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The U.S. Constitution's Emoluments Clauses: How History, Behavioral Psychology, and the Framers' Understanding of Corruption All Require an End to President Trump's Conflicts of Interest

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ABSTRACT

The two Emoluments Clauses in the U.S. Constitution forbid federal officials from accepting "any present, Emolument, Office, or Title, of any kind whatsoever" from foreign or domestic governments. President Donald Trump's business interests generate numerous opportunities to use public office for his personal benefit. This article examines the history of the Emoluments Clauses and the Framers' conception of corruption. The conflicts of interest alleged in pending emoluments lawsuits against President Trump would not be allowable in the private sector, and various plaintiffs argue that the Emoluments Clauses apply to all public officials, including the President. The President's lawyers have claimed he is exempt from the application of these clauses and have raised numerous procedural objections, such as challenging who might have" standing" to bring a lawsuit to compel his compliance with the clauses. Out of three cases filed in 2017, one has been dismissed, while two judges have recognized that the plaintiffs have standing. In each lawsuit, the President's lawyers insist on a conception of corruption that is quid pro quo, where only bargained for exchanges count as corruption. While the Emoluments Clauses require public officials to get Congressional permission before receiving such benefits, the President's position is that Congress must first demand an accounting of any personal benefits, rather than the burden being on the President to ask permission. Thus far, two courts have rejected that approach, and as of this writing, further appeals can be expected.

KEYWORDS

Emoluments; Conflicts of Interest; President Trump; Standing; Ethics.

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Introduction

Donald Trump has stated that he can discharge his public duties as President while he benefits from—and his immediate family continues to run—his global businesses without any conflicts of interest.[1] In this article, the ethics of public service and the two Emoluments Clauses[2] of the U.S. Constitution will be examined, along with the first reported federal judicial opinions about who can bring a lawsuit under either of the two Emoluments Clauses, and what "emoluments" meant to the Framers of the Constitution. U.S. law regarding conflicts of interest in the private sector—as well as findings in behavioral psychology—will be used to compare the President's public duties with the duties of fiduciaries in the private sector.

Part I establishes the Framers' understanding of law and ethics for U.S. public service.[3] Part II considers the two Emoluments Clauses, and the arguments over whether they apply to the office of the President.[4] Part III relates some of the personal domestic and global business interests of the 45th U.S. President and how they represent potential conflicts of interest in the discharge of his public duties. Part III considers the President's plans to avoid conflicts of interest, and finds them inadequate.[5]

For business ethics, as well as ethics in public service, Part IV describes the insights of behavioral psychology to demonstrate how often people and politicians overlook their own conflicts of interest, even where those conflicts strongly influence their decisions.[6] Part V summarizes observations related to conflict of interest laws and fiduciary duties in business, lending support to the conclusion that Trump's attempt to maintain a stake in his private interests while serving in public office would be untenable in other contexts.[7] Returning to legal issues raised by the President's conflicts of interest, Part VI describes three federal lawsuits filed in 2017, two of which have survived motions to dismiss and have addressed the meaning of "emoluments" as understood by the Framers of the Constitution.[8] We conclude that both the courts and Congress as the ultimate judges of the President's conflicts of interest should support the original intent and plain meaning of the Emoluments Clauses in the U.S. Constitution.

I. Public Service Ethics and the Emoluments Clauses

Article I, Section 9 of the Constitution provides as follows: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit

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1 "I can be president of the United States and run my business 100 percent, sign checks on my business." He also said, "The law is totally on my side, meaning, the president can't have a conflict of interest." The Editors, *Donald Trump's New York Times Interview: Full Transcript*, N.Y. Times, Nov. 23, 2016 (*hereafter*, N.Y. Times Interview).

2 The Foreign Emoluments Clause, U.S. Const. art. I, § 9, cl. 8; the Domestic Emoluments Clause, U.S. Const. art II, §1, cl. 7.

3 *See infra* notes 9–43 and accompanying text.

4 *See infra* notes 44–54 and accompanying text.

5 *See infra* notes 55–75 and accompanying text.

6 *See infra* notes 76–96 and accompanying text.

7 *See infra* notes 97–113 and accompanying text.

8 *See infra* notes 114–201 and accompanying text.

or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[9] This is often referred to as the Foreign Emoluments Clause, a provision that should be read in light of the history that preceded the Framers' wording.[10] The Domestic Emoluments Clause provides that the President "shall not receive" any emolument, other than his fixed compensation, from "the United States, or any of them."[11] Like the Foreign Emoluments Clause, it must also be read in light of the history that preceded the Framers' choice of words.[12]

In the 17th Century, it was customary for European heads of state to give elaborate and often expensive gifts. The intent was to create a sense of obligation on the part of the recipient. In 1651, the Dutch adopted a rule prohibiting their foreign ministers from accepting "any presents, directly or indirectly, in any manner or way whatever."[13] This rule departed from long-standing European diplomatic customs whereby gift giving was regarded as a significant aid to maintaining good relations among national leaders. For example, King Louis XVI had the custom of presenting expensive gifts to departing ministers who had signed treaties with France, including American diplomats. In 1780, he gave Arthur Lee a portrait of himself set in diamonds above a gold snuff box; Lee did not want to offend the King by refusing the gift, but at the time, the Articles of Confederation had an emoluments clause quite similar to the one later adopted as Article I, section 9. Although he brought it back with him, he gave it to Congress to consider what to do with it and Congress "eventually allowed him to keep it." [14]

In 1785, the King gave Benjamin Franklin a similar miniature portrait, also set in diamonds.[15] Already a francophile, Franklin wanted to keep the box, especially as the diamonds were quite valuable. He asked Congress for permission to do so in 1785; it was granted in 1786.[16] Although Franklin was given permission, there were doubts about his loyalty to the new nation; his semi-permanent residence was Paris, and his favorable sentiments toward France were known.[17] Despite much admiration in the new Republic toward the French for their role in the American Revolution against the British, there was also apprehension that the French government had hopes of colonizing America.[18]

Divided loyalties between person and nation were very much on the minds of the Framers, who were avid readers of Edward Gibbon. In 1776, Gibbon published volume I of the *Decline and Fall of the Roman Empire* to great popular acclaim. By

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9 U.S. Const. art 1, § 9.

