

# BRENNAN CENTER FOR JUSTICE

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## TWENTY YEARS

*at New York University School of Law*

### **Presidential Transparency: Beyond Tax Returns**

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*What would the president's tax returns show about his financial ties to foreign powers or other ethical issues? Is there a better way than disclosure of tax returns to get at such information? The paper below explores these questions.*

Critics of President Donald J. Trump frequently imply that disclosure of his tax returns might reveal not only how much he pays in taxes and gives to charity, but other bombshells damaging enough to bring down his presidency.<sup>1</sup> In April, thousands of people in over 150 cities joined nationwide protests demanding that he release his returns.<sup>2</sup> The president's defenders, on the other hand, argue that the returns are useless or worse. His son Donald, Jr. has said they would be a “distraction,” providing nothing more than fodder for opponents to harass him.<sup>3</sup> The president himself has said “[y]ou will learn more about Donald Trump by going down to the Federal Elections [sic]” Commission to view his completed financial disclosure form than from his tax returns.<sup>4</sup>

Whom should we believe? The urgency of this question grows as it becomes clearer that much of the president's conduct in office could impact his businesses, from his tax reform proposal to foreign relations not only with Russia (the focus of a wide-ranging inquiry in connection to its interference in the 2016 election), but other countries like China and the Philippines.<sup>5</sup> This presents the potential for numerous conflicts of interest, with no effective legal restraint since the president is exempt from federal conflict of interest rules (although every president for the last 50 years has voluntarily adhered to them).<sup>6</sup> A network of holdings as vast and opaque as the one Mr. Trump controls also presents opportunities for outright bribery and influence peddling on a vast scale, all under the guise of ordinary commercial transactions (that just happen to be exceptionally favorable to the president and his companies) — a dynamic we have seen play out in other countries where unscrupulous corporate magnates reached the height of political power.<sup>7</sup>

There is no way to know for sure how much light the president's personal tax returns would shed on such risks without actually seeing them. However, the likelihood is that they contain more relevant information than the president and his defenders will admit — but significantly less than his critics might hope. Tax returns are filed for the purpose of paying taxes, not to provide financial disclosure. Even for a filer with

nothing to hide, key information related to sources of income, debts, and the identities of key business partners is likely to be missing. For those who hope to obscure such information on their personal returns, there are many ways of legally doing so.

To gain a fuller picture of how the president's financial affairs could intersect with his official duties, it would be necessary to see not only his personal returns, but also those filed by his various companies, a point that is often missed in public debates. And even then, a great deal of relevant information would most likely still be missing — including the original sources for much of his income and the names of many creditors to whom he owes money.

Over the long term, and leaving the specific case of Donald Trump aside, instead of fighting about the release of tax returns, advocates of transparency for the president and other senior federal officials and candidates would do better to push for strengthening federal ethics law to require that more pertinent information be included in the ethics disclosures that these individuals are already required to make. In particular, the law ought to require disclosure of information not only about the filer's personal assets, income, and debts, but also (with certain exceptions) the assets, income, debts, and co-owners of any closely-held (not publicly-traded) entity in which the filer has a significant interest. At the same time, in order to achieve a better regulatory balance, monetary thresholds for the disclosure of particular assets and income ought to be significantly raised.

As the future Justice Brandeis pointed out more than a century ago, when it comes to the behavior of those in power, “sunlight” is often “the best of disinfectants.”<sup>8</sup> This is true no matter who is in the Oval Office. Improved financial disclosure will not only help address the many legitimate concerns about President Trump, but provide a lasting safeguard for the integrity of our government. It is a priority everyone should be able to support.

### ***What We Already Know***

At the outset, it must be acknowledged that we already have some information about the president's business empire — though nothing close to a complete picture.

The Ethics in Government Act of 1978 (EIGA) requires federal candidates and senior government officials to file annual disclosure reports (Form 278e) listing, among other things, their own and their immediate families' assets valued above \$1000, sources of income above \$200, and debts above \$10,000 (excluding a mortgage on a personal home).<sup>9</sup> President Trump's most recent report, made public in June 2017, runs 98 pages long and lists his personal assets, certain debts, income sources and positions held in various LLCs, partnerships, and domestic and foreign corporations.<sup>10</sup>

The report contains some useful information (perhaps including some the president may not have been technically obligated to provide),<sup>11</sup> but the picture it presents of his extensive holdings is far from complete. For example, it lists the president's various companies, where they are registered, and his percentage interest, but there is no requirement that the president name his business partners, or give a precise value for each holding and source of income.<sup>12</sup> The form also provides only cursory details about each company's own assets, and neither EIGA nor regulations issued by the Office of Government Ethics (OGE) require it to include any information about ultimate sources of revenue (e.g., the names of customers, lessees, licensees, clients, etc.) or debts, including the identities of creditors or other investors — even where Mr. Trump is the sole owner of an entity such that it is essentially his alter-ego. As experts have noted, the form also need not

include companies that no longer have a positive value because losses exceed assets,<sup>13</sup> even though such companies could still generate significant revenues or (perhaps more likely) owe significant debts. And of course there is no information about what Mr. Trump paid in taxes — to either the U.S. or foreign governments.

To be sure, bits and pieces of information can be found elsewhere. But even these snippets are often less valuable than one might think. For example, a recent report by *USA Today* found that roughly 70 percent of those who bought Trump properties in publicly-recorded real estate transactions since Mr. Trump became the Republican nominee used LLCs to shield their identities (compared to four percent in the preceding two years).<sup>14</sup> In such cases, the public learns little more relevant information than if there had been no disclosure at all.

