup> Danielle Douglas-Gabriel, Betsy DeVos’s 13-Year ‘Clerical Error’, *Washington Post*, Jan. 18, 2017, available at [https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/betsy-devoss-13-year-clerical-error/?tid=a\\_inl&utm\\_term=.b6defba17123](https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/betsy-devoss-13-year-clerical-error/?tid=a_inl&utm_term=.b6defba17123).

<sup>16</sup> *Id.*

<sup>17</sup> Goldstein, Eder, and Fink, *New York Times*, Jan. 20, 2017.

<sup>18</sup> Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics to Sen. Patty Murray, Senate Committee on Health, Education, Labor and Pensions, Jan. 9, 2017, available at [https://www.scribd.com/document/336195301/OGE-Response-to-Letter-From-Ranking-Member-Patty-Murray#from\\_embed](https://www.scribd.com/document/336195301/OGE-Response-to-Letter-From-Ranking-Member-Patty-Murray#from_embed).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; Emma Brown, Ethics Office Director Says Proper Vetting of Ultrawealthy Cabinet Nominees Can Take Weeks, Months, *Washington Post*, Jan. 10, 2017, available at [https://www.washingtonpost.com/news/education/wp/2017/01/10/ethics-office-director-says-proper-vetting-of-ultrawealthy-cabinet-nominees-can-take-weeks-sometimes-months/?utm\\_term=.be4103caf5d4](https://www.washingtonpost.com/news/education/wp/2017/01/10/ethics-office-director-says-proper-vetting-of-ultrawealthy-cabinet-nominees-can-take-weeks-sometimes-months/?utm_term=.be4103caf5d4).

<sup>21</sup> Emily Wilkins, DeVos Hearing Postponed Until Next Week, *Roll Call*, Jan. 10, 2017, available at <http://www.rollcall.com/news/politics/devos-hearing-delayed>.

<sup>22</sup> Ethics Agreement and Public Financial Disclosure Report.

<sup>23</sup> Emily Wilkins, Senate Democrats Want More Time to Question Trump’s Education Nominee, *Roll Call*, Jan. 13, 2017, available at <http://www.rollcall.com/news/policy/senate-democrats-want-time-question-trumps-education-nominee>.

<sup>24</sup> Valerie Strauss, Here are Betsy’s DeVos’s Answers to 139+ Questions from Democratic Sen. Murray, *Washington Post*, Jan. 30, 2017, available at [https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/30/here-are-betsys-devoss-answers-to-139-questions-from-democratic-sen-murray/?utm\\_term=.b206859e3186](https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/30/here-are-betsys-devoss-answers-to-139-questions-from-democratic-sen-murray/?utm_term=.b206859e3186).

<sup>25</sup> Brian McVicar, Betsy DeVos Committee Vote Postponed to Give Senators More Time to Review Ethics Report, *MLive*, Jan. 22, 2017, available at [http://www.mlive.com/news/index.ssf/2017/01/betsy\\_devos\\_committee\\_vote\\_pos.html](http://www.mlive.com/news/index.ssf/2017/01/betsy_devos_committee_vote_pos.html).

<sup>26</sup> Emma Brown, With Historic Tiebreaker from Pence, DeVos Confirmed as Education Secretary, *Washington Post*, Feb. 7, 2017, available at [https://www.washingtonpost.com/local/education/senate-to-vote-today-on-confirmation-of-betsy-devos/2017/02/06/fd4b7e9c-ec85-11e6-9662-6eedf1627882\\_story.html?utm\\_term=.e75d124bf034](https://www.washingtonpost.com/local/education/senate-to-vote-today-on-confirmation-of-betsy-devos/2017/02/06/fd4b7e9c-ec85-11e6-9662-6eedf1627882_story.html?utm_term=.e75d124bf034).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

## Scott Pruitt – Administrator of the Environmental Protection Agency

Ethics concerns about Scott Pruitt’s impartiality as the head of the Environmental Protection Agency (EPA) arose primarily from the multiple lawsuits he filed in opposition to the EPA while serving as Oklahoma Attorney General starting in 2010.<sup>1</sup> In that capacity, Mr. Pruitt reportedly called for the elimination of the EPA and referred to himself as a “leading advocate against the EPA’s activist agenda.”<sup>2</sup> Moreover, he engaged in extensive litigation with the EPA and has been characterized as a “longtime opponent of federal environmental regulations and a denier of climate change.”<sup>3</sup>

Of 19 cases Mr. Pruitt filed against the EPA as Oklahoma Attorney General, eight were pending before the courts at the time of his confirmation hearing.<sup>4</sup> As a result, 30 Senate Democrats requested that Mr. Pruitt recuse himself from participating personally and substantially in any matter (including regulations) related to the litigation he pursued as Oklahoma Attorney General for the entirety of his tenure at the EPA and without seeking any waiver.<sup>5</sup> Of particular concern was the language used in his ethics agreement for recusals involving his former employer, which deviates from the standard language employed in ethics agreements. That provision raised a concern that Mr. Pruitt intended to “switch sides” in the pending litigation at the outset of his appointment, which would create both an actual and apparent conflict of interest.<sup>6</sup> While Mr. Pruitt’s ethics agreement noted he had a “covered relationship” with Oklahoma for one year following his resignation, he stated affirmatively that upon confirmation he would “seek authorization to participate personally and substantially in particular matters involving specific parties” in which Oklahoma is a party or represents a party.<sup>7</sup>

Since some of the pending legal proceedings are expected to take longer than a year to be decided, the 30 senators requested he be recused for the duration of the litigation matters. The senators also stated that it would be “simply impossible” for him to meet the requisite test for impartiality demanded of a federal employee if he were to switch from plaintiff acting as Oklahoma Attorney General to defendant in his new position as EPA Administrator. Likewise, he would not be viewed as impartial if he took actions to repeal or weaken environmental protections that he originally sought to accomplish through litigation.<sup>8</sup>

A broader recusal for the EPA Administrator is not unprecedented. As an example, the senators noted that Carol Browner recused herself for her entire tenure at EPA from matters she personally and substantially worked on for Florida as that state’s Secretary of Environmental Regulation.<sup>9</sup>

Ultimately, Mr. Pruitt was confirmed as EPA Administrator by a vote of 52 to 46.<sup>10</sup> One Republican senator, Susan Collins of Maine, opposed him, but two Democratic senators from energy-producing states, Heidi Heitkamp of North Dakota and Joe Manchin of West Virginia, supported him.<sup>11</sup>

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<sup>1</sup> The Trump-Pence Transition Team, Scott Pruitt, Nominee for Administrator of the Environmental Protection Agency, Dec. 19, 2016, available at <https://greatagain.gov/pruitt-epa-9837b06dbbfd>.

<sup>2</sup> Dominique Mosbergen, Scott Pruitt Has Sued the Environmental Protection Agency 13 Times. Now He Wants to Lead It, *Huffington Post*, Jan. 17, 2017, available at [http://www.huffingtonpost.com/entry/scott-pruitt-environmental-protection-agency\\_us\\_5878ad15e4b0b3c7a7b0c29c](http://www.huffingtonpost.com/entry/scott-pruitt-environmental-protection-agency_us_5878ad15e4b0b3c7a7b0c29c).

<sup>3</sup> Rebecca Leber, Here Are All the Climate Deniers and Oil Flacks Who Love Trump’s EPA Pick, *Mother Jones*, Jan. 9, 2017, available at <http://www.motherjones.com/environment/2017/01/climate-deniers-coming-next-epa-chief-rescue>.

<sup>4</sup> Letter from 30 Senators to Scott Pruitt, Attorney General of Oklahoma, Feb. 16, 2017, available at <https://www.markey.senate.gov/imo/media/doc/Pruitt%20recusal%20letter%202002.16.17.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington, to Kevin S. Minoli, Principal Deputy General Counsel & Designated Agency Ethics Officer, Jan. 17, 2017, available at

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<http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/01/17183250/Letter-to-EPA-ethics-counsel-re-Pruitt-FINAL.pdf>.

<sup>7</sup> Letter from Edward Scott Pruitt to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, Jan. 3, 2017 (“Ethics Agreement”) *available at*

[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/C3B4C444EB20D1FD852580C1002C7A75/\\$FILE/Pruitt,%20Edward%20Scott%20%20%20finalAMENDEDEEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/C3B4C444EB20D1FD852580C1002C7A75/$FILE/Pruitt,%20Edward%20Scott%20%20%20finalAMENDEDEEA.pdf). *See also* 5 C.F.R. § 2635.501-.502 (requiring federal employee to recuse for one year from participating in any particular matter involving specific parties in which his former employer is or represents a party unless he receives authorization from an agency ethics official).

<sup>8</sup> *See* 5 C.F.R. § 2635.501 (setting forth the process and steps that a federal employee should take to avoid an appearance of a loss of impartiality in the performance of his official duties).

<sup>9</sup> Letter from 30 Senators to Scott Pruitt, Feb. 16, 2017.

<sup>10</sup> Ted Barrett, [Scott Pruitt Confirmed to EPA](http://www.cnn.com/2017/02/17/politics/senate-epa-scott-pruitt/index.html), CNN, Feb. 17, 2017, *available at* <http://www.cnn.com/2017/02/17/politics/senate-epa-scott-pruitt/index.html>.

<sup>11</sup> *Id.*



## Wilbur Ross – Secretary of Commerce

Wilbur Ross’s nomination for Secretary of Commerce presented many of the same challenges as Betsy DeVos’s nomination due to his extensive and complicated financial holdings. Secretary Ross reported assets on his financial disclosure form ranging from \$337 million to \$687 million in total value and income of between \$16 million and \$55 million.<sup>1</sup> Although Secretary Ross agreed to divest at least 80 assets and investment funds and to step down from more than four-dozen funds or companies,<sup>2</sup> he was permitted to retain certain holdings that nevertheless raise serious ethics concerns and require further examination in light of his duties and responsibilities as Commerce Secretary and his role overseeing the administration’s trade policy. In particular, Secretary Ross’s extensive holdings in Diamond S Shipping Group Inc., in which his co-investor is the Chinese government, raise questions about his ability to oversee U.S. trade policy. In addition, while he agreed to divest from the Bank of Cyprus, his investment in the bank, which has ties to a confidant of Russian President Vladimir Putin, raised questions about possible loans made by the bank to the Trump campaign and the bank’s dealings with persons under U.S. sanctions.

Nevertheless, after an initial postponement of Secretary Ross’s Senate confirmation hearing to allow time for him to obtain the necessary paperwork from the Office of Government Ethics,<sup>3</sup> his hearing and confirmation moved through the Senate “with relative ease.”<sup>4</sup> He was confirmed on February 27, 2017 in a 72-27 vote.<sup>5</sup>

### Diamond S Shipping Group Inc.

Secretary Ross’s significant holdings in Diamond S Shipping Group Inc.<sup>6</sup> present a fundamental conflict of interest for the Commerce Secretary since the company is “one of the largest owners and operators of medium-range tanker vessels” and participates in the transoceanic shipping trade.<sup>7</sup> Its success is largely reliant on transporting oil. According to a 2014 SEC filing, Diamond S provides “seaborne transportation of refined petroleum and other products in the international shipping markets.”<sup>8</sup>

*Dow Jones* reported that the Chinese government’s sovereign wealth fund, China Investment Corp., is a co-investor in Diamond S,<sup>9</sup> and the *Center for Public Integrity* examined Diamond S’s shipping operations and found that its vessels sail under Chinese flags.<sup>10</sup> Given these facts, there is a fundamental question about whether Secretary Ross can be involved in trade issues involving China while continuing to be invested in Diamond S.

There are other potential ethics concerns rising from Secretary Ross’s investment in Diamond S. Senator Maria Cantwell noted that Secretary Ross’s Diamond S holdings create a conflict of interest regarding some environmental issues because as Commerce Secretary he has the authority to determine financial liability from oil spills for tanker companies such as Diamond S.<sup>11</sup>

Based on Secretary Ross’s investment partners in Diamond S and the company’s business operations, the scope of matters from which Secretary Ross should recuse include shipping matters, oil and gas matters, trade, investment and foreign policy matters involving China, and environmental regulations and policy matters that would affect the oceans and shipping industry. A more comprehensive recusal is appropriate to avoid potential conflicts of interest and to avoid any appearance of lack of impartiality.<sup>12</sup>

### Bank of Cyprus

According to his public financial disclosure report, Secretary Ross served as Director and Vice Chairman of the Bank of Cyprus beginning in November 2014.<sup>13</sup> Under his ethics agreement, he was to resign from this position upon his appointment and to divest his financial interest in the bank.<sup>14</sup>

His position with the Bank of Cyprus raised questions during his confirmation hearing given its connection to various Russian actors with close ties to Russian President Putin and to banks that are subject to U.S. sanctions.<sup>15</sup> At the time Secretary Ross invested in the Bank of Cyprus, the State Department considered Cyprus an area of “primary concern” for money laundering.<sup>16</sup> In 2015, while Secretary Ross was vice-chair, the bank’s Russia-based businesses were sold to a Russian banker and consultant, Artem Avetisyan, who had ties to both Putin and to Russia’s largest bank, Sberbank, which was under both U.S. and European Union sanctions at the time.<sup>17</sup>

During the confirmation process, several senators also asked Secretary Ross about the Bank of Cyprus’s ties to another confidant of Russian President Putin and the possibility of loans made by the bank to the Trump campaign.<sup>18</sup> The senators further questioned him about his relationship with the bank’s second largest shareholder, Viktor Vekselberg.<sup>19</sup> Vekselberg reportedly is a close friend of Russian President Putin and at one time sat on the board of directors of the Russian state-controlled oil giant Rosneft, which is under partial sanctions with the Treasury Department.<sup>20</sup>

Secretary Ross never responded to these inquiries, but was later confronted with some of the same questions during a television interview.<sup>21</sup> When asked specifically about the bank’s involvement with persons under sanctions, Secretary Ross responded that he did not knowingly approve a loan to a person under sanctions, claiming that “none of the loans went to anybody with sanctions that I’m aware of and nor were there any great big deposits from sanctioned parties that came in while I was involved, that I was aware of.”<sup>22</sup> Secretary Ross also denied that the bank had made any loans to the Trump campaign, stating, “Certainly not to my knowledge.”<sup>23</sup>

Notably, Secretary Ross did not deny that the bank had dealings with sanctioned persons, only stating that he was not aware of any such deals. As a result, his responses raise questions about the extent of the bank’s business with Russians subject to U.S. sanctions and his ties to Putin confidants. Given the concerns about the role of the Bank of Cyprus in dealings with persons subject to U.S. sanctions and the lack of full transparency about these dealings, Secretary Ross should be recused from participating in policy and trade matters involving Russia or Cyprus to avoid any question of impropriety.

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<sup>1</sup> Matthew Goldstein, Commerce Pick Wilbur Ross to Divest at Least 80 Holdings, *New York Times*, Jan. 17, 2017, available at <https://www.nytimes.com/2017/01/17/business/commerce-secretary-pick-wilbur-ross.html>; Wilbur L. Ross, Public Financial Disclosure Report, Dec. 19, 2017, available at [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/88642A2CA81AA6C2852580AB00618C8C/\\$FILE/Ross%20Wilbur%20L.%20Final%20278.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/88642A2CA81AA6C2852580AB00618C8C/$FILE/Ross%20Wilbur%20L.%20Final%20278.pdf).

<sup>2</sup> *Id.*; Letter from Wilbur L. Ross to David Maggi, Alternate Designated Agency Ethics Official, Jan. 15, 2017 (“Ethics Agreement”), available at [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/F83B364B516448EF852580AB007DC94E/\\$FILE/Ross,%20Wilbur%20L.%20finalEA.PDF](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/F83B364B516448EF852580AB007DC94E/$FILE/Ross,%20Wilbur%20L.%20finalEA.PDF).

<sup>3</sup> Ben Leubsdorf, Senate Panel Delays Hearing for Wilbur Ross, Trump’s Pick as Commerce Secretary, *Wall Street Journal*, Jan. 10, 2017, available at <https://www.wsj.com/articles/senate-panel-delays-hearing-for-wilbur-ross-trumps-pick-as-commerce-secretary-1484089756>.

<sup>4</sup> Alan Rappeport, Wilbur Ross, a Billionaire Investor, Is Confirmed as Commerce Secretary, *New York Times*, Feb. 27, 2017, available at <https://www.nytimes.com/2017/02/27/us/politics/wilbur-ross-commerce-secretary.html>.

<sup>5</sup> Matt Egan, Wilbur Ross Approved by Senate as Trump’s Commerce Secretary, *CNN*, Feb. 27, 2017, available at <http://money.cnn.com/2017/02/27/investing/wilbur-ross-commerce-secretary-confirmation-senate/>.

<sup>6</sup> Wilbur L. Ross, Public Financial Disclosure Report, Dec. 19, 2017. The exact value is not easily ascertainable from Secretary Ross’ public financial disclosure report. The investment in Diamond S is reported in part 2, #10.14, at 10.14.1.1 - 10.14.1.4, but with no value listed. The corresponding investment identified at part 2, #19 lists a value of \$1 million to \$5 million.

<sup>7</sup> Carrie Levine and Chris Zubak-Skees, Wilbur Ross will shepherd Trump’s trade policy. Should he also own a shipping firm?, *Center for Public Integrity*, March 23, 2017, available at <https://www.publicintegrity.org/2017/03/23/14509/wilbur-ross-will-shepherd-trump-s-trade-policy-should-he-also-own-shipping-firm>.

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- <sup>8</sup> Amendment No. 3 to Form S-1, Registration Statement, Mar. 6, 2014, *available at* <https://www.documentcloud.org/documents/3521290-Diamond-S-Shipping-Group-Inc-SEC-Filing-on-March.html>.
- <sup>9</sup> Jean Eaglesham and Lisa Schwartz, *Commerce Wilbur Ross Will Keep His Stake in Chinese-Government Backed Company*, *Dow Jones*, Feb. 13, 2017, *available at* [https://www.morningstar.com/news/dow-jones/asia-pacific/TDJNDN\\_201702135024/commerce-nominee-wilbur-ross-will-keep-his-stake-in-chinesegovernmentbacked-company.html](https://www.morningstar.com/news/dow-jones/asia-pacific/TDJNDN_201702135024/commerce-nominee-wilbur-ross-will-keep-his-stake-in-chinesegovernmentbacked-company.html).
- <sup>10</sup> Levine and Zubak-Skees, *Center for Public Integrity*, March 23, 2017.
- <sup>11</sup> Eaglesham and Schwarz, *Dow Jones*, Feb. 13, 2017.
- <sup>12</sup> 18 U.S.C. § 208; 5 C.F.R. § 2635.502.
- <sup>13</sup> Ross, Public Financial Disclosure Report, part 1, #33.
- <sup>14</sup> *Id.*, part 2, #10.7.9.5 and Ethics Agreement.
- <sup>15</sup> Kevin G. Hall, *Exclusive: Trump commerce pick Wilbur Ross faces new Russia questions*, *McClatchy*, Feb. 16, 2017, *available at* <http://www.mcclatchydc.com/news/politics-government/article133217874.html>.
- <sup>16</sup> Stephanie Kirchgaessner, *Trump's commerce secretary oversaw Russia deal while at Bank of Cyprus*, *The Guardian*, Mar. 23, 2017, *available at* <https://www.theguardian.com/us-news/2017/mar/23/wilbur-ross-russian-deal-bank-of-cyprus-donald-trump-commerce-secretary>.
- <sup>17</sup> *Id.*
- <sup>18</sup> Kirchgaessner, *The Guardian*, Mar. 23, 2017; Hall, *McClatchy*, Feb. 16, 2017.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*
- <sup>21</sup> Jake Tapper, *CNN Interview with Commerce Secretary Wilbur Ross*, Apr. 2, 2017, *available at* <http://www.cnn.com/videos/politics/2017/04/02/sotu-wilbur-ross-intv.cnn> (partial transcript *available at* [http://www.realeclearpolitics.com/video/2017/04/02/cnns\\_jake\\_tapper\\_asks\\_commerce\\_secretary\\_wilbur\\_ross\\_about\\_his\\_role\\_at\\_russian-connected\\_bank\\_of\\_cyprus.html](http://www.realeclearpolitics.com/video/2017/04/02/cnns_jake_tapper_asks_commerce_secretary_wilbur_ross_about_his_role_at_russian-connected_bank_of_cyprus.html)).
- <sup>22</sup> *Id.*
- <sup>23</sup> *Id.*

## Tom Price – Secretary of Health and Human Services

After serving in Congress for twelve years, Rep. Tom Price of Georgia, an orthopedic surgeon, was nominated by President Trump to be Secretary of the Department of Health and Human Services (“HHS”).<sup>1</sup> Ethics concerns regarding Secretary Price’s nomination stemmed from his extensive trades in health care stocks and involvement in health care legislation. Pursuant to his ethics agreement, Secretary Price agreed to divest his holdings in health care stocks and other common stock holdings upon his appointment.<sup>2</sup> However, in the four years preceding his nomination, then-Rep. Price engaged in extensive trading in healthcare stocks, including more than \$300,000 worth of shares in approximately 40 medical companies.<sup>3</sup> His stock trades in Zimmer Biomet Holdings Inc. and Innate Immunotherapeutics Ltd. raised particular conflict of interest and insider trading concerns under the Stop Trading on Congressional Knowledge Act (“STOCK Act”).<sup>4</sup> During his confirmation hearings, these trades became the focus of several ethics complaints.