10 For a summary of that history, see Zephyr Teachout & Seth Barrett Tillman, *The Foreign Emoluments Clause*, *Article I, Section 9, Clause 8*, National Constitutional Center, available at https://constitutioncenter.org/interactive-constitution/interpretations/the-foreign-emoluments-clause-article-i-section-9-clause-8

11 U.S. Const. art. II, § 1, cl. 7.

12 See *infra*, notes 13-32 and accompanying text.

13 John Bassett Moore and Francis Wharton, A Digest of International Law (1906), at 579.

14 Zephyr Teachout, Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United, 24-25. (2014).

15 *Id*. at 24.

16 *Id*. at 26

17 *Id*.

18 *Id*.

the time the Articles of Confederation were ratified in 1781, Gibbon had published the second and third volumes. In 1788 and 1789, as the Constitution came into effect, the three final volumes were published. They told the story of a great republic that rose because of the "moral habits of private men in their public roles"[19] and then fell because of the increasing power and corruption of an elite group that had lost a sense of civic virtue. As Zephyr Teachout explains, the Framers were trying to avoid the mistakes of the past and create a sustainable political architecture.[20] They saw analogies to the corruption of late Rome and their direct experiences with King George III, who for many Framers was the embodiment of corruption. Franklin and Jefferson had read Gibbon avidly, and were haunted by the specter of a republic that would fail from internal corruption. Throughout the Convention and the ratification debates, the Framers refer to both Roman and Greek corruption dozens of times, frequently citing Brutus, Cassius, Cicero, and Tacitus.[21] Alexander Hamilton was well aware of potentially corrupting influences on the new republic. In Federalist Number 22, he wrote,

> One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption ... . In republics, persons elevated from the mass of the community ... to stations of great preeminence and power, may find compensations for betraying their trust, which to any but minds actuated by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty. Hence it is, that history furnishes us with so many mortifying examples of the prevalence of foreign corruption in republican governments.[22]

To the Framers, then, corruption meant private interests—foreign or otherwise—influencing the exercise of public power.[23] In the republican tradition, corruption was the cancer of self-love at the expense of country.[24] Corrupt acts came about where private power was used to influence public policy, and systemic internal corruption came about where public powers were used excessively to serve private ends rather than the public good. Government could not work without virtue, and there was "no substitute for good men and office." To the Framers, a sustainable political society required an aristocracy of virtue and talent, rather than an aristocracy of power and wealth. [25]

The Framers saw their work as creating a system that would curb excessive greed and abuses of power.[26] They believed that controlling and channeling the

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19 *Id*. at 32.
20 *Id.* at 32-35.
21 *Id*. at 34-35.
22 Alexander Hamilton, James Madison, and John Jay, The Federalist (#22), Gideon Edition (1818) at 121-22.
23 Teachout, *supra* note 14, at 38.
24 *Id*. at 40. Research has shown that a self-interest bias is fairly common, coupled with related biases such as overconfidence and loss-aversion. President Trump is no exception. See *infra*, notes 85–94 and accompanying text.
25 Teachout, *supra* note 14, at 40-44.
26 *Id*. at 60-67.

self-interested motives of political leaders was the central political problem of their time. In their deliberations, the Framers expressed deep concern not only about corruption through bribery transactions—the *quid pro quo* that the U.S. Supreme Court often sees as the only kind of recognizable corruption[27]—but also the greater and more insidious potential of public officials being influenced to serve the interests of the powerful by gifts from those who would seek to influence them.

During the Convention, the anti-emolument provision that was in the Articles of Confederation was initially excluded. But at the request of Charles Pinckney, and with little or no dissent, it was restored."[28] At the Virginia convention to ratify the Constitution, Edmund Jennings Randolph explained that the clause was "provided to prevent corruption."[29] The moral impulse behind these provisions is that individuals with public service obligations should not seek to use their office for private advantage, or betray their primary duty as an agent for the state. But the history and current reality of corruption tells us such corruption is the rule rather than the exception.[30] It turns out that humans are all too prone to rationalizing their own morally questionable acts and over-estimating their own morality.[31] As Eisen, Painter, and Tribe have noted, the Emoluments Clause "... is no relic of a bygone era, but rather an expression of insight into the nature of the human condition and the prerequisites of self-governance."[32]

While human nature is not about to change, preserving honest, effective public governance for the public—and not for private gain—is nonetheless essential to preserving American democracy. The history of public governance globally since World War II amply demonstrates that nation-states can be poorly governed, especially where those in power seek self-benefit even as they claim to serve the public interest.[33]

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27 *See* Citizens United v. FEC, 558 U.S.310, 360 (2010) (Kennedy, J.). "The *McConnell* record was 'over 100,000 pages' long ... yet it 'does not have any direct examples of votes being exchanged for ... expenditures,' ... . This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption."
Instead of seeing access and influence as corrupting factors, the majority opinion of Justice Kennedy shrank the definition of corruption down to the explicit exchange of money for votes. *See also* Lawrence Lessig, Republic Lost: How Money Corrupts Congress—and a Plan to Stop It (2011), discussing the moral confusion around corruption in the majority opinion by Justice Kennedy. *Id.* at 240-45.

28 Teachout, *supra* note 14, at 27. Pinckney had "urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence." *Id.*

29 Max Farrand, 3 The Records of the Federal Convention of 1787, 327 (1911).

30 *See, e.g.*, Sarah Chayes, Thieves of State: Why Corruption Threatens Global Security (2015). (Chayes' scholarship shows that historically, corruption has been a cause of disruption and disorder, drawing on political thinkers such as John Locke and Niccolo Machiavelli, as well as the great medieval Islamic statesman Nizam al-Mulk.) *See also* the Transparency International website: https://www.transparency.org/

31 See *infra*, notes 76–89 and accompanying text.

32 Norman Eisen, Richard Painter, & Laurence Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*. Brookings Institution, Dec. 16, 2016. (hereafter, Eisen *et al.)* https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/

33 Kenneth Rapoza, *Transparency International Spells It Out: Politicians Are the Most Corrupt*. Forbes, Jul. 9, 2013. "Transparency International says that politicians have a

