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Chair Titus, Ranking Member Meadows and members of the Subcommittee, thank you for the invitation to discuss the General Services Administration's failures in appropriately managing the lease for the Trump International Hotel located on the site of the Old Post Office building in Washington, D.C. Before turning to legal problems with the lease's management, I would like to draw the Subcommittee's attention to the impact of these failures on government ethics in the executive branch and on the public's confidence that government officials are upholding the most basic ethical principle, that public service is a public trust.

I. GSA's Role in the Executive Branch Ethics Crisis

It has been nearly three years since President Trump declared that "the president can't have a conflict of interest."¹ This statement was quite obviously wrong. In fact, a conflict arises any time personal interests create incentives that are at odds with an official's duty to the American people. Abuse of entrusted power for private gain is the very definition of corruption.²

It is true that the President is exempt from a law that prescribes criminal penalties for conflicts of interest.³ But this exemption was never intended as a perk of high office. Both the Office of Government Ethics and the Department of Justice have emphasized the importance of presidents acting as though they were covered by the law.⁴ As the Supreme Court cautioned, a conflict of interest is "an evil which endangers the very fabric of a democratic society."⁵ This is no less true for the President than for his cabinet secretaries. The public's faith in those who govern is shattered when they engage in activities that arouse "suspicions of malfeasance and corruption."⁶

That is why government employees are told to avoid even the appearance of a conflict of interest.⁷ This admonition should apply equally to the President. We entrust him with great

¹ Isaac Arnsdorf, Trump: 'The president can't have a conflict of interest', *Politico*, Nov. 22, 2016, <https://politi.co/2kPDw5L>.

² See Transparency International (website), How do you define corruption?, <https://bit.ly/2IMPCX9> (last viewed Sept. 18, 2019).

³ 18 U.S.C. §§ 202, 208; *but see* 18 U.S.C. § 201 (subjecting presidents to the criminal prohibition against bribery).

⁴ U.S. Office of Gov't Ethics, OGE Inf. Adv. Op. 83 x 16 (1983), <https://bit.ly/2fRpIG0>; Letter from Antonin Scalia, Assistant Attorney Gen., Office of Legal Counsel, to Kenneth A. Lazarus, Associate Counsel to the President, Dec. 16, 1974, <https://bit.ly/2Zv0xgb>.

⁵ *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961).

⁶ *Id.*

⁷ 5 C.F.R. § 2635.101(b)(14).

power, and we expect him to use that power solely for our benefit—not his own. The American people should never have to wonder whether government action is motivated by the President’s stated policy objectives or his personal interests. We should also never have to wonder whether he is using his high office for profit.

But today we are talking about precisely those questions. President Trump’s decision to retain his interests in the Old Post Office building lease (“OPO Lease”) was and continues to be part of a broad pattern that has called into question the government’s integrity in countless ways. The first agency subjected to the influence of those conflicts of interest was the General Services Administration (“GSA”). Even before President Trump was sworn into office, there were signs GSA officials were feeling hard pressed to enforce the Constitution they swore to support and the terms of the lease they had negotiated with his company. For instance, they initially tried to dodge questions about the OPO Lease by referring media inquiries to the agency I was then leading, the Office of Government Ethics (“OGE”).⁸ I had to ask GSA to either stop suggesting OGE was involved or start involving us.

GSA failed to make a determination before the inauguration as to whether it would continue the OPO Lease. That delay raised the stakes for GSA officials because they were no longer in the position of potentially having to cancel a major deal with a President-elect—which alone may have been overwhelming for many executive branch officials—but now faced the even more daunting prospect of canceling a deal with a sitting President after declaring him in violation of the Constitution. By then, GSA and the public had already witnessed the then-Chairman of the House Oversight Committee issue a menacing letter to me the day after I sounded the alarm about the President’s refusal to divest his conflicting financial interests, and the President’s Chief of Staff issue what seemed like a threat that I “ought to be careful.”⁹ It was, by then, also public knowledge that the White House had breached the norms of government by leaning on the Federal Bureau of Investigation (“FBI”) to refute allegations about the Trump campaign.¹⁰ Closer to home for GSA officials, President Trump had removed the acting GSA

⁸ Jordyn Phelps, [Inside the Potential Conflict Posed by Trump’s DC Hotel](#), *ABC News*, Dec. 15, 2016 (“[W]hile the terms of the lease do allow for the GSA to pull out under certain conditions, the agency at this point is continuing to hold up the terms of the lease and is deferring ethics questions to the Office of Government Ethics. . . ‘It is the Office of Government Ethics that provides guidance to the executive branch on questions of ethics and conflicts of interest. GSA plans to coordinate with the president-elect’s team to address any issues that may be related to the Old Post Office building,’ a GSA spokesperson told ABC News.”), <https://abc7ne.ws/2mcKHZw>; Steven Schooner and Daniel Gordon, [GSA’s Trump Hotel Lease Debacle](#), *GovExec Magazine*, Nov. 28, 2016 (“We are sympathetic to GSA’s quandary. Yet, despite media suggestions to the contrary, GSA cannot foist this challenging situation on the Office of Government Ethics.”), <https://bit.ly/2mgjntnxx>; Charles Clark, [GSA Will Examine Ethics Issues Around Trump’s D.C. Hotel Lease](#), *GovExec Magazine*, Nov. 17, 2016, <https://bit.ly/2kPoJLM>.

