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## “Alternative Facts” v. Reality: Ethics, Conflicts of Interest, and the Emoluments Clause

**Alternative Fact #1: “The president can’t have a conflict of interest.” – President Donald Trump.**

- **REALITY:** The president *can* have a conflict of interest. Congress only granted the president an exemption from a single criminal statute, Title 18 U.S.C. Section 208, with the understanding that the president is expected to adhere to the highest ethical standards.
  - Congress granted this exemption because the broad scope of the president’s responsibilities makes it impractical to mandate recusal from matters where his or her personal interests may be affected.
  - However, a 1974 Office of Legal Counsel (OLC) memorandum issued by then-Assistant Attorney General Antonin Scalia questioning the applicability of certain ethics regulations to the president, nonetheless suggested that it would be “undesirable as a matter of policy” for the president and vice president to “engage in conduct proscribed” by federal laws “where no special reason for exemption [for the president or vice president] from the generally applicable standards exists.”
  - Walter M. Schaub, Jr., the Director of the independent Office of Government Ethics, which advises officials on government ethics, [publicly stated](#): “Common sense dictates that a President can, of course, have very real conflicts of interest. . . . [I]t’s been the consistent policy of the executive branch that the President should act as though the financial conflict of interest law applied.”
  - President Trump, by virtue of his sprawling business empire, faces numerous conflicts of interest because of executive branch regulatory agencies’ jurisdiction over the Trump Hotel at the Old Post Office building (GSA), Trump Organization-owned planes (FAA), trademark registrations (Department of Commerce and the PTO), the sale of large housing complexes subsidized by the federal government (HUD), and golf courses as well as other properties subject to clean water environmental regulations (EPA), to name just a few.
  - Regardless of what the law requires, these conflicts of interests are concerning because the mere appearance that the president is making policy decisions based on his personal financial or business interests—rather than based on the interests of the American people—erodes the people’s trust in government institutions and our democratic political system.
  - Several other ethics statutes which govern or prohibit conduct such as nepotism, receipt of foreign gifts, bribery, and acting as an agent of a foreign power also likely apply to the president. Most importantly, the president is bound by the Constitution’s Emoluments Clause.

**Alternative Fact #2: The Trump Organization is abstaining from “any actions that actually exploit, or even could be perceived as exploiting, the Office of the Presidency.” – White paper prepared by President Trump’s attorneys at Morgan, Lewis & Bockius LLP.**

- **REALITY:** President Trump remains the legal owner of numerous properties – exemplified by his estate Mar-A-Lago – many of which generate income from membership fees and events as well as sales and rentals. As the president, he continues to attend high profile gatherings at these properties, which elevates their profile among potential customers. It appears that Trump personally profits from these actions.
  - Just days after announcing his refusal to divest his business interests—and to instead place his assets in an independent trust and subject any new domestic deals to the review of a company-appointed Ethics Adviser-- Trump Hotels [announced plans](#) to expand into 26 U.S. cities, a five-fold increase from the five markets in which they currently operate.
  - At his first official press briefing, incoming White House spokesperson Sean Spicer [stated the following](#) about the Trump International Hotel in D.C.: “It’s an absolutely stunning hotel. . . . I encourage you to go there if you haven’t been by.”
  - During Inauguration festivities, the [President hosted and attended several events](#) at the Trump International Hotel in D.C.
  - President Trump has referred to his estate at the Mar-A-Lago club in Palm Beach, Florida as the “Winter White House” and the cost of a membership at the club has doubled from \$100,000 to \$200,000 since he won the election.
  - In February 2017, President Trump attended the International Red Cross charity ball at Mar-A-Lago and a Super Bowl gathering at his Trump International Golf Club. According to tax records, the International Red Cross pays approximately \$300,000 in fees and catering costs to hold the event at Mar-A-Lago.
- **REALITY:** In a lawsuit filed in New York State Supreme Court against the owners of a British tabloid, lawyers for Melania Trump claimed that an article falsely alleging that she had worked at an escort service financially damaged her brand because it harmed a “unique, once in a lifetime opportunity” to “launch a broad-based commercial brand” and build “multimillion dollar business relationships” while she would be First Lady and “one of the most photographed women in the world.”