### ***What President Trump's Personal Tax Returns Might Show***

But would the president's personal tax returns tell us anything different? And more specifically, would they reveal more about potential conflicts or other ethical issues he has as President of the United States?

The answer to both questions is almost certainly yes, though how much the tax returns would tell us is far less clear.

Certainly, upon viewing his personal tax returns — including the standard form 1040 and accompanying schedules — the public would learn at least two things: how much President Trump is paying and has paid in federal taxes, and (from Schedule A) how much he has claimed in itemized deductions for things like charitable giving. This information can be highly relevant to determining the president's ethical fitness. For instance, Richard Nixon's tax returns, which he released in the midst of the Watergate scandal, showed that the president had paid less than \$1000 in taxes on an income of more than \$200,000 in both 1970 and 1971, thanks mostly to highly dubious charitable deductions.<sup>15</sup> The revelations damaged Nixon's credibility, making it harder for him to cover up the other wrongdoing that came to light during Watergate.<sup>16</sup>

Mr. Trump's tax returns might likewise either prove or debunk allegations of legally or ethically questionable conduct. His 1995 return obtained by the *New York Times*, for instance, reveals that he claimed nearly \$916 million in losses that year, which could be carried forward as deductions from taxable income for future years and thus may have enabled Mr. Trump to avoid, or at least reduce, his federal income tax burden for years to come.<sup>17</sup> Like charitable deductions, loss carry-forwards are perfectly legal, but without more detail it is impossible to judge whether Mr. Trump's particular claim was legitimate.

The president's only other leaked return, for 2005, indicates that he paid \$38 million in federal income taxes on a \$150 million income — roughly 25 percent (10 percent less than the top marginal rate of 35 percent for which Mr. Trump would have qualified) — thanks to the more than \$17 million he claimed in itemized deductions. But because no schedules were included we cannot tell what those claimed deductions were for.<sup>18</sup>

Apart from such information, Mr. Trump's federal returns would also reflect where he paid state taxes, which could be a clue as to where he is claiming residency.<sup>19</sup> New York voters, for instance, might care if it turned out the president had eschewed residency in his home state in favor of, say, Florida to avoid New York's comparatively high tax burden.

In addition, the various assets and sources of income listed in the tax returns could be compared to those listed in Mr. Trump's ethics disclosures, to verify that the latter did not omit any required information.

Beyond this basic information, there are other important details related to potential conflicts of interest and foreign ties not included on any ethics form that we *might* learn from the president's full tax returns — although there is no guarantee.<sup>20</sup>

**Additional information on foreign ties.** Mr. Trump's personal tax return could, for example, contain other information about his foreign business dealings not found on his ethics disclosure form.

The president has been especially insistent that he has had “nothing to do with Russia,”<sup>21</sup> notwithstanding contrary claims from one of his sons in 2008, who said that “Russians make up a pretty disproportionate cross section of a lot of our assets.”<sup>22</sup> It is impossible to tell from Mr. Trump's ethics report which of these statements is true.

The president's tax returns might provide more information on this front. Various IRS forms that sometimes accompany a personal tax return can require relevant information related to foreign investments and assets — including Form 1116, which requires disclosure of foreign taxes paid (assuming the filer is claiming a credit for them on his U.S. return);<sup>23</sup> Forms 8865,<sup>24</sup> 8858,<sup>25</sup> and 5471,<sup>26</sup> which require disclosure of certain information about foreign partnerships and corporations, including gross receipts, expenses, debts, total profits, and the names of certain other U.S. partners or shareholders (but not foreign ones); Form 8938, which requires a list of foreign financial assets, including foreign bank accounts and their maximum values;<sup>27</sup> Form 3520, which requires disclosure of certain foreign gifts;<sup>28</sup> and Form 8621, which requires disclosure of foreign dividends and other investment income.<sup>29</sup> All of this information would make it easier to scrutinize Mr. Trump's foreign business interests — although, as noted below — it might be included on the tax returns of his various companies rather than on his personal return.

**Information about negative-valued entities.** Tax returns are also much more likely than ethics reports to reflect information about negative-valued entities (for which losses exceed assets), which may generate tax-deductible losses. With only the president's ethics report, there is no way to tell if such entities even exist.<sup>30</sup>

**Additional information about sole proprietorships.** In addition, where the president is the sole member or owner of a limited liability corporation, such that it is a sole proprietorship whose corporate structure is “disregarded” for tax purposes (i.e. the IRS treats its income as the personal income of the owner), some additional information likely would appear on Schedule C of his personal return — the same schedule used by millions of self-employed Americans to report their business income.<sup>31</sup> That information would include the entity's gross receipts, a breakdown of expenses by type, and whether the owner — Mr. Trump — “materially participated” in its business.<sup>32</sup>

Schedule C does not usually show the names of a business's individual customers, clients, or other sources of revenue, or the names of creditors. But whether Mr. Trump claims to have “materially participated”<sup>33</sup> in a business (necessary to claim certain deductions) on his returns for the years he is in office could be a clue into how involved he remains with the operation of his companies while serving as president. The breakdown of expenses also contains useful line-items — including line 16 for interest paid, which could provide clues as to how much the president owes to his various creditors.<sup>34</sup>

**Information on the personal impact of tax reform.** The president's tax returns might also show with more precision what aspects of his tax plan would benefit him personally. Certain basic information is already apparent — like the fact that he would benefit significantly from his proposals to lower the tax rate for income derived from “pass-through” entities (whose taxable income is attributed to their owners),<sup>35</sup> repeal

the Alternative Minimum Tax,<sup>36</sup> and eliminate the 3.8 percent net investment income tax used to pay for the Affordable Care Act.<sup>37</sup> There are probably a host of other, lesser-known provisions that could impact the president's bottom line, but without his tax returns we cannot know for sure.

