

March 24, 2017

Donald F. McGahn II
White House Counsel
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. McGahn:

We are writing to express our deep concern about the highly unusual and inappropriate arrangement that is being proposed for Ivanka Trump, the President's daughter, to play a formalized role in the White House without being required to comply with the ethics and disclosure requirements that apply to White House employees.

As described in published reports, Ms. Trump in her role as White House adviser is assuming many of the indicia of a White House employee—she will have a West Wing office; she will receive a security clearance; she will be issued government communications devices and, according to these reports, she will participate in high-level White House meetings on a regular basis and provide advice to the President on a broad range of issues.

Under her arrangement, however, as *The New York Times* reports, she will “not hold a formal job at the White House and therefore is not likely to be considered a federal employee under the ethics rules, which prohibit government workers from participating in matters that can enrich their personal business interests. . . .”¹

This arrangement appears designed to allow Ms. Trump to avoid the ethics, conflict-of-interest and other rules that apply to White House employees.

As described by *Politico*, “In everything but name, Trump is settling in as what appears to be a full-time staffer in her father's administration, with a broad and growing portfolio—except she is not being sworn in, will hold no official position and is not pocketing a salary, her attorney said.”²

There are multiple problems with the arrangement that Ms. Trump has negotiated. But according to the report in *Politico*, a spokeswoman for Ms. Trump said “her role was signed off on by the White House counsel's office. . . .”³

¹R. Abrams, “Despite a Trust, Ivanka Trump Still Wields Power Over Her Brand,” *The New York Times* (March 21, 2017).

²A. Karni, “Ivanka Trump set to get West Wing office as role expands,” *Politico* (March 20, 2017).

³*Id.*

It is hard to believe that the White House Counsel's office has approved this arrangement, given previous opinions by the Department of Justice's Office of Legal Counsel (OLC). If you have given approval to this arrangement, however, we urge you to reconsider your position in light of the issues discussed in this letter.

The basic problem in the proposed relationship is that it appears to be trying to create a middle space that does not exist. On the one hand Ms. Trump's position will provide her with the privileges and opportunities for public service that attach to being a White House employee. On the other hand, she remains the owner of a private business who is free from the ethics and conflicts rules that apply to White House employees.

But Ms. Trump is either a White House employee subject to the rules that apply to other White House employees or she is not entitled to the rights and opportunities for service that are available to White House employees.

The Office of Legal Counsel recently explained why this kind of scheme does not work, in an opinion it issued to address whether President Trump could appoint his son-in-law, Jared Kushner, to the White House staff without running afoul of the anti-nepotism law that otherwise prevents a public official from appointing a relative to public office.

OLC concluded that the anti-nepotism law does not apply to a President's appointments to his White House staff and therefore that Mr. Kushner could take a staff position as a White House employee.⁴ OLC also noted that "the conflict of interest laws do apply to employees of the White House Office."⁵ On the other hand, OLC acknowledged that a President's relatives, in their capacity as private citizens, can have "an informal, essentially personal advisory relationship" with the President without becoming federal employees who are "subject to the conflict of interest laws in title 18."

But, OLC made clear, the President cannot have it both ways:

A President wanting a relative's advice on governmental matters therefore has a choice: to seek that advice on an unofficial, ad hoc basis without conferring the status and imposing the responsibilities that accompany formal White House positions; or to appoint his relative to the White House under title 3 and subject him to substantial restrictions against conflicts of interest. In choosing his personal staff, the President enjoys an unusual degree of freedom, which Congress found suitable to the demands of his office. Any appointment to the staff, however, carries with it a set of legal restrictions, by which Congress has regulated and fenced in the conduct of federal officials.⁶

⁴Department of Justice Office of Legal Counsel, "Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office" (January 20, 2017).

⁵*Id.* at 14.

⁶*Id.* (citations omitted) (emphases added).