**Alternative Fact #3: President Trump, like his predecessors, has adequately divested his business interests by turning over management of his organization to his children; he has enacted adequate organizational safeguards to protect against potential conflicts of interest and the appearance of impropriety.**

- **REALITY:** President Trump’s relinquishment of the Trump Organization’s day-to-day management to his children does not eliminate any conflicts of interest because he will continue to profit from the success of his businesses. His plan runs counter to the best practices prescribed by the Office of Government Ethics (OGE), and his refusal to completely divest marks a break with precedent set by past presidents.
  - In a December 2016 letter to Senator Carper, OGE Director Walter Shaub wrote: “. . .the Ethics in Government Act prescribes specific requirements for establishing a qualified blind trust. Transferring operational control of a company to one’s children would not constitute the

establishment of a qualified blind trust, nor would it eliminate conflicts of interest..." President Trump's refusal to create a qualified blind trust falls short because so long as the president is knowledgeable about the assets he owns, he has an incentive to act in a way that benefits him.

- While he no longer manages his businesses, President Trump still owns and receives financial benefits from their successes. Because many are well-known real estate properties, he does not need to be familiar with their day-to-day operations to understand what public policies would benefit them.
- OGE Director Shaub has said that "[t]he plan the president-elect has announced doesn't meet the standards that the best of his [cabinet] nominees are meeting and that every president in the last four decades have met...Stepping back from running his business is meaningless from a conflict of interest perspective."
  - Presidents Lyndon Johnson, Jimmy Carter, Ronald Reagan, George W. Bush, George H.W. Bush, and Bill Clinton placed their personal assets in blind trusts. President Obama did not do so only because his personal assets were composed entirely of mutual funds and Treasury bonds.
- According to legal documents, President Trump installed his eldest son Donald Jr. and Allen Weisselberg, the CFO of the Trump Organization, as trustees of the Donald J. Trump Revocable Trust. In addition to being able to revoke the trust at any time, as the name suggests, Trump is aware of the assets in the trust, many of which are high profile real estate properties.

**Alternative Fact #4: President Trump has dispelled conflicts of interest concerns by pledging that the Trump Organization will 1) appoint an independent ethics advisor to review and approve all new domestic business deals and 2) create a chief compliance officer to address any potential conflicts of interest.**

- **REALITY:** Instead of appointing an individual with a background in ethics compliance, the Trump Organization tapped longtime GOP lawyer Bobby Burchfield. Burchfield is far from an independent ethics advisor, as he has represented disgraced former-congressman Tom Delay and GPS Crossroads, an organization tied to Karl Rove's super PAC that does not disclose donors.
- Longtime Trump Organization lawyer, George Sorial, was appointed chief compliance counsel, despite having done work for Trump University, President Trump's for-profit education company, which recently paid \$25 million to settle a lawsuit alleging fraud.
- These individuals lack the experience and independence needed to provide sound ethical advice on complex deals. More importantly, without completely divesting or placing the Trump Organization under the control of a truly independent party, no ethics advisor or compliance counsel can eliminate conflicts of interest.

**Alternative Fact #5: President Trump is not in violation of the terms of his lease with the GSA to redevelop and manage the Old Post Office building hotel because he no longer manages the Trump Organization; his lease agreement poses no other conflict of interest.**

- **REALITY:** President Trump violated the terms of his lease with the GSA the moment he took office because of his continuing ownership of the Trump Organization. Additionally, his role overseeing the GSA poses a conflict of interest.

- The lease states that “No...elected official of the government of the United States...shall be admitted to any share or part of this Lease, or from any benefit that may arise therefrom.” As the continued owner of the Trump Organization, President Trump derives a financial benefit from the lease, despite no longer having a formal management role.
- President Trump now oversees the GSA and has the power to appoint the agency’s administrator, effectively rendering him both landlord and tenant. This poses a significant conflict of interest as the GSA is responsible for negotiating any rent adjustments or other payments with the Trump Organization.

**Alternative Fact #6: “The so-called Emoluments Clause has never been interpreted, however, to apply to fair value exchanges” – Sheri Dillon, attorney for President Donald Trump.**

- **REALITY:** According to noted constitutional and legal experts Norman Eisen, Richard Painter, and Laurence Tribe, the Framers intended the Emoluments Clause to cover a broad set of possible transactions between the president and a foreign government. Any other reading of the Constitution would have absurd results.
  - The scope of the Emoluments Clause is unsettled law, but to say that it has “never been interpreted” to apply to exchanges for fair market value is a misleading overstatement of the fact that the Supreme Court has never even considered this question. Noted constitutional scholar Laurence Tribe and presidential ethics experts Norman Eisen and Richard Painter have stated that the text of the Constitution supports an expansive definition of “Emoluments” because the Framers “sought to prohibit even reasonable money-for-services arrangements between officeholders and foreign states, which would result in profit to the officeholder.”
  - To interpret the Emoluments Clause otherwise would have illogical results, such as barring the president from receiving a gift of nominal value from a foreign government for fear of undue influence, but permitting that same foreign government to pay the president millions of dollars in exchange for duly provided goods or services, in the belief that this transaction cannot influence the president.

