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TOEING THE LINE: IVANKA TRUMP AND JARED KUSHNER'S POSSIBLE CONFLICTS OF INTEREST AS FEDERAL EMPLOYEES

❖ NOTE ❖

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I. INTRODUCTION

Federal employees are required to follow certain ethical standards of conduct, including managing their business and financial assets to prevent any conflicts of interest in the course of their government employment.¹ With so many of President Trump's appointees to federal positions holding large amounts of business-related and financial assets, there is a definite possibility of these assets becoming problematic conflicts of interest for these appointees.² Ivanka Trump, President Trump's daughter, and Jared Kushner, her husband, have been made federal employees but still hold significant

¹ *Employees Entering Government*, U.S. OFF. OF GOV'T ETHICS (Mar. 31, 2017), <https://www.oge.gov/web/oge.nsf/Resources/Employees+Entering+Government>.

² Eliza Newlin Carney, *A White House Without Rules*, MOYERS & CO. (Mar. 17, 2017), <http://billmoyers.com/story/white-house-without-rules/>.

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financial and business-related assets.³ It is possible that these assets will result in conflicts of interest as the two perform their duties as federal employees.⁴ This Note will explore conflicts of interest more generally in Section II, a more specific analysis of conflict of interest as applied to Ivanka Trump and Jared Kushner in Section III, a recommendation for avoiding these potential conflicts of interest in Section IV, and will conclude in Section V.

II. BACKGROUND

Government employees are expected to adhere to certain ethical standards during the course of their employment.⁵ Because government employees are expected to legislate or act in areas that will affect business or financial matters, it is important that they remain impartial. Ethics laws in this area require that government employees achieve impartiality by removing themselves from any attachments that may cause a conflict of interest.⁶ When entering government employment, an employee or officer is expected to divest himself or herself of any business or financial holdings that might be affected by that employee's government actions, and resign from positions in any organizations that may be influenced by the employee's government actions.⁷ In some cases, even members of the employee's household will have to relinquish these interests.⁸ For example, if the wife of a federal employee who heads the EPA owns an alternative fuel source company which could benefit from the federal employee's influence over the EPA, she may be required to divest her company.⁹ Potential problems arise where government employees don't rid themselves of these assets and ties.¹⁰ The continued possession of these interests not only presents an ethical dilemma, but can also lead to the commission of a criminal offense.¹¹ 18 U.S.C. § 208, a criminal statute, governs conflicts of interests involving the business and financial interests of a federal employee:

³ Eric Lipton & Jesse Drucker, *Trump Couple, Now White House Employees, Can't Escape Conflict Laws*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/2017/04/01/us/politics/ivanka-trump-jared-kushner-conflicts-business-empire.html?_r=0.

⁴ *Id.*

⁵ *Do It Right*, U.S. DEP'T OF JUSTICE (Sept. 4, 2014), <https://www.justice.gov/jmd/do-it-right>.

⁶ *Supra* note 1.

⁷ *Id.*

⁸ *Id.*

⁹ *See Id.*

¹⁰ *Id.*

¹¹ *Id.*

(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 [18 USCS § 216].¹²

The statutory language defining the offense has been made purposefully broad, containing terms that cover as many possible violations as possible.¹³ The effect of these strings of terms is to prohibit any activity done as a government employee or officer, which would affect any financial interest of or related to the offender. The statute covers all federal government employees and officers, with a few notable exceptions. For example, the president is an executive branch employee, but is not covered by this statute.¹⁴ Other exceptions include the vice president, federal judges, and members of congress.¹⁵ The penalties for those engaging in conduct detailed in 18 U.S.C. § 208 include up to one year in prison and fines of up to \$50,000 per violation or the amount of money which the person offered or received for the prohibited conduct, depending on

¹² 18 U.S.C. § 208 (2017).

¹³ *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993).