⁹ Rob Garver, [Team Trump Steps Up Intimidation of Government Ethics Officer](#), *Fiscal Times*, Jan. 16, 2017, <https://bit.ly/2kO7XNd>; Richard Painter and Norman Eisen, [Just when you thought the Trump ethics disaster couldn’t get worse, it did](#), *Washington Post*, Jan. 16, 2017, <https://wapo.st/2jhInex>; Dana Liebelson, [Chaffetz Skipped Meeting With Ethics Chief He Threatened To Subpoena, Emails Show](#), *Huffington Post*, Jan. 18, 2017, <https://bit.ly/2mejzcC>.

¹⁰ Jim Sciutto, Evan Perez, Shimon Prokupecz, Manu Raju, and Pamela Brown, [FBI refused White House request to knock down recent Trump-Russia stories](#), *CNN*, Feb. 24, 2017 (“The direct communications between the White House and the FBI were unusual because of decade-old restrictions on such contacts. Such a request from the White House is a violation of procedures that limit communications with the FBI on pending investigations.”), <https://cnn.it/2mlu7qC>.

Administrator and installed a hand-picked replacement shortly after the inauguration, and it would be months before he nominated a replacement.¹¹

Indeed, President Trump had created what must have been an unnerving environment for GSA officials confronting the challenge of evaluating his compliance with constitutional and contractual requirements applicable to him. They were not up to the challenge. As GSA's Office of Inspector General ("OIG") reported this past January, they balked entirely at evaluating the constitutional issues the situation presented.¹² As I discuss later, their failure to consider these issues rendered GSA's determination "arbitrary and capricious." Their conclusory determination that President Trump remained in compliance with the OPO Lease was inconsistent with its terms. To be fair, though, they should never have been put in this position—caught between their duty to the people and the President's conflicts of interest.

There is simply no getting around the fact that our President has chosen to undertake a dual role as both landlord and tenant of a historic property belonging not to him but to us. There is no getting around the fact that he has now spent close to a third of his days in office visiting his private properties, including his D.C. hotel at the Old Post Office.¹³ With the media in tow, every one of these visits amounts to an advertisement for those properties—only we are the ones paying for that advertising. This past May, the cost to taxpayers of trips to his golf courses alone was conservatively estimated to have exceeded \$100 million—an amount that excluded the costs of trips to his other properties.¹⁴ After a little more than two years, that cost was closing in on costs attributed by Judicial Watch to all presidential family travel during the entire eight years of the Obama administration.¹⁵

This circumstance flows from the original sin of this administration: the President's refusal to divest his conflicting financial interests. That breach of ethical norms has had a profoundly deleterious effect on the executive branch ethics program. The litany of the Trump administration's ethics scandals is far too expansive to recount today, and the unprecedented pace of ethics scandals in this administration shows no sign of slowing.¹⁶ Such are the wages of a bad tone at the top.

¹¹ Isaac Arnsdorf, [Trump picks leader for federal agency overseeing his D.C. hotel](https://politico.com/story/2017/01/26/gsa-leadership-change), *Politico*, Jan. 26, 2017 ("The reason for the whiplash isn't clear. It appears the GSA's outgoing leadership wanted Dong to take over temporarily but Trump preferred Horne."), [https://politico.com/21ZajJc](https://politico.com/story/2017/01/26/gsa-leadership-change); Mark Rockwell, [Pick to lead GSA is popular, but faces political challenges](https://federalcomputerweek.com/2017/09/05/gsa-leadership-change/), *Federal Computer Week*, Sept. 5, 2017, <https://bit.ly/2kRe1Ez>.

¹² GSA OIG, [Evaluation of GSA's Management and Administration of the Old Post Office Building Lease](https://www.gsa.gov/asset/gsa-oig-report-je19-002), JE19-002 (Redacted), Jan. 16, 2019, at 1, <https://bit.ly/2RAV9ct> ("GSA OIG Report").

¹³ Liz Johnston, [Tracking President Trump's visits to Trump properties](https://www.nbcnews.com/news/politics/2019/09/17/trump-properties-visits), *NBC News*, <https://nbcnews.com/news/politics/2019/09/17/trump-properties-visits> (last visited Sept. 17, 2019).

¹⁴ Daniel Moritz-Rabson, [Trump's golfing has cost taxpayers \\$102 million, just \\$12.7 million behind Obama's travel during entire presidency: report](https://www.newsweek.com/trump-golfing-cost-taxpayers-102-million-127-million-obama-travel-1148882), *Newsweek*, May 22, 2019, <https://bit.ly/2EHK9kX>.

¹⁵ *Id.*

¹⁶ See, e.g., [Presidential Profiteering: Trump's Conflicts Got Worse in Year Two](https://www.citizensforresponsibilityandethics.org/2019/01/16/presidential-profiteering-trump-conflicts-got-worse-in-year-two), *Citizens for Responsibility and Ethics in Washington*, Jan. 16, 2019, <https://bit.ly/2FBC2IK>; [The Most Unethical Presidency, Year One](https://www.citizensforresponsibilityandethics.org/2018/01/04/the-most-unethical-presidency-year-one), *Citizens for Responsibility and Ethics in Washington*, Jan. 4, 2018, <https://bit.ly/2DrM9y1>.

Earlier this month, President Trump announced a desire to host the G7 Summit at his own Miami resort.¹⁷ He then gave an internationally televised sales pitch for the property as he stood beside another world leader.¹⁸ As CREW explained in a complaint to an Inspector General, his words suggested a degree of personal involvement in the site selection process, potentially putting him in position to influence a federal procurement for a meeting he will lead.¹⁹ That would be a crime for any other executive branch official, besides the Vice President.²⁰ This spectacle undermines our government's reputation for integrity on the world stage, which could hurt our anti-corruption agenda in developing countries.²¹ Though it marks a possible escalation of his behavior, this aggressive bid to mix personal and official business was typical of his messaging about the overlap of official and personal business from the start.