### Zimmer Biomet Stock and Introduction of Related Legislation

Secretary Price’s ethics issues regarding Zimmer Biomet are based on the timing of legislation he introduced in March 2016 and his purchase of Zimmer Biomet common stock in the preceding week. Zimmer Biomet designs, manufactures and markets orthopedic reconstructive products, such as knee and hip reconstructive devices.<sup>5</sup> On March 17, 2016, then-Rep. Price purchased 26 shares of Zimmer Biomet worth \$2,697 at \$103.76 per share.<sup>6</sup> On March 23, 2016, Rep. Price introduced a bill known as the HIP Act to delay and suspend the implementation of the testing of a Comprehensive Care for Joint Replacement Model (CJR) Medicare payment model for lower extremity joint replacement.<sup>7</sup> One potential impact of this legislation would have been to delay a pilot program that would have a “direct effect” on Zimmer Biomet as a medical device manufacturer and “could have reduced the value” of shares in Zimmer Biomet.<sup>8</sup> As a senior member of the House Ways and Means Committee, which has jurisdiction over the Center for Medicare and Medicaid Services, Rep. Price arguably had “special access to nonpublic information regarding legislative and regulatory action affecting wide swaths of the healthcare industry, including medical device manufacturers like Zimmer Biomet.”<sup>9</sup> As a defense, Secretary Price asserted that the trade in Zimmer Biomet had been made by and at the discretion of his financial advisor as a periodic readjustment to rebalance his portfolio to ensure diversification.<sup>10</sup> Rep. Price subsequently sold his shares in Zimmer Biomet, on February 10, 2017, when the stock was trading at \$117.33 per share.<sup>11</sup>

Senator Kirsten Gillibrand, a co-author of the STOCK Act,<sup>12</sup> several other Democratic senators, and ethics organizations have called on the U.S. Securities and Exchange Commission (“SEC”) and the Office of Congressional Ethics to investigate whether Rep. Price violated the STOCK Act and other federal laws in the purchase and sale of his health care stocks, including Zimmer Biomet.<sup>13</sup>

### Innate Immunotherapeutics Stock Private Placement Offering

In addition to his trades in Zimmer Biomet, Secretary Price’s purchases of stock in Innate Immunotherapeutics raised similar conflict of interest and insider trading concerns. Innate Immunotherapeutics is a medical biotechnology company with offices in Australia and New Zealand.<sup>14</sup> According to its website, the company designs and manufactures technology to induce the human immune system to fight cancers and infections, and which can be used to design better vaccines against influenza, cancer, malaria and tuberculosis.<sup>15</sup> The *New York Times* reported that Innate Immunotherapeutics is a tiny pharmaceutical company that has no approved drugs and only one experimental multiple sclerosis drug under development.<sup>16</sup>

In his 2015 Financial Disclosure Statement, then-Rep. Price reported three separate January 2015 purchases of shares in Innate Immunotherapeutics totaling \$10,018.<sup>17</sup> In a September 12, 2016, periodic transaction

report, Rep. Price reported an additional purchase of Innate Immunotherapeutics on August 31, 2016, valued at \$50,001 - \$100,000,<sup>18</sup> which was subsequently determined by Senate Finance Committee staff to have been underreported.<sup>19</sup> The correct value should have been reported as between \$100,000 and \$250,000.<sup>20</sup> Notably, Rep. Price's last purchase of Innate Immunotherapeutics was his single largest stock buy reported, and by December 2016, it had doubled in value from the original purchase price of 41 cents per share.<sup>21</sup> When Rep. Price sold his shares in Innate Immunotherapeutics in February 2017, they were still trading at approximately 70 cents per share, and *ProPublica* reported he had "made a profit of more than \$150,000" on his trades in the stock.<sup>22</sup>

Rep. Price's August 2016 purchase came two days after his House colleague, Rep. Chris Collins, bought 4 million shares worth between \$500,000 and \$1,000,000.<sup>23</sup> Rep. Collins, who was also a member of the Trump transition team, is reported to be the company's largest shareholder and also sits on its board.<sup>24</sup> Rep. Collins' adult children are also among the largest shareholders.<sup>25</sup>

According to the *New York Times*, in June 2016 Innate Immunotherapeutics offered "a select opportunity" for a private placement offering to "sophisticated U.S. investors."<sup>26</sup> The proceeds "would be used, among other things, to finance a clinical trial and to gain permission from the F.D.A. to start a process that could lead to applying for approval of the drug in the United States."<sup>27</sup> Rep. Price was among 16 participants in the initial offering and also participated in a subsequent offering round.<sup>28</sup>

Secretary Price's trades in Innate Immunotherapeutics raised the possibility that he violated the STOCK Act, which prohibits members of Congress from using "any nonpublic information derived from the individual's position . . . or gained from performance of the individual's duties, for personal benefit."<sup>29</sup> Both Reps. Price and Collins played key roles in writing and supporting health care legislation, including the 21st Century Cures Act, which included measures and \$500 million in funding that would have permitted the FDA to speed up trials for new drugs.<sup>30</sup> Rep. Collins, a member of the health subcommittee of the House Energy and Commerce Committee, reportedly drafted a key provision that would permit clinical trials of new medical treatments to proceed more quickly.<sup>31</sup> Both Reps. Price and Collins voted in favor of the 21st Century Cures Act when it was voted upon in November 2016, three months after they had purchased shares in the company.<sup>32</sup>

During Secretary Price's confirmation hearing on January 18, 2017, before the Senate Committee on Health, Education, Labor and Pensions, Senator Patty Murray questioned him about the circumstances of his purchase and criticized him "for investing in Innate Immunotherapeutics while working on the 21st Century Cures Act, which contains provisions that could benefit the company."<sup>33</sup> Senator Murray prefaced one of her questions by noting that Collins had been overheard "off the House floor bragging about how he made people millionaires from a stock tip."<sup>34</sup> In addition, under questioning by Senator Al Franken, Rep. Price denied having engaged in a "sweetheart deal" after being offered a "discounted price."<sup>35</sup> However, the *Wall Street Journal* reported that "the cabinet nominee was one of fewer than 20 U.S. investors who were invited last year to buy discounted shares of the company – an opportunity that, for Rep. Price, arose from an invitation from a company director and fellow congressman."<sup>36</sup> On January 31, 2017, Simon Wilkinson, the CEO of Innate Immunotherapeutics, denied the allegation that Rep. Price had received a "privileged offer" to buy the company stock at a discount.<sup>37</sup> Wilkinson indicated "that Price was offered the same price offered to existing Australian and New Zealand shareholders as well as other US shareholders" that met the stated criteria.<sup>38</sup> Approximately "600 AU/NZ shareholders and about 20 US shareholders/investors took up the invitation," he claimed.<sup>39</sup>

Secretary Price's trades in Innate Immunotherapeutics also may have been inconsistent with his prior representation (with regard to his trades in Zimmer Biomet) that he relied on his broker to make all of his investments.<sup>40</sup>

Ultimately, Secretary Price was confirmed by the Senate in a 52-47 vote with no senators crossing party lines.<sup>41</sup> His trades raised questions about his judgment, conflicts of interest, and possible violations of the STOCK Act that consequently were the subject of a request for the SEC to investigate.<sup>42</sup>

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<sup>1</sup> Thomas E. Price, Nomination received in the Senate, Jan. 20, 2017, *available at*

<https://www.congress.gov/nomination/115th-congress/33>; *see also* <https://www.hhs.gov/about/leadership/secretary/thomas-e-price-md/index.html>.

<sup>2</sup> Letter from Thomas E. Price, M.D. to Elizabeth J. Fischmann, Associate General Counsel for Ethics, Designated Agency Ethics Official, Jan. 11, 2017 (“Ethics Agreement”), *available at* [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/FDC2060514F9E9D7852580C1004DB33A/\\$FILE/Price,%20Thomas%20E.%20%20finalAMENDEDEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/FDC2060514F9E9D7852580C1004DB33A/$FILE/Price,%20Thomas%20E.%20%20finalAMENDEDEA.pdf).

<sup>3</sup> Jordan Weissmann, *Tom Price’s Stock Trading Scandal Isn’t Going Away*, *Slate*, Jan. 18, 2017, *available at* [http://www.slate.com/blogs/moneybox/2017/01/18/tom\\_price\\_s\\_stock\\_trading\\_scandal\\_isn\\_t\\_going\\_away.html](http://www.slate.com/blogs/moneybox/2017/01/18/tom_price_s_stock_trading_scandal_isn_t_going_away.html); James V. Grimaldi and Michelle Hackman, *Donald Trump’s Pick for Health Secretary Traded Medical Stocks While in House*, *Wall Street Journal*, Dec. 22, 2016, *available at* <https://www.wsj.com/articles/donald-trumps-pick-for-health-secretary-traded-medical-stocks-while-in-house-1482451061?tesla=y>.

<sup>4</sup> *Id.* *See also* Jayne O’Donnell, *HHS nominee Tom Price bought stock, then authored bill benefiting company*, *USA Today*, Feb. 2, 2017, *available at* <https://www.usatoday.com/story/news/politics/2017/02/02/hhs-nominee-tom-price-bought-stock-then-authored-bill-benefiting-company/97337838/>.

<sup>5</sup> Zimmer Biomet Holdings, Inc., Yahoo Finance, last visited April 14, 2017, *available at* <https://finance.yahoo.com/quote/ZBH/profile>.

<sup>6</sup> Office of the President Elect, *Facts About Dr. Tom Price’s Investments (“Fact Sheet”)*, *available at* <https://assets.documentcloud.org/documents/3381256/Facts-Price.pdf>.

<sup>7</sup> HIP Act, H.R. 4848, 114th Cong. (2016).

<sup>8</sup> Alison Kodjack, *A Roundup of the Controversies Over Rep. Tom Price’s Investments*, *NPR*, Jan. 19, 2017, *available at* <http://www.npr.org/sections/health-shots/2017/01/19/510593180/a-roundup-of-the-controversies-over-rep-tom-prices-investments> (The HIP Act would have suspended a pilot program that “was testing so-called ‘bundled payments’ for joint replacements, under which a hospital receives a flat fee for all the care surrounding the surgery — including the cost of the implant. The idea was to give hospitals an incentive to negotiate for lower prices for the replacement knees and hips that Zimmer Biomet and its competitors make. Less than a week after buying the shares, Rep. Price introduced a bill called the [HIP Act](#) that would have suspended the pilot program.”)

<sup>9</sup> Letter from Senator Kirsten Gillibrand to Mary Jo White, Chair, U.S. Securities and Exchange Commission, Jan. 17, 2017, *available at* <https://www.gillibrand.senate.gov/newsroom/press/release/senator-gillibrand-author-of-the-stock-act-calls-on-securities-and-exchange-commission-to-immediately-investigate-department-of-health-and-human-services-secretary-nominee-tom-price>.

<sup>10</sup> Fact Sheet.

<sup>11</sup> Thomas Price, Periodic Transaction Report (OGE Form 278-T), Mar. 10, 2017, *available at* [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/5F3E366991E3A14A852580F40026F916/\\$FILE/Thomas-E-Price-03.10.2017-278T.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/5F3E366991E3A14A852580F40026F916/$FILE/Thomas-E-Price-03.10.2017-278T.pdf); Zimmer Biomet Holdings, Inc., Yahoo Finance, Feb. 10, 2017, *available at* <https://finance.yahoo.com/quote/ZBH?p=ZBH>.

<sup>12</sup> Stop Trading on Congressional Knowledge Act of 2012, 5 U.S.C. app. § 101 (2012).

<sup>13</sup> Letter from Senator Kirsten Gillibrand to Mary Jo White, Chair, U.S. Securities and Exchange Commission, Jan. 17, 2017; Letter from Public Citizen to U.S. Securities and Exchange Commission, Jan. 5, 2017, *available at* <http://www.citizen.org/documents/Request-for-Investigation-Price-Collins.pdf>; Senate Democrats on Health and Human Services Secretary Nomination, C-Span, Jan. 5, 2017, *available at* <https://www.c-span.org/video/?421183-1/senate-democrats-call-ethics-investigation-hhs-nominee-tom-price>.

<sup>14</sup> Innate Immunotherapeutics website, Home page, *available at* <http://www.innateimmunotherapeutics.com/IRM/content/default.aspx>.

<sup>15</sup> *Id.*

<sup>16</sup> Katie Thomas, *Australian Drug Maker Has Low Profile but Powerful Backers in Washington*, *New York Times*, Jan. 13, 2017, *available at* <https://www.nytimes.com/2017/01/13/health/innate-immunotherapeutics-tom-price.html>.

<sup>17</sup> Thomas Price, U.S. House of Representatives, 2015 Financial Disclosure Statement, Aug. 15, 2016, at 33, *available at* [http://clerk.house.gov/public\\_disc/financial-pdfs/2015/9109866.pdf](http://clerk.house.gov/public_disc/financial-pdfs/2015/9109866.pdf).

<sup>18</sup> Thomas Price, U.S. House of Representatives, Periodic Transaction Report, Sept. 12, 2016, *available at* [http://clerk.house.gov/public\\_disc/ptr-pdfs/2016/9110002.pdf](http://clerk.house.gov/public_disc/ptr-pdfs/2016/9110002.pdf).

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- <sup>19</sup> MJ Lee and Manu Raju, Senate committee raises more red flags on Tom Price, *CNN*, Jan. 24, 2017, available at <http://www.cnn.com/2017/01/24/politics/senate-red-flags-tom-price/index.html>.
- <sup>20</sup> *Id.*
- <sup>21</sup> Grimaldi and Hackman, *Wall Street Journal*, Dec. 22, 2016. The closing price on December 22, 2016 was 85 cents per share.
- <sup>22</sup> Robert Faturechi, Tom Price's \$150,000-Plus Stock Windfall, *ProPublica*, Apr. 3, 2017, available at <https://www.propublica.org/article/tom-prices-150000-plus-stock-windfall>.
- <sup>23</sup> Grimaldi and Hackman, *Wall Street Journal*, Dec. 22, 2016.
- <sup>24</sup> *Id.*
- <sup>25</sup> Thomas, *New York Times*, Jan. 13, 2017.
- <sup>26</sup> Thomas, *New York Times*, Jan. 13, 2017; Innate Immunotherapeutics, Private Placement and Rights Issue to raise Additional Working Capital, ASX Release, June 10, 2016, available at [http://www.innateimmuno.com/irm/PDF/1250\\_0/PlacementRightsIssuetoRaiseAdditionalWorkingCapital](http://www.innateimmuno.com/irm/PDF/1250_0/PlacementRightsIssuetoRaiseAdditionalWorkingCapital).
- <sup>27</sup> *Id.*
- <sup>28</sup> Thomas, *New York Times*, Jan. 13, 2017.
- <sup>29</sup> 5 U.S.C. app. § 101. See also Grimaldi and Hackman, *Wall Street Journal*, Dec. 22, 2017.
- <sup>30</sup> *Id.*
- <sup>31</sup> *Id.*
- <sup>32</sup> *Id.*
- <sup>33</sup> Osita Nwanevu, Patty Murray Really Grilled HHS Nominee Tom Price on His Health Stocks, *Slate*, Jan. 18, 2017, available at [http://www.slate.com/blogs/the\\_slatest/2017/01/18/watch\\_patty\\_murray\\_grill\\_tom\\_price\\_on\\_health\\_stocks.html](http://www.slate.com/blogs/the_slatest/2017/01/18/watch_patty_murray_grill_tom_price_on_health_stocks.html); Juliet Eilerin and Amy Goldstein, HHS nominee Price pressed hard on health policy positions, financial dealings, *Washington Post*, Jan. 20, 2017, available at [https://www.washingtonpost.com/news/powerpost/wp/2017/01/18/facing-the-senate-wednesday-hhs-nominee-price-will-defend-gops-health-care-overhaul/?utm\\_term=.a4c75a899bd7](https://www.washingtonpost.com/news/powerpost/wp/2017/01/18/facing-the-senate-wednesday-hhs-nominee-price-will-defend-gops-health-care-overhaul/?utm_term=.a4c75a899bd7).
- <sup>34</sup> Nwanevu, *Slate*, Jan. 18, 2017.
- <sup>35</sup> James V. Grimaldi, Rep. Tom Price Got Privileged, Discounted Offer on Biomedical Stock, Company Says, *Wall Street Journal*, Jan. 30, 2017, available at <https://www.wsj.com/articles/rep-tom-price-got-privileged-discounted-offer-on-biomedical-stock-company-says-1485800769>.
- <sup>36</sup> *Id.*
- <sup>37</sup> MJ Lee, In accidental 'reply all' to reporter, Collins thanks CEO for defending HHS nominee, *CNN*, Jan. 31, 2017, available at <http://www.cnn.com/2017/01/31/politics/chris-collins-tom-price-reply-all/>.
- <sup>38</sup> *Id.*
- <sup>39</sup> *Id.*
- <sup>40</sup> Weissmann, *Slate*, Jan. 18, 2017, available at [http://www.slate.com/blogs/moneybox/2017/01/18/tom\\_price\\_s\\_stock\\_trading\\_scandal\\_isn\\_t\\_going\\_away.html](http://www.slate.com/blogs/moneybox/2017/01/18/tom_price_s_stock_trading_scandal_isn_t_going_away.html).
- <sup>41</sup> Robert Pear and Thomas Kaplan, Tom Price is Confirmed as Health Secretary, *New York Times*, Feb. 10, 2017.
- <sup>42</sup> *Id.*

## Jeff Sessions – Attorney General

Attorney General Jeff Sessions’ ethics issues stem from the misleading and inaccurate testimony he gave in his Senate confirmation hearing and from his failure to recuse himself from an investigation despite a clear conflict of interest.

At Attorney General Sessions’ confirmation hearing before the Senate Judiciary Committee on January 10, 2017, he was asked what he would do if he learned of communications between Trump campaign members and the Russian government during the campaign.<sup>1</sup> Then-Sen. Sessions responded, “I’m not aware of any of those activities. I have been called a surrogate at a time or two in that campaign and I did not have communications with the Russians.”<sup>2</sup> In fact, Sen. Sessions had met at least twice with Russia’s ambassador to the United States during the course of the campaign, including a private conversation in Sen. Sessions’ office.<sup>3</sup> While it is unknown what exactly Sen. Sessions discussed with the ambassador during these conversations, his general denial to Congress of having “communications with the Russians” during the campaign was at best misleading and has been construed by some as outright dishonesty. The ACLU has since filed an ethics complaint for dishonesty against Attorney General Sessions with the Alabama State Bar.<sup>4</sup>

Attorney General Sessions’ misleading testimony is especially concerning given his role in the investigations into possible Russian interference with the 2016 presidential election. As early as February 27, there were calls for Attorney General Sessions to recuse himself from the investigations and for the appointment of a special counsel, given his own involvement in the campaign.<sup>5</sup> Attorney General Sessions did recuse himself – but only after his meetings with the Russian ambassador were reported on March 1.<sup>6</sup> Despite calls for resignation, he has refused to step down and continues to deny any wrongdoing in his communications with the ambassador.<sup>7</sup> President Trump has expressed complete confidence in Attorney General Sessions and denied any need for recusal.<sup>8</sup>

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<sup>1</sup>Philip Bump, What Jeff Sessions said about Russia, and when, *Washington Post*, Mar. 2, 2017, available at <https://www.washingtonpost.com/news/politics/wp/2017/03/02/what-jeff-sessions-said-about-russia-and-when/>.

<sup>2</sup> *Id.*

<sup>3</sup>Adam Entous, Ellen Nakashima, and Greg Miller, Sessions met with Russian envoy twice last year, encounters he later did not disclose, *Washington Post*, Mar. 1, 2017, available at [https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html).

<sup>4</sup> Catherine Herridge, ACLU files ethics complaint against Sessions with Alabama Bar Disciplinary Commission, *Fox News*, Mar. 9, 2017, available at <http://www.foxnews.com/politics/2017/03/09/aclu-files-ethics-complaint-against-sessions-with-alabama-bar-disciplinary-commission.html>.

<sup>5</sup> Chris Strohm, Sessions Says He’ll Recuse Himself on Russia Probe If Needed, *Bloomberg*, Feb. 27, 2017, available at <https://www.bloomberg.com/politics/articles/2017-02-27/sessions-says-he-ll-recuse-himself-on-russia-probe-if-needed>; Norman Eisen and Noah Bookbinder, Time for a Special Counsel in the Russiagate Scandal, *Politico*, Mar. 3, 2017, available at <http://www.politico.com/magazine/story/2017/03/donald-trump-russia-contacts-special-counsel-214859>.

<sup>6</sup> Mark Landler and Eric Lichtblau, Jeff Sessions Recuses Himself From Russia Inquiry, *New York Times*, Mar. 2, 2017, available at <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html>.

<sup>7</sup> *Id.*

<sup>8</sup> Abby Phillip, Trump has ‘total’ confidence in Jeff Sessions amid calls for attorney general’s resignation, *Washington Post*, Mar. 2, 2017, available at <https://www.washingtonpost.com/news/post-politics/wp/2017/03/02/trump-has-total-confidence-in-jeff-sessions-amid-calls-for-attorney-generals-resignation/>.