**Precise numbers.** Finally, if nothing else, unlike ethics forms — which are required to provide values only in broad ranges, like “\$5,000,001-\$25,000,000” up to a maximum value of \$50,000,000<sup>38</sup> — tax returns must give precise figures. So while the president's sources of personal income — including from companies he owns<sup>39</sup> — must be reported in both places, a sharp increase in income from a particular source might only be reflected in the latter.

To take just one example, the president's latest ethics disclosure lists his income from a company called “Trump Tower Commercial, LLC,” which appears to collect rent from Trump Tower's commercial tenants, simply as “over \$5,000,000.”<sup>40</sup> One of the largest commercial tenants in Trump Tower is a Chinese state bank whose lease will be up for renegotiation in October 2019 —dubbed “one of the clearest financial connections between [President Trump] and a foreign government.”<sup>41</sup> Yet even if the bank agreed to pay a substantially higher rent than it does now, which would raise a host of ethics concerns about payments to the Commander-in-Chief from one of America's top strategic rivals, there would be no way to tell. Tax returns could shed more light on this issue.

Mr. Trump's tax returns might also reflect extra income he is earning from the various properties he has been accused of trying to promote as president.

Interestingly, although not required, Mr. Trump's ethics report actually does give a precise figure for one of his most controversial sources of income — Mar-a-Lago, his private Palm Beach club (a/k/a the “Winter White House”<sup>42</sup>), whose membership fee he doubled after winning the 2016 election and which has since become a prime venue for those seeking access to top government officials.<sup>43</sup> The president's June 2017 ethics report indicates that he earned \$7.4 million more in income from the club over the preceding year (including his first months in office) than was reflected on his last report, filed in May 2016.<sup>44</sup> However, there is nothing to stop the broad ranges permitted on the form from being used to mask future increases (though it should be noted that, even on a tax return, Mar-a-Lago profits — or those from any recognizable company — could easily be masked by funneling them through another entity with a less obvious name).

### ***What the Tax Returns of the President's Companies Might Show***

In considering all of this information, it is important to remember that U.S. tax law requires even closely-held business entities with a small number of owners to file their own returns (unless they are sole proprietorships that are disregarded for tax purposes).<sup>45</sup> Such entities are the repositories for most of Mr. Trump's wealth — and his debts— making it entirely possible that much of the information discussed above would appear on their returns, not his.<sup>46</sup>

Such entities might, for instance, hold most of the president's foreign assets, meaning that it would be their returns, not his, that would reflect information about his foreign business dealings. The same is true for negative-valued entities, which could be subsidiaries of other Trump companies rather than held by the president personally.

Tax returns for the president's companies could also reveal additional ways that he could be impacted by tax code changes. His companies probably owe most of his business debt, for example. Observers have noted that the president's tax proposals make no mention of House Republicans' proposal to eliminate the tax

deduction for interest payments on such debt — a huge subsidy for highly-leveraged industries like real estate development that will cost the government roughly \$1.5 trillion over the next decade.<sup>47</sup> How valuable this omission would be to Mr. Trump personally is impossible to know without seeing the tax returns of his various companies as well as his own.

None of this means that the president's personal tax returns are irrelevant. Ultimately, though, it makes little sense to call for them but not the returns of his companies. Providing both is the minimum amount of transparency that should be expected if the president is going to retain ownership and effective control of his vast business empire while in office.

### ***What Likely Cannot be Found on Any Tax Return***

The issue is not, however, just that some information people think would be on the president's personal tax return is actually reflected on those of his companies. The bigger problem is that there is probably a great deal of highly-relevant information about his business interests that simply would not show up on any tax document.

In particular, Mr. Trump's returns likely would not shed much light in three key areas:

**Original sources of revenue and debts.** Most importantly, neither Mr. Trump's individual tax return nor those of his companies are likely to tell us the specific sources from which his various businesses derive their revenues. This is because revenues are usually aggregated, and reported by type, not source — so the names of particular buyers, paying club members, lessees, licensees, or customers need not be provided.<sup>48</sup>

The same is true for debts. While many types of business interest are tax-deductible, and thus the interest payments would be reflected on a return, payments to different creditors can be aggregated together, and the creditors themselves need not be named.<sup>49</sup> So if, for example, a Trump-owned company had made interest payments to a Russian state bank, neither the name of the bank nor even the specific amounts paid would necessarily appear on the company's return.

In short, no compilation of tax returns is likely to provide a complete picture of who is paying Mr. Trump and to whom he owes money, precisely the sort of financial relationships that are likely to give rise to conflicts of interest or other ethical violations.

**Business partners.** It is also unlikely that Mr. Trump's tax returns would reveal information about many of his most concerning business partners. To be sure, the tax returns of his U.S. entities should include the names of the other owners — but the co-owners listed might just be vaguely-named holding corporations that cannot be connected to any readily-identifiable individual or company; there is no requirement that a tax return disclose who is behind such entities.<sup>50</sup> Certain U.S. partners in foreign ventures also need to be disclosed, but with the same caveat.<sup>51</sup> Most importantly, foreign partners in non-U.S. ventures — who present some of the most troubling potential conflicts — likely are not disclosed on any U.S. tax document.

**Extent of personal wealth.** Finally, the president's tax returns and/or those of his various entities might reveal snippets of detail — like information on the depreciation of certain assets or the contents of various accounts — but they are unlikely to show the full extent of his personal wealth or where particular assets are located. Significant increases in a leader's personal wealth during his or her time in office are a classic sign that political power has been used for personal self-enrichment,<sup>52</sup> but tax returns are not the place to find that information.