It is no wonder lobbyists, companies, industry associations, nonprofits, and others with interests affected by the government are flocking to the Trump International Hotel in Washington, D.C., as well as his other properties.²² Among other incentives, top administration officials congregate at the hotel.²³ Numerous members of Congress similarly frequent his hotel, though they are responsible for oversight of presidential conflicts of interest.²⁴ Even Attorney General Barr, who is responsible for ongoing investigations affecting the President, has drawn criticism based on his booking a \$30,000 holiday party at the President's hotel.²⁵ The line between official and personal activities in the Trump administration is a blurry one. Just this month Secretary Pompeo spoke at the Old Post Office hotel to the President's paying customers, and his remarks may have implicated the misuse of position rule when he praised the venue they chose.²⁶ Displaying a disdain for government ethics endemic to this administration, Secretary Pompeo joked that his effective endorsement of the hotel was "for the Washington Post."²⁷

¹⁷ Remarks by President Trump and President Macron of France in Joint Press Conference, *White House*, Aug. 26, 2019, <https://bit.ly/328d7Uc>.

¹⁸ Jennifer Jacobs, Josh Wingrove, and Jonathan Levin, Trump Pitches Luxury Miami Property for Next G-7: His Own, *Bloomberg*, Aug. 26, 2019, <https://bloom.bg/2PkyIHK>.

¹⁹ CREW requests investigation of Trump Doral G-7 announcement, *Citizens for Responsibility and Ethics in Washington*, Sept. 9, 2019, <https://bit.ly/2kmlU4J>.

²⁰ 18 U.S.C. § 208(a).

²¹ The State Department works internationally to strengthen "the ability of governments and their citizens to promote better public transparency, accountability, and integrity." U.S. Department of State, Combating Corruption and Promoting Good Governance, <https://bit.ly/2IVBXqM> (last viewed Sept. 18, 2019).

²² Bernard Condon, Vaping group plotted lobbying efforts at Trump's DC hotel, *Associated Press*, Sept. 11, 2019, <https://abcn.ws/2kCpZC9>; Jonathan O'Connell and David Fahrenthold, T-Mobile announced a merger needing Trump administration approval. The next day, 9 executives had reservations at Trump's hotel, *Washington Post*, Jan. 16, 2019, <https://wapo.st/2mep7Uu>; Ben LeFebvre, Oil group to lobby president after stay at Trump hotel, *Politico*, Mar. 14, 2018, <https://politi.co/2Hzm2nj>.

²³ Trump's 2,000 Conflicts of Interest (and Counting), *Citizens for Responsibility and Ethics in Washington*, updated Aug. 15, 2019, <https://bit.ly/31FxDp> ("CREW Conflicts Report"); Eric Lipton and Annie Karni, Checking In at Trump Hotels, for Kinship (and Maybe Some Sway), *New York Times*, Sept. 7, 2019, <https://nyti.ms/2m8VmVh>.

²⁴ CREW Conflicts Report, <https://bit.ly/31FxDp>; David A. Fahrenthold, Jonathan O'Connell, and Anu Narayanswamy, Trump's properties made \$4.2 million from Republican campaigns, even as GOP suffered defeats, *Washington Post*, Nov. 8, 2018, <https://wapo.st/2mfe7Gr>.

²⁵ Aaron Rugar, William Barr's \$30k Trump hotel party illustrates how corruption is becoming more brazen and blatant, *Vox*, Aug. 28, 2019, <https://bit.ly/2kpy7Ws>; Madeleine Carlisle and Olivia Paschal, After Mueller: The Ongoing Investigations Surrounding Trump, *Atlantic*, Mar. 22, 2019, <https://bit.ly/2OIF71d>.

²⁶ John Bowden, Pompeo jokes about speaking at Trump hotel: 'The guy who owns it' is 'going to be successful', *The Hill*, Sept. 13, 2019 ("I look around. This is such a beautiful hotel."), <https://bit.ly/2kGcj9h>.

²⁷ *Id.*; 5 C.F.R. § 2635.702(c).

CREW has also tallied sightings of officials from nearly 60 foreign governments at Trump properties.²⁸ Not long after the election, Bahrain and Kuwait moved their annual galas to the Old Post Office hotel.²⁹ The Philippine embassy similarly celebrated the country's 120th anniversary at the hotel.³⁰ The Romanian Prime Minister personally stayed at the hotel this year.³¹ Then there's Saudi Arabia, which is reportedly a big customer of the President's business.³² Lobbyists for the Saudi government ran up a tab of \$270,000 at his D.C. hotel at a time when it was lobbying against legislation that would allow victims of terrorist attacks to sue foreign governments.³³ In this context, it is easy to understand how even the appearance of a conflict of interest can be as damaging as an actual conflict of interest.

In that vein, it bears emphasizing that questions linger as to the President's role in the decision to scrap the long-planned FBI headquarters relocation project.³⁴ The move was abruptly canceled after the government had spent \$20 million and more than a decade on planning.³⁵ The public did not fail to notice to how this cancellation could benefit President Trump, whose Old Post Office hotel lies just up Pennsylvania Avenue from prime real estate that might attract a competitor if the FBI were to relocate its headquarters.³⁶ But GSA Administrator Emily Murphy, who personally met with President Trump before cancelling the move, seems disinclined to supply the transparency needed to assess the decision, and her agency is resisting CREW's requests for more information.³⁷

It is in the context of this entirely foreseeable ethics crisis that Congress turns its attention to the fateful decision GSA made regarding the OPO Lease on March 23, 2017. That decision, with its profound consequences, was the wrong one.