## Rex Tillerson – Secretary of State

The central ethics issue surrounding former ExxonMobil CEO Rex W. Tillerson's nomination and confirmation for Secretary of State related to his lengthy 41-year career with his former employer and his extensive financial holdings in the company.<sup>1</sup> While Secretary Tillerson properly divested those holdings, questions remain about his ability to be impartial regarding the company, oil and gas issues, and countries he worked with during his tenure.

Secretary Tillerson received ethics accolades from the Office of Government Ethics (OGE) for agreeing to divest his ExxonMobil financial holdings upon being confirmed as Secretary of State,<sup>2</sup> with OGE Director Walter Shaub, Jr. applauding him for “making a clean break from Exxon,” including “forfeiting bonus payments worth millions.”<sup>3</sup> It is important to note, however, that Director Shaub's observations regarding Secretary Tillerson were made in the context of his criticism of President-elect Trump's “wholly inadequate” plan to turn over business operations to his sons but retain his ownership interest in the Trump Organization.<sup>4</sup>

Under Secretary Tillerson's ethics agreement, ExxonMobil would make a one-time payment to an independent irrevocable trust that would equal the value of two million shares of restricted stock and restricted stock units that had not yet vested.<sup>5</sup> The value of that payment is worth approximately \$180 million.<sup>6</sup> The trust will then make payments to Secretary Tillerson based on the same 10-year schedule he would have received had he not joined the government.<sup>7</sup> This arrangement does not entirely resolve Secretary Tillerson's potential ethics issues. The standards of ethical conduct require a federal employee not to participate in any particular matter involving specific parties in which a person with whom he has a contractual or financial relationship (other than a routine consumer transaction) is or represents a party.<sup>8</sup> It could be argued that the trust arrangement between Secretary Tillerson as the beneficiary and ExxonMobil as the grantor should still be treated as a relationship covered by the standards because of its non-routine financial nature. If viewed in this light, the standards of ethical conduct would require Secretary Tillerson to recuse himself from specific party matters involving ExxonMobil for the duration of the arrangement, unless he received prior authorization, and a broader recusal than that mandated by OGE would be appropriate.

In addition, even though Director Shaub called Secretary Tillerson's ethics agreement a “sterling model,”<sup>9</sup> environmental groups called his selection “an epic mistake” based on his former position with ExxonMobil, which could call into question his objectivity in international climate talks, in which he will play a key role.<sup>10</sup> Several senators also expressed concern about Secretary Tillerson's impartiality with respect to Russia based on his prior opposition to sanctions against Russia when he served as ExxonMobil's CEO.<sup>11</sup> They noted that ExxonMobil had lobbied against sanctions on Russia because those sanctions impeded the company's ability to drill in Russia after it acquired drilling rights to 63 million acres of Russian land under Secretary Tillerson's leadership.<sup>12</sup> These senators requested that Secretary Tillerson recuse himself from all matters related to ExxonMobil for the entirety of his term rather than for the one year required by ethics rules.<sup>13</sup> As the senators noted, a broader recusal is not unprecedented: Secretary of State James A. Baker III formally recused himself from “any particular matter that has a direct and predictable effect upon the price of domestic oil and gas.”<sup>14</sup>

Notwithstanding these objections, Secretary Tillerson was confirmed by a 56 to 43 vote.<sup>15</sup> The number of votes against Secretary Tillerson were the most recorded in Senate history for a Secretary of State.<sup>16</sup> Notably, after he was sworn in, Secretary Tillerson recused himself from “working on issues related to TransCanada's application for a Presidential Permit for the proposed Keystone XL pipeline.”<sup>17</sup> Secretary Tillerson submitted this recusal letter in response to a specific request from an environmental organization for him to recuse from the Keystone XL pipeline matter.<sup>18</sup> Even though ExxonMobil was not technically a party to the matter, the group requested the recusal because ExxonMobil would likely benefit financially if the permit were to be approved.

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- <sup>1</sup> Press Release, ExxonMobil, Rex Tillerson to Retire, Darren Woods Elected Chairman, CEO of Exxon Mobil Corporation, Dec. 14, 2016, *available at* <http://news.exxonmobil.com/press-release/rex-tillerson-retire-darren-woods-elected-chairman-ceo-exxon-mobil-corporation>.
- <sup>2</sup> Letter from Rex W. Tillerson to Katherine D. McManus, Deputy Legal Advisor and Designated Agency Ethics Office, Jan. 3, 2017 (Ethics Agreement) *available at* [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/02AB20DA8210059D852580CB002C7C35/\\$FILE/Tillerson,%20Rex%20W.%20%20finalAmendedEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/02AB20DA8210059D852580CB002C7C35/$FILE/Tillerson,%20Rex%20W.%20%20finalAmendedEA.pdf) and Public Financial Disclosure Report (OGE 278), Dec. 31, 2016.
- <sup>3</sup> Walter M. Shaub, Jr. Remarks, Jan. 11, 2017 (“Shaub Remarks”) *available at* [https://oge.gov/web/oge.nsf/0/6E08189CF6AF742B852580A500799063/\\$FILE/Remarks%20of%20W%20M%20Shaub%20Jr%20\(1\).pdf](https://oge.gov/web/oge.nsf/0/6E08189CF6AF742B852580A500799063/$FILE/Remarks%20of%20W%20M%20Shaub%20Jr%20(1).pdf).
- <sup>4</sup> *Id.*
- <sup>5</sup> Ethics Agreement; Jessie Drucker, Rex Tillerson, Required to Shed Exxon Shares, Wants to Defer the Taxes, *New York Times*, Jan. 10, 2017, *available at* <https://www.nytimes.com/2017/01/10/business/rex-tillerson-exxon-secretary-of-state.html>.
- <sup>6</sup> Dan Alexander, Secretary of State Appointee Rex Tillerson Reaches \$180 Million Severance Deal with Exxon, *Forbes*, Jan. 4, 2017, *available at* <https://www.forbes.com/sites/danalexander/2017/01/04/secretary-of-state-appointee-rex-tillerson-reaches-180-million-severance-deal-with-exxon/#32ebad0b4d3a>.
- <sup>7</sup> Ethics Agreement.
- <sup>8</sup> 5 C.F.R. §§ 2635.501-.502.
- <sup>9</sup> Shaub Remarks.
- <sup>10</sup> Nicole Puglise, ‘An Epic Mistake’: Environmental Groups Fume Over Rex Tillerson Nomination, *The Guardian*, Dec. 15, 2016, *available at* <https://www.theguardian.com/us-news/2016/dec/15/rex-tillerson-environmental-record-exxonmobil>.
- <sup>11</sup> Letter to Mr. Rex W. Tillerson from Senators Edward J. Markey, Tom Udall, Richard Blumenthal, Jeffrey A. Merkley, Tammy Duckworth, Elizabeth Warren, Sheldon Whitehouse, Kirsten Gillibrand, Tammy Baldwin, and Robert Menendez, Jan. 30, 2017, *available at* [https://www.cenews.net/assets/2017/01/31/document\\_daily\\_02.pdf](https://www.cenews.net/assets/2017/01/31/document_daily_02.pdf).
- <sup>12</sup> *Id.*; see also Nik DeCosta-Klipa, Ed Markey Says He Will Vote No on Rex Tillerson’s Nomination. Here’s His Statement Why, *Boston.com*, Jan. 23, 2017, *available at* <https://www.boston.com/news/politics/2017/01/23/ed-markey-says-he-will-vote-no-on-rex-tillersons-nomination-heres-his-statement-why>.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> Gardiner Harris, Rex Tillerson is Confirmed as Secretary of State Amid Record Opposition, *New York Times*, Feb. 1, 2017, *available at* [https://www.nytimes.com/2017/02/01/us/politics/rex-tillerson-secretary-of-state-confirmed.html?\\_r=0](https://www.nytimes.com/2017/02/01/us/politics/rex-tillerson-secretary-of-state-confirmed.html?_r=0).
- <sup>16</sup> *Id.*
- <sup>17</sup> Letter from Katherine D. McManus, Deputy Legal Adviser and Designated Agency Ethics Official, to Annie Leonard, Executive Director, Greenpeace USA, Mar. 9, 2017, *available at* <https://oge.app.box.com/v/TillersonRecusal>.
- <sup>18</sup> Letter from Annie Leonard, Executive Director, Greenpeace USA, to Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics, and Katherine D. McManus, Deputy Legal Adviser and Designated Agency Ethics Officer, Mar. 8, 2017, *available at* [http://www.greenpeace.org/usa/wp-content/uploads/2017/03/OGE\\_letter\\_TillersonKXL.pdf](http://www.greenpeace.org/usa/wp-content/uploads/2017/03/OGE_letter_TillersonKXL.pdf).

## Withdrawn Nominees – Vincent Viola, Andrew Puzder, Philip Bilden and Todd Ricketts

President Trump’s penchant for nominating millionaires and billionaires with extensive financial holdings for top administrative positions – and announcing their nominations before vetting for financial conflicts of interest--has led to several prominent withdrawals due to conflict of interest and ethical concerns.

On February 3, Vincent Viola, nominated to be Secretary of the Army, withdrew from consideration for the position.<sup>1</sup> To comply with the Department of Defense’s ethics rules, Mr. Viola, would have had to separate himself financially from the multiple companies he owns. For Mr. Viola, a Forbes 400 billionaire and owner or majority shareholder of such organizations as the Florida Panthers, Virtu Financial, and Eastern Airlines, the financial sacrifice proved to be too high.<sup>2</sup> Before he withdrew, Mr. Viola also faced ethical scrutiny over benefits he would receive for federal contracts and potentially unethical trading practices.<sup>3</sup>

On February 15, Andrew Puzder withdrew from his nomination to be Secretary of Labor.<sup>4</sup> Though the withdrawal was apparently catalyzed by Mr. Puzder’s prior employment of an undocumented housekeeper and allegations of domestic abuse,<sup>5</sup> his nomination had already been stalled for weeks due to ethical issues with his finances.<sup>6</sup> Mr. Puzder’s confirmation hearing was delayed four times because of the difficulty of disentangling Mr. Puzder from his extensive holdings,<sup>7</sup> primarily the privately-owned CKE Restaurants Inc., which includes franchised restaurants such as Hardee’s and Carl’s Jr. Even under the ethics plan the Office of Government Ethics eventually approved, he would have retained an alarming ability to benefit from his companies, including opportunities to influence Department of Labor investigations at CKE franchise-owned stores and to promote policy decisions favorable to fast food restaurants in general.<sup>8</sup> Moreover, unnamed underlying assets in Mr. Puzder’s investment funds, which Mr. Puzder refused to disclose, likely would have raised further conflict of interest concerns.<sup>9</sup>

On February 26, Philip Bilden, President Trump’s nominee for Navy Secretary, withdrew his name from consideration.<sup>10</sup> Like Mr. Viola, Mr. Bilden decided that the hit his finances would suffer if he complied with federal conflict of interest rules was too high a price to pay, even for a top position in the Pentagon. Mr. Bilden, recently retired from twenty-five years at a private equity firm he co-founded, explained that the ethics requirements would be too disruptive given his family’s private financial interests.<sup>11</sup>

Most recently, Todd Ricketts, who President Trump had nominated for Deputy Commerce Secretary, withdrew his name from consideration due to the difficulty of complying with the ethics requirements.<sup>12</sup> In addition to holding a wide variety of financial interests, Mr. Ricketts is a board member of the Chicago Cubs.

Those familiar with presidential transitions and the appointments process have voiced concern that the Trump administration failed to vet candidates for financial conflicts of interest before officially nominating them. The resulting withdrawals not only reveal the wisdom of the customary vetting process, but also underline the Trump administration’s cavalier attitude towards conflicts of interest.

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<sup>1</sup> Susanne Craig, *Vincent Viola, Nominee for Army Secretary, Drops Out*, *New York Times*, Feb. 3, 2017, available at <https://www.nytimes.com/2017/02/03/us/politics/vincent-viola-withdraws-army-secretary-trump.html>.

<sup>2</sup> *Id.*; Scott Horsley, *The Richest Administration In History Just Got Richer*, *NPR*, Dec. 20, 2016, available at <http://www.npr.org/2016/12/20/506210163/the-richest-administration-in-history-just-got-richer>.

<sup>3</sup> Patrick Reilly, *Why Vincent Viola turned down Trump's nomination for Army Secretary*, *Christian Science Monitor*, Feb. 4, 2017, available at <http://www.csmonitor.com/USA/Politics/2017/0204/Why-Vincent-Viola-turned-down-Trump-s-nomination-for-Army-Secretary>; Craig, *New York Times*, Feb. 3, 2017.

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<sup>4</sup> Ed O'Keefe and Jonnelle Marte, Andrew Puzder withdraws labor nomination, throwing White House into more turmoil, *Washington Post*, Feb. 15, 2017, available at [https://www.washingtonpost.com/powerpost/now-6-republicans-are-on-the-fence-about-andrew-puzder/2017/02/15/e34cada6-f38b-11e6-8d72-263470bf0401\\_story.html](https://www.washingtonpost.com/powerpost/now-6-republicans-are-on-the-fence-about-andrew-puzder/2017/02/15/e34cada6-f38b-11e6-8d72-263470bf0401_story.html).

<sup>5</sup> Marianne Levine, Puzder addresses abuse allegations, *Politico*, Mar. 9, 2017, available at <http://www.politico.com/story/2017/03/andrew-puzder-labor-abuse-allegations-235895>.

<sup>6</sup> *Id.*

<sup>7</sup> Jonnelle Marte, Labor Nominee Puzder's Confirmation Hearing Delayed a Fourth Time, *Washington Post*, Jan. 31, 2017, available at [https://www.washingtonpost.com/news/get-there/wp/2017/01/31/labor-nominee-puzders-confirmation-hearing-delayed-a-fourth-time/?utm\\_term=.f93cf67f4a39](https://www.washingtonpost.com/news/get-there/wp/2017/01/31/labor-nominee-puzders-confirmation-hearing-delayed-a-fourth-time/?utm_term=.f93cf67f4a39).

<sup>8</sup> Ben Penn, Puzder Ethics Plan Permits a Pro-Restaurant Labor Department, *Bloomberg BNA*, Feb. 10, 2017, available at <https://www.bna.com/puzder-ethics-plan-n57982083611/>.

<sup>9</sup> *Id.*; Ralph Ellis, Navy Secretary Nominee Philip Bilden Withdraws, *CNN*, Feb. 26, 2017, available at <http://www.cnn.com/2017/02/26/politics/navy-secretary-nominee-bilden-withdraws/>.

<sup>10</sup> Scott Shane, Philip Bilden, Nominee for Secretary of the Navy, Withdraws, *New York Times*, Feb. 26, 2017, available at <https://www.nytimes.com/2017/02/26/us/politics/philip-bilden-nominee-secretary-navy-withdraws.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Lynn Sweet, Cubs' Todd Ricketts withdraws name for Trump's Cabinet, *Chicago Sun-Times*, Apr. 19, 2017, available at <http://chicago.suntimes.com/politics/cubs-todd-ricketts-withdraws-name-for-trumps-cabinet/>.

## WHITE HOUSE STAFF AND ADVISORS: CLOSE TRUMP AIDES OFF TO A BAD START

Unlike his cabinet nominations, who required Senate hearings and approval, President Trump had virtually free reign in picking his White House staff and close advisors. Unsurprisingly, President Trump's disdain for ethical standards is reflected in those selections. In the short time they have been in their positions, the President's top aides have been caught in multiple and wide-ranging ethical entanglements.

Within days of President Trump taking office, White House aide Kellyanne Conway clearly violated ethics rules by improperly promoting the accessories and clothing line of President Trump's daughter on national television and in the White House press room. Another White House official, Christopher Liddell, actively participated in three meetings with CEOs of companies in which he held millions of dollars in stock, laying the foundation for a potential criminal conflict of interest violation. President Trump's chief strategist Steve Bannon appears to have improperly communicated with his former employer, Breitbart News, in clear violation of the administration's new Ethics Pledge; his social media director Dan Scavino Jr. seemingly violated the Hatch Act by improperly engaging in political activity while using his official authority; and the president's first National Security Advisor, Michael Flynn, was forced to resign after failing to be forthcoming with Vice President Mike Pence about his discussions with the Russian ambassador during the transition and later had to retroactively register as a foreign agent of the government of Turkey. President Trump has also designated individuals outside the government, most notably the billionaire investor Carl Icahn, as advisors on various policy initiatives; such advisors should be subject to a basic set of ethics rules, but thus far the administration has declined to clarify these individuals' roles and therefore their ethics obligations, even as Icahn and others have engaged in conduct that could implicate ethics rules.

Perhaps most notably, President Trump appointed his daughter Ivanka Trump and son-in-law Jared Kushner to serve as senior White House advisors without any particular qualifications or experience and with little regard for laws against nepotism. Moreover, both have retained extensive outside business interests giving rise to significant conflicts of interest that are exceeded in scope only by those of President Trump himself. Additionally, President Trump promised before his inauguration that he would not communicate about his businesses with his sons Eric Trump and Donald Trump, Jr. to avoid conflicts of interest during his presidency; however, it appears that even these inadequate limitations are not being observed strictly.

A discussion of some of the most egregious ethical problems of President Trump's White House staff and advisors follows.

## Misuse of Public Office to Promote Products

One of the most revealing incidents involving ethics since President Trump took office was Counselor to the President Kellyanne Conway's clear violation of ethics rules when she endorsed Ivanka Trump's accessories and clothing line. While Ms. Conway's violation itself was concerning, the White House's attitude toward ethics was exposed by its reaction and ultimate refusal to take any meaningful disciplinary action against her.

The incident began on February 9, when Ms. Conway endorsed Ivanka Trump's fashion products in an interview on Fox News as a way of responding to Nordstrom dropping the line and President Trump's tweet that his daughter had been treated "so unfairly."<sup>1</sup> Ms. Conway first told viewers, "Go buy Ivanka's stuff is what I would tell you," and a few moments later added, "I'm going to give a free commercial here: Go buy it today, everybody; you can find it online."<sup>2</sup> Ms. Conway unquestionably made these statements in her official capacity. She was introduced on the program as "Special Counselor to the President," and spoke from the White House briefing room in front of the White House seal and the American flag.<sup>3</sup>

Federal ethics regulations concerning the "use of office for private gain" clearly prohibit any employee from using her government position or any authority associated with her public office to endorse "any product, service or enterprise."<sup>4</sup> One example provided in the regulations even states that a government employee "may not appear in a television commercial in which she endorses" a product.<sup>5</sup>

Ms. Conway's endorsement worked. Following the interview, sales of Ivanka Trump's products soared.<sup>6</sup>

Despite the clear violation, the White House has largely rebuffed calls to discipline Ms. Conway. The same day the interview aired, the chair and ranking member of the House Committee on Oversight and Government Reform requested that OGE investigate Ms. Conway's remarks, as did CREW and other ethics organizations.<sup>7</sup> The White House quickly stated that it had "counseled" Ms. Conway on the subject, but refused to elaborate on what that counseling entailed.<sup>8</sup>

At the same time, President Trump made clear he did not believe that Ms. Conway did anything wrong. One White House official said the president told Ms. Conway in a meeting that "he backed her up 'completely'" and said he "hated" the word "counseled" being used,<sup>9</sup> and Ms. Conway asserted that President Trump "backs me 100 percent" and tweeted that "POTUS supports me."<sup>10</sup> A White House spokeswoman added that President Trump "understands she was merely sticking up for a wonderful woman who she has great respect for and felt was treated unfairly."<sup>11</sup> These assertions from the president undercut any statements from White House staff suggesting that Ms. Conway's actions could have constituted any type of problem.

The next request for action came from Office of Government Ethics Director Walter Shaub, Jr. In a February 13 letter to White House ethics officer Stefan Passantino, Director Shaub noted there was "strong reason to believe" Ms. Conway violated the rule and that disciplinary action was warranted, and recommended the White House investigate and consider taking disciplinary action.<sup>12</sup>

In its February 28 response, however, the White House made clear that no further action would be taken.<sup>13</sup> The letter claimed Ms. Conway made the statement "in a light, off-hand manner while attempting to stand up for a person she believed had been unfairly treated and did so without nefarious motive or intent to benefit personally," and concluded she "acted inadvertently" and was "highly unlikely to do so again."<sup>14</sup> The only apparent consequence of Ms. Conway's violation, based on the letter, was that Mr. Passantino personally reviewed with her the ethics rules White House employees are expected to follow, and that he advised that her comments "implicated the prohibition on using one's official position to endorse any product or service."<sup>15</sup> In contrast to this light reprimand, other executive branch employees who violate the rule prohibiting misuse of office can face a multi-day suspension, loss of pay, or even termination.<sup>16</sup> The letter also took the concerning position that many OGE regulations do not apply to many White House officials.<sup>17</sup>

Director Shaub questioned the White House's decision on March 9, strongly recommending that Ms. Conway be disciplined.<sup>18</sup> "Not taking disciplinary action against a senior official under such circumstances," he wrote, "risks undermining the ethics program."<sup>19</sup> Director Shaub also strongly disagreed with the "extraordinary assertion" that the rules might not apply to employees of the Executive Office of the President.<sup>20</sup> It does not appear, however, that any further action has been or will be taken against Ms. Conway.