¹⁴ Lauren Carroll, *Giuliani: President Trump Will Be Exempt From Conflict-Of-Interest Laws*, POLITIFACT (Nov. 16, 2016, 11:00 AM), <http://www.politifact.com/truth-o-meter/statements/2016/nov/16/rudy-giuliani/giuliani-president-trump-will-be-exempt-conflict-i/>.

¹⁵ *Id.*

which amount is greater.¹⁶ Those who willfully engage in such conduct may be sentenced to up to five years in prison in addition to the aforementioned fines.¹⁷

Government employees who are unwilling to fully divest themselves of their assets have a few options to avoid commission of a crime under Section 208.¹⁸ They may choose to contain their business and financial holdings in a qualified trust, which must meet certain requirements.¹⁹ In both types of qualified trusts, the employee retains ownership of those assets contained in the trust, but those assets are no longer under his or her direct control or influence.²⁰ In a qualified blind trust, the employee effectively sells his or her assets and the money is reinvested into a portfolio of new assets, of which the employee knows no details.²¹ In a qualified diversified trust, the employee places their assets into a portfolio, which is diversified to the point where no one asset contained within will be seen as posing a conflict of interest.²² An employee may also be recused from the matter which conflicts with their assets, rather than divesting them.²³ When recused, the employee simply does not take part in the matter. Recusal is a viable option to remedy a conflict of interest, unless the matter involved is so central or critical to the employee's role in government that they could not possibly perform their job due to the need to recuse themselves.²⁴ In rare cases, the conflict of interest will be waived.²⁵ Generally, waiver is only an option in situations where the employee is not exempt from the statute, and divestiture and recusal are not viable options.²⁶

Business-related conflicts of interest have recently become a subject of concern, as many of President Trump's employees and appointees hold substantial financial and business-related assets.²⁷ The President's own assets would put him at risk for many potential conflicts of interest, if Section 208

¹⁶ 18 U.S.C. § 216 (2017).

¹⁷ *Id.*

¹⁸ *Do It Right*, *supra* note 5.

¹⁹ *Resolving Conflicts of Interest*, U.S. OFF. OF GOV'T ETHICS, <https://oge.gov/web/oge.nsf/Resources/Resolving+Conflicts+of+Interest>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Newlin Carney, *supra* note 2.

applied to him.²⁸ The assets held by Ivanka Trump and Jared Kushner are especially problematic.²⁹ Ms. Trump now serves as an assistant to the President, and Mr. Kushner, a senior advisor to the President.³⁰ Now that the Ms. Trump and Mr. Kushner are federal employees, Section 208 applies to them.³¹ Whether these assets will result in criminal conflicts of interest and charges pursuant to the statute remains to be seen, and this issue will be a main topic of discussion in this Note.

III. ANALYSIS

Simply put, commission of an offense under 18 U.S.C. § 208 involves the following four elements:

- (1) "an officer or employee of the executive branch of the United States Government" (2) "participates personally and substantially as [***16] a Government officer or employee" (3) "in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (4) in which he knows he has a financial interest.³²

A study of several instances where a government employee has been indicted for violating Section 208 offers a clearer picture of what constitutes a business or financial conflict of interest. In *United States v. Nevers*, the defendant was an executive branch employee working as a trade specialist for the International Trade Division and was indicted under Section 208.³³ The court found that, as a government employee, he knowingly participated in a matter involving a prospective International Trade Division client that had been recommended by a company in which he knew his wife had a financial interest.³⁴ Defendant was convicted under Section 208(a).³⁵ In *United States v. Selby*, the defendant was an official at a government agency and was convicted under Section 208

²⁸ Jeremy Venook, *Donald Trump's Conflicts Of Interest: A Crib Sheet*, THE ATLANTIC (Jun. 9, 2017), <https://www.theatlantic.com/business/archive/2017/06/donald-trump-conflicts-of-interests/508382/>.

²⁹ Lipton & Drucker, *supra* note 3.