## *Recommendations for More Comprehensive Disclosure*

So where does all of this leave us?

Legislation is already pending before Congress that would require disclosure of the president's personal tax returns, as well as those of all future major party nominees for president.<sup>53</sup> This is a sound proposal, and would simply codify what every one of Mr. Trump's predecessors going back 40 years has done voluntarily.<sup>54</sup>

As this paper has explained, however, the president's personal returns are not likely to contain all, or even most, of the details necessary to determine the full extent of his potential conflicts of interest or other ethical issues. And there would still be a great deal of information missing even if the legislation were amended to also require disclosure of the tax returns of his businesses.

At bottom, tax returns are simply not an ideal mechanism for transparency. They were never intended for such a purpose, and by their nature are likely to omit key information that the public has a legitimate interest in knowing, while including other information (about, say, alimony payments) that even a president should be allowed to keep private.

Rather than requiring the release of thousands of pages of returns,<sup>55</sup> a better solution — as Bush Administration ethics lawyer Richard Painter suggested in recent congressional testimony — would be to amend the Ethics in Government Act to strengthen existing ethics disclosure requirements.<sup>56</sup>

To build off Painter's suggestion, we propose that the Act be amended to require officials who already have a public filing obligation, including the president and vice president (and candidates for those offices), to also:

- Disclose the assets, ultimate sources of income, and liabilities (including the names of creditors) of any non-publicly-traded entity — whether foreign or domestic — in which the filer has a significant direct or indirect interest (with a specific monetary threshold to be set in consultation with OGE, as discussed below);<sup>57</sup>
- Disclose, for each of these entities, the names of any co-members or owners, and the individuals or entities that ultimately control them (where applicable);
- Provide more precise estimates for the value of particular assets, sources of income, and debts, rather than the broad ranges currently provided; and
- Sell any asset with respect to which the filer cannot or does not wish to provide the information described above.

We recognize that these new disclosure requirements might be burdensome for some filers, or even impossible to the extent that their business partners do not consent to public disclosure. Given the unique power vested in the president over virtually every aspect of our economy, divestment would be necessary in such circumstances — as much for a President Bloomberg or Zuckerberg as for President Trump. That, after all, is what every other president for the last 50 years (even before it became customary to release tax returns) has done.<sup>58</sup>

For other filers, OGE should be given authority to permit confidential rather than public disclosure with respect to a particular asset, upon an application from the filer. OGE would need to identify by regulation grounds for confidential disclosure, which might include, for instance, a finding that the asset in question was unlikely to give rise to an actual conflict of interest or other ethics violation, and that public disclosure was

likely to materially harm the business in question. OGE's determinations with respect to such applications should be made public and reviewable in court.<sup>59</sup>

Along with these changes, it makes sense to significantly raise EIGA's asset and income disclosure thresholds, and index them to inflation. As with federal campaign contribution disclosure requirements passed in the 1970s, raising these thresholds (currently \$200 for sources of income and \$1000 for assets) would lessen the regulatory burden on filers without depriving the public or ethics regulators of significant useful information.<sup>60</sup> The best approach would be to determine revised thresholds for all of EIGA's disclosure provisions in consultation with OGE, which is best positioned to opine on the monetary thresholds beyond which it generally considers a potential conflict to be material.<sup>61</sup>

These changes would be consistent with the underlying transparency goals of federal ethics law, and would provide a much-needed backstop for other ethics safeguards.<sup>62</sup> While not erasing otherwise unaddressed ethical problems, more transparency would at least help mitigate the resulting harms by allowing the public to act as a check on self-interested government decision-making.<sup>63</sup> They deserve broad support.

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<sup>1</sup> Moira Donegan, "How Trump's Tax Returns Became a Liberal Fantasy," *New Republic*, April 18, 2017, <https://newrepublic.com/article/142108/trumps-tax-returns-became-liberal-fantasy>.

<sup>2</sup> Chris Franciscani and Tom Ramstack, "Thousands at Rallies Demand Trump Release Tax Returns," *Reuters*, April 16, 2017, <http://www.reuters.com/article/us-usa-trump-taxes-idUSKBN17H0FW>.

<sup>3</sup> Eliza Collins, "Trump Jr.: Releasing Tax Returns Would Be a Distraction," *USA Today*, September 15, 2016, <https://www.usatoday.com/story/news/politics/onpolitics/2016/09/15/trump-tax-returns-detract-message/90404924/>.

<sup>4</sup> Louis Jacobson, "Donald Trump Wrong That 'You Will Learn More' from Financial Disclosure Form than from Tax Returns," *PolitiFact*, September 26, 2016, <http://www.politifact.com/truth-o-meter/statements/2016/sep/26/donald-trump/donald-trump-talks-about-his-finances-first-presid/>.

<sup>5</sup> See Jeremy Venook, "Donald Trump's Conflicts of Interest: A Crib Sheet," *The Atlantic*, May 31, 2017, <https://www.theatlantic.com/business/archive/2017/06/donald-trump-conflicts-of-interests/508382/>.