Many Americans tend to think of public corruption as something that afflicts other countries, not the United States, seeing it as a phenomenon of foreign leaders who take public money and stash it in private Swiss bank accounts.[34] But the U.S. does not top the list of nations with the least corruption. Transparency International (TI) has tracked public corruption for many years, and ranks degrees of public corruption among nations. TI states that their mission is "to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. Our Core Values are: transparency, accountability, integrity, solidarity, courage, justice and democracy."[35] The United States does rank relatively well in TI's annual corruption rankings; for example, in 2016, the U.S. ranked 18th out of 176 countries, making it the 18th "least corrupt" nation.[36] Yet concerns over corruption in the U.S. political economy have risen over the past 30 years.[37] The election of 2016 saw numerous attacks on the moral character of the two major party candidates, attacks that revolved around conflicts of interest. Hilary Clinton's alleged untrustworthiness related to her alleged failures to conduct all of her official State Department business on a public e-mail server, where it could be a matter of public record, and thus transparent. Lack of transparency fits the narrative of Secretary Clinton as "secretive" and thus untrustworthy. As then-candidate Trump said, "Hillary Clinton is the embodiment of corruption. She's a corrupt person. What she's done with her e-mails, what she's done with so many things, and I see the ads up all the time, the ads. She's totally bought and paid for by Wall Street, the special interests, the lobbyists, 100 percent. She's crooked Hillary."[38]

Candidate Trump was expressing the notion—a correct one—that corruption involves more than taking cash in a briefcase in exchange for conferring special favors, or stashing bribe money in offshore accounts. His statements about Ms. Clinton are entirely congruent with the definition that "corruption is the misuse of public power

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lot of work to do to regain trust. The Global Corruption Barometer shows a worldwide crisis of confidence in political leaders and real concern about the capacity of government institutions to respond to societal needs, be it for security or in a safety net capacity." http://www.forbes.com/sites/kenrapoza/2013/07/09/transparency-international-spells-it-out-politicians-are-the-most-corrupt/#62ac6a723ab6.

34 Regarding "public corruption," private corruption is similar. Corruption is the misuse of *entrusted* power (by heritage, education, marriage, election, appointment or whatever else) for private gain. This broader definition covers not only the politician and the public servant, but also the CEO and CFO of a company as well. For public corruption in Africa, and the role of Swiss bank accounts, see Peter Fabricius, *Swiss Bankers Swear They Are Trying To Help Africa Get Its Dirty Money Back*, Quartz Africa, June 13, 2016. https://qz.com/africa/705509/swiss-bankers-swear-they-are-trying-to-help-africa-get-its-dirty-money-back/.

35 *See* Transparency International's website, at https://www.transparency.org/whoweare/organisation/mission_vision_and_values.

36 http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table.

37 *See generally* Kevin Phillips, Bad Money: Reckless Finance, Failed Politics, and the Global Crisis of American Capitalism (2008) (describing how the financial sector has hijacked the U.S. political economy). *See also* Luigi Zingales, A Capitalism for the People (2011) (describing a corrupt crony capitalism and how it has come to replace competition and merit in both business and government).

38 Philip Bump, *Donald Trump's Favorite Topic While Introducing Mike Pence? Donald Trump*. Wash. Post, July 16, 2106.

by an elected official or appointed civil servant for private gain."[39] Clinton could not, according to Trump's "crooked Hilary" characterization, be an objective public servant for the average American, as she was "bought and paid for" by Wall Street.

Yet candidate Trump also received media scrutiny over potential conflicts of interest, especially when he refused to make his tax returns public. Given the global extent of his business interests, many were concerned that the public policies he would help to create as President could be strongly influenced by his private interests. For example, if substantial business debts were owed to Russian creditors in the oligarchy close to Russian President Vladimir Putin, Trump might be less inclined to be confrontational with Russia. If there were Trump-branded hotels in foreign countries, would he impose an immigration ban on nationals from those countries, or only countries with no Trump-branded hotels?[40]

Given what the Framers understood of human nature, and what behavioral psychologists confirm empirically, concern over the private interests of public officials was entirely reasonable, and in keeping with the Framers' intentions in the Emoluments Clauses. Those concerns were amplified when President-Elect Trump said, just before his Inauguration, "I can be President of the United States and run my business 100 percent, sign checks on my business."[41] Such claims implied that Mr. Trump could not even see that there might be conflicts of interest between his private business interests and the public interest. Mr. Trump then added, "The law is totally on my side, meaning, the president can't have a conflict of interest."[42] In saying this, the President-elect arguably (and erroneously) conflated a statement of law with a judgment on what is right, as if the law had already determined that Presidents could never have conflicts of interest. But he is wrong to think that all conflicts of interest are defined and resolved by law, and he is also wrong on what the law requires.

II. Legal Issues for Enforcing the Emoluments Clauses

There are at least three legal issues to consider, and for each one, the greater weight of precedent and common sense supports the view that both of the Constitution's Emoluments Clauses do in fact apply to the U.S. President, do address conflicts of interest related to the private gains of a federal office-holder such as the President, and do lay down a principle that it is not proper to personally accept items of value from foreign or state governments while serving in an executive capacity on behalf of the U.S. public. The first issue is whether the two Emoluments Clauses apply to the office of the President. The second issue is what might qualify as an "emolument." The third issue is who or what might qualify as a "King, Prince, or Foreign State" in the context of the Foreign Emoluments Clause. A fourth issue is wrapped up in both legal and political considerations; given that this is the first

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39 This is the definition of corruption provided by Corruptie.org. http://www.corruptie.org/en/corruption/what-is-corruption/.

40 Richard N. Painter and Norman L. Eisen, *Who Hasn't Trump Banned? People From Places Where He's Done Business*, NY Times, Jan. 30, 2017. https://www.nytimes.com/2017/01/29/opinion/who-hasnt-trump-banned-people-from-places-where-hes-made-money.html.

