



A Competition for Law Students

To Help Restore the Rule of Law to American Jurisprudence

With Prizes of Up to \$15,000

**Sponsored by the American Constitution Society and Educating Citizens on
Government Corruption**

Background: The bedrock of our democracy is the rule of law: everyone must obey the laws of our nation, and no individual is above the law.

Public officials owe the people their faithful adherence to the law. When executive branch officers take their oath of office, each must swear he or she will “well and faithfully discharge the duties of the office on which I am about to enter.”¹ The Constitution requires the President to swear that he or she “will faithfully execute the Office of President of the United States.”² Moreover, it directs the President to “take care that the laws be faithfully executed.”³

Public servants—from the President down—owe the people their undivided loyalty. Yet, American history is full of examples of government officials using public office to

¹ 5 U.S.C. § 3331 (2018).

² U.S. CONST., art. II, § 1, cl. 8.

³ U.S. CONST., art. II, § 3.

enrich themselves. In 1778, Maryland's Samuel Chase was kicked out of the Continental Congress for attempting to use information he gained as a member to corner the flour market in Baltimore.⁴ In the 1960s, President Lyndon Johnson used the power of the presidency to support and steer business toward radio stations owned by his wife.⁵

In even worse cases, public servants have taken bribes in exchange for government action. In the 1920s Tea Pot Dome scandal, the former Secretary of the Interior, Albert Fall, was convicted of bribery in exchange for oil drilling rights on public land. He became the first cabinet member to serve prison time. In the 1970s, President Richard M. Nixon personally directed the Department of Justice to back down on its antitrust suit and investigation involving I.T.T. in exchange for a corporate donation to the Republican National Committee.⁶

These types of conflicts of interest tear at the fabric of democracy, introducing the corrosive sense that our government is not "of the people, by the people, and for the people." Instead, the public increasingly believes that government officials are acting for their own personal benefit, that laws and policies are based on corrupt purposes, and that inconvenient laws are ignored by politicians but rigorously enforced for the public. The lack of confidence in the fair and equitable application of the law undermines the rule of law.

Public trust in government is near historic lows. A Pew Research Center poll from December 2017 found that "Only 18% of Americans today say they can trust the government in Washington to do what is right "just about always" (3%) or "most of the time" (15%)."⁷ Another poll from Transparency International found that "almost 7 out of 10 people [in the United States] believe the government is failing to fight corruption, up from half in 2016."⁸

⁴ Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 348-349 (2009).

⁵ Jack Shafer, *The Honest Graft of Lady Bird Johnson*, SLATE (July 16, 2007, 5:06 PM), http://www.slate.com/articles/news_and_politics/press_box/2007/07/the_honest_graft_of_lady_bird_johnson.html.

⁶ Ciara Torres-Spelliscy, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions*, BRENNAN CENTER FOR JUSTICE (Mar. 19, 2014), <https://www.brennancenter.org/blog/itt-affair-why-public-financing-matters-political-conventions>.

⁷ PEW RESEARCH CENTER, *Public Trust in Government: 1958-2017* (Dec. 14, 2017), <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/>.

⁸ TRANSPARENCY INT'L, *Corruption in the USA: The Difference a Year Makes* (Dec. 12, 2017), https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes.

How can the people use the law to ensure that its public servants are free from conflicts of interest and do not use the power of the office for personal enrichment?

To explore the issue this year, this competition will set forth a fact pattern that raises the question whether and to what extent a President may flout the rule of law and conflict-of-interest principles.

Participants in the competition are asked to propose and analyze possible legal remedies (short of impeachment or criminal prosecution) to the problem (if they conclude there is a problem).

The facts: In 2013, the General Services Administration leased the Old Post Office in downtown Washington, D.C., to Donald Trump's company, the Trump Organization, for the development and operation of the Trump International Hotel.⁹ The lease between the GSA and the Trump Organization runs for 60 years .

The lease agreement states that no elected official of the government may benefit from the lease. Specifically, Section 37.19 of the lease provides:

No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom; provided, however, that this provision shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this Lease is for the general benefit of such corporation or other entity.¹⁰

The lease also contains a provision reallocating the share of proceeds to be divided between the landlord and the lessee in favor of the landlord if the lessee assigns its interest to a third party. This provision makes the lease less valuable to an assignee.

⁹ The leaseholder is Trump Old Post Office LLC, a Delaware limited liability company. DJT Holdings LLC in turn controls 76.735% of it. President Trump's children collectively own 22.275% of it.