That is the core problem with the proposed arrangement for Ms. Trump: she is seeking the “status” of assuming what is in fact, if not in name, a “formal White House position” (one that includes a West Wing office, a security clearance, and an issues portfolio), but at the same time the arrangement avoids the “set of legal restrictions” that accompany such positions.

The impermissibility of this arrangement is also demonstrated by a 1977 OLC opinion that is cited and discussed in the 2017 OLC opinion. The earlier opinion⁷ addressed whether a regular but informal adviser to President Jimmy Carter should be treated as a government employee.

OLC concluded that the adviser’s general practice of giving informal policy advice to the President did not make him a government employee. But his work on one particular issue—when he “called and chaired a number of meetings that were attended by employees of various agencies in relation to this work,” and “assumed considerable responsibility for coordinating the Administration’s activities in that particular area”—did, in the words of the 2017 opinion, “cross a line and made him a government employee for purposes of that work.”⁸

Published reports quote Ms. Trump’s attorney as saying that her job “will be to serve as the president’s ‘eyes and ears’ while providing broad-ranging advice, not just limited to women’s empowerment issues.”⁹ The description of what will be provided to Ms. Trump in her White House role, combined with the broad portfolio she will have, makes her a government employee under the applicable standards.

Ms. Trump plans to decline to take the oath of office that other White House staff must take. While the oath of office may seem like a mere formality, it is in fact a commitment by an employee that creates a fiduciary relationship between the employee and the United States, and that imposes an obligation on the employee to “well and faithfully discharge the duties” of her office.

Ms. Trump also says that she will voluntarily comply with ethics rules.

According to *Politico*, Ms. Trump “plans to adhere to the same ethics and records retention rules that apply to government employees . . . even though she is not technically an employee.” Of course, voluntary compliance with the law is just that—voluntary. This means that Ms. Trump is free to comply or not, as she sees fit and with no legal sanctions for not complying. If voluntary compliance with the law was sufficient to safeguard the public interest embodied in the ethics and conflicts rules, then all federal employees could be similarly held to a voluntary standard. But of course that is not, and should not be, the law. The fact that Ms. Trump is not accepting a salary does not change the need for mandatory compliance.

⁷Department of Justice Office of Legal Counsel, “Conflict of Interest—Status of an Informal Presidential Advisor as a ‘Special Government Employee’” (Feb. 24, 1977).

⁸2017 Op. at 13 n.7.

⁹A. Karni, *Politico*, *supra*.

Ms. Trump also has not agreed to separate herself in any meaningful way from her ownership of her business enterprises. Instead, like her father, she is maintaining her ownership interest in the businesses and transferring day-to-day control to a trust that will be managed by her brother-in-law and her sister-in-law.

All of Ms. Trump's business and financial interests should be fully be disclosed, along with any trust arrangements, in a manner consistent with the rules that apply to other government employees, and then should be assessed by the White House and OGE to determine the most appropriate means of resolving any potential conflicts of interest.

In sum, under the proposed arrangement for Ms. Trump, she will not be a White House employee and will continue to own businesses that emphasis her brand name. As such, she will not make the commitment set forth in the oath of office that White House employees take and will remain unbound by government ethics and conflicts of interest rules, except to the extent that Ms. Trump voluntarily chooses to comply with them. This arrangement does not work and needs to be revised.

We urge you to reconsider your approval of the arrangement proposed for Ms. Trump, to take appropriate steps to revise it to comply with the OLC opinions cited above, and to ensure that any potential conflicts of interest between Ms. Trump's service in the White House and her ownership of her businesses are properly addressed.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
President
Democracy 21

/s/ Norman L. Eisen

Ambassador (ret.) Norman L. Eisen, Chair
Richard Painter, Vice Chair
Noah Bookbinder, Executive Director
Citizens for Responsibility and Ethics in
Washington

/s/ Lawrence M. Noble

Lawrence M. Noble
General Counsel
Campaign Legal Center