<sup>6</sup> See 18 U.S.C. § 208(a) (barring most "officers" and "employees" of the federal government from participating in specific matters in which they, their immediate family members, business partners, or organizations with which they are affiliated have a "financial interest"); *Ibid.* § 202(c) (exempting the President, Vice President, members of Congress and federal judges from the definition of "officer" or "employee" under section 208). The decision to exempt the President, Vice President, members of Congress and judges from conflict of interest rules dates back to 1989, and arose in part from a view that it would be impractical to ask such officials to step aside from their constitutionally-assigned duties in the same manner as other officials who are required to recuse themselves when a conflict is present. See Josh Gerstein, "Trump Owes Ethics Exemptions to George H.W. Bush," *POLITICO*,



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November 23, 2016, <http://www.politico.com/story/2016/11/trump-bush-ethics-exemption-231773>. Nevertheless, for the last fifty years every other president has opted to voluntarily comply with conflict of interest restrictions while in office by limiting his direct holdings to “plain vanilla” assets that do not pose any conflict risk (like cash, diversified mutual funds and treasury bills) and placing other assets in a “blind trust” whose contents are insulated from the president’s knowledge and control. Roger Parloff, “Why Aren’t Donald Trump’s Epic Conflicts of Interest Illegal,” *Forbes*, November 15, 2016, <http://fortune.com/2016/11/15/donald-trump-conflicts-interest-ethics/>; Jennifer Wang, “Why Trump Won’t Use a Blind Trust and What His Processors Did with Their Assets,” *Forbes*, November 15, 2016, <https://www.forbes.com/sites/jenniferwang/2016/11/15/why-trump-wont-use-a-blind-trust-and-what-his-predecessors-did-with-their-assets/#3f6de17b29c0>.

<sup>7</sup> A classic example of this phenomenon is the reign of Italian Prime Minister Silvio Berlusconi. Berlusconi, the wealthiest person in Italy, served a total of nine years as prime minister between 1994 and 2009, during which he was not required to divest from the television stations that made up the core of his media empire. Recent scholarship has estimated that roughly a third of the revenues earned by those stations during his time in power — almost €2 billion — resulted from “indirect lobbying” by highly-regulated industries like telecommunications, pharmaceuticals, and construction, who purchased advertising time at inflated prices in order to curry favor with the government. See Ray Fisman, “How Much Will Trump Profit from the Presidency?,” *Slate*, January 12, 2017, [http://www.slate.com/articles/news\\_and\\_politics/the\\_dismal\\_science/2017/01/how\\_much\\_will\\_trump\\_profit\\_from\\_the\\_presidency.html](http://www.slate.com/articles/news_and_politics/the_dismal_science/2017/01/how_much_will_trump_profit_from_the_presidency.html) (citing Stefano Della Vigna, Ruben Durante, Brian Knight and Eliana La Ferrara, “Market-Based Lobbying: Evidence from Advertising Spending in Italy,” *American Economic Journal: Applied Economics* 8 (2016): 228, 252).

<sup>8</sup> Louis D. Brandeis, *Other People’s Money and How the Bankers Use It* (New York: Frederick A. Stokes Co. 1914), 62.

<sup>9</sup> Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101,102 (1978).

<sup>10</sup> Sean O’Key, “Trump Financial Disclosure 2017,” *CNN Money*, <https://assets.documentcloud.org/documents/3867112/Trump-Financial-Disclosure-2017.pdf>. The report was not technically due until May 2017. Ethics in Government Act of 1978, 5 U.S.C. app. § 105 (1978). Before it was filed, it came to light that the President’s lawyer had asked for him to be able to submit the form without signing it to verify that its contents are truthful to the best of his knowledge, a request that OGE denied. See Megan R. Wilson, “Trump Lawyer Asked to Submit Financial Disclosure without His Signature,” *The Hill*, May 19, 2017, <http://thehill.com/homeneews/administration/334246-trump-lawyer-asked-to-submit-financial-disclosure-without-his>.

<sup>11</sup> For instance, the President’s 2016 disclosure report, filed when he was still a candidate, reportedly listed not only his personal debts, but also those of at least some of his businesses, which he was not technically required to report. The report did not specify which debts were which, however, or indicate one way or the other whether then-candidate Trump’s companies had other undisclosed obligations. See Josh Gerstein, “Justice Department Defends Trump Financial Disclosure,” *POLITICO*, June 3, 2017, <http://www.politico.com/blogs/under-the-radar/2017/06/03/trump-financial-disclosure-justice-department-defends-239091>.

<sup>12</sup> Ethics in Government Act of 1978, 5 U.S.C. app. § 101, et seq. (1978); Code of Federal Regulations: Executive Branch Financial disclosure, Qualified Trusts, and Certificates of Divestiture, 5 C.F.R. § 2634.301, et seq.

<sup>13</sup> Norman Eisen and Richard W. Painter, “What Trump’s Tax Returns Could Tell Us about His Dealings with Russia,” *POLITICO*, October 31, 2016, <http://www.politico.com/magazine/story/2016/10/donald-trump-taxes-russia-214405>.

<sup>14</sup> Nick Penzenstadler, Steve Reilly, and John Kelly, “Most Trump Real Estate Now Sold to Secretive Buyers,” *USA Today*, June 13, 2017, <https://www.usatoday.com/story/news/2017/06/13/trump-property-buyers-make-clear-shift-secretive-llcs/102399558/>.

<sup>15</sup> Stephen Mihm, “Nixon’s Failed Effort to Withhold His Tax Returns,” *Bloomberg*, August 2, 2016,

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<https://www.bloomberg.com/view/articles/2016-08-02/nixon-s-failed-effort-to-withhold-his-tax-returns>.

<sup>16</sup> Ibid.

<sup>17</sup> David Barstow, Susanne Craig, Russ Buettner, and Megan Twohey, “Donald Trump Tax Records Show He Could Have Avoided Taxes for Nearly Two Decades, the *Times* Found,” *New York Times*, October 1, 2016, <https://www.nytimes.com/2016/10/02/us/politics/donald-trump-taxes.html>; Phil Hessel, “Trump Tax Return Shows He Could Have Avoided Taxes for 18 Years: NYT,” *NBC News*, October 2, 2016, <http://www.nbcnews.com/politics/2016-election/times-publishes-trump-95-tax-return-documents-show-nearly-1b-n658051>.