The White House's cavalier attitude toward ethics may have contributed to a similar incident just a few weeks later. Another senior Trump administration official, Treasury Secretary Steven Mnuchin, breached the same rule as Ms. Conway did on March 24 when he publicly endorsed a movie on which he was an executive producer.<sup>21</sup> Again, there were quickly calls for an investigation and disciplinary action.<sup>22</sup> In contrast to the Ms. Conway response, Secretary Mnuchin took action to remedy his violation. As noted by Director Shaub in a March 31 letter, Secretary Mnuchin "publicly acknowledged responsibility" for his actions by sending a letter to OGE conceding that "he should not have made remarks about his film" and pledging to "exercise greater caution with respect to the Standards of Conduct in the future," and announced his intent to complete additional remedial ethics training.<sup>23</sup> As a result, Director Shaub determined there was a "meaningful distinction" from the response to Ms. Conway's conduct.<sup>24</sup>

In the latest similar violation, on April 24 the State Department removed an article apparently promoting President Trump's Mar-a-Lago resort, including referring to it as the "winter White House."<sup>25</sup> The property is held in a trust of which President Trump is the sole beneficiary.<sup>26</sup> After public outcry, including criticism from several members of Congress and outside ethics watchdogs,<sup>27</sup> the State Department took down the post, admitting that it had not been vetted for potential legal or ethical issues before being posted.<sup>28</sup>

Ms. Conway clearly violated the rules when she endorsed Ivanka Trump's products. A White House that takes ethics seriously would have responded very differently to that violation, and perhaps averted the subsequent violations.

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<sup>1</sup> Kellyanne Conway on Ivanka Trump's Fashion Line: 'Go Buy It Today!', Fox & Friends, Feb. 9, 2017, *available at* <http://insider.foxnews.com/2017/02/09/kellyanne-conway-ivanka-trump-retailers-go-buy-her-stuff>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 5 C.F.R. § 2635.702.

<sup>5</sup> 5 C.F.R. § 2635.702(c).

<sup>6</sup> Kristine Phillips, 'Go buy Ivanka's stuff,' Kellyanne Conway said. Then the first daughter's fashion sales exploded, *Washington Post*, Mar. 10, 2017, *available at* <https://www.washingtonpost.com/news/business/wp/2017/03/10/go-buy-ivankas-stuff-kellyanne-conway-said-then-the-first-daughters-fashion-sales-exploded/>.

<sup>7</sup> Richard Pérez-Peña and Rachel Abrams, Kellyanne Conway Promotes Ivanka Trump Brand, Raising Ethics Concerns, *New York Times*, Feb. 9, 2017, *available at* <https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html>.

<sup>8</sup> *Id.*

<sup>9</sup> Sunlen Serfaty and Dan Merica, Kellyanne Conway Apologized to Donald Trump After Ivanka Clothing Line Comments, *CNN*, Feb. 10, 2017, *available at* <http://www.cnn.com/2017/02/10/politics/kellyanne-conway-tweets-potus-supports-me/>.

<sup>10</sup> Conway Says Trump Has Her Back Amid Ivanka Comment Controversy, *Fox News*, Feb. 10, 2017, *available at* <http://www.foxnews.com/politics/2017/02/10/conway-says-trump-has-her-back-amid-ivanka-comment-controversy.html>.

<sup>11</sup> Julie Bykowitz and Bernard Condon, White House Adviser 'Counseled' After Brand Promotion, *Associated Press*, Feb. 9, 2017, *available at* <http://bigstory.ap.org/article/c41ee620816a492190ee249d282cedf9>.

<sup>12</sup> Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics to Stefan C. Passantino, Deputy Counsel to the President, Feb. 13, 2017, *available at* <https://pbs.twimg.com/media/C4pcNvwWcAAz3a7.jpg:large>.

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- <sup>13</sup> Letter from Stefan C. Passantino, Deputy Counsel to the President, to Walter M. Shaub, Jr., Director, Office of Government Ethics, Feb. 28, 2017, available at <https://assets.documentcloud.org/documents/3477259/WH-to-OGE-28Feb17.pdf>.
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> Matea Gold, [White House rebuffs ethics office recommendation to discipline Kellyanne Conway](#), *Washington Post*, Mar. 1, 2017, available at [https://www.washingtonpost.com/news/post-politics/wp/2017/03/01/white-house-rebuffs-ethics-office-recommendation-to-discipline-kellyanne-conway/?utm\\_term=.a874a7e130b6](https://www.washingtonpost.com/news/post-politics/wp/2017/03/01/white-house-rebuffs-ethics-office-recommendation-to-discipline-kellyanne-conway/?utm_term=.a874a7e130b6).
- <sup>17</sup> Letter from Stefan C. Passantino, Feb. 28, 2017.
- <sup>18</sup> Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics to Stefan C. Passantino, Deputy Counsel to the President, Mar. 9, 2017, available at <https://oge.app.box.com/s/r2t4v8ftjmkx4cfgfolqzievuhcvrfj2>.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*
- <sup>21</sup> Jeremy Venook, [Holy Ethics Disaster, Batman!](#), *The Atlantic*, Mar. 24, 2017, available at <https://www.theatlantic.com/business/archive/2017/03/steven-mnuchin-lego-batman-movie/520782/>.
- <sup>22</sup> David Lawder, [Senator seeks ethics probe of Mnuchin's 'Lego Batman' comment](#), *Reuters*, Mar. 28, 2017, available at <http://www.reuters.com/article/us-usa-treasury-ethics-idUSKBN16Z062>.
- <sup>23</sup> Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to Sen. Ron Wyden, Mar. 31, 2017, available at [https://www.oge.gov/web/OGE.nsf/All%20Documents/282B38EF4C78AD20852580F8004D2768/\\$FILE/Letter%20to%20R.%20Wyden.pdf?open](https://www.oge.gov/web/OGE.nsf/All%20Documents/282B38EF4C78AD20852580F8004D2768/$FILE/Letter%20to%20R.%20Wyden.pdf?open).
- <sup>24</sup> *Id.*
- <sup>25</sup> Anne Gearan, [State Department Website Removes Article Touting History of Trump's Mar-a-Lago Estate](#), *Washington Post*, Apr. 24, 2017, available at [https://www.washingtonpost.com/world/national-security/state-department-website-touts-glittering-history-of-trumps-mar-a-lago-estate/2017/04/24/bd298e44-292f-11e7-b605-33413c691853\\_story.html](https://www.washingtonpost.com/world/national-security/state-department-website-touts-glittering-history-of-trumps-mar-a-lago-estate/2017/04/24/bd298e44-292f-11e7-b605-33413c691853_story.html).
- <sup>26</sup> Jennifer Rubin, [Trump's Brazen Self-Promotion Crosses the Line](#), *Washington Post*, Apr. 25, 2017, available at <https://www.washingtonpost.com/blogs/right-turn/wp/2017/04/25/trumps-brazen-self-promotion-crosses-the-line/>.
- <sup>27</sup> Gardiner Harris, [U.S. Embassies Post Article Extolling Trump's Mar-a-Lago](#), *New York Times*, Apr. 24, 2017, available at <https://www.nytimes.com/2017/04/24/us/politics/mar-a-lago-winter-white-house-state-department.html>; Matt Shuham, [Watchdog Groups File Complaints Over State Dept. Mar-A-Lago Promotion](#), *Talking Points Memo*, Apr. 25, 2017, available at <http://talkingpointsmemo.com/livewire/watchdog-groups-common-cause-complaint-mar-a-lago-share-america>.
- <sup>28</sup> Anne Gearan, [Mar-a-Lago Article Not Reviewed Before Publication on Government Site](#), *Washington Post*, Apr. 25, 2017, available at [https://www.washingtonpost.com/world/national-security/mar-a-lago-article-not-reviewed-before-publication-on-government-site/2017/04/25/2a95e418-29ef-11e7-a616-d7c8a68c1a66\\_story.html](https://www.washingtonpost.com/world/national-security/mar-a-lago-article-not-reviewed-before-publication-on-government-site/2017/04/25/2a95e418-29ef-11e7-a616-d7c8a68c1a66_story.html).



## Conflict of Interest

In addition to the Trump administration's many potential conflicts of interest, at least one top aide may have violated criminal conflict of interest laws within the first two weeks of the presidency. That official, Director of Strategic Initiatives Chris Liddell, participated in at least three meetings with President Trump and various business executives – including executives from seventeen companies in which he held millions of dollars in stock.<sup>1</sup>

On February 9, 2017, OGE issued four Certificates of Divestiture for Mr. Liddell in response to a request from a White House ethics official.<sup>2</sup> These Certificates of Divestiture were issued to Mr. Liddell, his spouse, and a trust in which he appears to have a beneficial interest.<sup>3</sup> The Certificates of Divestiture allow Mr. Liddell, his spouse, and the trust the opportunity to defer capital gains treatment for the sale of the stock.<sup>4</sup>

One certificate listed more than 800 separate stock holdings, including in the following companies that participated in the White House meetings: Arconic, Blackrock Inc., Corning, Dell Technologies, Dow Chemical, Ford Motor Co., General Motors Co., IHS Markit LTD, International Business Machines (IBM), International Paper, Johnson & Johnson, JP Morgan Chase & Co., Lockheed Martin, Pepsico Inc., Tesla Motors Inc., Walmart Stores Inc., and Whirlpool.<sup>5</sup> The fact that OGE issued the certificates on February 9 strongly indicates that Liddell still held stock in the companies on that date and had not divested his financial interests.

On January 23, 2017, Mr. Liddell participated with President Trump in a meeting with business leaders that included representatives from 12 companies including 10 companies in which Liddell appears to have held stock worth approximately \$2.1 million: Arconic, Corning, Dell Technologies, Dow Chemical, Ford Motor Co., International Paper, Johnson & Johnson, Lockheed Martin, Tesla Motors, and Whirlpool.<sup>6</sup> During the meeting, President Trump reportedly told attendees that his “administration would prioritize corporate tax cuts and decrease regulation.”<sup>7</sup> He also repeated his threat to impose a “border tax” on companies that move production outside the United States, saying: “There will be advantages to companies that do indeed make their products here.”<sup>8</sup> In that regard, President Trump was making a specific overture to these companies to make their products in the United States so that they could obtain the “advantages” being offered.

On January 24, 2017, Mr. Liddell participated with President Trump in a meeting with General Motors, Ford Motors, Fiat Chrysler Automobiles NV, and the head of the automobile manufacturer trade association.<sup>9</sup> At the time he participated in the meeting, Mr. Liddell and his spouse apparently held stock in General Motors and Ford Motors worth more than \$72,000.<sup>10</sup> Prior to the meeting, President Trump tweeted: “Will be meeting at 9:00 with top automobile executives concerning jobs in America. I want new plants to be built here for cars sold here!”<sup>11</sup> During the meeting, President Trump reportedly urged the executives to build new factories and promised to change environmental regulations to encourage job creation.<sup>12</sup> Based on the invitation list, President Trump's morning tweet about the meeting, and related news reports, this particular meeting appears to have been focused on the automobile industry and included a direct appeal to its representatives to build more plants in the United States.

On February 3, 2017, Mr. Liddell further participated with President Trump in a meeting with members of the Strategic and Policy Forum chaired by Blackstone Group Chairman and CEO Stephen Schwarzman.<sup>13</sup> Representatives of approximately 14 other companies also were in attendance, including the following companies in which Mr. Liddell appears to have held a financial interest: BlackRock, General Motors, IHS Markit LTD, International Business Machines, JPMorgan Chase, Pepsico, Tesla Motors Inc., and Walmart Stores.<sup>14</sup> At the time he participated in the meetings, Mr. Liddell's stock holdings in these companies appear to have been worth approximately \$2.3 million.<sup>15</sup> President Trump and the CEOs in attendance reportedly discussed topics “ranging from tax reform to infrastructure,” and some executives presented prepared remarks on specific issues, including the CEO of General Motors who “was expected to talk about the auto

industry's desire for a second look at fuel-economy rules that the Obama administration affirmed just before leaving office."<sup>16</sup>

Federal law prohibits a federal employee from participating personally and substantially in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.<sup>17</sup> As defined in OGE regulations, a "particular matter" includes only a matter that involves deliberation, decision, or action that is focused on the interests of either a specific person or a discrete and identifiable class of persons.<sup>18</sup>

The January 24 meeting with representatives of the automobile manufacturers seemingly was convened by President Trump to make a direct appeal to the three biggest American automobile manufacturers to build factories in the United States and to discuss changes in environmental regulations to help them in this regard. As a result, this meeting appears to have been a particular matter because it was carried out in furtherance of the government's stated policy to encourage car companies to build more factories.

The January 23 and February 3 meetings also may have been particular matters under the statute and regulations. At the January 23 meeting, President Trump apparently appealed to the attendees to specifically support his tax and regulatory reform initiatives. Moreover, it is unknown to what extent President Trump and the executives discussed policies focused on the interests of a discrete and identifiable group of companies. Similarly, it appears likely that the fuel-economy rules specifically impacting the auto industry were discussed at the February 3 meeting, and it is unknown whether the participants discussed other policies focused on the interests of a discrete and identifiable group of companies.

The White House meetings also may have constituted particular matters for Mr. Liddell to the extent he was involved in planning and organizing them. Based on his stated responsibility to "focus on priority projects" and to "interface with private sector forums,"<sup>19</sup> there is a reasonable basis to believe that Mr. Liddell had responsibility to organize the meetings, and to oversee and participate in the selection process for prospective attendees. To the extent that he did so, he may be viewed as having personally and substantially participated in the White House meetings as particular matters involving specific parties that would have a direct and predictable effect on his financial interests.

As a result, it appears that each of the meetings may have constituted particular matters and that at the time of the meetings Mr. Liddell held significant amounts of stock in several of the companies that participated in them.

The conflict of interest statute's purpose is to ensure that a government employee's official conduct is directed solely to advancing the public interest and not the employee's private financial gain. On March 14, CREW filed a complaint with White House Counsel Donald McGahn requesting that he evaluate whether the possible violations should be referred to the Department of Justice for investigation.<sup>20</sup> The White House claimed that Mr. Liddell was working with them to comply with ethical obligations, but so far, there is no indication that the matter has been addressed.<sup>21</sup>

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<sup>1</sup> Peter Overby, *Ethics Documents Suggest Conflict Of Interest By Trump Adviser*, NPR, Mar. 14, 2017, *available at* <http://www.npr.org/sections/thetwo-way/2017/03/14/520121822/ethics-documents-suggest-conflict-of-interest-by-trump-adviser>; Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington to Donald F. McGahn, White House Counsel, Mar. 14, 2017, *available at* <http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/03/14134927/McGahn-Liddell-3-14-17.pdf>.

<sup>2</sup> Office of Government Ethics, Certificate of Divestiture, Certificate No. OGE-2017-009 (Feb. 9, 2017); Office of Government Ethics, Certificate of Divestiture, Certificate No. OGE-2007-010 (Feb. 9, 2017); Office of Government

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Ethics, Certificate of Divestiture, Certificate No. OGE-2007-011 (Feb. 9, 2017); and Office of Government Ethics, Certificate of Divestiture, Certificate No. OGE-2017-012 (Feb. 9, 2017).

<sup>3</sup> The financial interests of his spouse and any trust in which Liddell has a beneficial interest are imputed to him under 18 U.S.C. § 208, and are considered “eligible persons” to receive Certificates of Divestiture under 5 C.F.R. § 2634.1001 and § 2634.1003.

<sup>4</sup> 5 C.F.R. § 2634.1001; 26 U.S.C. § 1043.

<sup>5</sup> Certificate No. OGE-2017-011.

<sup>6</sup> See <http://www.gettyimages.com/license/633088382> (photo of meeting showing Mr. Liddell); Richard Feloni, [Here Are the 12 Business Leaders Trump Hosted For His First Big White House Meeting](#), *Business Insider*, Jan. 23, 2017, available at <http://www.businessinsider.com/business-leaders-trump-white-house-meeting-2017-1>; Certificate No. OGE-2007-011. The amounts of stock holdings were determined by multiplying the number of shares listed in the Certificates of Disclosure by the values of stock on the New York Stock Exchange (“NYSE”) or the Nasdaq Stock Market on the date of each meeting, according to Google Finance. See <https://www.google.com/finance>.

<sup>7</sup> Feloni, *Business Insider*, Jan. 23, 2017.

<sup>8</sup> *Id.*

<sup>9</sup> See Simon Plumb, [First Photos of Kiwi in Trump’s Team](#), *New Zealand Herald*, Jan. 29, 2017, available at [http://m.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11790581](http://m.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11790581); David Shepardson and Roberta Rampton, [Trump Talks to U.S. Automakers, Pushes For New American Plants](#), *Reuters*, Jan. 24, 2017, available at <http://www.reuters.com/article/us-usa-trump-autos-idUSKBN1581CA>.

<sup>10</sup> Certificate Nos. OGE-2007-010, OGE-2007-011. Values of stock on the NYSE on the date of the meeting, according to Google Finance. See <https://www.google.com/finance>. Mr. Liddell’s stock holdings were worth approximately \$65,263 on the day of the meeting and his wife’s holdings were worth approximately \$7,400.

<sup>11</sup> See <https://twitter.com/realDonaldTrump/status/823850781946343427>.

<sup>12</sup> Bill Vlasic, [Trump, In Meeting, Urges Automakers to Build in United States](#), *New York Times*, Jan. 24, 2017, available at [https://www.nytimes.com/2017/01/24/business/trump-us-automakers-meeting.html?\\_r=0](https://www.nytimes.com/2017/01/24/business/trump-us-automakers-meeting.html?_r=0).

<sup>13</sup> See <http://www.gettyimages.com/license/633692742> (photo of meeting showing Mr. Liddell); Matthew Townsend and Justin Sink, [Trump CEO Brain Trust Huddles as Corporate America Splits](#), *Bloomberg*, Feb. 3, 2017, available at <https://www.bloomberg.com/politics/articles/2017-02-03/trump-ceo-brain-trust-huddles-as-rifts-open-in-corporate-america>.

<sup>14</sup> In addition, two retired executives, Jim McNerney of Boeing and Jack Welch of General Electric, attended the meeting. Mr. Liddell held stock in these companies as well. Richard Feloni, [Here’s Who Sat Where in Trump’s First Big Business Council Meeting - And What The Layout Communicates](#), *Business Insider*, Feb. 3, 2017, available at <http://www.businessinsider.com/who-sat-where-in-president-trumps-business-advisory-council-and-why-2017-2>; Certificate No. OGE-2007-011.

<sup>15</sup> Certificate No. OGE-2007-011.

<sup>16</sup> Townsend and Sink, *Bloomberg*, Feb. 3, 2017.

<sup>17</sup> 5 C.F.R. § 2635.402(a).

<sup>18</sup> 5 C.F.R. § 2635,402(b)(3).

<sup>19</sup> See <http://www.presidency.ucsb.edu/ws/index.php?pid=49389>.

<sup>20</sup> Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington to Donald F. McGahn, White House Counsel, Mar. 14, 2017, available at <http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/03/14134927/McGahn-Liddell-3-14-17.pdf>.

<sup>21</sup> Overby, [Ethics Documents Suggest Conflict Of Interest By Trump Adviser](#), *NPR*, Mar. 14, 2017.

## Violating the Ethics Pledge

President Trump’s so-called “Ethics Pledge” – Executive Order No. 13770 – lies at the heart of his promise to “drain the swamp” in Washington. Issued on January 28, 2017, the Executive Order requires all executive branch appointees to pledge to abide by certain ethical obligations.<sup>1</sup> Those obligations include a promise not to participate in certain matters related to the appointees’ former employers for a two-year period from the date of their appointments.<sup>2</sup> The “particular matter[s]” within that two-year period include “any meeting or other communication relating to the performance of one’s official duties with a former employer[.]”<sup>3</sup>

Chief Strategist and Senior Counselor to the President Stephen K. Bannon appears to already have violated the required Ethics Pledge by communicating repeatedly with his most recent former employer, Breitbart News Network (“Breitbart”), about official matters. Until his resignation on or about November 13, 2017, Mr. Bannon served as Breitbart’s executive chairman.<sup>4</sup> Since leaving Breitbart and joining the Trump White House in one of the most senior positions, Mr. Bannon has communicated with his former employer about official matters, likely violating the Ethics Pledge.

The first set of conversations was initiated by a February 14, 2017 news story by Breitbart Washington Editor Matthew Boyle that was viewed as “extremely critical” of White House Chief of Staff Reince Priebus.<sup>5</sup> Mr. Boyle’s article discussed White House sources attributing “the botched rollout of the executive order” on travel to Mr. Priebus and noted “more and more reports of a likely shake-up at the top loom.”<sup>6</sup> At the time, Mr. Bannon reportedly was feuding with Mr. Priebus.<sup>7</sup>

Shortly after Breitbart published this story, Mr. Bannon reportedly contacted Mr. Boyle to give him “a talking to.”<sup>8</sup> Mr. Bannon admitted he “went ballistic” on the call, giving Mr. Boyle “both barrels.”<sup>9</sup> Mr. Bannon’s anger was fueled by public speculation that Breitbart had coordinated the story with Mr. Bannon at a time when Mr. Bannon and Mr. Priebus “were portraying themselves in the press as friends and allies.”<sup>10</sup>

Reportedly Mr. Bannon “further aggravated” Mr. Boyle that same week “when he instructed him not to publish additional articles critical of Priebus.”<sup>11</sup> Tensions between the two allegedly “reached a fever pitch” until senior White House staff offered Mr. Boyle “access to key staffers.”<sup>12</sup> Mr. Boyle was afforded exclusive interviews with White House Press Secretary Sean Spicer on February 18,<sup>13</sup> Deputy Chief of Staff Katie Walsh on February 22,<sup>14</sup> and President Trump on February 27.<sup>15</sup>

Mr. Boyle later characterized reports of his conversations with Mr. Bannon as “absurd and fake news,”<sup>16</sup> but he did not deny that the conversations between him and Mr. Bannon had taken place. At a minimum, the reported facts establish that after Breitbart published Mr. Boyle’s February 14 story, Mr. Bannon and Mr. Boyle engaged in at least two conversations about Breitbart’s news coverage of Mr. Priebus. Following these conversations, Breitbart received exclusive access to senior members of the Trump administration. It therefore appears that Mr. Bannon’s communications with Mr. Boyle involved official matters related to Mr. Bannon’s White House duties.