³⁰ *Id.*

³¹ *Id.*

³² 636 F.3d 630, 636 (D.C. Cir. 2011).

³³ 7 F.3d 59, 62 (5th Cir. 1993).

³⁴ *Id.* at 62–63.

³⁵ *Id.* at 63.

for knowingly recommending use of software made by a company for which her husband worked as a salesman, by promoting additional use of the product, and by taking part in the decision-making process on federal contracts or matters in which her husband had a financial interest.³⁶ The defendant in *United States v. Stadd* served as the interim Assistant Administration to the National Aeronautics and Space Administration (“NASA”) and the head of a consulting firm whose clients included the GeoResources Research Institute at Mississippi State University.³⁷ The *Stadd* defendant was involved in NASA’s decision to allocate \$12 million of a \$15 million congressional earmark to research, of which the aforementioned Research Institute received almost \$10 million.³⁸ The defendant knew he had a financial interest in this matter, and therefore, the court convicted him under Section 208.³⁹ In *United States v. Irons*, the court convicted defendant, an Education Program Officer for the Department of Health Education and Welfare (“HEW”), after finding he had committed several acts violating Section 208 while involved in negotiating a contract between HEW and a company in which he had a personal financial interest.⁴⁰

Ivanka Trump and Jared Kushner have been appointed to serve as federal employees by President Trump.⁴¹ The ethics laws governing senior officials in the executive branch require that new employees submit public finances, as well as assets and interests outside of the government, in order to identify potential conflicts of interest.⁴² Because of this, Ivanka Trump’s and Jared Kushner’s assets are on record and are known to the public.⁴³ Ms. Trump and Mr. Kushner, hold assets valued at least \$240 million and up to \$700 million between them.⁴⁴ Ivanka Trump’s company, a brand touting clothing and accessories that bears her name, is worth more than \$50 million.⁴⁵ Ms. Trump

³⁶ 557 F.3d 968, 971 (9th Cir. 2009).

³⁷ 636 F.3d 630, 632 (D.C. Cir. 2011).

³⁸ *Id.* at 637.

³⁹ *Id.* at 638.

⁴⁰ 640 F.2d 872, 872–875 (7th Cir. 1981).

⁴¹ Lipton & Drucker, *supra* note 3.

⁴² *Public Financial Disclosure*, U.S. OFF. OF GOV’T ETHICS, <https://www.oge.gov/web/oge.nsf/Public%20Financial%20Disclosure>.

⁴³ *Jared Kushner And Ivanka Trump Worth Up To \$700M In Combined Assets*, FOX NEWS (Apr. 1, 2017), <http://www.foxnews.com/politics/2017/04/01/jared-kushner-and-ivanka-trump-worth-up-to-700m-in-combined-assets.html>.

⁴⁴ Rebecca Ballhaus et al., *President Trump’s Advisors Made Big Money, Disclosures Show*, WALL ST. J. (Mar. 31, 2017, 11:33 PM), <https://www.wsj.com/articles/trump-adviser-steve-bannon-earned-at-least-1-4-million-last-year-1491008430?mg=id-wsj>.

⁴⁵ *Jared Kushner And Ivanka Trump Worth Up To \$700M In Combined Assets*, *supra* note 41.

also retains a stake in her father's Trump International Hotel, worth between \$5 million and \$25 million.⁴⁶

The assets that Ivanka Trump retains could potentially cause conflicts of interests in the course of her government employment, despite efforts to avoid such problems. Instead of selling her company or divesting it into a blind trust, Ms. Trump has chosen to step away from its day to day operations, leaving her top executive, Abigail Klem, in charge.⁴⁷ The assets of the company have been placed in a trust overseen by her husband's family, called the Ivanka M. Trump Business Trust.⁴⁸ It is unknown how much control Ms. Trump maintains over her company per this arrangement, but she still receives payments from her business holdings.⁴⁹ Even more problematic is the fact that Ms. Trump has been involved with international leaders from countries where her company does business since becoming a federal employee.⁵⁰ Ms. Trump sat beside Chinese President Xi Jinping at a dinner on April 6th, 2017, and on the very same day obtained three trademarks that would allow her brand to sell merchandise in China.⁵¹ These trademarks give Ms. Trump the exclusive right to sell her merchandise to a market of 1.4 billion people in China.⁵² These are exactly the sort of situations that might violate Section 208.⁵³ Ms. Trump's stake in her father's hotel is also concerning because members of foreign governments or organizations might stay there in order to gain the President's influence.⁵⁴