**Alternative Fact #7: President Trump’s pledge to donate profits collected from foreign governments on hotel rooms to the U.S. Treasury remedies any perceived or actual conflicts of interest or violations of the Emoluments Clause. And the only possible source of Emolument Clause violations are from hotel stays.**

- **REALITY:** According to constitutional scholar Erwin Chemerinsky: “Trump’s proposed solutions are laughable. So what if he donates ‘profits’ from foreign governments to the United States Treasury? All he has to do is *accept* money from a foreign government and he’s already in violation of the emoluments clause—it doesn’t matter whether it constitutes a profit, or where the money ultimately ends up. Focusing on profits, moreover, ignores the countless ways that his businesses can benefit from foreign governments that would never show up on a balance sheet.”
- **REALITY:** President Trump’s continued ownership of his intellectual property and his businesses’ ongoing branding efforts present problems under the Emoluments Clause, as it raises the possibility that foreign courts, at the direction of their governments, are giving preferential treatment to the Trump Organization during judicial proceedings, including trademark applications.
  - For example, in 2006 President Trump applied to Chinese authorities for a trademark for construction services. However, a Trump mark already belonged to another party. For 10 years,

President Trump received only rejections in response to his appeals. On September 6, 2016, Chinese authorities published a decision invalidating the previously awarded trademark, paving the way for President Trump to register the mark during his potential presidency.

- **REALITY:** Even if the acceptance of foreign payment does not violate the Emoluments Clause, it would be at the discretion of the Trump Organization to calculate hotel “profits” on a per room basis; the public currently has no way to verify or to enforce President Trump’s compliance with his own promise.
  - On its face, President Trump’s pledge applies only to foreign governments. As such, it appears to exempt businesses or other third party entities in which foreign governments have a significant financial stake. Furthermore, the pledge does not address the fact that the Trump Organization leases office space in Trump Tower to foreign government-controlled businesses or entities.
  - Business administration experts [have indicated](#) it would be “challenging and unusual” for Trump-owned hotels to “try to calculate ‘profit’ on an individual room or venue rental” for the purposes of donation.
  - Due to privacy concerns, the Treasury Department generally does not report donation details. President Trump has not publically committed to disclosing donation details voluntarily, such as which foreign government paid for services or the amount. As such, it is nearly impossible for the public to hold the president accountable for his pledge.
  - President Trump has not addressed what, if any, other businesses would be covered by his foreign-profits donation pledge and whether it would cover hotels that he does not own but to which he has licensed the Trump name.
  - Additionally, it may be possible for the Trump Organization to claim a tax deduction for the donation to the U.S. Treasury which would still allow it to benefit from foreign governments paying for hotel stays.

**Alternative Fact #8: President Trump does not need to release his tax returns because “Prior to the election it was well known that I [President Trump] have interests in properties all over the world. Only the crooked media makes this a big deal!”**

- **REALITY:** A majority of Americans, including nearly 50 percent of his supporters, believe President Trump should release his tax returns. Disclosure of his tax returns would reveal many details of his foreign financial interests. In addition, the limited financial disclosures that President Trump made available reveal an unprecedented network of opaque interconnected LLCs and limited partnerships whose sources of funding and debt have not been disclosed.
  - President Trump has argued that Americans knew he possessed numerous foreign business ties during the election and no further financial disclosure is necessary. But the nature of the financial interest remains unknown because President Trump, in defiance of 40 years of precedent, has yet to publically release his tax returns.
  - An overwhelming majority of the American public believes President Trump should release his tax returns. According to an *ABC News/Washington Post* poll conducted in the lead up to President Trump’s inauguration, 74 percent of Americans believe he should release his tax returns, including 49 percent of his own supporters.

- In a January 22, 2017 interview on ABC’s “This Week”, Special Advisor to the President Kellyanne Conway stated unequivocally that President Trump is “not going to release his tax returns” — a departure from previous statements made by the president that he would release his tax returns following the completion of an IRS audit. The following day, Conway backtracked tweeting that “POTUS is under audit and will not release [tax returns] until that is completed.”
- According to attorneys for President Trump, his returns from before 2009 are no longer under audit, yet they have not been publically disclosed.
- Multiple Republican Members of Congress have also called on President Trump to disclose his tax returns during the course of the presidential campaign, including House Oversight and Government Reform Chairman Jason Chaffetz.