In a second set of conversations, Mr. Bannon apparently communicated with Breitbart Editor-in-Chief Alex Marlow while serving in the administration. In an interview aired on March 17, 2017, a reporter asked Mr. Marlow about his contacts with President Trump and Mr. Bannon. Mr. Marlow stated in response to a question that Mr. Bannon reaches out to him “every so often.”<sup>17</sup>

Given the impact Breitbart’s news coverage seemingly has had on the Trump administration, it is reasonable to assume Mr. Bannon’s conversations with Mr. Marlow – like those he had with Mr. Boyle – were focused on official matters and were related to Mr. Bannon’s duties.

The Ethics Pledge Mr. Bannon signed required him to refrain for two years from participating in any matter or communication with Breitbart related to his official White House duties. As Chief Strategist and Senior Counselor to the President, Mr. Bannon's duties certainly include communications involving the Trump administration and its top officials. By communicating with his former employer about official matters, Mr. Bannon appears to have violated the Ethics Pledge.

The rules the president has adopted for his administration to ensure ethical conduct are effective only if enforced. Mr. Bannon, with these violations, joined a growing list of top White House officials who have displayed a flagrant disregard for their ethical responsibilities.

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<sup>1</sup> Executive Order No. 13770, Ethics Commitments by Executive Branch Appointees (Jan. 28, 2017).

<sup>2</sup> *Id.*, sec. 1, para. 6.

<sup>3</sup> *Id.* sec 2(s).

<sup>4</sup> Breitbart CEO and President Larry Solov identified this as the date of Mr. Bannon's resignation. Hadas Gold, Breitbart's Bid for Congressional Pass Put Off, *Politico*, Mar. 27, 2017, available at <http://www.politico.com/story/2017/03/breitbart-capitol-hill-credentials-merciers-236547>.

<sup>5</sup> Oliver Darcy, 'There Are No Sacred Cows': Breitbart's Honeymoon With Establishment Wing of Trump White House May Be Over, *Business Insider*, Mar. 8, 2017, available at <http://www.businessinsider.com/breitbart-establishment-trump-this-is-war-obamacare-2017-3>.

<sup>6</sup> Matthew Boyle, As Flynn Resigns, Priebus Future in Doubt as Trump Allies Circulate List of Alternate Chief of Staff Candidates, *Breitbart*, Feb. 14, 2017, available at <http://breitbart.com/big-government/2017/02/14/flynn-resigns-priebus-future-doubt-trump-allies-circulate-list-alternate-chief-staff-candidates/>.

<sup>7</sup> Oliver Darcy, Breitbart Editors Tell Staffers to Stop Writing Stories Critical of Jared Kushner, Sources Say, *Business Insider*, Apr. 10, 2017, available at <http://www.businessinsider.com/breitbart-jared-kushner-coverage-steve-bannon-2017-4>.

<sup>8</sup> Lloyd Grove, Steve Bannon: I Didn't Order Breitbart Hit on Reince Priebus, *Daily Beast*, Feb. 15, 2017, available at <http://www.thedailybeast.com/articles/2017/02/15/steve-bannon-i-didn-t-order-breitbart-hit-on-reince-priebus.html>.

<sup>9</sup> *Id.*; Jonathan Swan, Steve Bannon Privately Unloaded on Breitbart Reporter, *Axios*, Feb. 15, 2017, available at <https://www.axios.com/steve-bannon-privately-unloads-on-breitbart-2263308411.html>.

<sup>10</sup> Darcy, *Business Insider*, Mar. 8, 2017; see also Swan, *Axios*, Feb. 15, 2017.

<sup>11</sup> Darcy, *Business Insider*, Mar. 8, 2017.

<sup>12</sup> *Id.*

<sup>13</sup> Matthew Boyle, Exclusive – Sean Spicer: President Trump Taking Message of Success Directly to America Around Inaccurate 'Filer of the Mainstream Media', *Breitbart*, Feb. 18, 2017, available at <http://www.breitbart.com/big-government/2017/02/18/exclusive-sean-spicer-president-trump-taking-message-success-directly-america-around-inaccurate-filter-mainstream-media/>.

<sup>14</sup> Matthew Boyle, Exclusive – Meet Deputy Chief of Staff Katie Walsh: The Woman Who Helps Coordinate Trump's White House, *Breitbart*, Feb. 22, 2017, available at <http://www.breitbart.com/biggovernment/2017/02/22/exclusive-meet-deputy-chief-staff-katie-walsh-helps-coordinate-white-house/>.

<sup>15</sup> Matthew Boyle, Exclusive – President Trump: Oscars 'Were Focused So Hard on Politics' They Could Not Get the Basics of the Ceremony Right, *Breitbart*, Feb. 27, 2017, available at <http://www.breitbart.com/big-government/2017/02/27/exclusive-president-trump-oscar-fail-focused-hard-politics-not-get-basics-right/>.

<sup>16</sup> Joe Concha, Breitbart Editor Slams 'Absurd' Story About Dispute with Bannon Over Coverage, *The Hill*, Mar. 8, 2017, available at <http://thehill.com/homenews/media/323093-breitbart-editor-slams-absurd-story-about-dispute-with-bannon-over-coverage>.

<sup>17</sup> Hannah Rappleye, Stephanie Gosk, and Anneke Foster, Inside Breitbart News: 'We're Not a Hate Site', *NBC News*, Mar. 17, 2017, available at <http://www.nbcnews.com/news/us-news/breitbart-editor-we-re-not-hate-site-n733576>. See also Watch: Breitbart Editor-In-Chief Alex Marlow Interviewed by NBC's 'Today', *Breitbart TV*, Mar. 17, 2017, available at <http://www.breitbart.com/video/2017/03/17/watch-breitbart-editor-chief-alex-marlow-interviewed-nbcs-today/>.

## Misuse of Office for Partisan Politics (Hatch Act)

The Hatch Act prohibits executive branch officials from using their official authority for political purposes, but White House Director of Social Media Dan Scavino Jr. ignored the law in March when he called on President Trump's followers to defeat Republican Rep. Justin Amash of Michigan, who defied the president on health care legislation, in a primary election.

On March 24, 2017, House Speaker Paul Ryan withdrew the American Health Care Act ("AHCA"), proposed legislation to replace the Affordable Care Act.<sup>1</sup> President Trump used Twitter to rail against the House Freedom Caucus and its members, whose opposition helped sink the bill.<sup>2</sup> The president tweeted: "The Republican House Freedom Caucus was able to snatch defeat from the jaws of victory. After so many bad years they were ready for a win!"<sup>3</sup> and further "Democrats are smiling in D.C. that the Freedom Caucus, with the help of Club For Growth and Heritage, have saved Planned Parenthood & Ocare!"<sup>4</sup>

Mr. Scavino continued the fight a few days later. On March 30, 2017, Rep. Amash, a member of the House Freedom Caucus and a vocal critic of the AHCA,<sup>5</sup> tweeted that "it didn't take long for the swamp to drain" President Trump.<sup>6</sup> Mr. Scavino responded with a series of tweets attacking Rep. Amash, first calling Rep. Amash a "Freedom Caucus Troll" and alleging he "[d]idn't vote for #AHCA b/c he puts politics before MI."<sup>7</sup> Mr. Scavino then encouraged Rep. Amash's ouster through a primary challenge, tweeting on April 1, 2017: "@realDonaldTrump is bringing auto plants & jobs back to Michigan. @justinamash is a big liability.#TrumpTrain, defeat him in primary."<sup>8</sup>

Mr. Scavino posted the tweet from his @DanScavino Twitter account.<sup>9</sup> At the time of the tweet, his profile photograph on the account showed him standing in the Oval Office next to the official presidential flag, and the header photograph showed President Trump giving a speech behind a lectern displaying the official presidential seal.<sup>10</sup> On his account profile, Mr. Scavino described it and himself as "Personal Twitter Handle, 6/20/15-11/2016, Director of #SocialMedia @realDonaldTrump. Official White House Twitter Handle: @Scavino45."<sup>11</sup> In response to questions raised about the legality of his tweet, Mr. Scavino removed the photograph showing the official seal and changed the description.<sup>12</sup>

Under the Hatch Act, executive branch employees are barred from "us[ing] [their] official authority or influence for the purpose of interfering with or affecting the result of an election."<sup>13</sup> This prohibition includes use of an executive branch employee's "official title while participating in political activity."<sup>14</sup> "Political activity" is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group."<sup>15</sup>

Mr. Scavino's April 1, 2017 tweet clearly constituted political activity under the statute. The purpose of the post was to use Mr. Scavino's official authority to affect Rep. Amash's primary election by encouraging supporters of President Trump to defeat Rep. Amash in the Republican primary. That it was sent from Mr. Scavino's personal Twitter account does not alter this conclusion. Guidance from the Office of Special Counsel, the entity charged with enforcing the Hatch Act, admonishes executive branch employees to "not engage in political activity in an official capacity at any time."<sup>16</sup> The guidance further explains that "the Hatch Act prohibits employees from . . . referring to their official titles or positions while engaged in political activity at any time."<sup>17</sup> The use by Mr. Scavino in his Twitter account of a photograph of himself in the Oval Office alongside the presidential flag, a picture that appears next to each tweet, clearly identified him by his official position. This conclusion is reinforced by the inclusion of a photograph of President Trump speaking in front of the official seal.

The Hatch Act is intended to prevent federal employees from engaging in partisan political activity in their official capacity. The White House staff appears to have run afoul of those prohibitions mere months into President Trump's tenure.

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<sup>1</sup> Robert Pear, Thomas Kaplan, and Maggie Haberman, In Major Defeat For Trump, Push to Repeal Health Law Fails, *New York Times*, Mar. 24, 2017, available at <https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html>.

<sup>2</sup> Lauren Fox, Jeremy Diamond, and Phil Mattingly, Trump Calls Out Freedom Caucus Members in Tweetstorm, *CNN*, Mar. 31, 2017, available at <http://www.cnn.com/2017/03/30/politics/freedom-caucus-trump-tweet/index.html>.

<sup>3</sup> See <https://twitter.com/realDonaldTrump/status/846537639167713281>.

<sup>4</sup> See <https://twitter.com/realDonaldTrump/status/845974102619906048>.

<sup>5</sup> Tom LoBianco, House Freedom Caucus Member Justin Amash Break Vote Streak After Blasting Ryan, Health Care Bill, *CNN*, Mar. 10, 2017, available at <http://www.cnn.com/2017/03/10/politics/justin-amash-voting-streak-broken/>.

<sup>6</sup> See <https://twitter.com/justinamash/status/847448570081005568>.

<sup>7</sup> See <https://twitter.com/DanScavino/status/847663548477997060>.

<sup>8</sup> See <https://twitter.com/DanScavino/status/848211792916557824>.

<sup>9</sup> *Id.*

<sup>10</sup> Matea Gold, White House Social Media Director Misused Official Position By Going After GOP Lawmaker, Ethics Experts Say, *Washington Post*, Apr. 2, 2017, available at [https://www.washingtonpost.com/news/post-politics/wp/2017/04/02/white-house-social-media-director-misused-official-position-by-going-after-gop-lawmaker-ethics-experts-say/?utm\\_term=.4a9d88c2d20f](https://www.washingtonpost.com/news/post-politics/wp/2017/04/02/white-house-social-media-director-misused-official-position-by-going-after-gop-lawmaker-ethics-experts-say/?utm_term=.4a9d88c2d20f) (showing screenshot). See also <https://twitter.com/NormEisen/status/848347910425243648>.

<sup>11</sup> Gold, *Washington Post*, Apr. 2, 2017.

<sup>12</sup> *Id.*; see also <https://twitter.com/DanScavino>.

<sup>13</sup> 5 U.S.C. § 7323(a)(1).

<sup>14</sup> 5 C.F.R. § 734.302(b)(1).

<sup>15</sup> 5 C.F.R. § 734.101.

<sup>16</sup> Office of Special Counsel, The Hatch Act: Frequently Asked Questions on Federal Employees and the Use of Social Media and Email, Dec. 18, 2015, available at <https://osc.gov/Pages/The-Hatch-Act-Frequently-Asked-Questions-on-Federal-Employees-and-the-Use-of-Social-Media-and-Email.aspx> (emphasis in original).

<sup>17</sup> *Id.* The mere “inclusion of an employee’s official title or position on one’s social media profile, without more, however, is not an improper use of official authority.” *Id.*

## Improper Foreign Contacts, Payments and Agency

In February 2017, Michael Flynn resigned as national security advisor to President Trump after only 24 days on the job.<sup>1</sup> The resignation occurred amidst a growing scandal regarding Mr. Flynn's contacts with Russian officials during the post-2016 election transition.<sup>2</sup> With the House and Senate Intelligence Committees continuing their investigation into ties between the Russian officials and the Trump campaign, the controversy surrounding Mr. Flynn has continued to plague the Trump administration.

Mr. Flynn was one of the first leading national security officials to publicly support President Trump during the campaign, and he gave a speech supporting him at the Republican National Convention.<sup>3</sup> Mr. Flynn served as a military advisor to President Trump throughout his campaign and shortly after his electoral victory, President Trump named Mr. Flynn as national security advisor for his administration.<sup>4</sup>

Only weeks into his tenure, however, allegations surfaced that during the Trump transition in December 2016, Mr. Flynn discussed the U.S. sanctions on Russia with Russian Ambassador Sergey Kislyak and did not fully disclose the contents of that discussion to Vice President Mike Pence and other White House officials.<sup>5</sup> In early February 2017, Mr. Flynn explicitly denied that he discussed the U.S. sanctions with Ambassador Kislyak, but later walked back that statement by claiming that he did not recall that sanctions were discussed, but could not be certain.<sup>6</sup> However, Mr. Flynn's account directly conflicted with several officials in the intelligence community who refuted Mr. Flynn and said U.S. sanctions were explicitly discussed during the conversation and that Vice President Pence may have been misled over the contents of the conversation.<sup>7</sup> Mr. Flynn soon resigned over these allegations.<sup>8</sup>

In April 2017, the White House released updated financial disclosures that reveal Mr. Flynn's ties to several Russian organizations from his private sector career.<sup>9</sup> These connections include speaking engagements by Mr. Flynn for the Russian state-funded news outlet RT, a Moscow-based cybersecurity firm, and a Russian airline.<sup>10</sup> These disclosures correspond with documents that Rep. Elijah Cummings, Ranking Member of the House Oversight and Government Reform Committee released showing that Mr. Flynn had made over \$68,000 in fees and expenses from Russia-related organizations.<sup>11</sup> Notably, the payment from RT was not in the original financial disclosures that Mr. Flynn filed in January 2017.<sup>12</sup>

Mr. Flynn's problems extend beyond his Russia connections. After Mr. Flynn was fired, his consulting firm disclosed that while serving as a military advisor to President Trump's campaign, he performed work that "could be construed to have principally benefitted the Republic of Turkey."<sup>13</sup> Mr. Flynn, therefore, should have registered under the Foreign Agents Registration Act.<sup>14</sup> While Mr. Flynn's client at the time was a privately owned consulting firm, its founder is chairman of the Turkish-American Business Council and reportedly helped coordinate a U.S. visit by Turkish President Recep Tayyip Erdogan in 2016.<sup>15</sup> Mr. Flynn finally registered "retroactively" in early March.<sup>16</sup>

Importantly, public officials are prohibited by criminal statute from being registered as foreign agents.<sup>17</sup> Failure to identify Mr. Flynn's foreign ties to Turkey and Russia underscores the importance of carefully vetting candidates prior to taking office.

Mr. Flynn's most recent controversy involves his apparent failure to get permission to speak in Russia at the gala of a government-funded news network or disclose income from the trip in forms related to his security clearance. After reviewing classified documents and receiving a private briefing related to Mr. Flynn, House Oversight and Government Reform Committee Chairman Jason Chaffetz and Ranking Member Cummings said on April 25 that it appeared Mr. Flynn broke the law by not obtaining permission to receive payments from the Russian government for the December 2015 trip and by not disclosing \$45,000 he was paid on security clearance forms.<sup>18</sup> As a retired military officer, Mr. Flynn may not receive payments from foreign governments without permission, and payments like the one he received must be disclosed on forms filed by



government employees who handle classified information.<sup>19</sup> Compounding the problem, the White House refused to turn over documents related to Mr. Flynn that the committee requested.<sup>20</sup>

The Flynn scandal is not the only challenge the Trump administration faces over ties to Russia. The House and Senate Intelligence Committees have both launched investigations into Russian attempts to influence the 2016 election including allegations of contact with the Trump campaign.<sup>21</sup> Additionally, in March 2017, FBI Director James Comey confirmed that the FBI was conducting its own investigation into possible Russian interference.<sup>22</sup> While these investigations into Russian influence continue, the resignation of Michael Flynn stands as a testament to the need to carefully vet political advisors prior to taking office.

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<sup>1</sup> Greg Miller and Philip Rucker, Michael Flynn resigns as national security adviser, *Washington Post*, Feb. 14, 2017, available at [https://www.washingtonpost.com/world/national-security/michael-flynn-resigns-as-national-security-adviser/2017/02/13/0007c0a8-f26e-11e6-8d72-263470bf0401\\_story.html?utm\\_term=.0c2704acade4](https://www.washingtonpost.com/world/national-security/michael-flynn-resigns-as-national-security-adviser/2017/02/13/0007c0a8-f26e-11e6-8d72-263470bf0401_story.html?utm_term=.0c2704acade4).

<sup>2</sup> *Id.*

<sup>3</sup> Dana Priest and Greg Miller, He was one of the most respected intel officers of his generation. Now he's leading 'Lock her up' chants, *Washington Post*, Aug. 15, 2016, available at [https://www.washingtonpost.com/world/national-security/nearly-the-entire-national-security-establishment-has-rejected-trumpexcept-for-this-man/2016/08/15/d5072d96-5e4b-11e6-8e45-477372e89d78\\_story.html?utm\\_term=.4a93e49d9b6a](https://www.washingtonpost.com/world/national-security/nearly-the-entire-national-security-establishment-has-rejected-trumpexcept-for-this-man/2016/08/15/d5072d96-5e4b-11e6-8e45-477372e89d78_story.html?utm_term=.4a93e49d9b6a).

<sup>4</sup> Bryan Bender, Trump names Mike Flynn national security adviser, *Politico*, Nov. 17, 2016, available at <http://www.politico.com/story/2016/11/michael-flynn-national-security-adviser-231591>.

<sup>5</sup> Matthew Nussbaum and Kyle Cheney, Pence was told Flynn didn't discuss sanctions, aides say, *Politico*, Feb. 10, 2017, available at <http://www.politico.com/story/2017/02/michael-flynn-russia-sanctions-mike-pence-234899>.

<sup>6</sup> Greg Miller, Adam Entous, and Ellen Nakashima, National security adviser Flynn discussed sanctions with Russian ambassador, despite denials, officials say, *Washington Post*, Feb. 9, 2017, available at [https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5\\_story.html?utm\\_term=.29170bc37d2b](https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.29170bc37d2b).

<sup>7</sup> *Id.*

<sup>8</sup> Maggie Haberman, Matthew Rosenberg, Matt Apuzzo, and Glenn Thrush, Michael Flynn Resigns as National Security Adviser, *New York Times*, Feb. 13, 2017, available at <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>.

<sup>9</sup> Darren Samuelsohn and Bryan Bender, More Flynn omissions as White House discloses Russia Today payment, *Politico*, April 1, 2017, available at <http://www.politico.com/story/2017/04/michael-flynn-financial-disclosures-rt-russia-today-236783>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Megan R. Wilson, Flynn discloses lobbying that may have helped Turkey, *The Hill*, Mar. 8, 2017, available at <http://thehill.com/business-a-lobbying/business-a-lobbying/323087-flynn-discloses-lobbying-that-may-have-helped-turkey>.

<sup>14</sup> *Id.*

<sup>15</sup> Megan R. Wilson, Flynn discloses lobbying that may have helped Turkey, *The Hill*, March 8, 2017, available at <http://thehill.com/business-a-lobbying/business-a-lobbying/323087-flynn-discloses-lobbying-that-may-have-helped-turkey>.

<sup>16</sup> Peter Baker and Matthew Rosenberg, Michael Flynn Was Paid to Represent Turkey's Interests During Trump Campaign, *New York Times*, Mar. 10, 2017, available at <https://www.nytimes.com/2017/03/10/us/politics/michael-flynn-turkey.html>.

<sup>17</sup> 18 U.S.C. § 219.