<sup>18</sup> Brett Arends, “Donald Trump’s 2005 Tax Return Shows He’s One of the Top 400 Earners,” *Market Watch*, March 15, 2017, <http://www.marketwatch.com/story/donald-trumps-2005-tax-return-shows-hes-one-of-the-top-400-earners-2017-03-15>; Stephen Gandel, “Trump’s 2005 Tax Return Was Leaked. He Paid Far More than People Thought,” *Fortune*, March 14, 2017, <http://fortune.com/2017/03/15/donald-trump-2005-tax-returns/>.

<sup>19</sup> Instructions for Form 1040: U.S. Individual Income Tax Return, Internal Revenue Service, 2016, 7.

<sup>20</sup> The availability of this information should not be impacted by the President’s decision to place his holdings in a revocable trust through which he still effectively controls his businesses and derives income from them. *See* Drew Harwell, “Trump Can Quietly Draw Money from Trust Whenever He Wants, New Documents Show,” *Washington Post*, April 3, 2017, [https://www.washingtonpost.com/politics/trump-can-quietly-draw-money-from-trust-whenever-he-wants-new-documents-show/2017/04/03/7f4c0002-187c-11e7-9887-1a5314b56a08\\_story.html?utm\\_term=.45a6ff476c02](https://www.washingtonpost.com/politics/trump-can-quietly-draw-money-from-trust-whenever-he-wants-new-documents-show/2017/04/03/7f4c0002-187c-11e7-9887-1a5314b56a08_story.html?utm_term=.45a6ff476c02); Jill Disis, “What We Know, and Don’t, about Trump’s Trust,” *CNN Money*, February 8, 2017, <http://money.cnn.com/2017/02/08/news/trump-trust-what-we-know/index.html>. Under these circumstances, the Internal Revenue Code generally ignores the existence of a trust and treats its contents as owned by the grantor. *See generally* 26 U.S.C. §§ 671-678.

<sup>21</sup> Jessica Durando, “Trump Says ‘I Have Nothing to do With Russia.’ That’s Not Exactly True,” *USA Today*, January 11, 2017, <https://www.usatoday.com/story/news/world/2017/01/11/donald-trump-russia-vladimir-putin/96444482/>.

<sup>22</sup> TIME Staff, “Donald Trump’s Many, Many Business Dealings in 1 Map,” *TIME*, January 10, 2017, <http://time.com/4629308/donald-trump-business-deals-world-map/>.

<sup>23</sup> *See* Form 1116: Foreign Tax Credit, Internal Revenue Service, 2016.

<sup>24</sup> *See* Form 8865: Return of U.S. Persons with Respect to Certain Foreign Partnerships, Internal Revenue Service, 2016.

<sup>25</sup> *See* Form 8858: Return of U.S. Persons with Respect to Foreign Disregarded Entities, Internal Revenue Service, 2016.

<sup>26</sup> *See* Form 5471: Return of U.S. Persons with Respect to Certain Foreign Corporations, Internal Revenue Service, 2016.

<sup>27</sup> *See* Form 8938: Statement of Specified Foreign Financial Assets, Internal Revenue Service, 2016.

<sup>28</sup> *See* Form 3520: Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, Internal Revenue Service, 2016.

<sup>29</sup> *See* Form 8621: Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Election Fund, Internal Revenue Service, 2016.