¹⁰ A copy of most of the relevant GSA documentation regarding this issue is available at https://www.gsa.gov/cdnstatic/Contracting_Officer_Letter_March_23__2017_Redacted_Version.pdf

Before President Trump's inauguration, the GSA's Deputy Commissioner concluded that Trump would be in violation of the lease unless he "fully divests himself of all financial interests in the lease."¹¹

Shortly after the inauguration, Norman Dong, a GSA official appointed by former President Obama, became acting administrator. But less than a day later, Trump replaced Dong with Tim Horne, who had coordinated the GSA's transition with the Trump campaign.¹²

President Trump, through his lawyers, has maintained that the provision barring elected officials from being leaseholders does not apply to him. Nevertheless, on January 19, 2017, one day before President Trump was inaugurated, he transferred his interest in the hotel to an LLC that in turn is managed by a revocable trust. Trump's son Donald Trump, Jr., and Chief Financial Officer of the Trump Organization Allen Weisselberg are the trustees. Eric Trump is chairman of the advisory board of the trust.

While the trust still left President Trump as a beneficial owner of the hotel and its profits, a variety of alterations to the hotel's operating agreement divested him of any control of its operations and provided that he receive no distributions while President. Moreover, all of his income from the hotel is to be treated as unrecovered capital contributions and will not be distributed to the trust.

After a review that lasted approximately three months, in March 2017, the GSA concluded that, because of the transfer to the trust, the President's beneficial ownership did not violate the relevant lease provision (37.19).

In late August 2017, a GSA spokesperson confirmed that the agency's Inspector General was reviewing the enforcement of the lease provisions.¹³ As of July 11, 2018, the Inspector General's office has not released a report on its findings. Additionally, in late

¹¹ Eliza Collins, *GSA reserves judgment on Trump hotel lease*, USA TODAY (Dec. 14, 2016, 10:39 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/12/14/dems-gsa-says-trump-could-breach-lease-washington-hotel/95419452/>.

¹² Isaac Arnsdorff, *Trump picks leader for federal agency overseeing his D.C. hotel*, POLITICO (Jan. 26, 2017, 2:55 PM), <https://www.politico.com/story/2017/01/trump-picks-gsa-leader-oversee-hotel-234233>.

¹³ Josh Delk, *Watchdog Probing Federal Agency's Handling of Trump DC Hotel*, THE HILL (Aug. 29, 2017, 8:41 PM), <http://thehill.com/homenews/administration/348485-gsa-inspector-general-reviewing-agencys-handling-of-trump-hotel>.

April 2017 a government watchdog group requested that the Senate committee with oversight of the GSA review and investigate the decision to affirm the lease.¹⁴

In 2017, the first full year that the hotel was open, President Trump reported it had more than \$40 million in revenue,¹⁵ although it had an occupancy rate substantially lower than comparable D.C. hotels. According to CNN, the hotel “charged nightly room rates that were 40% higher on average than those same nearly two dozen hotels.”¹⁶ Indeed, according to the Washington Post, “[t]his year [2017], guests have paid an average of \$652.98 a night to stay there, beating the company’s expectations by 57 percent. . . . That probably makes it the most expensive hotel in the city.”¹⁷ But, since Trump’s 2017 inauguration, room rates at other hotels bearing his name outside of Washington, D.C., have dropped sharply – 25 percent on average.

A Washington Post analysis of events at the hotel since President Trump’s swearing in shows 59 campaigns and PACs holding fundraisers and receptions by campaigns and PACs at the Hotel; 25 business interests holding industry or lobbying events at the hotel; and seven foreign governments hosting events or putting their officials up at the hotel.¹⁸ In February 2018, the Trump Organization donated \$151,470 in profits it said it made from foreign government patronage of Trump hotels worldwide.¹⁹

Many third-party lawyers who have reviewed the facts have concluded that the GSA’s determination that Trump was not in violation of the lease was wrong. Yet, thus far no third party has been found to have standing to challenge the lease. Even though the alleged violation may facilitate government corruption and may deprive the government and the public of its agreed-upon share of revenue, there may not be an

¹⁴ Letter from Citizens for Responsibility and Ethics in Washington to Chairman John Barrasso and Ranking Member Carper (Apr. 25, 2017), <http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/04/25171058/Senate-EPW-GSA-Old-Post-Office-lease-4-25-17-1.pdf>

¹⁵ U.S. OFFICE OF GOVERNMENT ETHICS, *Executive Branch Personnel Public Financial Disclosure Report* at 20 (Jan. 20, 2017), <https://oge.app.box.com/v/Trump2018Annual278>.

¹⁶ Cristina Alesci and Curt Devine, *Exclusive: Data Show Trump’s DC Hotel was Pricier and Emptier Than Peers in 2017*, CNN (Jan. 27, 2018, 11:54 AM), <https://www.cnn.com/2018/01/27/politics/trump-hotel-occupancy-rates-data/index.html>.

¹⁷ Jonathan O’Connell, *Trump D.C. Hotel Turns \$2 Million Profit in Four Months*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/politics/trump-dc-hotel-turns-2-million-profit-in-four-months/2017/08/10/23bd97f0-7e02-11e7-9d08-b79f191668ed_story.html?utm_term=.00a0e53d733c.