<sup>18</sup> Karoun Demirjian, Flynn Probably Broke the Law By Failing to Disclose Foreign Payments, House Oversight Leaders Say, *Washington Post*, Apr. 25, 2017, available at [https://www.washingtonpost.com/powerpost/flynn-likely-broke-the-law-by-failing-to-disclose-foreign-payments-house-committee-says/2017/04/25/249fc22c-29cc-11e7-a616-d7c8a68c1a66\\_story.html?utm\\_term=.5fe1a59c21aa](https://www.washingtonpost.com/powerpost/flynn-likely-broke-the-law-by-failing-to-disclose-foreign-payments-house-committee-says/2017/04/25/249fc22c-29cc-11e7-a616-d7c8a68c1a66_story.html?utm_term=.5fe1a59c21aa); Emmarie Huetteman and Adam Goldman, Flynn May Have Broken Law By Not Disclosing Russia Dealings, Lawmakers Say, *New York Times*, Apr. 25, 2017, available at [https://www.nytimes.com/2017/04/25/us/politics/michael-flynn-white-house-documents-russia.html?\\_r=0](https://www.nytimes.com/2017/04/25/us/politics/michael-flynn-white-house-documents-russia.html?_r=0).

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<sup>19</sup> *Id.*; Demirjian, Flynn Probably Broke the Law By Failing to Disclose Foreign Payments, House Oversight Leaders Say, *Washington Post*.

<sup>20</sup> Tom LoBianco and Manu Raju, House Oversight Committee: Flynn Might Have Broken the Law, *CNN*, Apr. 25, 2017, available at <http://www.cnn.com/2017/04/25/politics/michael-flynn-house-oversight-committee/>.

<sup>21</sup> Madeline Conway, The definitive guide to Trump's Russia ties, *Politico*, March 2, 2017, available at <http://www.politico.com/trump-russia-ties-scandal-guide>.

<sup>22</sup> Austin Wright and Martin Matishak, Comey confirms FBI probe into Trump-Russia collusion, *Politico*, March 20, 2017, available at <http://www.politico.com/story/2017/03/adam-schiff-trump-twitter-wiretapping-russia-ties-236249>.

## Outside Advisors Skirting Ethics Rules

In December 2016, President Trump named billionaire investor Carl Icahn as a special advisor for overhauling the U.S. regulatory framework.<sup>1</sup> Through his firm, Mr. Icahn's portfolio includes investments in a wide variety of industries including energy. Before this announcement, Mr. Icahn had already advised President Trump on the nomination of Scott Pruitt to head the Environmental Protection Agency.<sup>2</sup> In announcing their decision to give Mr. Icahn an advisory role, the Trump transition team explicitly asserted that Mr. Icahn would not be "serving as a federal employee or a Special Government Employee and will not have any specific duties."<sup>3</sup> As a result, the White House claims that when Mr. Icahn advises the president in his current role, he does so only as a private citizen and does not have to follow government ethics rules or sell any financial holdings to reduce conflicts of interest.

However, the policies Mr. Icahn has advocated to President Trump demonstrate the dangers in allowing him to advise the president without following the ethics requirements of a government employee. For example, Mr. Icahn has pushed to shift the compliance requirements of biofuel quotas from refining firms to fuel-blending companies while he currently sits as the majority shareholder of the refining firm CVR Energy.<sup>4</sup> CVR would have saved more than \$200 million in costs last year alone if the regulations had been changed according to Mr. Icahn's suggestions.<sup>5</sup> Since President Trump's election, Mr. Icahn's stake in CVR has climbed more than \$500 million in value.<sup>6</sup> In another instance of questionable conduct, during the confirmation hearings of Jay Clayton, President Trump's nominee to lead the Securities and Exchange Commission, Mr. Clayton stated that he had met with Mr. Icahn shortly after he had been nominated for the position.<sup>7</sup> The discussion centered around the merits of activist trading, the strategy of buying shares in a publicly traded firm with the goal of gaining the ability to influence the firm's future decisions, with Mr. Icahn advocating that activist trading was beneficial to the U.S. economy. Mr. Icahn himself is a well-known activist trader and due to his extensive participation in the stock and bond markets would be greatly interested in the future direction of the SEC on this question.

The Trump administration's position that Mr. Icahn is not a federal employee or special government employee appears to be contradicted by an opinion issued by the Department of Justice's Office of Legal Counsel (OLC). In addressing the fluidity by which an "informal advisor" to the president, such as Mr. Icahn, may take on the status of a special government employee, OLC noted that the term "employee" was "no doubt intended to contemplate an employer-employee relationship as that term is understood in other areas of the law."<sup>8</sup> In that opinion, when the informal advisor called and chaired several meetings with agency employees and "assumed considerable responsibility" for coordination, OLC determined that the advisor "quite clearly engag[ed] in a governmental function," and for this reason should be "designated as a special Government employee" for purposes of this work.<sup>9</sup>

OLC's opinion also rejected the view that an actual act of appointment is necessary "for an individual to be regarded as an officer or employee in a particular case where the parties omitted it for the purpose of avoiding the application of the conflict-of-interest laws."<sup>10</sup> By avoiding a formal appointment, the Trump administration attempted to insulate Mr. Icahn from the conflict of interest laws. However, by assuming the formal title of special advisor with specific responsibilities to overhaul the U.S. regulatory framework, the Trump administration has laid the foundation for him to be considered an employee. As a result, his meetings or other consultations with government officials or members of the private sector on behalf of the administration with regard to regulatory reform and the degree to which he assumes responsibility for this area may provide the basis to conclude that he is engaging in a governmental function and therefore should be subject to conflict of interest laws.<sup>11</sup>

Mr. Icahn is in a high-profile position to assist in crafting the U.S. regulatory framework while directly profiting off the decisions that are being made. Government ethics laws are created to prevent these explicit

conflicts of interest, and the Trump administration cannot insulate Mr. Icahn from the application of the ethics laws simply by refusing to classify him as a government employee.

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<sup>1</sup> Patrick Temple-West, [Trump taps investor Icahn to advise on regulatory reform](https://www.politico.com/blogs/donald-trump-administration/2016/12/carl-icahn-regulatory-reform-adviser-232901), *Politico*, Dec. 21, 2016, available at <https://www.politico.com/blogs/donald-trump-administration/2016/12/carl-icahn-regulatory-reform-adviser-232901>.

<sup>2</sup> Mario Parker, [Icahn Cheers Trump EPA Pick Amid Calls for Fuel-Rule Revamp](https://www.bloomberg.com/news/articles/2016-12-09/oil-friendly-epa-pick-has-icahn-seeing-trump-revamp-of-fuel-rule), *Bloomberg*, Dec. 9, 2016, available at <https://www.bloomberg.com/news/articles/2016-12-09/oil-friendly-epa-pick-has-icahn-seeing-trump-revamp-of-fuel-rule>.

<sup>3</sup> The Trump-Pence Transition Team, [President-Elect Donald J. Trump Names Carl Icahn Special Advisor to the President on Regulatory Reform](https://greatagain.gov/icahn-advisor-regs-cd3c949af118), Dec. 21, 2016, available at <https://greatagain.gov/icahn-advisor-regs-cd3c949af118>.

<sup>4</sup> Jennifer A. Dlouhy and Mario Parker, [Trump Said to Consider Biofuel Plan Between Icahn, Ethanol Group](https://www.bloomberg.com/news/articles/2017-02-28/trump-said-to-consider-biofuel-plan-between-icahn-ethanol-group), *Bloomberg*, Feb. 27, 2017, available at <https://www.bloomberg.com/news/articles/2017-02-28/trump-said-to-consider-biofuel-plan-between-icahn-ethanol-group>.

<sup>5</sup> Eric Lipton, [Icahn Raises Ethics Flags With Dual Roles as Investor and Trump Adviser](https://www.nytimes.com/2017/03/26/us/politics/carl-icahn-trump-adviser-red-flags-ethics.html), *New York Times*, Mar. 26, 2017, available at <https://www.nytimes.com/2017/03/26/us/politics/carl-icahn-trump-adviser-red-flags-ethics.html>.

<sup>6</sup> Zachary Mider and Jennifer Dlouhy, [Icahn Bets Against Renewables Market He Wants Trump to Overhaul](https://www.bloomberg.com/news/articles/2017-03-17/icahn-bets-against-renewables-market-he-wants-trump-to-overhaul), *Bloomberg*, Mar. 17, 2017, available at <https://www.bloomberg.com/news/articles/2017-03-17/icahn-bets-against-renewables-market-he-wants-trump-to-overhaul>.

<sup>7</sup> Benjamin Bain and Zachary Mider, [Warren Wants SEC to Review Icahn's Role Advising Trump on Rules](https://www.bloomberg.com/news/articles/2017-03-23/warren-wants-sec-to-review-icahn-s-role-advising-trump-on-rules), *Bloomberg*, Mar. 23, 2017, available at <https://www.bloomberg.com/news/articles/2017-03-23/warren-wants-sec-to-review-icahn-s-role-advising-trump-on-rules>.

<sup>8</sup> Memorandum Opinion for the Attorney General, [Conflict of Interest - Status of an Informal Presidential Advisor as a "Special Government Employee"](https://www.justice.gov/sites/default/files/olc/opinions/1977/02/31/op-olc-v001-p0020.pdf), Opinion 77-9 (Feb. 24, 1977), available at <https://www.justice.gov/sites/default/files/olc/opinions/1977/02/31/op-olc-v001-p0020.pdf>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 18 U.S.C. § 208; 5 C.F.R. § 2635.402.

## Nepotism and Conflicts of Interest – Jared Kushner and Ivanka Trump

When President Trump appointed his son-in-law Jared Kushner as a senior advisor, the appointment appeared to run afoul of the federal anti-nepotism statute. The statute specifies both that the prohibition against hiring family members applies to the president and that sons-in-law are family members.<sup>1</sup> Given the even closer proximity of their relationship, President Trump's more recent hiring of his daughter Ivanka Trump seems to be an even more apparent violation of the statute. Overturning decades of precedent,<sup>2</sup> however, the Department of Justice's Office of Legal Counsel released an opinion shortly after Mr. Kushner's appointment concluding that, based on another statute, the president is exempt from the anti-nepotism statute when hiring White House employees.<sup>3</sup>

Whether or not this legal analysis holds up, President Trump's hiring of his son-in-law and daughter undoubtedly violates the intended purpose of the anti-nepotism statute. Originally passed after President Kennedy appointed his brother as attorney general, the statute manifestly aims to prevent the president from appointing family members to government positions.<sup>4</sup> Allowing nepotism – especially at the highest level of government – undermines the integrity of the Administration's policy making.<sup>5</sup> President Trump's appointments of his daughter and son-in-law make clear that he is not interested in selecting the most qualified candidates, and also may violate President Trump's own Ethics Pledge.<sup>6</sup> Neither Mr. Kushner nor Ms. Trump has any significant experience in policymaking.<sup>7</sup> For example, Mr. Kushner has little experience in his expanding portfolio of assigned areas of responsibilities, which include: brokering Middle East peace, solving the opioid crisis, improving government through data and technology, reforming the criminal justice system, reforming veterans care, and managing diplomatic relations with Mexico and China.<sup>8</sup> These appointments also are likely to inhibit the ability of other government employees to give candid opinions about policy proposals and personnel matters for fear of alienating the president's family members.<sup>9</sup>

Moreover, serving as a presidential advisor to a close family member raises a larger and more serious question about whether Ms. Trump's and Mr. Kushner's primary allegiance is to the Constitution or to President Trump personally and his brand. In a monarchy, these interests may be one and the same, but not necessarily in a democracy.

President Trump's nepotism is especially concerning given this White House's lax approach to ethical misconduct.<sup>10</sup> The White House counsel has already failed to take significant disciplinary action for clear ethics violations by Kellyanne Conway (violations that expressly benefitted Ms. Trump, though Ms. Trump was not implicated in them), and it is not known whether the White House Counsel made the appropriate referral to the Department of Justice's Office of Public Integrity in another incident of apparent ethical misconduct. Based on this track record, it is even less likely the president's own family members would be held accountable.

Mr. Kushner's and Ms. Trump's appointments as presidential advisors are all the more concerning because of the high risk that they carry their own significant conflicts of interest. Like the president, both have refused to put their assets in a blind trust to be sold – the most effective method to avoid conflicts of interest.<sup>11</sup> Although they have taken some steps to reduce possible conflicts of interest,<sup>12</sup> their many remaining assets place them in an ethical minefield. Mr. Kushner retains extensive real estate properties in multiple American cities, and has reported large lines of credit with several major banks for which he retains personal liability.<sup>13</sup> Ms. Trump retains sole ownership and veto power over her international fashion franchise, and recently received preliminary approval for several trademark applications in China.<sup>14</sup> She also has a large stake in the Trump International Hotel in Washington, D.C.<sup>15</sup> In addition, the fact that they are married complicates the risks; under the applicable criminal statute they share any conflicts of interest that arise, even if that conflict arises from the other partner's assets.<sup>16</sup> The fact that their financial interests overlap in some cases with those

of the president further complicates the web of conflicts they may face since they may have duplicative and reinforcing incentives to advance those interests.

To avoid conflicts arising from these holdings, Mr. Kushner and Ms. Trump should recuse themselves from a wide variety of issues likely to be addressed by the Trump administration, including many related to the real estate industry, the financial services industry, taxes, trade matters involving China, and intellectual property.<sup>17</sup> However, using recusals to address their conflicts of interest does not account for their wide-ranging areas of responsibility, the fluid nature of the policy-making process, and the reality of situations where it is difficult to step out of the room when the president needs and is seeking advice from his most trusted advisors. They would also need to avoid anything to do with the Trump Washington, D.C. hotel, including even suggesting that an official event be held there.<sup>18</sup> If such conflicts of interest arise – which seems all but inevitable given their wide spheres of influence – and one or both of them fail to recuse themselves, they may subordinate America’s interests to their own and even open themselves to criminal prosecution.<sup>19</sup>

The concern that the couple’s financial interests and their official positions would intersect has already materialized. On April 6, the same day that Ms. Trump and Mr. Kushner dined with Chinese President Xi Jinping and his wife at a dinner hosted by the president at Mar-a-Lago, the Chinese government provisionally approved three new trademarks for the Ivanka Trump brand.<sup>20</sup> Having approved these trademarks, the Chinese seemingly sent a message that they are prepared to engage with Ms. Trump and Mr. Kushner by providing them with business favors. Ms. Trump’s acceptance of these benefits highlights the significant conflicts of interest she and her husband will face and her susceptibility to potential violations of the foreign emoluments clause of the U.S. Constitution.

Moreover, the public does not know the full extent of the possible conflicts of interest Mr. Kushner and Ms. Trump may face. Mr. Kushner has yet to disclose many of the investors and creditors for the family real estate holdings in which he reports a financial interest, which may well create further conflicts, and there is little transparency or limitation placed on the overseas activities of Ms. Trump’s businesses or on the benefits that may be conferred by foreign governments to enhance her brand marketability and consumer access while she serves as a federal official.<sup>21</sup>

In addition, Mr. Kushner’s failure to report foreign government contacts on his national security questionnaire, including his meetings with Russian Ambassador Sergey Kislyak and with the head of a Russian state-owned bank during the transition period, raise separate national security and conflict of interest concerns.<sup>22</sup> Mr. Kushner’s attorney called the omissions “an error,”<sup>23</sup> and informed the FBI that he will be providing supplemental information.<sup>24</sup> Punishment for failing to disclose foreign contacts on a national security questionnaire or in an FBI interview can be severe.<sup>25</sup> Officials can lose access to intelligence or face criminal penalties for making a false statement.<sup>26</sup> Several House members have also called for Mr. Kushner’s security clearance to be suspended.<sup>27</sup>

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<sup>1</sup> 5 U.S.C. § 3110.

<sup>2</sup> Susan Hennessey and Helen Klein Murillo, *Ivanka Trump’s West Wing job isn’t just unethical. It’s also dangerous*, *Washington Post*, Mar. 23, 2017, available at [https://www.washingtonpost.com/posteverything/wp/2017/03/23/ivanka-trumps-west-wing-job-isnt-just-unethical-its-also-dangerous/?tid=ss\\_tw&utm\\_term=.0411bc8cecf6](https://www.washingtonpost.com/posteverything/wp/2017/03/23/ivanka-trumps-west-wing-job-isnt-just-unethical-its-also-dangerous/?tid=ss_tw&utm_term=.0411bc8cecf6).

<sup>3</sup> DOJ’s argument was based primarily on 5 U.S.C. § 105(a), which authorizes the president “to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service,” as long as the employees’ pay is within certain salary caps. Memorandum for the Counsel to the President from Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of Anti-Nepotism Statute to Presidential Appointment in White House Office* (Jan. 20, 2017), available at <https://www.justice.gov/opinion/file/930116/download>.

<sup>4</sup> Alan Yuhas, *Jared Kushner cleared for Trump job, breaking with decades of legal advice*, *The Guardian*, Jan. 20, 2017, available at <https://www.theguardian.com/us-news/2017/jan/21/jared-kushner-donald-trump-job-white-house-nepotism>.

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<sup>5</sup> Hennessey and Murillo, *Washington Post*, Mar. 23, 2017.

<sup>6</sup> Executive Order 13770, Ethics Commitments by Executive Branch Appointees, Jan. 28, 2017, sec. 1(8) (“I agree that any hiring or other employment decisions I make will be based on the candidate’s qualifications, competence and experience.”)

<sup>7</sup> Samantha Wilson, “Ivanka Trump Scores Official White House Job Along With Husband – Is That Fair?,” *Hollywood Life*, Mar. 29, 2017, available at <http://hollywoodlife.com/2017/03/29/ivanka-trump-official-white-house-job-unpaid-president-assistant-fair/>.

<sup>8</sup> Ashley Parker and John Wagner, Kushner has a singular and almost untouchable role in Trump’s White House, *Washington Post*, April 3, 2017, available at [https://www.washingtonpost.com/politics/kushner-has-a-singular-and-almost-untouchable-role-in-trumps-white-house/2017/04/03/df4e7cf8-1897-11e7-855e-4824bbb5d748\\_story.html](https://www.washingtonpost.com/politics/kushner-has-a-singular-and-almost-untouchable-role-in-trumps-white-house/2017/04/03/df4e7cf8-1897-11e7-855e-4824bbb5d748_story.html).

<sup>9</sup> Editorial, Pick Your Favorite Ethics Offender in Trumpland, *New York Times*, Apr. 1, 2017, available at <https://www.nytimes.com/2017/04/01/opinion/sunday/pick-your-favorite-ethics-offender.html>.

<sup>10</sup> Lauren Evens, Ivanka Trump Is Joining Her Father In The White House And There Are No Laws To Stop Her, *The Village Voice*, Mar. 22, 2017, available at <http://www.villagevoice.com/news/ivanka-trump-is-joining-her-father-in-the-white-house-and-there-are-no-laws-to-stop-her-9800070>.

<sup>11</sup> Richard Painter, Norman Eisen, and Virginia Canter, Ethics laws will sideline Jared and Ivanka: Experts, *USA Today*, Apr. 3, 2017, available at <https://www.usatoday.com/story/opinion/2017/04/03/ethics-laws-will-sideline-jared-kushner-ivanka-trump-painter-eisen-canter-column/99955864/#> (“Jared, the president’s son-in-law and senior adviser, has resigned from more than 260 outside positions, including as CEO of the Kushner Companies and publisher of the *New York Observer*. He has divested or committed to divest approximately 80 holdings owned by himself, his spouse or their minor children. . . . Ivanka has resigned from all her officer positions with her outside companies, including those with the Trump Organization, according to the couple’s attorney. She has appointed a company president to manage her day-to-day business operations and turned over the businesses themselves to a trust managed by her brother-in-law and sister-in-law.”).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (“Jared has retained extensive real estate holdings primarily located in Chicago, Manhattan, Brooklyn, Philadelphia and throughout New Jersey. He has secured lines of credit (some of which are shared with his mother and father) through 10 banks, including Deutsche Bank, Bank of America and Citigroup.”)

<sup>14</sup> Rachel Abrams, Despite a Trust, Ivanka Trump Still Wields Power Over Her Own Brand, *New York Times*, Mar. 20, 2017, available at <https://www.nytimes.com/2017/03/20/business/despite-trust-ivanka-trump-still-wields-power-over-her-brand.html>; Erika Kinetz and Anne D’Innocenzio, Ivanka’s biz prospers as politics mixes with business, *Associated Press*, Apr. 19, 2017, available at <https://apnews.com/d9e34f23a64947d99e4a7d757012c509>.

<sup>15</sup> *Id.*; Jill Disis, Ivanka Trump’s stake in D.C. hotel renews ethics questions, *CNN*, Apr. 4, 2017, available at <http://money.cnn.com/2017/04/04/news/ivanka-trump-hotel-ethics/>.

<sup>16</sup> Under 18 U.S.C. § 208, the financial interests of a spouse and minor children are imputed to a federal employee.

<sup>17</sup> Painter, Eisen, and Canter, *USA Today*, Apr. 3, 2017.

<sup>18</sup> Disis, *CNN*, Apr. 4, 2017.

<sup>19</sup> Painter, Eisen, and Carter, *USA Today*, Apr. 3, 2017.

<sup>20</sup> Kinetz and D’Innocenzio, *Associated Press*, Apr. 19, 2017.