²⁸ Eric Lipton and Annie Karni, Checking In at Trump Hotels, for Kinship (and Maybe Some Sway), *New York Times*, Sept. 7, 2019, <https://nyti.ms/2m8VmVh>.

²⁹ Alex Altman, Donald Trump's Suite of Power: How the President's D.C. outpost became a dealmaker's paradise for diplomats, lobbyists and insiders, *Time*, Mar. 14, 2018, <https://bit.ly/2kmmxLD>.

³⁰ Ali Dukakis, Watchdog group finds more spending at Trump properties by foreign governments, political groups, *ABC News*, June 27, 2018, <https://abcn.ws/2GVc9VH>.

³¹ Ilya Marritz, Justin Elliott, and Zach Everson, Romanian Prime Minister Is Staying at Trump's D.C. Hotel, *Pro Publica*, Mar. 25, 2019, <https://bit.ly/2kplQkT>.

³² David A. Fahrenthold and Jonathan O'Connell, Saudi-funded lobbyist paid for 500 rooms at Trump's hotel after 2016 election, *Washington Post*, <https://bit.ly/2kF4ING>.

³³ Altman, *Time*, Mar. 14, 2018.

³⁴ Jonathan O'Connell, Federal government cancels costly, decade-long search for a new FBI headquarters, *Washington Post*, July 10, 2017, <https://wapo.st/2ubVdmz>.

³⁵ Was the FBI headquarters relocation scrapped to protect trump's hotel from competition?, *Citizens for Responsibility and Ethics in Washington*, Oct. 13, 2018, <https://bit.ly/2krLLZe>.

³⁶ Editorial Board, The FBI needs new digs. For some reason, Trump doesn't seem inclined to help, *Washington Post*, Aug. 8, 2018, <https://bit.ly/2IVIK3L>.

³⁷ General Servs. Admin., Office of Inspector, Review of GSA's Revised Plan for the Federal Bureau of Investigation Headquarters Consolidation Project, Aug. 28, 2018, <https://bit.ly/2kk120s>; CREW sues GSA for FBI HQ renovation records, *Citizens for Responsibility and Ethics in Washington*, updated July 29, 2019, <https://bit.ly/2kPgC1W>.

II. Legal Problems with GSA’s Management of the OPO Lease

In March 2017, GSA issued a letter determining that the Trump Old Post Office LLC (“Trump-OPO”) was in compliance with its lease for the Trump International Hotel, located in the federally-owned Old Post Office building in Washington, D.C. There are two major legal problems with GSA’s decision and its overall management of the OPO Lease warranting congressional scrutiny.

First, as the GSA OIG found in its January 2019 report, GSA’s lease-compliance determination ignored critical questions regarding the Constitution’s Emoluments Clauses. There is also no indication that, in response to the OIG report, GSA has undertaken any evaluation of emoluments issues relating to the OPO Lease.

Second, GSA’s determination was analytically flawed because it failed altogether to construe section 37.19 of the lease, which forbids any “elected official of the Government of the United States” to “be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.” Rather than interpreting this lease language, GSA merely recited steps Trump-OPO took ostensibly to insulate President Trump from active management of the hotel and summarily concluded that those steps were sufficient to avoid a violation of section 37.19. GSA reached this conclusion even though the President, an elected official of the United States government, still holds a 77.5% interest in the hotel through a revocable trust, and therefore is plainly “admitted to” a share or part of the OPO Lease from which he derives a “benefit.”

GSA should, at a minimum, undertake a new assessment of Trump-OPO’s compliance with the lease that properly evaluates both the emoluments issues agency officials previously ignored and the application of section 37.19 to the facts. Given that all federal officials have a duty to support and defend the Constitution, it is incumbent on GSA to take all steps within its power to ensure compliance with the Emoluments Clauses and the terms of the OPO Lease.

A. Factual Background

In August 2013, Trump-OPO executed a 60-year ground lease with GSA under which the Old Post Office building would be redeveloped as a luxury hotel.³⁸ At that time, Donald J. Trump had a majority interest in Trump-OPO.³⁹ The Trump International Hotel opened on the site in October 2016.⁴⁰ Just before taking office in January 2017, President Trump resigned from his position with Trump-OPO but retained a 77.5% interest in it through DJT Holdings LLC and DJT Holdings Managing Member LLC, both of which he placed in the Donald J. Trump Revocable Trust (“DJT Revocable Trust”).⁴¹

³⁸ GSA OIG Report, at 2.

³⁹ *Id.*

⁴⁰ *Id.* at 3.

⁴¹ GSA Determination, Exhibit B to Exhibit 7 (Exhibit 7 is a Dec. 29, 2016 letter from Adam L. Rosen of Trump-OPO to GSA, and Exhibit B to that letter includes an ownership chart for Trump-OPO). Donald J. Trump Resignation Letter, Jan. 19, 2017, <https://bit.ly/2kolESM>; Letter from GSA Contracting Officer Kevin M. Terry to Trump Old Post Office LLC, March 23, 2017, at 6, <https://bit.ly/2nhKfaB> (“GSA Determination”).