41 N.Y. Times interview, *supra* note 1.

42 *Id.*

instance of litigation related to the application of these clauses to the office of the President in nearly 230 years, judicial reticence comes into play in the form of the U.S. Supreme Court's "political question doctrine."[43]

The Emoluments Clauses do apply to the office of the president, despite President Trump's claims that he is, by law, conflict free. This is a fairly clear matter, as Article II, Section 1 provides that the President "shall hold his *office* during the term of four years." It further provides that no person except a "natural born citizen ... shall be eligible to the *office* of President," and addresses what occurs in the event of "the removal of the President from *office*."[44] In addition, the Presidential Oath Clause, and the Twelfth, Twenty-Second, and Twenty-Fifth Amendments, all refer to the President as occupying an "Office."[45]

The exact language of the Foreign Emoluments clause is this: "And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." The occupant of the Oval Office is clearly an office of Trust, with some profit as well (the Presidential salary, Air Force One, and residence in the White House, among other benefits). When President Obama was awarded the Nobel Prize for Peace, he sought and received permission from Congress. The Department of Justice Office of Legal Counsel (OLC) offered an opinion that said he could accept the prize, inasmuch as the Nobel Prize committee was not an agent or instrumentality of the Norwegian government.[46] Previous Presidents, as well, have sought and received "the Consent of the Congress."[47]

As to what an "emolument" is, the Oxford English Dictionary defines the word as meaning "profit or gain arising from station, office, or employment: reward, remuneration, salary."[48] At the time of ratification of the U.S. Constitution, "emolument" was used as a generic term for many different kinds of remuneration. James Madison warned that Alexander Hamilton was trying to conduct government through the "pageantry of rank, the influence of money and emoluments, and the terror of military force."[49] Eisen, Painter and Tribe have framed the Foreign Emoluments Clause this way:

> First it picks out words that, in the 1790s, were understood to encompass any conferral of a benefit or advantage, whether through money, objects, titles, offices, or economically valuable waivers or relaxations of otherwise applicable requirements. And then, over and above the breadth of its categories, it instructs that the Clause reaches any such transaction "of any kind whatever." [50]

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43 See *infra* notes 130-32, and 167-73 and accompanying text.

44 Emphases added.

45 Eisen *et al*., *supra* note 32, at 11–12. *See also* District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Messitte, J.).

46 Memorandum Opinion for the Counsel to the President, Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, Dec. 7, 2009. http://www.politico.com/f/?id=00000158-b7ee-d53b-a37f-bfee7b6d0001.

47 Eisen *et al., supra* note 32, at 9–10.

48 *Id*. at 11.

49 *Id*.

50 *Id.*

As to the meaning of "King, Prince, or Foreign State," there are no judicial rulings on point. But previous opinions of the Office of Legal Counsel have established that the Nobel Prize Committee is not an agency of Norway, and thus not a "foreign state."[51] This clearly implies that subdivisions or agencies of a state—or corporations that are state-owned enterprises—may not give valuable items to the President without Congressional approval. Justice Samuel Alito, when he was an Assistant U.S. Attorney in the Department of Justice, considered whether an honorarium to a NASA engineer/scientist from the University of New South Wales was an "emolument." In Alito's Office of Legal Counsel opinion, the question was whether the University of New South Wales was an agent or instrumentality of the government of Australia.[52] Although a majority of the members of the governing Council of the University were state employees, and funding came from the government, he noted that there was no review of Council decisions by the government; he concluded that, because of its functional and operational independence from the Australian government, the University was not an agent or instrumentality of Australia for purposes of the Emoluments Clause.[53]

In summary, as to the first three issues, whether any of President Trump's foreign holdings are subject to either emoluments clause will depend on whether the "emolument" (the gain, or forgiveness of loss) is conferred on the President by a foreign state, an agent or instrumentality of that state, or a U.S. state. His numerous private interests at home and abroad provide ample room for such conflicts to flourish. U.S. judges often hesitate to get involved in a matter that many see as "political." The "political question doctrine" will be reviewed below, after exploring the President's conflicts of interest and his plan to avoid them. [54]

III. Clear and Convincing Conflicts of Interest: The Global Businessman as President

This part proceeds in two sections. First, facts and analysis about known conflicts of interest are listed. Second, Trump's plan to distance himself from his businesses is examined.

A. The President's Known Conflicts of Interest

As noted in the Introduction, corruption is the misuse of public power by an elected official or appointed civil servant for private gain. Private gain does not have to be

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51 David J. Barron, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 4 (2009).

52 Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales.*

53 Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales* at 4-5 (May 23, 1986).

54 See *infra* notes 130-32 and notes 167-73 and accompanying text.

a direct bribe or "kickback;" the Framers understood this clearly. The private gain contemplated by the Emoluments Clause includes anything of value, although the U.S. courts have seldom had opportunities to construe the clause. One of the very few cases to consider the clause was *Hoyt v. United States* (1850),[55] defining "... the term emoluments, that being more comprehensive, and embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office." In a U.S. Court of Claims case, *Sherburne v. United States*, emoluments were defined as "... indirect or contingent remuneration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes the nature of reimbursement."[56]

Some foreign leaders have already reached out to Mr. Trump through business channels; they could easily believe that pleasing him personally could create personal or public benefits for themselves or their nations.[57] Ingratiating themselves with Mr. Trump, they think, will be generally advantageous.[58] Mr. Trump has also reached out to foreign leaders for reasons not relevant to U.S. policy interests. For example, Mr. Trump opposes wind farms because he believes that they ruin the view from his golf course in Aberdeen, Scotland. While President-Elect, he openly lobbied Nigel Farage—a British political ally of his—to oppose wind farms in the United Kingdom. While this is not an exchange of money, and nowhere near bribery, this use of public office to create private gain conflicts with his duties as a public servant. To put it more bluntly, it does not serve the U.S. public for a U.S. president, or President-elect, to spend any time or effort trying to influence wind farm policy in the United Kingdom.

As President-Elect, Mr. Trump demonstrated a willingness to use his influence to create financial gain for his enterprises and his family. His daughter, Ivanka, participated in several meetings between Mr. Trump and foreign heads of state, including those of Turkey, Argentina, and Japan. Ivanka's presence at Mr. Trump's meeting with Prime Minister Shinzo Abe of Japan is especially striking, as Ivanka was concurrently in talks with Sanei International (whose largest shareholder is wholly owned by the Japanese government) to close a major and highly lucrative licensing deal.[59]

Mr. Trump openly acknowledges that he has raised business issues in the course of calls to foreign public officials.[60] The Trump organization's debts to

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55 51 U.S. (10 How.) 109, 135 (1850).