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- <sup>30</sup> Norman Eisen and Richard W. Painter, “What Trump’s Tax Returns Could Tell Us about His Dealings with Russia,” *POLITICO*, October 31, 2016, <http://www.politico.com/magazine/story/2016/10/donald-trump-taxes-russia-214405>.
- <sup>31</sup> “Single Member Limited Liability Companies,” Internal Revenue Service, last updated April 18, 2017, <https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies>.
- <sup>32</sup> Instructions for Schedule C: U.S. Profit or Loss from Business, Internal Revenue Service, 2016, C-4.
- <sup>33</sup> Instructions: Line G, Schedule C: U.S. Profit or Loss from Business, Internal Revenue Service, 2016, C-4.
- <sup>34</sup> Schedule C: U.S. Profit or Loss from Business, Line 16, Internal Revenue Service, 2016.
- <sup>35</sup> Drew Harwell and Jonathan O’Connell, “How Trump’s Tax Proposal Could Impact His Own Business Empire,” *Washington Post*, April 26, 2017, [https://www.washingtonpost.com/business/economy/how-trumps-tax-proposal-could-impact-his-own-business-empire/2017/04/26/7a2c0b32-29eb-11e7-b605-33413c691853\\_story.html?utm\\_term=.9506055f4ecc](https://www.washingtonpost.com/business/economy/how-trumps-tax-proposal-could-impact-his-own-business-empire/2017/04/26/7a2c0b32-29eb-11e7-b605-33413c691853_story.html?utm_term=.9506055f4ecc).
- <sup>36</sup> *Ibid.*
- <sup>37</sup> Harry Stein, “\$2,183,552: Donald Trump’s Annual Tax Cut from ACA Repeal,” *Center for American Progress*, March 22, 2017, <https://www.americanprogress.org/issues/economy/news/2017/03/22/428905/2183552-donald-trumps-annual-tax-cut-aca-repeal/>.
- <sup>38</sup> Ethics in Government Act of 1978, 5 U.S.C. app. § 102 (1978); “Instructions for Completing the OGE Form 278e,” Office of Government Ethics, March 2014, on file with authors.
- <sup>39</sup> *See generally* Schedule E (Form 1040): Supplemental Income and Loss, Internal Revenue Service, 2016; 2016 Instructions for Schedule E (Form 1040), Internal Revenue Service, 2016.
- <sup>40</sup> Sean O’Key, “Trump Financial Disclosure 2017,” *CNN Money*, <https://assets.documentcloud.org/documents/3867112/Trump-Financial-Disclosure-2017.pdf>.
- <sup>41</sup> Caleb Melby, Stephanie Baker, and Ben Brody, “When Chinese Bank’s Trump Lease Ends, Potential Conflict Begins,” *Bloomberg*, November 28, 2016, <https://www.bloomberg.com/politics/articles/2016-11-28/trump-s-chinese-bank-tenant-may-negotiate-lease-during-his-term>.
- <sup>42</sup> Mark Caputo, “Trump Dubs Mar-a-Lago the New ‘Winter White House,’” *POLITICO*, January 18, 2017, <http://www.politico.com/states/florida/story/2017/01/trump-dubs-mar-a-lago-the-new-winter-white-house-108841>.
- <sup>43</sup> Brooke Seipel, “Mar-a-Lago Doubles Initiation Fee to \$200,000,” *The Hill*, January 25, 2017, <http://thehill.com/blogs/in-the-know/in-the-know/316104-mar-a-lago-doubles-initiation-fee-to-200000>; Darren Samuelsohn and Aidan Quigley, “Trump’s Mar-a-Lago Tested Amid Stiffening Security,” *POLITICO*, March 5, 2017, <http://www.politico.com/story/2017/03/trump-mar-lago-security-235686>.
- <sup>44</sup> *See* Jill Disis and Cristina Alesci, “Trump Reports Hundreds of Millions in Income,” *CNN Money*, June 16, 2017, <http://money.cnn.com/2017/06/16/news/trump-financial-disclosure-form/index.html>.
- <sup>45</sup> *See* Instructions for Form 1065: U.S. Return on Partnership Income, “Who Must File,” Internal Revenue Service, 2016, 2; Instructions for Form 1120: U.S. Corporation Income Tax Income, “Who Must File,” Internal Revenue Service, 2016, 2.
- <sup>46</sup> The media has extensively reported on President Trump’s use of multiple layers of LLCs and other types of holding corporations for most of his assets. In many cases, Mr. Trump is not the sole owner of these companies,

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meaning that most information about them would not appear on his personal tax return. See Jean Eaglesham, Mark Maremont, and Lisa Schwartz, “How Donald Trump’s Web of LLCs Obscures His Business Interests,” *Wall Street Journal*, December 8, 2016, <https://www.wsj.com/articles/how-donald-trumps-web-of-llcs-obscures-his-business-interests-1481193002>; notes 31-33 above. The use of holding corporations like LLCs is a commonly-used way of allowing shareholders to minimize taxes and protect their assets from creditors and lawsuits. Mary Stark-Hood, “Real Estate Asset Protection,” *Certified Commercial Investment Member*, March 2015, <http://www.ccim.com/cire-magazine/articles/323779/2015/03/real-estate-asset-protection/>.

<sup>47</sup> Lynnley Browning and Sahil Kapur, “Trump ‘Preference’ for Interest Deduction May Snarl GOP Tax Plan,” *Bloomberg*, May 12, 2017, <https://www.bloomberg.com/politics/articles/2017-05-12/trump-preference-for-interest-deduction-may-snarl-gop-tax-plan>; James B. Stewart, “Trump’s Industry, Real Estate, Poses Hurdle to Tax Overhaul,” *New York Times*, April 22, 2017, <https://www.nytimes.com/2017/04/22/business/trump-tax-real-estate.html>; see also “The 1-page White House Handout on Trump’s Tax Proposal,” *CNN*, April 26, 2017, <http://www.cnn.com/2017/04/26/politics/white-house-donald-trump-tax-proposal/index.html>.

<sup>48</sup> See, e.g., Form 1065: U.S. Return of Partnership Income, Lines 1-8, Internal Revenue Service, 2016; Instructions for Form 1065: U.S. Return of Partnership Income, Internal Revenue Service, 2016, 16-17. A publicly released March 8 letter from the President’s personal lawyer asserts that his tax returns would reflect income from several transactions connected to Russia — including the sale of a \$95 million Florida estate to a Russian oligarch by Trump Properties LLC. “Trump Lawyers Push Back against Russia Ties in Letter,” *CNBC*, May 12, 2017, <http://www.cnn.com/2017/05/12/trump-lawyer-says-tax-returns-from-past-10-years-show-no-income-of-any-type-from-russian-sources-with-few-exceptions-report.html>. While it is true that income from the sale would have been reflected in some form on both Mr. Trump’s personal return and that Trump Properties, LLC, there would have been no legal requirement that he provide the buyer’s name.

<sup>49</sup> See, e.g., Form 1065: U.S. Return of Partnership Income, Line 15, Internal Revenue Service, 2016; Instructions for Form 1065: U.S. Return of Partnership Income, Internal Revenue Service, 2016, 19-20.

<sup>50</sup> See, e.g., Form 1065: U.S. Return of Partnership Income, Schedule K, Internal Revenue Service, 2016, 4.

<sup>51</sup> For instance, Form 8865 requires disclosure of the names of other U.S. partners holding at least a 10% stake in the foreign partnership. See Form 8865: Return of U.S. Persons With Respect to Certain Foreign Partnerships, Internal Revenue Service, 2016.