<sup>21</sup> Painter, Eisen, and Canter, *USA Today*, Apr. 3, 2017; Jesse Drucker, Eric Lipton, and Maggie Haberman, Ivanka Trump and Jared Kushner Still Benefitting From Business Empire, Filings Show, *New York Times*, Mar. 31, 2017, available at <https://www.nytimes.com/2017/03/31/us/politics/ivanka-trump-and-jared-kushner-still-benefiting-from-business-empire-filings-show.html>; Danny Hakim and Rachel Abrams, Ivanka Trump’s Global Reach, Undeterred by a White House Job, *New York Times*, Apr. 18, 2017 available at <https://www.nytimes.com/2017/04/18/business/ivanka-trump-trademark-brand.html>.

<sup>22</sup> Jo Becker and Matthew Rosenberg, Kushner Omitted Meeting With Russians on Security Clearance Forms, *New York Times*, Apr. 6, 2017, available at <https://www.nytimes.com/2017/04/06/us/politics/jared-kushner-russians-security-clearance.html>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; Max Greenwood, FBI interviewed Flynn shortly after Trump took office: report, *The Hill*, Feb. 14, 2017, available at <http://thehill.com/homenews/administration/319512-flynn-was-interviewed-by-fbi-shortly-after-trump-took-office-report>.

<sup>26</sup> 18 U.S.C. 1001; see also Becker and Rosenberg, *New York Times*, Apr. 6, 2017.

<sup>27</sup> Kyle Cheney, House Democrats want Kushner’s security clearance suspended, *Politico*, Apr. 13, 2017, available at <http://www.politico.com/story/2017/04/jared-kushner-security-clearance-revoke-democrats-237177>.

## Ignoring the Wall Between Government and Business – Eric Trump and Donald Trump, Jr.

President Trump's primary gesture towards avoiding conflicts of interest was to turn over day-to-day control of the Trump Organization to his sons, Eric and Donald Jr., and a longtime executive. Although the president has retained his ownership interests in the company, he and his sons have insisted that they will maintain enough separation to avoid conflicts of interest or other unethical conduct. Specifically, they pledged not to talk about the business and announced that the Trump organization would not start new international projects.<sup>1</sup>

There is already reason to believe they are not following these two promises scrupulously. Eric Trump has been elusive about how much he discusses the business with his father. He has insisted, "I do not talk about the government with him, and he does not talk about the business with us."<sup>2</sup> Yet he also admitted that he will keep his father informed about "the bottom line, profitability reports and stuff like that," on a "probably quarterly" basis.<sup>3</sup>

Notwithstanding these stated measures, there remains a strong concern that Eric and Donald Jr. are exploiting their father's office to benefit the family's business interests. Both maintain large social media presences that freely intermingle political views and explicit support for their father with promoting the businesses.<sup>4</sup> This mixing of family, wealth, and politics has led to some queasiness, with a Republican lobbyist commenting, "I wish personally that they [Eric and Donald Jr.] just kind of make it church and state. If Obama did it, my hair would be on fire."<sup>5</sup>

There also is a legitimate concern about improper foreign influence on the Trump Organization. For example, one of the first transactions the Trump Organization completed after the inauguration implicated foreign interests. The deal involved the sale of a \$15.8 million condo to a Chinese American businesswoman with ties to Chinese political and military intelligence elites.<sup>6</sup> George Washington University law professor Jessica Tillipman, who specializes in corruption and ethics, commented, "Hypothetically, if they cared about this, they would be concerned they were involved with a business transaction with someone who could endanger national security interests."<sup>7</sup>

The Trump Organization has long been a family business. President Trump is now trying to run the country the same way, with trusted family members in key positions of power. This model, particularly with the president remaining inextricably intertwined with his business through his sons, does not satisfy basic standards of ethics.

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<sup>1</sup> Gabby Morrongiello, Eric Trump says organization to stop developing overseas real estate projects, *Washington Examiner*, Mar. 19, 2017, available at <http://www.washingtonexaminer.com/eric-trump-says-organization-to-stop-developing-overseas-real-estate-projects/article/2617831>.

<sup>2</sup> Dan Alexander, After Promising Not To Talk Business With Father, Eric Trump Says He'll Give Him Financial Reports, *Forbes*, Mar. 24, 2017, available at <https://www.forbes.com/sites/danalexander/2017/03/24/after-promising-not-donald-talk-business-with-father-eric-trump-says-president-give-him-financial-reports/#13dcf61359a1>.

<sup>3</sup> *Id.*

<sup>4</sup> Darren Samuelsohn, Trump's sons run the business – and keep tweeting about their dad, *Politico*, Mar. 18, available at <http://www.politico.com/story/2017/03/trump-sons-business-presidency-tweets-236200>.

<sup>5</sup> *Id.*

<sup>6</sup> Russ Choma and Andy Kroll, The Trump Organization Says It's Vetting Deals for Conflicts—But Refuses to Say How, *Mother Jones*, Mar. 21, 2017, available at <http://www.motherjones.com/politics/2017/03/trump-organization-wont-say-how-its-vetting-deals-conflicts>.

<sup>7</sup> *Id.*



## PRESIDENT TRUMP FILLS THE SWAMP – WITH LOBBYISTS

In the final months of his campaign, President Trump made “draining the swamp” an essential part of his electoral narrative. The campaign used this slogan as a metaphor for his promise to eliminate the circle of Washington, D.C. lobbyists and special interests that supposedly dominate the policy discussion in our nation’s capital.<sup>1</sup> The push to “drain the swamp” included a five-year ban for executive branch appointees lobbying the federal agency in which they served and a lifetime ban on appointees lobbying for foreign governments – provisions which were included in the executive order President Trump issued on ethics early in his term.<sup>2</sup>

President Trump’s executive order, however, also removed a number of lobbying restrictions that President Obama had put in place. First, the Trump order removes the restriction barring lobbyists from taking administration jobs with any agency that they had lobbied in the previous two years.<sup>3</sup> The Trump order still prevents lobbyists who join the administration from specifically working for two years on matters on which they had previously lobbied without a waiver, but the waivers do not have to be released to the public, as they were under President Obama.<sup>4</sup> These new loopholes have opened new avenues for lobbyists to influence policy. An industry lobbyist can now immediately begin a job at the regulatory agency designed to oversee his former clients and with an undisclosed waiver can work on the very same matters on which he lobbied without any public scrutiny.

President Trump’s actions upon taking office also demonstrate – despite the tough campaign rhetoric attacking Washington, D.C.’s “revolving door” – not only an unwillingness to take on special interests, but a continued expansion of the influence of lobbyists on his administration. For example, President Trump is expected to select Andrew Wheeler as the deputy chief of the Environmental Protection Agency.<sup>5</sup> Mr. Wheeler is currently a registered lobbyist for Murray Energy, the largest privately owned coal company in the United States, and works on several energy and agricultural-related issues for other clients.<sup>6</sup> While Mr. Wheeler would have to get a waiver from President Trump’s lobbying restrictions to work at the EPA on particular matters on which he previously lobbied, any waiver would not have to be released to the general public.<sup>7</sup> Mike Catanzaro, another energy lobbyist whose clients included natural gas and fossil fuel companies, will serve as a special assistant to the president for domestic energy and environmental policy.<sup>8</sup> Even the president of the National Institute for Lobbying and Ethics, an industry trade group, expressed his belief that the Trump administration’s regulations on lobbyists are mostly for show.<sup>9</sup> Meanwhile, the list of lobbyists who are receiving positions in the administration continues to grow. Geoff Burr, a former construction industry lobbyist, will likely become the chief of staff to the future Secretary of Labor;<sup>10</sup> Chad Wolf, a lobbyist for numerous defense and security contractors, is serving as an advisor to the Transportation Security Administration; and numerous health care and insurance lobbyists have joined the Department of Health and Human Services.<sup>11</sup>

The Trump administration has already demonstrated its willingness to waive its own five-year lobbying ban for former officials. In April 2017, senior White House budget adviser Marcus Peacock left his position to join the Business Roundtable, a high-profile pro-business lobbying group chaired by JPMorgan Chase CEO Jamie Dimon. Lobbying the Office of Management and Budget for the group would have violated the five-year ban, but the Trump administration helpfully waived the ban.<sup>12</sup> While Mr. Peacock will recuse himself from lobbying his former administration colleagues at OMB for six months, this short wait is far less than the original five-year ban President Trump has so vocally touted.<sup>13</sup>

President Trump’s claimed efforts to drain the swamp of lobbyists also are undercut by his own former campaign aides setting up shop as lobbyists who market themselves as having special access to the president.

Former Trump campaign manager Corey Lewandowski was one of the first to signal this trend. Mr. Lewandowski opened a new lobbying firm in late December 2016 and reported that it had relationships with eleven clients by January 2017 – with the firm’s business pitch appearing to be based on helping firms navigate the Trump administration’s agenda.<sup>14</sup> The firm is also engaged in setting up a pro-Trump super PAC designed to build grassroots support for a pro-Trump agenda.<sup>15</sup>

These examples demonstrate that President Trump has abjectly failed to “drain the swamp.” To the contrary, he has repeatedly turned to industry insiders and lobbyists to advise him, and former aides are taking advantage of their access to the president and the administration to lobby for special interests.

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<sup>1</sup> Isaac Arnsdorf, Josh Dawsey, and Daniel Lippman, Will ‘drain the swamp’ be Trump’s first broken promise?, *Politico*, Dec. 22, 2016, available at <http://www.politico.com/story/2016/12/trump-drain-swamp-promise-232938>.

<sup>2</sup> Press Release, Executive Order: Ethics Commitments by Executive Branch Appointees, Jan. 28, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>.

<sup>3</sup> Executive Order 13490, Jan. 21, 2009, available at [https://oge.gov/Web/OGEnsf/Executive%20Orders/A70F962587DAC28F85257E96006A90F2/\\$FILE/23a5e4eeaffd4e14b4387b40b0eae5963.pdf?open](https://oge.gov/Web/OGEnsf/Executive%20Orders/A70F962587DAC28F85257E96006A90F2/$FILE/23a5e4eeaffd4e14b4387b40b0eae5963.pdf?open); see also Isaac Arnsdorf, Trump lobbying ban weakens Obama rules, *Politico*, Jan., 28, 2017, available at <http://www.politico.com/story/2017/01/trump-lobbying-ban-weakens-obama-ethics-rules-234318>.

<sup>4</sup> *Id.*

<sup>5</sup> Andrew Restuccia, Alex Guillén, and Anthony Adragna, Sources: Trump expected to tap Wheeler as EPA deputy, *Politico*, Mar. 16, 2017, available at <http://www.politico.com/story/2017/03/andrew-wheeler-epa-deputy-sources-236151>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Megan R. Wilson, Lobbyists finding spots in Trump administration, *The Hill*, Mar. 15, 2017, available at <http://thehill.com/business-a-lobbying/324195-more-lobbyists-finding-spots-in-trump-administration>.

<sup>9</sup> Maggie Severns and Isaac Arnsdorf, The Trump lobbying purge that wasn’t, *Politico*, Jan. 18, 2017, available at <http://www.politico.com/story/2017/01/trump-administration-lobbying-purge-233736>.

<sup>10</sup> Wilson, *The Hill*, Mar. 15, 2017.

<sup>11</sup> Justin Elliott, Derek Kravitz, and Al Shaw, Meet the Hundreds of Officials Trump Has Quietly Installed Across the Government, *ProPublica*, March 8, 2017, available at <https://www.propublica.org/article/meet-hundreds-of-officials-trump-has-quietly-installed-across-government>.

<sup>12</sup> Ben Brody, Senior White House Adviser Departs for Business Lobby Group, *Bloomberg*, April 12, 2017, available at <https://www.bloomberg.com/politics/articles/2017-04-12/senior-white-house-adviser-departs-for-business-lobbying-group>.

<sup>13</sup> *Id.*

<sup>14</sup> Joshua Green, Trump’s K Street Office Is Open for Business, *Bloomberg*, Jan. 19, 2017, available at <https://www.bloomberg.com/news/articles/2017-01-19/trump-s-k-street-office-is-open-for-business>.

<sup>15</sup> *Id.*

## UNDERMINING ETHICS AGENCIES

Even as he promised to drain the swamp, President Trump and his supporters embarked at the outset of his administration upon a flurry of attacks against government ethics institutions established to uphold federal ethics laws and regulations, including the Office of Government Ethics in the executive branch and the Office of Congressional Ethics in the House of Representatives.

### Attacks on the Office of Government Ethics

On January 11, 2017, Office of Government Ethics (OGE) Director Walter Shaub, Jr. delivered remarks responding to a plan announced that morning by President-elect Trump and his attorney Sheri Dillon to turn over the management of business operations for the Trump Organization to a new management team comprised of his two adult sons and a longstanding Trump executive and to place his assets in a revocable trust, but not to divest his ownership interest in his businesses.<sup>1</sup> In his remarks at the Brookings Institution, Director Shaub responded to the Trump-Dillon plan:

[The President-Elect's] plan does not comport with the tradition of our Presidents over the past 40 years. This isn't the way the Presidency has worked since Congress passed the Ethics in Government Act in 1978 in the immediate aftermath of the Watergate scandal. Since then, Presidents Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama all either established blind trusts or limited their investments to non-conflicting assets like diversified mutual funds, which are exempt under the conflict of interest law.<sup>2</sup>

Relying on an opinion issued by Justice Antonin Scalia when he served as the head of the Office of Legal Counsel,<sup>3</sup> Director Shaub noted that the Trump-Dillon plan was “wholly inadequate” and that we “can't risk creating the perception that government leaders would use their official positions for profit.”<sup>4</sup> Director Shaub then went on to explain that the “idea of setting up a trust to hold his operating businesses adds nothing to the equation. This is not a blind trust – it's not even close.”<sup>5</sup>

Director Shaub added that “the ethics program starts at the top. The signals a President sends set the tone for ethics across the executive branch. Tone from the top matters.”<sup>6</sup> Expanding on this point, Director Shaub noted that “every President in modern times has taken the strong medicine of divestiture. This means OGE Directors could always point to the President as a model.... Officials in any administration need their President to show ethics matters, not only through words but also through deeds.”<sup>7</sup> The president, he said, is “now entering the world of public service. He's going to be asking his own appointees to make sacrifices. He's going to be asking our men and women in uniform to risk their lives in conflicts around the world. So, no, I don't think divestiture is too high a price to pay to be the President of the United States of America.”<sup>8</sup>

Following these remarks, Director Shaub became the victim of a series of public attacks, which were partially based on earlier tweets to the president-elect,<sup>9</sup> but focused primarily on his remarks at the Brookings Institution. Rep. Jason Chaffetz, Chairman of the House Oversight and Government Reform Committee, sent him a letter, dated January 12, 2017, requesting that Director Shaub make himself available for a transcribed interview with Committee staff as soon as possible.<sup>10</sup> Later that day, Rep. Chaffetz threatened to subpoena Director Shaub to appear before the Committee after claiming that Director Shaub had “refused since the election to agree to a meeting to discuss matters related to OGE's public remarks about Trump, as well as the Republican-led panel's plans to pass language reauthorizing the office.”<sup>11</sup> These claims were unfounded: email showed Rep. Chaffetz's office in fact had canceled a meeting that had been scheduled between the two.<sup>12</sup>

In a separate nationally televised interview, White House Chief of Staff Reince Priebus made a related baseless allegation against Director Shaub warning him that he “ought to be careful because [he] is becoming extremely political” because he “publicly supported Hillary Clinton.”<sup>13</sup> These attacks by Rep. Chaffetz and Chief of Staff Priebus were accompanied by similar attacks in the media<sup>14</sup> and through a super PAC, America Rising,<sup>15</sup> all of which were shown to be unfounded.<sup>16</sup>

## Attacks on the Office of Congressional Ethics

Efforts to handcuff institutions that monitor ethics have not been limited to the new administration. Perhaps seeing President Trump’s election as an opportunity to weaken oversight in Congress, House Republicans quietly tried to gut their own independent ethics investigator, the Office of Congressional Ethics (“OCE”), in early January 2017. That attempt failed after a public outcry.

House Republicans began the year by voting in a closed party conference to severely diminish OCE’s independence and power.<sup>17</sup> The move was made without any warning and was not made public until late on the night before the changes would have been brought to the House floor for a vote, presumably in an attempt to avoid public scrutiny.<sup>18</sup>

If passed by the House, the measure would have greatly limited OCE’s power to investigate ethics violations, mainly by making it much more beholden to the House Ethics Committee, which rarely punishes ethical transgressions forcefully.<sup>19</sup> The proposal would have banned OCE from launching investigations based on anonymous complaints or referring possible criminal wrongdoing to Department of Justice prosecutors without Ethics Committee approval, and would have given the Ethics Committee the power to terminate any OCE investigation.<sup>20</sup> The measure also would have silenced OCE by banning it from making any information public without Ethics Committee approval or even having a spokesperson.<sup>21</sup>

The plan, however, was met with immediate public outcry.<sup>22</sup> Members of Congress were inundated the next day with calls from constituents opposed to the measure.<sup>23</sup> A group of 36 watchdog groups and individual ethics reformers, including CREW, sent House Speaker Paul Ryan a letter condemning the changes,<sup>24</sup> and lawmakers on both sides of the aisle spoke out against the measure.<sup>25</sup> Even President Trump weighed in against the Republicans making it a legislative priority, though he insisted that OCE was “unfair.”<sup>26</sup> Beset by criticism, including from their own leadership, House Republicans backed down and scrapped the measure less than 24 hours after they had voted to go ahead with it.<sup>27</sup>

Rep. Devin Nunes’s recent ethics crisis highlights the need for OCE’s independent ethics oversight. Rep. Nunes, as chairman of the House Intelligence Committee, was until early April in charge of the committee’s investigation into allegations of coordination between the Trump campaign and Russian officials.<sup>28</sup> On March 22, Rep. Nunes publicly announced that “American intelligence agencies monitoring foreign officials may have ‘incidentally’ picked up communications of [President] Trump transition team members.”<sup>29</sup> Rep. Nunes did not disclose the source for his information,<sup>30</sup> but later noted that it “has to do with FISA, and there are multiple FISA warrants that are out there.”<sup>31</sup>

Rep. Nunes may have disclosed this information to support President Trump’s false claims that President Obama was responsible for illegal wiretapping of the president and his associates in Trump Tower before the election.<sup>32</sup> In addition, Rep. Nunes obtained the information during a trip to the White House and later briefed President Trump on it.<sup>33</sup> This led to calls for Rep. Nunes’s recusal from the investigation, citing concerns that he was too close to the White House and the president to run an independent investigation.<sup>34</sup>

In making the public statements, Rep. Nunes may have revealed classified information. Rep. Nunes himself acknowledged that the information was classified, but “argued that disclosing the existence of the report and the nature of it did not reveal any classified information.”<sup>35</sup>

On March 28, CREW and Democracy 21 filed a complaint with OCE requesting an investigation into whether Rep. Nunes violated House rules.<sup>36</sup> Though initially adamant that he would not step down, Rep. Nunes recused himself from the investigation on April 6, specifically citing complaints by ethics watchdogs as the primary reason for doing so.<sup>37</sup>

Rep. Nunes’s announcement came shortly before the House Ethics Committee announced it would launch an investigation into his conduct,<sup>38</sup> a move that may have been prompted by the prospect of a thorough OCE investigation. It is unknown if that is the case, but it is almost certain this swift response would not have happened if OCE had been gutted in January, demonstrating the value of a strong, independent OCE.

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<sup>1</sup> Suzanne Craig and Eric Lipton, *Trump’s Plans on Businesses May Fall Short*, *New York Times*, Jan. 11, 2017, available at <https://www.nytimes.com/2017/01/11/us/politics/trump-organization-business-conflicts.html>; Nicholas Fandos, *10 Key Moments and More From Trump’s News Conference*, *New York Times*, Jan. 11, 2017, available at <https://www.nytimes.com/2017/01/11/us/politics/trump-news-conference-highlights.html>.

<sup>2</sup> Walter M. Shaub, Jr. Remarks, Jan. 11, 2017 (“Shaub Remarks”) available at [https://oge.gov/web/oge.nsf/0/6E08189CF6AF742B852580A500799063/\\$FILE/Remarks%20of%20W%20M%20Shaub%20Jr%20\(1\).pdf](https://oge.gov/web/oge.nsf/0/6E08189CF6AF742B852580A500799063/$FILE/Remarks%20of%20W%20M%20Shaub%20Jr%20(1).pdf).

<sup>3</sup> Memorandum to Honorable Kenneth A. Lazarus, Associate Counsel to the President, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Dec. 19, 1976, available at <https://fas.org/irp/agency/doj/olc/121674.pdf>. See also Office of Government Ethics, Memorandum 83 x 16, Letter to a Deputy DAEO, Oct. 20, 1983, available at [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/01F8E09232041FD185257E96005FBBE8/\\$FILE/64ed9ad9bd294b45a88ac8729a97968a3.pdf?open](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/01F8E09232041FD185257E96005FBBE8/$FILE/64ed9ad9bd294b45a88ac8729a97968a3.pdf?open).

<sup>4</sup> Shaub Remarks.