Upon taking office, Mr. Trump became an elected official of the Government of the United States, a change in status that implicated section 37.19 of the OPO Lease. Section 37.19 of the lease provides:

No . . . elected official of the Government of the United States . . . 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.⁴²

As GSA’s OIG explained, “[f]ollowing the publication of the first of several articles about section 37.19 on November 15, 2016, the OGC attorneys working on the OPO project began discussing whether President Trump’s business interest in the OPO Lease constituted a breach of the section.”⁴³ Ultimately, GSA issued a determination in March 2017 finding that Trump-OPO was in full compliance with section 37.19 and that the lease remained in full force and effect.⁴⁴ That determination failed to provide any legal analysis of the meaning of section 37.19. In addition, it failed to address the Constitution’s Emoluments Clauses, which were implicated by the benefits accruing to President Trump. It also failed to consider related sections of the OPO Lease, sections 6.2 and 37.2, barring Trump-OPO from “us[ing]” the property, or “permit[ting]” it “to be used,” for “any unlawful or illegal business, use or purpose” or “in any way in violation . . . of any . . . Applicable Laws,” including the Constitution.⁴⁵ Instead, it concluded that certain measures Trump-OPO took ostensibly to insulate President Trump from the hotel’s management and profits were sufficient to avoid a violation of section 37.19.⁴⁶

The Domestic and Foreign Emoluments Clauses are two constitutional provisions designed to prevent self-dealing and corruption by federal officials, including the President. The Domestic Emoluments Clause provides: “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.”⁴⁷ Similarly, the Foreign Emoluments Clause bars any person “holding any Office of Profit or Trust”—including the President—from, “without the Consent of the Congress, accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”⁴⁸ In establishing these prohibitions, the Framers sought to prevent foreign governments, the federal government and the

⁴² Ground Lease By and Between the United States of America and Trump Old Post Office LLC, Lease No. GS-LS-11-1307, Aug. 5, 2013, <https://bit.ly/2kHtmaT> (“OPO Lease”).

⁴³ GSA OIG Report, at 8.

⁴⁴ GSA Determination, at 1.

⁴⁵ *Id.*; OPO Lease, §§ 6.2, 37.2.

⁴⁶ *See* GSA Determination, at 2-8.

⁴⁷ U.S. Const., art. II, § 1, cl. 7.

⁴⁸ U.S. Const. art. I, § 9, cl. 8.

states from improperly influencing the President through financial rewards,⁴⁹ and to address their “concern that the President should not have the ability to convert his or her office for profit.”⁵⁰

In January 2019, the GSA OIG released a report finding that GSA’s “decision to exclude the emoluments issues from GSA’s consideration of the lease was improper because GSA, like all government agencies, has an obligation to uphold and enforce the Constitution; and because the lease, itself, requires that consideration.”⁵¹ GSA’s Office of General Counsel deliberately chose not to consider the Constitution’s Emoluments Clauses because they mistakenly believed the issue was outside GSA’s purview.⁵² The report further found that “GSA’s unwillingness to address the constitutional issues affected its analysis of section 37.19 of the lease that led to GSA’s conclusion that Tenant’s business structure satisfied the terms and conditions of the lease.”⁵³ The GSA OIG did not, however, recommend that GSA take any action to remedy this deficiency in the agency’s evaluation of the lease.

In its response to the OIG’s report, GSA did not dispute that it failed to consider the impact of the Constitution’s Domestic and Foreign Emoluments Clause in approving the OPO Lease, nor did it commit to undertake an analysis of those issues.⁵⁴ GSA instead referenced the Department of Justice’s (“DOJ”) litigation filings from the various pending emoluments suits against the President to support the proposition that the lease “does not violate the Emoluments Clauses.”⁵⁵ Unlike the decision of a court, however, DOJ’s litigation briefs are not binding on GSA and do not relieve the agency of its obligation to evaluate known constitutional questions.

B. Legal Issues

There are at least two major problems with GSA’s management of the OPO Lease that deserve congressional scrutiny: its wholesale failure to consider the impact of the Constitution’s Emoluments Clauses and its failure to properly analyze section 37.19 of the lease.

1. The Domestic and Foreign Emoluments Clauses

GSA has never properly evaluated the impact of the Constitution’s Emoluments Clauses on the OPO Lease. The OIG report confirms that GSA consciously chose to ignore this issue as part of its March 2017 lease-compliance determination, and the agency has given no indication that it plans to consider them in the future. The closest GSA has come to addressing the topic publicly was its response to the OIG’s report, where it summarily adopted DOJ’s litigation position that the lease itself “does not violate the Emoluments Clauses.” But this lackluster effort falls far short of satisfying GSA officials’ constitutional duties.⁵⁶ As the D.C. Circuit has

⁴⁹ 5 Op. O.L.C. 187, 189 (1981).

⁵⁰ *Griffin v. United States*, 935 F. Supp. 1, 4 (D.D.C. 1995); *see also* Brianne J. Gorod, Brian R. Frazelle, and Samuel Houshower, *The Domestic Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, *Constitutional Accountability Center*, July 2017, <https://bit.ly/2kuOXmE>.

⁵¹ GSA OIG Report, at 1.

⁵² *Id.* at 4, 16-17.

⁵³ *Id.* at 1.

⁵⁴ *Id.*, App. B.

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* at 17.

observed, “[f]ederal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it,” and thus an agency’s failure to properly evaluate known constitutional issues is “the very paradigm of arbitrary and capricious administrative action.”⁵⁷ GSA’s determination was also arbitrary and capricious because GSA “entirely failed to consider an important aspect of the problem.”⁵⁸

In addition, GSA misstates the scope of the problem: the question is not merely whether the lease itself “violate[s] the Emoluments Clauses,” but whether Trump-OPO is using the property, or permitting it to be used, in an “unlawful or illegal” manner, in violation sections 6.2 and 37.2 of the OPO Lease and the Emoluments Clauses.⁵⁹ CREW and others have documented numerous instances of the apparent receipt of prohibited emoluments via payments to the Trump International Hotel.⁶⁰