<sup>52</sup> In Argentina, for instance, the personal wealth of Presidents Néstor and Cristina Fernández de Kirchner rose by an estimated 900 percent during the Kirchners’ time in office. Ian Mount, El Calafate, and Philip Sherwell, “The Argentine President and Her Empire in the South,” *The Telegraph*, February 12, 2012, <http://www.telegraph.co.uk/news/worldnews/southamerica/argentina/9076133/The-Argentine-president-and-her-empire-in-the-south.html>. Mr. Kirchner passed away in 2010, but Mrs. Kirchner and their children were indicted on charges of fraud and corruption shortly after she left office. Daniel Politi, “Ex-President of Argentina Indicted Again, Now with Her Children,” *New York Times*, April 4, 2017, <https://www.nytimes.com/2017/04/04/world/americas/argentina-cristina-fernandez-de-kirchner-corruption-indictment.html>.

<sup>53</sup> Presidential Tax Transparency Act, S.2979, 114th Cong. (2016); Presidential Tax Transparency Act; H.R. 305, 115th Cong. (2017); Simone Thomas and Kristin Wilson, “Pelosi, Dems Not Letting Go of Trump Tax Return Push,” *CNN*, April 5, 2017, <http://www.cnn.com/2017/04/05/politics/democrats-trump-tax-return/>. Others have called for Congress to request the returns pursuant to Section 6103 of the Internal Revenue Code, which allows three different congressional committees to obtain private tax information from the IRS. See U.S. Code: Confidentiality and Disclosure of Returns and Return Information, 26 U.S.C. § 6103(f). There appears to be no bar on the committees subsequently making the returns public (though whether it is ever a good idea to use section 6103 to get private tax information to release to the public is another question). See, e.g., Bryan Camp and Victor Thuronyi, “Disclosing President Trump’s Tax Returns – An Unconventional Idea,” *Forbes*, February 21, 2017, <https://www.forbes.com/sites/procedurallytaxing/2017/02/21/disclosing-president-trumps-tax-returns-an-unconventional-idea/#6a40eeef5010>.

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<sup>54</sup> Sitting presidents (and major party presidential candidates) have released their personal tax returns since the 1970s. Until President Trump, every president since Richard Nixon had done so, with the exception of Gerald Ford, who released summaries but not his actual tax returns. See Tax History Project, “Presidential Tax Returns,” *Tax Analysts*, <http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns>.

<sup>55</sup> If there were better disclosure rules for assets and income, it would probably be reasonable for presidents to limit their disclosures to Form 1040 and all or part of Schedule A, which lists itemized deductions (including charitable deductions), as former IRS Commissioner Fred Goldberg has proposed. See Fred Goldberg, “Trump Has No Excuse to Not Release His Tax Returns,” *CNBC News*, August 23, 2016, <http://www.cbc.com/2016/08/22/trump-has-no-excuse-to-not-release-his-tax-returns-commentary.html>.

<sup>56</sup> *Hearing on Legislative Proposals for Fostering Transparency before the House Committee on Oversight and Government Reform*, 115th Cong. (2017) (testimony of Richard W. Painter, S. Walter Richey Professor of Corporate Law at the University of Minnesota Twin Cities, and former chief White House ethics lawyer for President George W. Bush).

<sup>57</sup> With respect to sources of revenue, OGE should have authority to create reasonable exemptions by regulation, including a de minimis exemption and an exemption for transactions—like the small-scale purchase of commercial goods or services—for which it would be unreasonable to expect a business to keep a record of every customer.

<sup>58</sup> See note 6 above.

<sup>59</sup> For instance, a party who disputed a waiver determination could file a lawsuit under the Freedom of Information Act (FOIA). The Freedom of Information Act, 5 U.S.C. §§552, 701 – 706 (1996).

<sup>60</sup> For a discussion of why monetary disclosure thresholds ought to be raised in the campaign finance context, see Daniel I. Weiner and Ian Vandewalker, *Stronger Parties, Stronger Democracy: Rethinking Reform*, Brennan Center for Justice, 2015, 15-16. While we believe disclosure thresholds for ordinary income and assets should be raised, we would leave gift disclosure thresholds where they are, because the public has a legitimate interest in knowing who might be trying to influence powerful officials through the giving of even relatively modest gifts.

<sup>61</sup> Some of the agency’s thinking in this regard is already reflected in its regulations. See, e.g., Code of Federal Regulations: Interpretation, Exemptions, and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting A Personal Financial Interest), 5 C.F.R. §2640.202(a) (setting forth certain *de minimis* thresholds).

<sup>62</sup> Conflict of interest rules, for instance, have been interpreted to permit officials to retain ownership of many assets potentially impacted by their decisions in office provided they recuse themselves from particular matters where they have a conflict—a requirement that appears to be unevenly enforced, at least under the current Administration. For instance, President Trump’s daughter Ivanka and son-in-law Jared Kushner, both top advisors “remain the beneficiaries of a sprawling real estate and investment business still worth as much as \$740 million, despite their new government responsibilities.” See Jesse Drucker, Eric Lipton, and Maggie Haberman, “Ivanka Trump and Jared Kushner Still Benefiting from Business Empire, Filings Show,” *New York Times*, March 31, 2017, [www.nytimes.com/2017/03/31/us/politics/ivanka-trump-and-jared-kushner-still-benefiting-from-business-empire-filings-show.html](http://www.nytimes.com/2017/03/31/us/politics/ivanka-trump-and-jared-kushner-still-benefiting-from-business-empire-filings-show.html). As one expert noted with respect to Mr. Kushner, “[g]iven his level in the White House and broad portfolio, it’s hard to see how he will recuse himself from everything that may impact his financial interest.” *Ibid*.

<sup>63</sup> Of course, having such information would be just the beginning. A great deal of work—including investigative reporting—would be required to determine its actual significance.