While Jared Kushner has divested a large portion of his assets, he still retains some business and financial holdings, which could pose ethical issues.⁵⁵

⁴⁶ David Smith, *Ivanka Trump And Jared Kushner Retain Property Assets While In White House*, THE GUARDIAN (Apr. 1, 2017, 5:18 PM), <https://www.theguardian.com/us-news/2017/mar/31/ivanka-trump-jared-kushner-financial-disclosure>.

⁴⁷ Rachel Abrams, *Despite A Trust, Ivanka Trump Still Wields Power Over Her Brand*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/business/despite-trust-ivanka-trump-still-wields-power-over-her-brand.html?action=click&contentCollection=Politics&module=RelatedCoverage®ion=Marginalia&pgtype=article>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Lindsey Rupp & Caleb Melby, *Your Guide To Ivanka Trump's Potential Conflicts Of Interest*, BLOOMBERG POLITICS (Apr. 26, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-04-26/being-ivanka-trump-brings-ethical-legal-pitfalls-quicktake-q-a>

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Smith, *supra* note 44.

⁵⁵ *Id.*

Kushner reportedly resigned from seats in more than 260 organizations and advisory boards and sold off more than fifty-eight businesses or investments in order to ready himself to take his position as a federal employee.⁵⁶ He chose to divest these assets based on the advice of his own lawyers, and that of the Office of Government Ethics.⁵⁷ While he retains some of his real estate assets, his lawyers believe that these holdings will not pose an ethical dilemma in the course of his employment, and that any conflicts will be easy to handle or avoid.⁵⁸ Another potential conflict could arise when it comes to Kushner's debts, including as much as \$25 million in liabilities to Deutsch Bank, a major lender to both the Trump and Kushner families' real estate ventures, and \$5 million in liabilities between Kushner and his father to Israel Discount Bank.⁵⁹ The debts Kushner holds at these international banks could pose problems because the interest of these banks could supersede the interest of the Trump Administration, causing conflicts for Kushner as he tries to perform his duties.⁶⁰

IV. RECOMMENDATION

It is possible that Ivanka Trump and Jared Kushner could avoid conflicts of interest by recusing themselves from any issues that could affect their assets. However, because Ms. Trump assists President Trump in international matters, her recusal from all matters involving countries where her company sells products may make it very difficult for her to perform her duties. The same problems exist with Mr. Kushner's real estate holdings. Because of his role as senior advisor to the President, he will encounter matters related to his assets to the point where recusal will not be a viable option if he is to continue to perform his duties as an executive branch employee. In order to best avoid conflicts of interest that would violate Section 208, Ivanka Trump and Jared Kushner would be advised to divest any and all of the business and financial assets mentioned above. The couple could simply sell their problematic assets, or contain them in either a qualified diversified trust or a qualified blind trust run by someone else. This would be the most effective way to prevent criminal conflicts of interest involving the couple's business and financial holdings.

IV. CONCLUSION

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Jared Kushner And Ivanka Trump Worth Up To \$700M In Combined Assets*, *supra* note 41.

⁶⁰ *Id.*

Although Ivanka Trump and Jared Kushner's assets may lead to conflicts of interest during the course of their tenure as federal employees, it is possible that they can avoid these ethical problems. Through recusal or divesting their assets, the couple will likely be able to prevent any violations of Section 208 while performing their respective duties as federal government employees.