56 Sherburne v. United States, 16 Ct. Cl. 491, 496 (1880).

57 Richard C. Paddock et al., *Potential Conflicts Around the Globe for Trump, the Businessman President* , N.Y. Times, Nov. 26, 2016. (noting concern that "in some countries those connections could compromise American efforts to criticize the corrupt intermingling of state power with vast business enterprises controlled by the political elite"). *Id.* https://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html.

58 *Id.*

59 Sherisse Pham, *Is Ivanka Trump Mixing Japanese Business With Politics?* CNN Money, Dec.5, 2016. http://money.cnn.com/2016/12/05/news/donald-trump-japan-ivanka-clothing-deal/.

60 Rosalind S. Helderman & Tom Hamburger, *Trump's Presidency, Overseas Business Deals and Relations With Foreign Governments Could All Become Intertwined*. Wash. Post, Nov. 25, 2016. https://www.washingtonpost.com/politics/trumps-presidency-overseas-business-deals-and-relations-with-foreign-governments-could-all-become-intertwined/2016/11/25/d2bc83f8-b0e2-11e6-8616-52b15787add0_story.html?utm_term=.86784d1c34d3.

foreigners and other civil or criminal inquiries are also worrisome. The Industrial and Commercial Bank of China—owned by the People's Republic of China—is the single largest tenant in Trump Tower. Its valuable lease will expire, and thus come up for re-negotiation, during Mr. Trump's presidency.[61] There are persistent rumors, underlined by the apparent Russian cyber-attacks and influence on the U.S. 2016 election, that the President may feel obligated to Vladimir Putin, the President of Russia; this may or may not have arisen from the Trump organization's getting loans from Russian oligarch financiers, or the "Russian mob," but rumors persist that people close to the Russian government have compromising information about his personal activities in Moscow.[62] Federal prosecutors in Brazil are in the middle of a sensitive criminal investigation into whether two pension funds that invested in the Trump Hotel in Rio de Janeiro were bribed to do so.[63] Brazilian leaders who want to "get along" with Mr. Trump may choose to slow or end the investigation. For the purpose of either emoluments clause, it matters whether the "favor" done is by a government, or an agent of the government. The above examples contrast with a situation where a major retailer chooses to continue Ivanka Trump's clothing line, even as it somehow hopes for favorable treatment from the President. In such a case, there would be no government action that would qualify as a constitutional emolument.[64]

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[61] Caleb Melby, Stephanie Baker & Ben Brody, *When Chinese Bank's Trump Lease Ends, Potential Conflict Begins*, Bloomberg, Nov. 28, 2016. https://www.bloomberg.com/politics/articles/2016-11-28/trump-s-chinese-bank-tenant-may-negotiate-lease-during-his-term.

[62] Adam Davidson, *A Theory of Trump Kompromat: Why Trump Is So Nice to Putin, Even When Putin Might Not Want Him to Be*. New Yorker, July 19, 2018. It would be hard to show that Trump's indebtedness, and seeming deference to Putin, is a violation of the Foreign Emoluments Clause. The "favors" may not have come from the government itself, but rather a network of people close to the government, yet who are not formally official agents of the government. Davidson however, notes that

> Trump's business deals ... were with tertiary figures. *Sistema* is rooted in local, often familial, trust, so it is common to see networks rooted in ethnic or national identity. My own reporting has shown that Trump has worked with many ethnic Turks from Central Asia, such as the Mammadov family, in Azerbaijan, Tevfik Arif, in New York; and Aras the Mammadov family, in Azerbaijan and Emin Agalarov, in Moscow... . Trump's partners and their rivals would likely have gathered any incriminating information they could find on him, knowing that it might one day provide some sort of business leverage—even with no thought that he could someday become the most powerful person on Earth ... . Under Putin, *sistema* has become a method for making deals among businesses, powerful players, and the people. Business has not taken over the state, nor vice versa; *the two have merged in a union of total and seamless corruption*. (emphasis added).

For U.S. judicial system, however, this seamless union is probably not sufficient to recognize that Russian funds supplied to Trump outside the regular banking system were "emoluments" from the government of Russia or "instrumentalities" of Russia.

[63] Anthony Boadle, *Brazil Prosecutor Says Trump Franchise May Have Benefitted From Corruption.* Reuters, Oct. 28, 2016. ("The structuring of the Porto Maravilha deal 'favored, in a suspicious way, the Trump Organization economic group', among others, Lopes said. The prosecutor gave no further details and was not immediately reachable for comment.") *Id*. http://uk.reuters.com/article/brazil-corruption-trump-idUKL1N1CX0Q6.

[64] Macy's, for example, might want to avoid any Trumpian "tweets" against it in order to not offend pro-Trump patrons. See also *supra* note 62, discussing "Russia's" possible

President Trump's financial relations with members of the Saudi royal family provide some indication of how his private interests could cloud his judgment about significant matters of U.S. foreign policy. Journalist Jamal Khashoggi, a citizen of both the U.S. and Saudi Arabia, was apparently murdered in Turkey by operatives of the Saudi government in September, 2018. This action precipitated widespread condemnation by the international community, but President Trump had difficulty taking the kind of public stance that many in his own party wanted him to take. His foreign policy toward Saudi Arabia is likely compromised, as his past, present, and future prospects of business with the Saudis "make it impossible for him to contemplate the kind of consequences that the Saudis deserve."[65] In short, the President seems to have a difficult time separating his personal interests from the political interests of the United States.[66]

The Saudis—along with many other foreign officials—have also made generous use of the Trump International Hotel in Washington, D.C.[67] In being both a tenant and, as President, arguably chief executive of the entity that owns the old Post Office Building on Pennsylvania Avenue, there is a direct conflict of interest between the President's private interests and compliance with the rule of law; as Judge Messitte notes in his March 2018 opinion,

> As has been reported in the press and as noted in the Amended Complaint and confirmed at oral argument, almost immediately after the President took office, federal regulations were amended so that the former U.S. Post Office, which is the site of the Trump International Hotel, which could not previously be leased to someone associated with the Federal Government, suddenly could be leased to someone despite that someone's connection with the Federal Government.[68]

The lease had provided, pursuant to pre-Inauguration regulations, that "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." This sudden reversal appears to be a clear violation of the Domestic Emoluments clause.