2. Section 37.19 of the OPO Lease

GSA also has never properly assessed whether Trump-OPO is in compliance with section 37.19 of the OPO Lease, which provides that “[n]o . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.” Critically, the President has not divested his 77.5% interest in Trump-OPO; he merely placed it in his revocable trust, the DJT Revocable Trust. GSA’s March 2017 lease-compliance determination concluded that Trump-OPO had avoided a violation of section 37.19 based on: (1) President Trump’s establishment of the DJT Revocable Trust; (2) the fact that the President no longer held a position with any member entity of Trump-OPO; and (3) amendments to the Trump-OPO internal operating agreement requiring that money that otherwise would have been distributed to President Trump during his term in office be credited to an unrecovered capital contribution account that may only be used for Trump-OPO’s business activities.⁶¹

But in reaching this conclusion, GSA failed to conduct any substantive analysis of the meaning of section 37.19. GSA failed entirely to consider what qualifies as a “benefit” arising from the OPO Lease or what it means to be “admitted to any share or part of th[e] lease.” This failure falls below the basic standard required for administrative decision making, for not only must the result of agency action be within the scope of its lawful authority “but the process by which it reaches that result must be logical and rational.”⁶² Were the agency to properly analyze the issue, it would see that, in fact, the trust does not sever the President’s interest in the trust

⁵⁷ *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987); accord *Graceba Total Commc’ns, Inc. v. FCC*, 115 F.3d 1038, 1041-42 (D.C. Cir. 1997); *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 62 (D.C. Cir. 2001).

⁵⁸ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁹ GSA OIG Report, App. B at 2 (agency’s Jan. 9, 2019, response to the OIG); OPO Lease. §§ 6.2, 37.2.

⁶⁰ Trump’s 2,000 Conflicts of Interest (and Counting), *Citizens for Responsibility and Ethics in Washington*, updated Aug. 15, 2019, <https://bit.ly/31FxDcP>; Jonathan O’Connell, Joshua Partlow, and David A. Fahrenthold, Trump pledged not to use his office to help his business. Then he pitched his Florida club for the next G-7, *Washington Post*, Aug. 31, 2019, <https://wapo.st/2ZKTIXL> (noting that “[t]he Post has identified at least nine examples of foreign governments spending money at Trump Properties since Trump took office” and noting a Trump Organization official’s estimate that “about 90%” of the money foreign governments paid to the Trump Organization was spent at the Trump International Hotel in Washington, D.C.).

⁶¹ GSA Determination, at 4-8.

⁶² *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

property, nor does Trump-OPO's use of an unrecovered capital contribution account deprive him of the benefits of the OPO Lease.

- a. *President Trump's revocable trust does not sever his financial interests in the trust property and, as a result, he derives a benefit and is admitted to a share or part of the OPO Lease.*

A reasoned analysis reveals that President Trump does, indeed, derive “benefit” from the OPO Lease and has been “admitted to a share or part” of it in violation of section 37.19. The discussion of the President's trust in GSA's determination letter ignored the nature of that trust, which is merely a revocable trust for which he is both grantor and beneficiary.⁶³ It does nothing to sever his financial interest in the trust property.

A revocable trust can remain subject to modification and dissolution at the whim of the grantors after its establishment.⁶⁴ This feature of a revocable trust leaves its property within reach of the grantor's creditors, for the establishment of a revocable trust does not truly alienate the grantor from trust property.⁶⁵ In the analogous context of conflict of interest laws—which, like section 37.19, guard government integrity against the conflicting financial interest of high officials—OGE has explained: “[T]he grantor of a revocable living trust retains such rights of control and enjoyment with respect to the trust property that OGE must view the grantor as the true owner of the property.”⁶⁶ OGE has also emphasized that, “OGE believes this to be the case whether or not the grantor actually receives any distribution of trust income and whether or not the grantor actually serves as trustee.”⁶⁷

This explanation by OGE demonstrates the ineffectiveness of a revocable trust to separate a grantor from the trust property. In fact, Congress gave similar treatment to the property of revocable trusts when it designed a qualified blind trust mechanism for executive branch

⁶³ Establishing that President Trump is the grantor of the DJT Revocable Trust, his attorney explained that, “[a]mong other steps taken, Mr. Trump conveyed all of his business and investment assets to The Donald J. Trump Revocable Trust” GSA Determination, Exhibit 1.B at 5 (Letter from Sheri Dillon to Kevin Terry). President Trump's financial disclosure report likewise establishes he is the trust's beneficiary, disclosing his financial interest in Trump-OPO through the DJT Revocable Trust. *See* Donald J. Trump, Public Financial Disclosure Report, May 15, 2019 (Part 2, Line 95 (Trump-OPO), App., Item 408 (Trump-OPO), and App., at A1 (“All of the Interests listed below in this exhibit, which were formerly held by Donald J. Trump, directly or indirectly, are now held by The Donald J. Trump Revocable Trust.”)), <https://bit.ly/2WhTs0Q> (“Trump 2019 Financial Disclosure”).

⁶⁴ *See, e.g., In re: Marriage of Githens*, 227 Or. App. 73, 88 (Or. Ct. App. 2009) (“Only nomenclature distinguishes the remainder interest created by [a revocable] trust from the mere expectancy arising under a will. Under either the trust or the will, the interest of the beneficiaries is both revocable and ambulatory.”) (quoting John Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1113 (1984)); *see also* Restatement (Third) of Trusts § 25 (2003) comment a (“[T]he revocable trust is widely used as a legally accepted substitute for the will as the central document of an estate plan.”); 67 Fed. Reg. 37965 (May 31, 2002) (grantor of a revocable trust has the power “to revoke the trust entirely and to make lessor changes, such as substitutions of beneficiaries or trustees”), <https://bit.ly/2IXz7RS>.