**Alternative Fact #9: “No new foreign deals will be made whatsoever during the duration of President Trump’s presidency”– Sheri Dillion, attorney for President Trump.**

- REALITY: Recent news reports show that President Trump has already reneged on his pledge, which demonstrates that he cannot or will not comply with his own ambiguous promise to forgo any new foreign deals.
  - According to the Guardian, President Trump has commenced plans on a multi-million dollar expansion to his Scotland golf course. President Trump’s business representatives have dismissed this violation of the President’s pledge because the expansion plan predates his election.
  - However, this action and the Trump Organization’s response illustrate the ambiguity and unenforceability of President Trump’s pledge. The Trump Organization spans more than 20 countries, and it is likely that more plans for business expansion were conceived before President Trump took office. But apparently none of these qualify as “new” foreign business deals--no matter what stage of development they were in prior to the beginning of Trump’s presidency.

**Alternative Fact #10: President Trump will not personally benefit from the Republican’s legislative agenda; and negotiations between the White House and Congressional Republicans over dueling tax reform proposals pose no conflicts of interest for the president as he would not personally financially benefit under either plan.**

- REALITY: President Trump stands to benefit financially from expected Republican proposed changes to the tax code, the Dodd-Frank financial reform law, and the repeal of key tax related provisions of Obamacare. And negotiations over tax reform between President Trump and House Republicans are rife with potential conflicts of interest because he has refused to divest from businesses whose bottom line will be affected by the outcome.
  - Republican plans for tax code “reform” are expected to include tax cuts for the top business rates, which would allow President Trump’s companies to keep a greater percentage of its profits, as well as tax deductions on debt financed projects and exemptions on foreign sales income, both of which would likely benefit President Trump’s real estate development deals and numerous overseas ventures.

- Additionally, President Trump’s family could receive an estimated 4 billion dollars in tax savings from a repeal of the estate tax, if the president’s personal wealth is greater than 10 billion dollars, as he has claimed.
- House Republicans have proposed eliminating a deduction for interest payments from a company’s total taxable income, while President Trump’s plan would preserve that same deduction.
  - Although it is impossible to calculate exactly Trump’s personal savings because he refuses to release his tax returns, a [conservative estimate by the Wall Street Journal](#) puts President Trump’s personal savings under this deduction at \$20 million.
- Changes to the Dodd-Frank financial reform law, which Republicans are expected to propose this Congress, would make it easier for real estate developers to obtain lending due to loosened restrictions on financial institutions.
- President Trump could save millions of dollars if the Republican’s repeal of Obamacare, as it would eliminate the tax burdens on earned income and capital gains imposed on the wealthiest Americans to help pay for affordable healthcare.

**Alternative Fact #11: President Trump’s decision to shutter the Trump Foundation eliminates any legal questions raised regarding its potential mismanagement and allegations of self-dealing.**

- **REALITY:** According to the Office of the New York State Attorney General, President Trump cannot legally dissolve his charitable foundation because it is the subject of an ongoing investigation into its finances and the misuse of funds. There are several known instances where the Trump Foundation has used charitable funds for questionable or legally prohibited purposes.
  - President Trump has reportedly used over \$250,000 in foundation funds to pay for personal legal settlements. Additionally, there are reports that President Trump used foundation funds to pay for portraits of him as well as an autographed football helmet. And the Trump Foundation admitted in a 2015 IRS filing that it had violated tax regulations and misused charitable funds to his personal benefit.
  - In 2013 the Trump Foundation wrote a \$25,000 check to the political fundraising committee of Florida Attorney General Pam Bondi, a violation of federal tax law that prohibits charitable foundations from making donations to candidates running for office. President Trump wrote this check at a time when his for-profit education venture Trump University was under investigation by the New York State Attorney General and potentially faced legal scrutiny elsewhere. In 2016, the IRS fined President Trump \$2,500 for the violation.