To make matters worse, as mentioned earlier, foreign government officials stay there in order to please the U.S. President,[69] a likely violation of the Foreign Emoluments Clause. With considerable public fanfare, the Kingdom of Bahrain

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favors to the Trump Organization before his candidacy, and why those may not be "emoluments."

65 Brian Klass, *Jamal Khashoggi's Fate Casts a Harsh Light on Trump's Friendship with Saudi Arabia*, Wash. Post, Oct. 10, 2018.

66 "In 2015, when asked about his relationship with the Saudis, Trump said: 'I get along great with all of them. They buy apartments from me. They spend $40 million, $50 million. Am I supposed to dislike them?'" *Id.*

67 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 (undated) http://time.com/donald-trumps-suite-of-power/ *See also* Jonathan O'Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel Is Place to Be*, Wash. Post Nov. 18, 2016. https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.55ffc8c4734b.

68 District of Columbia v. Trump, 291 F. Supp. 3d 725, 741 (2018)(Messitte, J.).

69 O'Connell & Jordan, *supra* note 67.

decided to mark the seventeenth anniversary of King Hamad bin Isa Al Khalifa's accession to the throne by hosting a reception at the Trump International Hotel.[70] The total value to Mr. Trump from hotel profits could eventually make the diamond-encrusted snuffbox gifts of Louis XVI look comparatively inconsequential. The Framers of the U.S. Constitution included explicit prohibitions on receiving any such benefits, due to a clear awareness of their potentially corrupting effects.

B. A Very Permeable Border Wall: President Trump's Plan to Avoid Conflicts of Interest

President Trump believes that he can simultaneously manage the nation's business while avoiding any serious conflicts between his own interests and the public interest. Yet as public concerns mounted after his election, he promised to work out a solution before taking office. His January 11, 2017 press conference claimed a transfer of Trump Enterprises management to his sons, along with a promise to make no new foreign deals.[71] He also set up an ethics officer to review any new domestic deals, and said he would donate any proceeds from foreign dignitaries staying in his hotels to the American people.[72] However, ethics experts have called these arrangements inadequate.[73] Mr. Trump has transferred management, but not ownership, of the Trump Organization. He retains all of his ownership rights in Trump Enterprises. He has assigned operational responsibility not to an independent arm's-length trustee, but to his sons, Eric and Donald Jr. Walter Shaub, the head of the U.S. Office of Government Ethics, responded within days in a speech to the Brookings Institution, finding the plan "far from adequate."[74] Shaub said he had been initially encouraged by a Trump tweet last year that "no way" would he allow any conflicts of interest. "Unfortunately," he said, "his current plan cannot achieve that goal."[75] Shaub cited the late Justice Antonin Scalia, often venerated by GOP politicians. "Justice Scalia warned us that there would be consequences if a president ever failed to abide to the same principles that apply to lower level officials." He added that officials needed their president to show that ethics matter, "not only through words but through deeds."[76]

Much of what Trump proposed was more show than substance; handing over control to his sons, with whom he is in regular contact, is anything but a

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70 Nolan D. McCaskill & Madeline Conway, *Bahrain to Host Event at Trump's D.C. Hotel, Raising Ethical Concerns*, Politico (Nov. 29, 2016). http://www.politico.com/story/2016/11/trump-bahrain-hotel-dc-231941.

71 Jeremy Venook, *Trump's Interests vs. America's, Dominican Republic Edition*. The Atlantic, Feb. 10, 2017. https://www.theatlantic.com/business/archive/2017/02/donald-trump-conflicts-of-interests/508382/.

72 *Id.*

73 Sam Fleming & Shawn Donnan, *Government Ethics Chief Says Trump Conflicts Plans Are Inadequate*. Fin. Times, Jan. 13, 2017. https://www.ft.com/content/f0f84aba-d814-11e6-944b-e7eb37a6aa8e.

74 Remarks of Walter M. Shaub, Jr. Director, U.S. Office of Government Ethics, delivered at the Brookings Institution, Jan. 11, 2017. https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf.

75 *Id.*

76 *Id.*

blind trust, which is the gold standard of removing conflicts for public officials. Critical financial matters will almost surely be discussed between father and sons. Despite his pledge to end all new foreign investments, the Trump Organization was reportedly pursuing new investment in the United Arab Emirates.[77] Given the frailties of human nature and Mr. Trump's particularly strong loss-aversion bias,[78] the better public policy is to follow President Reagan's "trust, but verify"[79] approach, by requiring transparency and accountability for all public officials. The Framers would undoubtedly agree.

IV. Behavioral Psychology and Conflicts of Interest

Beginning with the path-breaking work of Daniel Kahneman and Amos Tversky, social scientists have been examining the subconscious, often irrational ways we make decisions. Contrary to the prevailing assumptions of many economists, human beings are often influenced by circumstances to do things that do not maximize their personal monetary gains.[80] At the same time, experiments have shown that people will often engage in maximizing their gains unethically (cheating, for example) while maintaining a rock-solid belief in their own morality.[81] None of this is random or senseless, according to Dan Ariely and others. As Kahneman would put it, our human biases and mental shortcuts are quite systematic and fairly predictable.[82]

For any President or member of the U.S. Congress, putting the public interest ahead of personal gain is a continuing challenge. Just to remain in power, members of Congress spend 30-70% of their time soliciting campaign contributions from likely donors, most of whom hope to have the ear of the politician, and perhaps even some influence. This leaves very little time for actual discussion and deliberation.[83] This is not a *quid pro quo* kind of corruption, where cash is exchanged for a vote, but it can be remarkably close. Yet politicians are likely to claim that such influences do not affect them or deflect them from true public service. On the contrary, Lawrence Lessig cites empirical work on how members of Congress represent "funders" far more than they attend to the people's agenda. "A wide range of important work in political science," he notes, "makes it possible to argue with confidence that, first,

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77 Venook, *supra* note 71. During January and February of 2017, the Trump organization began moving forward with its plans to expand its golf course in Aberdeen, Scotland. It also renewed discussions with Ricardo and Fernando Hazoury, the brothers who own the Cap Cano resort in the Dominican Republic. *Id*.