⁶⁵ *See, e.g., In re Estate of King*, 196 Misc. 2d 250, 256, 764 N.Y.S.2d 519, 524 (Surr. Ct. Broome. Co. 2003) (“A revocable trust is subject to the claims of the grantor's creditors.”); *Ackerman v. Abbott*, 978 A.2d 1250, 1256 (D.C. 2009) (“[Trust] had an enforceable right to require the personal representative to convey the property to it under the terms of the will (subject, to be sure, to any outstanding creditor claims and expenses of administration . . .).”).

⁶⁶ Office of Gov't Ethics, DO-02-15, at 7 (2002), <https://bit.ly/2lyKYWB>.

⁶⁷ 67 Fed. Reg. 37965, 37966 (May 31, 2002), <https://bit.ly/2IXz7RS>.

officials.⁶⁸ The mechanism Congress designed, which is predicated on the establishment of revocable trusts,⁶⁹ treats all known trust property as the financial interest of the grantor for purposes of the conflict of interest law:

An asset placed in a trust by an interested party shall be considered a financial interest of the reporting individual, for the purposes of any applicable conflict of interest statutes, regulations, or rules of the Federal Government (including section 208 of title 18, United States Code), until such time as the reporting individual is notified by the trustee that such asset has been disposed of, or has a value of less than \$1,000.⁷⁰

Thus, this mechanism frees grantors from coverage of the primary conflict of interest law only after they lack the requisite knowledge of their financial interests to violate that law—a clear recognition by Congress that placing property in a revocable trust does nothing to eliminate a financial interest in the property.⁷¹

Consistent with these well-settled principles of revocable trusts, the terms of the DJT Revocable Trust make clear that President Trump has a continuing financial interest in the trust property. Its stated purpose is to “hold assets for the exclusive benefit of Donald J. Trump, and President Trump retains the power to revoke the trust or appoint new trustees.”⁷² President Trump’s attorney has also publicly acknowledged that President Trump has the right to withdraw money or assets from the trust any time he wishes.⁷³ A tax expert who reviewed this arrangement, summed it up by explaining that “[f]or tax purposes, it’s as if the trust doesn’t exist at all. . . . It’s just an entity on paper, nothing more.”⁷⁴

b. President Trump continues to derive benefits from the lease notwithstanding Trump-OPO’s distributions to the unrecovered capital contribution account.

Trump-OPO’s use of an unrecovered capital contribution account is likewise insufficient to bring it into compliance with section 37.19 of the OPO Lease. GSA’s determination regarding the OPO Lease cited assurances by Trump-OPO that “amounts that would have been distributed to DJT Holdings LLC,” through which President Trump holds an interest in Trump-OPO, “will instead be credited to the unrecovered capital contribution account of DJT Holdings LLC” and “treated as capital contributions” to Trump-OPO.⁷⁵ GSA offered the following summary of this arrangement: “In plain terms, what this means is that the funds will remain in [Trump-OPO]

⁶⁸ 5 U.S.C. app. § 102(f)(3).

⁶⁹ 5 U.S.C. app. § 102(f)(5)(C) (establishing procedures attendant to dissolution of the qualified blind trust); 5 C.F.R. 2634.410 (Dissolution); Office of Gov’t Ethics, Model Qualified Blind Trust Provisions, OMB No. 3209-0007, at 2 (2016) (lines 18-19 provide for dissolution by revocation), <https://bit.ly/2kkMv25>.

⁷⁰ 5 U.S.C. app. § 102(f)(4).

⁷¹ 18 U.S.C. § 208(a) (conflict of interest prohibition applicable only to known assets of an employee).

⁷² Certification of Trustee, Jan. 26, 2017, <https://bit.ly/2IWUusew>; GSA Determination, at 6-7 & Exhibit 14.

⁷³ Derek Kravitz and Al Shaw, Trump Lawyer Confirms President Can Pull Money From His Businesses Whenever He Wants, Pro Publica, Apr. 17, 2017, <https://bit.ly/2o1OM1C>.

⁷⁴ *Id.* President Trump recently acknowledged his continuing financial interest in an asset he placed in the revocable trust: “Turnberry Resort (which I do own) in Scotland.” Donald J. Trump (@realDonaldTrump), Twitter, <https://bit.ly/2mrywsd>; Trump 2019 Financial Disclosure (Part 2, Line 38 and App., Item 157).

⁷⁵ GSA Determination, at 7.

instead of being distributed to DJT Holdings LLC.”⁷⁶ Nevertheless, President Trump still benefits from the OPO Lease in several ways, both tangible and intangible.⁷⁷ I will summarize highlights of CREW’s discussion in a prior submission to Congress regarding ways he benefits.⁷⁸

GSA’s explanation that “the funds will remain in [Trump-OPO]” ignored the fact that the President retained his financial interest in Trump-OPO. Stated even more plainly, the money remains invested in an asset that President Trump owns. In addition, any money remaining in the capital contribution account can be distributed directly to President Trump or his businesses after he leaves office.⁷⁹ If no money is drawn from the capital contribution account while he is in office, all of it may flow to him in the future.