<sup>5</sup> Shaub Remarks.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See <https://twitter.com/OfficeGovEthics/status/804020925893054464>; <https://twitter.com/OfficeGovEthics/status/804021426311180288>; <https://twitter.com/OfficeGovEthics/status/804020925171646464>; <https://twitter.com/OfficeGovEthics/status/804020924089438208>; <https://twitter.com/OfficeGovEthics/status/804020923800158209>; <https://twitter.com/OfficeGovEthics/status/804020923703533568>; <https://twitter.com/OfficeGovEthics/status/804020923519012864>; <https://twitter.com/OfficeGovEthics/status/804020923548303360>. See also Email from Walter M. Shaub to Donald McGahn, Nov. 30, 2016, available at <https://assets.documentcloud.org/documents/3248864/Office-of-Government-Ethics-emails.pdf>.

<sup>10</sup> Letter from Congressman Jason Chaffetz to Walter M. Shaub, Jr., Jan. 12, 2017, available at <https://www.documentcloud.org/documents/3284846-2017-01-12-Chaffetz-to-Shaub-OGE.html>.

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## QUESTIONS ABOUT BASIC TRANSPARENCY OBLIGATIONS

The Trump White House appears to have failed to comply with basic transparency obligations, such as the requirement to maintain and preserve presidential records under the Presidential Records Act and the requirement under the Federal Advisory Committee Act to open up to public scrutiny committees that include non-governmental personnel advising the president. On other fronts, President Trump has rolled back transparency initiatives of his predecessor, declaring recently for example that the White House would no longer make its visitor logs public. At a time when outside influences are having a bigger and bigger role in the formulation of administration policies, this lack of transparency raises serious concerns about who is pulling the levers of power.

### Retaining Presidential Records Under the Law

During the president's brief tenure in office, multiple concerns have been raised about the failure of the president and his staff to comply with the Presidential Records Act ("PRA"). Possible violations range from the use of private email systems to conduct White House business to the use of phone apps that prevent messages from being created and preserved in the first instance. This behavior appears to fit into a larger pattern of secrecy surrounding the White House and its activities.

The PRA was enacted to establish public ownership of presidential and vice presidential records, to impose record keeping requirements on the president and vice president, and to authorize the National Archives and Records Administration ("NARA") to preserve and make publicly available presidential records. Toward that end, the PRA specifies that "[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records[.]"<sup>1</sup> Stated differently, the records of a president belong to the people, not the president.

The PRA defines the term "Presidential record" broadly to include documentary materials "created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President" in conducting activities related to the president's constitutional, statutory or ceremonial duties.<sup>2</sup> The statute excludes from the definition of presidential records "personal records," defined as those "of a purely private or nonpublic character" unrelated to the president's constitutional, statutory, or ceremonial duties.<sup>3</sup> In addition, the PRA directs the president to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records[.]"<sup>4</sup>

Amendments to the PRA, added in 2014, address the growing use of personal email accounts to conduct official business. Those subject to the PRA – the president, vice president, and their staff – may not create or send a presidential record using "a non-official electronic message account" unless they also copy their official government account or forward a copy to their official government account within 20 days.<sup>5</sup> Those who intentionally violate this provision are subject to disciplinary action.<sup>6</sup> With respect to other forms of social media and methods of electronic communications, NARA guidance makes clear such communications, including those sent from a Twitter account, must be managed as "records."<sup>7</sup>

The PRA also dictates when and how presidential records may be destroyed during a president's term of office. The president may dispose of his or her non-personal records only after making a determination that the records "no longer have administrative, historical, or evidentiary value."<sup>8</sup> Upon such a determination, an

incumbent president may destroy his or her non-personal records, but only after obtaining the written views of the archivist and only after the archivist states in writing that he does not intend to take action.<sup>9</sup> Further, after the archivist has stated in writing that he does not intend to take action with respect to the destruction of specified presidential records, the president must then notify the appropriate congressional committee 60 days before the proposed disposal date of his or her intention to dispose of the records.<sup>10</sup> This multi-step process reflects the care Congress took to ensure presidential records could be destroyed only after considered deliberation by multiple entities.

As has been widely reported, the president has deleted records the PRA requires him to preserve. President Trump's preferred method of public communication is Twitter, and he has both a personal and an official Twitter account. But the contents of the tweets from both accounts, which set forth the president's musings on a wide variety of topics from the performance of the intelligence community to his views on a judicial decision enjoining his travel ban, clearly pertain to his official position. Nevertheless, a number of President Trump's tweets have been deleted, sometimes because of typos,<sup>11</sup> but sometimes in an apparent attempt to avoid criticism over apparent conflicts of interest, such as a tweet concerning his meeting with generals at his Mar-a-Lago residence.<sup>12</sup> Underlining these concerns is the boast of President Trump's former campaign manager Corey Lewandowski to lobbying clients of his access to the president's Twitter account.<sup>13</sup>

Further, at least four other senior White House officials reportedly maintained, and may still use, active email accounts on the Republican National Committee ("RNC") email system. Unfortunately, for at least three of the accounts it may not be possible to verify whether their use excluded government business as the RNC already has deleted emails from them.<sup>14</sup> But their use raises concerns about whether White House staff is complying with the PRA. The use of personal cell phones and non-governmental email accounts by White House officials to send texts or emails relating to government business would violate the PRA, unless those messages were transferred to an official EOP recordkeeping system.<sup>15</sup>

In a January 30, 2017 letter to White House Counsel Donald F. McGahn, Ranking Member Claire McCaskill and Sen. Tom Carper of the Senate Homeland Security and Governmental Affairs Committee raised concerns regarding White House staff's compliance with the PRA. They requested a variety of information that would shed light on the use by White House staff of non-governmental email accounts to conduct official business. To date, the White House has not responded to this request.

In February, White House Press Secretary Sean Spicer directed random phone checks of White House staff and warned them that using certain texting apps that encrypt and automatically delete texts after they are sent violates the PRA.<sup>16</sup> This action followed multiple reports that members of the Trump administration were using "Confide," an app that encrypts and deletes messages after they have been read.<sup>17</sup> EOP-issued cell phones do not allow apps to be loaded on them, meaning any use of encryption apps necessarily involves personal cell phones, heightening the risk that presidential records sent or received on those phones have not been preserved. Of course, any app that deletes messages would not allow such preservation, raising another concern under the PRA.

The Trump administration's apparent disregard for statutory recordkeeping responsibilities is depriving the American public of the historical records to which it is entitled. The ethical lapses and missteps the administration already has made underline the need to preserve a full record of its activities.

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<sup>1</sup> 44 U.S.C. § 2202.

<sup>2</sup> 44 U.S.C. § 2201(2).

<sup>3</sup> *Id.*, § 2201(3).

<sup>4</sup> 44 U.S.C. § 2203.

<sup>5</sup> 44 U.S.C. § 2209.

<sup>6</sup> *Id.*



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<sup>7</sup> NARA Bulletin 2015-02, *Guidance on Managing Electronic Messages*, July 29, 2015; National Archives and Records Administration, *White Paper on Best Practices for the Capture of Social Media Records*, May 2013.

<sup>8</sup> 44 U.S.C. § 2203(c).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, § 2203(d).

<sup>11</sup> See, e.g., Meg Wagner, *Trump's Deleted Tweets Could Violate Presidential Records Act*, *New York Daily News*, Jan. 1, 2017, available at <http://www.nydailynews.com/news/politics//trump-deleted-tweets-violate-presidential-records-act-article-1.2952416>; Eli Watkins and Laura Jarrett, *The Presidential Records Act and @realdonaldtrump*, *CNN*, Feb. 18, 2017, available at <http://www.cnn.com/2017/02/18/politics/presidential-records-act-donald-trump-twitter/>.

<sup>12</sup> Ben Kentish, *Donald Trump Deletes Tweet About Meeting Generals at his Mar-a-Lago Florida Resort*, *The Independent*, Feb. 22, 2017, available at <http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-delete-tweet-generals-meeting-mar-a-lago-florida-keith-kellogg-h-r-mcmaster-a7590886.html>.

<sup>13</sup> Tarini Parti, *Corey Lewandowski's Potential Clients Say He's Bragging About Access to Trump's Twitter Account*, *BuzzFeed*, Feb. 15, 2017, available at [https://www.buzzfeed.com/tariniparti/corey-lewandowskis-potential-clients-say-hes-bragging-about?utm\\_term=.ijEvykebo#.th7kwVKD9](https://www.buzzfeed.com/tariniparti/corey-lewandowskis-potential-clients-say-hes-bragging-about?utm_term=.ijEvykebo#.th7kwVKD9).

<sup>14</sup> Letter from Sen. Claire McCaskill and Sen. Tom Carper to White House Counsel Donald F. McGahn, Jan. 30, 2017, available at [https://www.carper.senate.gov/public/\\_cache/files/a88eb66b-4ba0-4bb7-8fd5-a7613fe9598f/2017-01-30-letter-from-mccaskill-carper-to-wh-counsel-mcgahn-press-pdf](https://www.carper.senate.gov/public/_cache/files/a88eb66b-4ba0-4bb7-8fd5-a7613fe9598f/2017-01-30-letter-from-mccaskill-carper-to-wh-counsel-mcgahn-press-pdf).

<sup>15</sup> *Id.*

<sup>16</sup> Annie Karni and Alex Isenstadt, *Sean Spicer Targets Own Staff in Leak Crackdown*, *Politico*, Feb. 26, 2017 (available at <http://www.politico.com/story/2017/02/sean-spicer-targets-own-staff-in-leak-crackdown-235413>).

<sup>17</sup> See, e.g., Lily Hay Newman, *Encryption Apps Help White House Staffers Leak – and Maybe Break the Law*, *Wired*, Feb. 15, 2017 (available at <https://www.wired.com/2017/02/white-house-encryption-confide-app/>); Andrew Restuccia and Nancy Cook, *Trump Inspires Encryption Boom in Leaky D.C.*, *Politico*, Feb. 27, 2017 (available at <http://www.politico.com/story/2017/02/trump-encryption-cybersecurity-leaks-235417>).

## Documenting Outside Advisory Committees

President Trump and his top aides repeatedly have turned to outside groups and individuals to help them formulate policy. In doing so, they may have triggered the requirements of the Federal Advisory Committee Act (“FACA”). They have not, however, complied with those transparency obligations.

The FACA is an open-government law that, with respect to the Executive Office of the President, is triggered whenever a committee is advising the president and is not “composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government.”<sup>1</sup> Committees subject to the FACA must make publicly available the committee’s “records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by” the committee.<sup>2</sup> Beyond these disclosure requirements, such committees must file a charter; publish notices of their meetings in the Federal Register; hold public meetings; and document each meeting with detailed minutes.<sup>3</sup> FACA also requires advisory committees to be “fairly balanced in terms of the points of view represented,” and prohibits them from being “inappropriately influenced by the appointing authority or by any special interest.”<sup>4</sup>

President Trump appears to have ignored these requirements for multiple committees. For example, knowing that he would have a Supreme Court vacancy to fill at the outset of his administration and likely several more during his term in office, President Trump assembled a committee to give him recommendations. Committee members include the Federalist Society’s Leonard Leo Jr. and Jim DeMint of the Heritage Foundation,<sup>5</sup> along with Vice President Mike Pence, White House Counsel Donald McGahn, and Chief Strategist and Senior Counselor to the President Stephen K. Bannon.<sup>6</sup> Reportedly, Attorney General Jeff Sessions also is advising the President on Supreme Court nominees.<sup>7</sup>

This committee has the earmarks of an advisory committee subject to the FACA: due to the participation of Leo and DeMint,<sup>8</sup> it is not composed entirely of full-time federal employees, and it was formed to provide advice to the president on Supreme Court nominees. Yet the committee has not complied with any of the FACA’s requirements, leaving the public in the dark about the committee’s recommendations and even whether the committee is “fairly balanced,” as the statute requires.

These same concerns were raised with the committee the president formed as part of his “Manufacturing Jobs Initiative” that includes CEOs and labor leaders.<sup>9</sup> The White House has attempted to place this committee beyond the FACA’s reach by using certain “magic” words to delineate its responsibilities, namely the claim that the group is not expected to provide “consensus advice or recommendations.”<sup>10</sup> But the actual function of the committee belies this claim. Dow Chemical CEO Andrew Liveris, who is organizing the first series of meetings, has described the purpose of the committee as “offer[ing] perspectives and information to President Trump and his Administration on a variety of policy priorities.”<sup>11</sup> Toward this end, the committee “will help identify and work with experts from across the country to make U.S. manufacturing more competitive.”<sup>12</sup> Directly after the committee’s first meeting, Mr. Liveris told reporters that “the White House wanted the CEOs to present recommendations in 30 days.”<sup>13</sup> Another committee member, Tesla and Space X CEO Elon Musk, announced via Twitter his plan to use a subsequent meeting to “seek advisory council consensus & present to President.”<sup>14</sup> These descriptions simply do not square with a group that does not provide “consensus advice or recommendations.” Yet despite the committee’s status as one subject to the FACA, to date the White House has refused to comply with any of the FACA’s mandatory requirements.

Other potential FACA issues are on the horizon. For example, as a presidential candidate, Donald Trump formed a “coalition of gun enthusiasts to advise him on Second Amendment issues” just days before the election.<sup>15</sup> Although the White House now describes the group as a “campaign coalition,” some of its co-chairs hope to have an ongoing role advising the president, and expect Donald Trump Jr. to serve as “a conduit between the advisory group and the White House.”<sup>16</sup> Any ongoing work of the group may implicate FACA, depending on the group’s composition and its relationship to the president.

The FACA affords a level of transparency that ensures that the work of groups composed of government and non-government members advising the president is publicly accessible. At a time when the president is relying increasingly on outsiders for advice and direction – individuals who are not subject to the ethical and other disclosure obligations imposed on federal employees – this access is more important than ever.

## White House Visitor Logs – President Trump Reverses Course

In September 2009, in response to four pending lawsuits brought by CREW for White House visitor logs, President Barack Obama announced he would begin opening up the logs to the public on a regular basis by posting online the names of visitors over the previous 90 to 120 days. As implemented, the posted records included names of visitors, the dates and times they entered and left the White House compound, and the names of the persons they visited (or at least who was requesting they be cleared for access). Publication of the logs was subject to several exceptions, including purely personal guests of the Obama family, the need to protect national security interests, and the temporary need to protect particularly sensitive meetings, such as the vetting of a Supreme Court candidate.<sup>17</sup>

In announcing the new policy, President Obama recognized the “right” of “Americans” to “know whose voices are being heard in the policymaking process.”<sup>18</sup> When he left office, President Obama’s administration had released under this policy 5.99 million records of White House visitors.<sup>19</sup> These records helped inform the public about the range of influences brought to bear on the president. For example, one news report that examined records from an “unremarkable” day in January 2012 revealed the “regular presence” of lobbyists at the White House, with “lobbyists with personal connections to the White House enjoy[ing] the easiest access.”<sup>20</sup>

On April 14, 2017, the Trump White House announced it no longer would provide public access to visitor logs, an announcement that in the words of the *New York Times* “return[s] a cloak of secrecy over the basic day-to-day workings of government.”<sup>21</sup> White House officials largely justified this decision on national security grounds,<sup>22</sup> even though the Obama White House released the vast majority of its visitor records with no evidence the disclosures raised any national security concerns, or indeed any concerns at all beyond, at times, showing the Obama White House in a less than flattering light.

As commentators have pointed out, this “claw back” of transparency by the Trump administration fits into a larger narrative about a White House intent on concealing from the American public what it is doing and why.<sup>23</sup> President Trump has set the tone by refusing to release his taxes, a refusal that carries over from the campaign when he also refused to release a full medical history and documentation of his charitable donations.<sup>24</sup> At a time when the president and his top advisors are relying extensively on outside opinions and input to formulate policy, this latest announcement about the sealing up of visitor records erects one more barrier to transparency and the public accountability that it brings.

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<sup>1</sup> 5 U.S.C. App. § 3(2).

<sup>2</sup> *Id.*, § 10(b).

<sup>3</sup> *Id.*, §§ 9(c); 10(a)(1), (a)(2), (b) and (c); and 11.

<sup>4</sup> *Id.*, §§ 5(b)(2), (b)(3), and (c).

<sup>5</sup> See, e.g., Peter Baker, [Supreme Court Nomination Will Come on Tuesday, Trump Says](https://www.nytimes.com/2017/01/30/us/politics/trump-supreme-court-nominee.html?_r=2), *New York Times*, Jan. 30, 2017, available at [https://www.nytimes.com/2017/01/30/us/politics/trump-supreme-court-nominee.html?\\_r=2](https://www.nytimes.com/2017/01/30/us/politics/trump-supreme-court-nominee.html?_r=2); Bill Mears, [Trump Set to Make Supreme Court Choice This Week, Short List Down to Three](http://www.foxnews.com/politics/2017/01/24/trump-set-to-make-supreme-court-choice-this-week-several-judges-on-short-list.html), *Fox News*, Jan. 24, 2017, available at <http://www.foxnews.com/politics/2017/01/24/trump-set-to-make-supreme-court-choice-this-week-several-judges-on-short-list.html>; Greg Stohr, [Trump Fulfills Conservative Wishes With High Court Shortlist](http://www.bloomberg.com/news/articles/2017-01-26/trump-fulfills-conservative-wishes-with-high-court-shortlist), *Bloomberg.com*, Jan. 26, 2017,

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<sup>6</sup> Jonathan Swan, *Inside Trump's Supreme Court Pick*, *Axios*, Jan. 31, 2017, available at <https://www.axios.com/inside-trumps-scotus-pick-2226499240.html>.

<sup>7</sup> Maggie Stevens, *How Trump is Approaching his SCOTUS Selection*, *Politico*, Jan. 27, 2017, available at <http://www.politico.com/blogsdonald-trump-administration/2017/01/how-trump-is-approaching-his-scotus-selection-234272>.

<sup>8</sup> Leo went on leave from the Heritage Foundation to work on Judge Neil Gorsuch's nomination on behalf of the White House, but this does not prevent the committee from being subject to FACA. Eric Lipton and Jeremy W. Peters, *In Gorsuch, Conservative Activist Sees Test Case For Reshaping the Judiciary*, *New York Times*, Mar. 18, 2017, available at <https://www.nytimes.com/2017/03/18/us/politics/neil-gorsuch-supreme-court-conservatives.html>.

<sup>9</sup> Press Release, The White House, President Trump Announces Manufacturing Jobs Initiative, Jan. 27, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/27/president-trump-announces-manufacturing-jobs-initiative>.

<sup>10</sup> *Id.*

<sup>11</sup> Press Release, Dow Chemical Company, Statement Regarding Manufacturing Jobs Initiative, Jan. 27, 2017, available at <http://www.dow.com/en-us/news/press-releases/dow-statement-regarding-manufacturing-jobs-initiative>.

<sup>12</sup> *Id.*

<sup>13</sup> Steve Toloken, *Newell CEO Named to Manufacturing Jobs Initiative*, *Plastic news*, Jan. 30, 2017, available at <http://www.plasticsnews.com/articleee/20170130/NEWS/170139989/newell-ceo-named-to-manufacturing-jobs-initiative>.

<sup>14</sup> See <https://www.twitter.com/elonmusk/status/825809205244223488>.

<sup>15</sup> Nicole Gaudiano, *What Ever Happened to President Trump's Gun Advisory Group?*, *USA Today*, Mar. 29, 2017, available at <https://www.usatoday.com/story/news/politics/2017/03/29/what-ever-happened-president-trumps-gun-advisory-group/99176736/>.

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., Peter Baker, *The White House Will Disclose Visitor Logs*, *New York Times*, Sept. 4, 2009, available at <https://thecaucus.blogs.nytimes.com/2009/09/04/the-white-house-will-disclose-visitor-logs/>.

<sup>18</sup> *Id.*

<sup>19</sup> The White House, *More Than 5.99 Million Records Released*, Dec. 30, 2016, available at <https://obamawhitehouse.archives.gov/blog/2016/12/30/more-599-million-records-released>.

<sup>20</sup> T.W. Farnam, *White House Visitor Logs Show Lobbying Going Strong*, *Washington Post*, May 20, 2012, available at [https://www.washingtonpost.com/politics/2012/05/20/gIQA2ok4dU\\_story.html?utm\\_term=.8ce1ea60fbaa](https://www.washingtonpost.com/politics/2012/05/20/gIQA2ok4dU_story.html?utm_term=.8ce1ea60fbaa).

<sup>21</sup> Julie Hirschfeld Davis, *White House to Keep Its Visitor Logs Secret*, *New York Times*, Apr. 14, 2017, available at <https://www.nytimes.com/2017/04/14/us/politics/visitor-log-white-house-trump.html>.

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., James Hohmann, *The Daily 202: What Does Trump Have to Hide? Secretive White House Unapologetic About Clawing Back Transparency*, *Washington Post*, Apr. 17, 2017, available at [https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/04/17/daily-202-what-does-trump-have-to-hide-secretive-white-house-unapologetic-about-clawing-back-transparency/58f411b3e9b69b3a72331e8e/?hpid=hp\\_rhp-top-table-main\\_transparency1055am%3Ahomepage%2Fstory&utm\\_term=.7b02ab8d75ff](https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/04/17/daily-202-what-does-trump-have-to-hide-secretive-white-house-unapologetic-about-clawing-back-transparency/58f411b3e9b69b3a72331e8e/?hpid=hp_rhp-top-table-main_transparency1055am%3Ahomepage%2Fstory&utm_term=.7b02ab8d75ff).

<sup>24</sup> *Id.*