78 *See infra*, notes 88-89 and accompanying text.

79 President Reagan had deep suspicions about the Soviets during the "Cold War." When talks were underway with the Soviets for the Intermediate-Range Nuclear Forces Treaty (INF), he often used the Russian proverb "Doveryai, no proveryai" ("Trust, but verify.").

80 Dan Ariely, Predictably Irrational (2008). (Ariely makes the case that people are constantly susceptible to irrelevant influences from their immediate environment, short-sightedness, and other forms of irrationality, contrary to the model of "economic man" as a reasoning, calculating utility maximizing machine.).

81 *Id*. at 279-90.

82 Daniel Kahneman, Thinking, Fast and Slow (2011). (Kahneman makes a thorough case that the human animal is systematically illogical. We routinely fail to assess situations, yet do so in fairly predictable patterns that are grounded in our primate ancestry.).

83 Lessig, *supra* note 27, at 138.

there is a wide gap in the policy preferences of "the funders" and "the People," and second, in the face of that gap, Congress tracks not "the People" but "the funders."[84]

In short, what Kahneman and Tversky call the self-serving bias is likely not to be noticed by politicians, the vast majority of whom must focus on fund-raising to get re-elected. Professor Robert Prentice has aptly described the self-interest bias as one that "unconsciously distorts evidence, allowing people to view themselves as 'good and reasonable.' Inevitably, self-interest clouds the ethical decision making of even the most well-intentioned people."[85]

All people have a tendency to gather information in a self-serving way and also to process that information in a way that is self-serving. Fans of two teams watching a video of a football game between the two will tend to disagree completely about which team got the most breaks from the referees.[86] Studies show that even people who are trained to be objective and skeptical, such as auditors and scientists, tend to find more persuasive the information that is consistent with their self-interest or their previously drawn conclusions. In general, people tend to see what they expect to see in the facts that they take in.

In the case of a narcissistic politician, the self-serving bias can become even more pronounced.[87] But there are two other well-known biases that are also exaggerated by this particular personality: loss-aversion and overconfidence. Empirical studies show that people enjoy their gains only about half as much as they suffer from their losses. That is, people feel losses more deeply than gains of the same value.[88] This loss aversion is connected to what Kahneman and Tversky call "the endowment effect," which is evident in the attachment most people have with what they own, and the "status quo bias," where people unconsciously yet consistently resist change.[89] For loss aversion, once someone sees an item they identify as "theirs," it usually becomes more valuable to them, often more than what the market would bear. This may partly explain why Mr. Trump finds it difficult to part with ownership of his assets, even as he cedes temporary control of them to his sons.

Overconfidence is related to over-optimism, a fairly common trait in successful business people. People who routinely view the glass as "half empty" seldom

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84 *Id.* at 151-52. *See also* Martin Gillers and Benjamin I. Page, *Testing Theories of American Politics, Elites, Interest Groups, and Average Citizens*, 12(3) Perspective on Politics 564, at 564 (2014) ("Multivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.").

85 Robert A. Prentice, *Ethical Decision Making: More Needed Than Good Intentions*, Fin. Analysts J. 63(6), (2007), at 22.

86 Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 45(1) J. Abnormal Psychol. 129-34 (1954).

87 Dan P. McAdams, *The Mind of Donald Trump*, The Atlantic, June 2016, https://www.theatlantic.com/magazine/archive/2016/06/the-mind-of-donald-trump/480771/. ("Narcissistic people like Trump may seek glorification over and over, but not necessarily because they suffered from negative family dynamics as children. Rather, they simply cannot get enough.") *Id.* It seems likely that it's just not possible for President Trump to acknowledge that he could be wrong on occasion.

88 Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5(1) J. Econ. Persp. 193, 193-206.

89 *Id.*

become business leaders. Yet many people's tendencies toward optimism are so strong that they are unknowingly led to make irrational and injurious decisions. [90] Robert Prentice makes the connection between over-optimism and overconfidence in this way:

> Decisional errors caused by over-optimism may be exacerbated by *overconfidence.* Studies have shown that high percentages of people believe they are better drivers, better teachers, better eyewitnesses, better auditors, and on and on, than their peers. Students, psychologists, CIA agents, engineers, stock analysts, financial analysts, investment bankers, investors, and many other categories of people have been studied and shown to tend toward irrational confidence in the accuracy of their decisions. Moreover, entrepreneurs, investors, stock analysts, and others who have had success in their chosen fields tend to develop a sense of invulnerability and ignore the role good fortune played in their success.[91]

This can also lead to a distinct double standard: being overly confident in your own moral compass can short-circuit your own interest in moral self-reflection. If you are overconfident, you already "know" you are a good person, having a "strong but wrong" belief that you are entirely ethical. Numerous empirical studies show otherwise. For example, a large majority of physicians who routinely get free merchandise from drug companies will deny that this compromises their objectivity in any way, but only a small percentage believed that other physicians could retain their objectivity.[92] In short, we humans routinely give our own ethics higher marks than they deserve.

Over-confidence, especially when it comes to our own ethics, is a fairly common failing.[93] In claiming that he can both run the country and run his businesses, President Trump illustrates this failing. By turning over management of Trump Enterprises—but not ownership—to the younger Trumps, he arguably demonstrates loss aversion and it is difficult to imagine that he will somehow not realize the implications of his official business decisions on his business interests. The arrangement that Trump has in place is a separate issue, but it merits mention that Trump's handing of control of his companies to his children is nowhere near the kind of "blind trust" that ethics experts recommend for a high public official who wants to avoid confusing his private interests with the public interests he has pledged to serve.[94]

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90 Prentice, *supra* note 85, at 20.

91 *Id.*

92 *Id.*

93 Marianne M. Jennings, *Ethics and Investment Management: True Reform*, 61(3) Financial Analysts Journal, 45 (2005). Studies indicate that 74 percent of us believe our ethics are higher than those of our peers and 83 percent of us say that at least one- half of the people we know would list us as one of the most ethical people they know. An amazing 92 percent of us are satisfied with our ethics and character. *Id.* at 52.