The capital contribution account is broadly available for “business activities and purposes, such as repayment of debt, capital improvements, maintenance and repairs, operating expenses, etc.”⁸⁰ With this broad language, the opportunities for benefitting President Trump are nearly boundless. The company could use the capital contribution account to make enhancements to the hotel, which would benefit President Trump both by increasing the value of his investment and attract additional revenue. The success of the hotel, in turn, would strengthen the Trump brand, which further inures to the President’s benefit by increasing the value of, and revenue from, the vast web of business entities he refused to divest.⁸¹ In addition, the value of his investment in Trump-OPO would increase if the capital contribution account made payments toward the company’s loans or other liabilities. Further, the capital contribution account could be used to subsidize his other businesses—for example, by purchasing wine for the hotel from his Trump Vineyards Estates LLC.⁸²

For these reasons, President Trump has not deprived himself of the benefits of the OPO Lease by arranging for Trump-OPO to credit money to an unrecovered capital contribution account that would otherwise be distributed to him. It was inappropriate for GSA to rely on this arrangement to justify a conclusion that Trump-OPO remained in compliance with the OPO Lease. At a minimum, GSA should conduct a new review of the lease that takes into account the fact that President Trump continues to be admitted to the benefits of the OPO Lease.

c. Arguments made by President Trump’s attorney, on which GSA may have relied, run contrary to the natural meaning of the lease language.

Although GSA’s lease-compliance determination does not grapple with the meaning of section 37.19, President Trump’s attorney offered arguments on that issue in urging the agency to deem Trump-OPO in compliance with the OPO Lease. She argued that Trump-OPO qualified for an exception to section 37.19 and, alternately, that section 37.19 was inapplicable because

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Letter from CREW to Sens. John Barrasso and Tom Carper, April 25, 2017, <https://bit.ly/2IT1hh8>.

⁷⁹ GSA Determination, Exhibit 1.C (the relevant document is the “First Amendment to Second Amended and Restated Limited Liability Company Agreement of Old Post Office LLC,” which is attached to the Mar. 20, 2017 letter from Sheri Dillon to Kevin Terry).

⁸⁰ GSA Determination, Exhibit 1.C., at 4 (letter from President Trump’s attorney, Sheri Dillon).

⁸¹ Trump 2019 Financial Disclosure (Part 2).

⁸² Trump 2019 Financial Disclosure (Part 2, Line 110).

President Trump was a private citizen when the lease was executed. The extent to which GSA relied on either of these arguments is unclear, but the OIG report (which is redacted in key places) seems to suggest GSA accepted the former and rejected the latter. As the OIG report explains, however, both arguments were without merit.⁸³

As to the first argument, the President’s attorney urged GSA to conclude that, as a privately-held limited liability company (“LLC”), Trump-OPO qualified for an exception to section 37.19. I encourage the Subcommittee to review the discussion of the issue in the OIG report, which ably refutes this argument.⁸⁴ The exception provides that section 37.19 is inapplicable to “a shareholder or other beneficial owner of any *publicly held* corporation or other entity.”⁸⁵ President Trump’s attorney argued that the phrase “publicly held” modified only “corporation” and was, therefore, available to Trump-OPO.⁸⁶ But this nonsensical reading would make the exception unavailable to a privately held corporation while leaving it available to any privately held LLC, limited liability partnership, statutory trust, business trust, common-law trust, real estate investment trust, unincorporated association, and any other conceivable type of legal entity that is privately held. Such an outcome would fail to achieve the section’s goal of reducing conflicts of interest. No one could reasonably argue that a large financial interest in a privately held LLC—owned primarily by a few family members and bearing an elected official’s name—poses less risk than a few shares of a privately held corporation with thousands of shareholders, officers, and employees.

As to the second argument, the President’s attorney argued that section 39.17 was inapplicable because the lease was executed when he was a private citizen, but the OIG Report seems to suggest GSA rejected this argument.⁸⁷ The attorney essentially urged GSA to read the phrase “admitted to” out of context to support a conclusion that the term referred to a “singular transaction or act” occurring when the lease was executed.⁸⁸ The language, however, does not bar an elected official’s admittance to the lease. Rather, it bars admittance to any “share or part” of the lease or any benefit “arising therefrom.” The benefits of the lease will arise across the life of the lease. In fact, the public statements of GSA and Trump-OPO show they were focused on ensuring that benefits arise after the President entered government.⁸⁹

III. Conclusion

For all of these reasons, GSA should undertake a new assessment of Trump-OPO’s compliance with the lease to properly evaluate both the emoluments issues and the application of

⁸³ GSA OIG Report, at 20-23.

⁸⁴ GSA Determination, Exhibit 1.B, at 7; GSA OIG Report, at 20-23.

⁸⁵ OPO Lease at § 39.17 (emphasis added).

⁸⁶ GSA OIG Report, at 21-22.

⁸⁷ *Id.*

⁸⁸ GSA Determination, Exhibit 1.C at 6.

⁸⁹ GSA Lease-Compliance Determination, at 2 (“[T]he Lease turned a building that had been costing taxpayers millions of dollars per year into a revenue-generating asset.”); Betsy Woodruff, Trump Inc. Had a Rough Year, but His D.C. Hotel Is Killing It, *Daily Beast*, Dec. 29, 2017 (“Patricia Tang, the hotel’s director of sales and marketing, said the team there is happy with its success this year. ‘We are very pleased with the performance of the hotel in its first full year of operation, not just financially but also with regards to the recognition of the high service standards achieved by our associates as indicated in the reviews and rankings on TripAdvisor, Expedia, Booking.com,’ she told The Daily Beast. ‘We are looking forward to an even more successful 2018.’”), <https://bit.ly/2IUPS08>.

section 37.19 to the facts. I will close by noting an important point: while we strongly disagree with GSA's actions in this case, ultimate responsibility for the harms we have identified lies with President Trump. His decision to break from ethical norms by retaining his vast portfolio of conflicting financial interests is the true source of these problems.

Thank you for the opportunity to address the Subcommittee today. I respectfully request that this written testimony be entered into the record of this hearing. I am also happy to answer questions members of the Subcommittee may have.