**Alternative Fact #12: President Trump’s executive order banning travel by U.S. legal residents and valid U.S. visa holders to the United States from seven Muslim-majority nations will protect Americans from terrorism, poses no conflicts of interest, and does not give the appearance of impropriety.**

- **REALITY:** President Trump excluded from the ban several countries his organization has or had business connections to—including hosting a Trump licensed golf course—even though their nationals have perpetrated terrorist attacks on U.S. soil. No national from the seven countries affected by the ban has killed an American on U.S. soil in a terrorist attack according to 40 years of data. But conveniently for President Trump, his businesses have no ties to the seven countries affected by the ban.

- President Trump’s travel ban is bad policy: it is unconstitutional and betrays American values, all while making Americans less safe by sending the message that the U.S. is opposed to Muslim immigration rather concerned about preventing terrorism. But even if the travel ban’s flawed, discriminatory premise is assumed true, the ban falls short of its purported goal and poses several conflicts of interest for President Trump.
  - No nationals from the seven majority-Muslim countries under President Trump’s ban has killed an American on U.S. soil through an act of terrorism according to a review of 40 years’ worth of records conducted by the Cato Institute.
  - Many of the terrorists responsible for the 9/11 attacks—which President Trump invoked to justify the order—were from Saudi Arabia, Egypt, and the United Arab Emirates, yet those countries are not included among those subject to the travel ban.
- But, unlike the seven countries targeted by the ban, President Trump has or had business ties with Saudi Arabia, Egypt, and the United Arab Emirates:
  - Saudi Arabia is currently home to several Trump owned corporate entities.
  - Two Trump companies were registered in Egypt.
  - In the United Arab Emirates, President Trump licensed his name to a luxury golf course and spa development.
- As bipartisan ethics experts Richard Painter and Norm Eisen summarized it: “The arbitrary and discriminatory nature of this order is bad enough; but if the president is also considering payoffs to the Trump organization, it’s much worse.”

**Alternative Fact #13: President Trump’s executive order on ethics and lobbying is as comprehensive as the order issued by President Obama when he took office.**

- **REALITY:** President Trump’s order weakens the lobbying restrictions put in place by the Obama administration by omitting two important provisions. First, it removes the ban on lobbyists working for the agencies they formerly lobbied. Second, it only bans former government officials from “lobbying activities,” Rather than completely banning all communication with their former agency, this loophole permits former officials to engage in “shadow lobbying,” which includes activities such as arranging meetings between special interests and current government officials.

**Alternative Fact #14: President Trump’s refusal to divest ownership of his businesses has not generated taxpayer burdens which present unavoidable conflicts of interest.**

- **REALITY:** President Trump’s refusal to divest forces government agencies to expend taxpayer dollars in support of business operations from which he ultimately personally profits, creating a situation where the president is utilizing public resources while pursuing private gain.
  - For example, the Secret Service and the State Department [spent](#) \$97,830 to cover hotel costs incurred while providing protective services to Eric Trump during a business trip to Uruguay to promote Trump-branded properties.



**Alternative Fact #15: President Trump has no conflict of interest under OGE ethics regulations requiring him to oversee the discipline of White House employees for ethics violations and the White House satisfied its obligations under those regulations when it “counseled” Kellyanne Conway for her use of a T.V. appearance from the West Wing briefing room to promote Ivanka Trump’s product line.**

- **REALITY:** President Trump’s February 9 tweet criticizing the retailer Nordstrom for no longer carrying Ivanka Trump products illustrates that the president can have a conflict of interest in carrying out his responsibilities under OGE ethics regulations. “Counseling” Ms. Conway for her conduct does not appear to adequately address this apparent violation of ethics regulations. Under OGE ethics rules it is President Trump’s responsibility to discipline Ms. Conway for her apparent ethics violation. Yet the president’s own action in defense of his daughter’s financial interests undermines his ability to do so.
  - Oversight and Government Reform Chairman Chaffetz and Ranking Member Cummings wrote a letter to OGE Director Shaub requesting that he review the incident and recommend an appropriate disciplinary action, such as reprimand, suspension, demotion, or dismissal.
  - In response, OGE Director Shaub wrote a letter to the White House stating that the OGE had previously been in contact with them regarding the incident, that Reps. Chaffetz and Cummings had written asking for a review, and noting that “OGE has not yet received notification of any disciplinary or other corrective action against Ms. Conway” despite Press Secretary Sean Spicer’s public assurances that she had been “counseled.”
  - Director Shaub’s letter further stated “[u]nder present circumstances, there is strong reason to believe that Ms. Conway has violated the Standards of Conduct and that disciplinary action is warranted” and it recommended that the White House investigate Ms. Conway and report back “any disciplinary or corrective action” by February 28, 2017.