¹⁸ Gabriel Florit et al., *Tracking Who is Spending Money at President Trump’s D.C. Hotel*, WASH. POST (May 4, 2018), https://www.washingtonpost.com/graphics/2018/politics/trump-hotel-events/?utm_term=.79a4a450d1f5.

¹⁹ Associated Press, *Trump Org Donated \$151, 470 to Gov’t from Foreign Profits at Hotels*, NBC NEWS (Mar. 9, 2018, 4:23 PM), <https://www.nbcnews.com/politics/donald-trump/trump-org-says-it-donated-151-470-hotel-profits-gov-n855331>.

injury sufficient for a plaintiff to bring an action regarding the conflicts of interest that arise from President Trump's ownership of the hotel.

In summary, this lease, involving one of the government's most valuable properties in Washington, D.C., has as its landlord an entity effectively controlled by its tenant, the President, and financially benefits the President personally. Moreover, the President maintains that the initiatives undertaken to comply with the lease were not legally required and that he can alter them at any time. But no independent party seems to have the legal right to verify compliance. The lease provision—a provision designed specifically to protect the public from government corruption—is allegedly being violated with no apparent recourse.

Legal Background: One set of laws that could address the issue, the federal conflict-of-interest laws, 18 U.S.C. § 208 et seq., does not apply to the President. The federal conflict-of-interest laws were first enacted in 1962, but they were considerably revised and strengthened in 1978 when the Ethics in Government Act was passed. Section 208 was a core provision. It bars executive branch employees from participation in matters in which they (or their immediate family) have a financial interest.²⁰ Consequently, many federal employees put their investments in a blind trust, which then enables them to participate in a matter that might otherwise pose a conflict of interest.

But the President and Vice President are exempt from this provision. According to the Congressional Research Service, “because of concerns regarding interference with the exercise of constitutional duties, Congress has not applied these restrictions to the

²⁰ It provides:

- (a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—
Shall be subject to the penalties set forth in section 216 of this title.

See 18 U.S.C. § 208(a) (2018).

President. Consequently, there is no current legal requirement that would compel the President to relinquish financial interests because of a conflict of interest.”²¹

Two constitutional provisions also may be implicated. Under the Constitution’s Foreign Emoluments Clause (Article I, Section 9, Clause 8), public officials are prohibited from accepting emoluments from a foreign government, unless approved by Congress:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Meanwhile, under the Domestic Emoluments Clause (Article II, Section 1, Clause 7), the President is banned entirely from receiving emoluments from the federal government or from any state government:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Three lawsuits have been brought alleging that the President is violating the emoluments clauses. One, *CREW et al. v. Trump*, was initially dismissed for lack of standing and is now on appeal. The second, *The District of Columbia and the State of Maryland v. Trump*, survived a motion to dismiss on standing grounds and a motion to dismiss on whether plaintiffs have stated a claim turning on the meaning of “emoluments” is pending. A motion to dismiss in the third case, *Blumenthal et al. v. Trump*, is also pending.

In addition, a lawsuit brought by a local Washington, D.C., wine bar alleges unfair competition from the hotel. A motion to dismiss that suit, *K&D, LLC v. Trump Old Post Office, LLC*, is pending.

Content: Competition participants around the country are challenged to address this potential hole in the law: the lack of a clear path to adjudicate whether a government contract has been breached and a grave conflict of interest has been allowed to persist.

²¹ CONGRESSIONAL RESEARCH SERVICE, *Conflicts of Interest and the Presidency* (Oct. 14, 2016), <https://fas.org/sgp/crs/misc/conflicts.pdf>.

Submissions should address:²²

- Is the GSA's conclusion that President Trump is not violating the lease warranted?
- Are any other conflict of interest statutes or constitutional provisions at stake in the Old Post Office arrangement? Are any other laws implicated?
- What potential causes of action exist that might challenge the lease, the GSA's conclusion, or the conflicts of interest that may be inherent in the hotel's ownership and management structure?
- What standing issues limit potential challenges and how can they be overcome?
- What remedies are available?
- What facts need to be or could be developed to support litigation or other solutions and how can they be developed, either via discovery or prior to litigation being filed?

People who want to participate in the competition should consult "Frequently Asked Questions" available at <https://acslaw.org/ruleoflawwritingcompetition> for details regarding the prizes, submission form, deadline, and other important matters. If you have further questions, please email ROLwritingcompetition@acslaw.org.

Please note: an analysis of the current lawsuits discussed above and their merits or demerits is disfavored unless the submission contains a novel or innovative approach that might increase the likelihood of their success.

²² This is neither an exhaustive nor a mandatory list of questions that should be addressed. But participants are strongly encouraged to consider these issues.