94 The trustee of a blind trust keeps certain information secret from the trust beneficiaries, who do not know the nature of the assets held in trust. Moreover, they have no power, directly or indirectly, to participate in the management or distribution of those assets. In the case of President Trump, "blindness" would be difficult at best, as he already knows the nature of his real estate assets and where his branded properties are.

V. Implications From Conflict of Interest Laws and Private Sector Fiduciary Duty

Because of the lack of judicial precedents related to the Emoluments Clauses, it makes sense to look for persuasive legal authority on conflicts of interest in areas other than constitutional law. As a matter of federal statutory law, officers of the executive branch of the federal government are barred from participating in matters that may impact their financial interests.[95] This is unambiguous in the context of federal contracting: losses or bad intent do not need to be shown, and penalties, including nullification of contracts, have been characterized as deliberately harsh.[96] Another area where conflicts of interest are addressed is in corporate governance. Numerous state corporation laws govern the conduct of officers and directors.[97] As discussed above, it is a fair summary to say that the United States now has a chief executive of the federal government, making important domestic and foreign policies, and at the same time having businesses that receive money and benefits from representatives of foreign governments and from states and the District of Columbia. Would an analogous scenario be tolerated in private enterprise? Clearly not.

In the private sector, officers and directors must adhere to fiduciary duties, serving the firm's interests above all others.[98] Although fiduciary principles related to public sector actors evolved separately from those applicable in the private sector,[99] in all three branches of government, officials are widely seen as owing fiduciary obligations to the public.[100]

Unlike the history of the Emoluments Clause described above, fiduciary duty in the context of business grew out of centuries of case law concerning trusts.[101] Starting in the 12th Century, standards and duties evolved for managing assets on behalf of someone else.[102] A theoretical debate has lingered regarding the question of whether fiduciary duties are therefore more accurately seen as rooted in contracts or property law.[103] Regardless of how its theoretical underpinnings are imagined,

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95 18 U.S.C. § 208 as cited in Appendix, 36 Fed. B. News & J. 129 (1989).

96 Padideh Ala'i, *Civil Consequences of Corruption in International Commercial Contracts,* 62 Am. J. Comp. L. 185, 191 (2014).

97 *See, e.g.*, Craig Palm & Mark A. Kearney, *A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)* 40 Vill. L. Rev. 1297 (1995).

98 Claire Hill & Richard W. Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 Minn. L. Rev. 1637, 1644 (2011).

99 *See* Richard W. Painter, Getting the Government America Deserves: How Ethics Reform Can Make a Difference, 3 (2009).

100 Hill & Painter, *supra* note 98, at 1645, citing Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. Ill. L. Rev. 57, 74 ("Numerous courts have recognized the fiduciary obligation of government employees, even in the absence of specific legislative or regulatory endorsements of such duties, and these courts have imposed fiduciary-like remedies in response to violations of the conflict and influence components of that obligation."). Hill and Painter also cite Exec. Order No. 12,674 § 101(a), 3 C.F.R. 215 (1990) ("Public service is a public trust."), as modified by Exec. Order No. 12,731, 3 C.F.R. 306 (1991) (codified at 5 U.S.C. §§ 7301, 7351, 7353 (2006)).

101 *See* David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. Rev. 1011 (2011).

102 *Id.* at 1014-16.

103 *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L. J. 625 (1995).

in the corporate setting the law concerning loyalty has been characterized as comparatively "simple,[104] and, more generally, "homogenized."[105] While Julian Velasco argues that fiduciary duty can be deconstructed into five aspects, he acknowledges that it is commonly and most widely understood as entailing two main duties: the duty of care and the duty of loyalty.[106] He further explains that while alleged breaches of the duty of care have been protected by the business judgment rule, alleged breaches of the duty of loyalty have been more likely to lead to liability.[107]

While there is ambiguity surrounding several issues, such as whether the business judgment rule applies to officers and not just directors,[108] Delaware jurisprudence has reasserted that the duty of loyalty is the "the most critical" core requirement of a fiduciary.[109] As clarified by recent prominent cases, just a failure to show care can lead to the finding that there is a lack of good faith and therefore a lack of loyalty.[110] In other words, carelessness alone can provide grounds for ruling that there was a failure to be loyal. Cases where there is an overt and obvious conflict of interest are even more clearly a breach of fiduciary duty. The existence of an undisclosed conflict of interest provides shareholders with grounds to remove a director.[111] Removal (or impeachment) may not be the only remedy for conflicts of interest where federal officials—including the President—are concerned. We contend that the Emoluments Clauses provide a different, and less drastic, remedy. Declaratory relief, as well as an injunction, is the relief sought in the emoluments lawsuits against the President.[112]

VI. The Emoluments Lawsuits Against President Trump

Although President Trump has likely been—based on our foregoing analysis—in violation of the Emoluments Clause as soon as he took the oath of office on January 20, 2017, there was no likelihood that a GOP-led Congress would begin a legal challenge. Congressional GOP leaders had a large legislative agenda of their own, including infrastructure projects, tax cuts, deregulation, and ending the Affordable

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104 Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?* 83 S. Cal. L. Rev. 1231, 1233 (2010).

105 Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. Kan. L. Rev. 923, 924-25 (2013).

106 *Id.* at 1234-37.

107 *Id.* at 1233.

108 *See* Gantler v. Stephens, 965 A.2d 695, 708-09 & n.37 (Del. 2009) (holding that officers have fiduciary duties equal to those of directors, though consequences may differ), and Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 Bus. Law. 865 (2005) (stating that the protection of the business judgment rule should apply with equally to officers and directors).

109 Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 Geo. L.J. 629, 696 (2010).

110 *Id.* at 694-96.

111 Elizabeth M. Dunshee et al., *Overcoming the Challenge of Director Misconduct*, Business Law Today, (American Bar Association, July, 2015); http://www.americanbar.org/publications/blt/2015/07/02_juvan.html.

112 E.g., as noted in District of Columbia. v. Trump, 315 F. Supp. 3d at 877-78.

Health Care Act.[113] Three days after the Inauguration of President Trump, the non-profit CREW (Citizens for Responsible Ethics in Washington) filed a lawsuit against President Trump based on the Emoluments Clause.[114] Although the case was dismissed in December of 2017, important issues were raised that bear on two significant cases brought in 2017 as well, cases that have thus far survived motions to dismiss, as discussed below. [115]

The legal brain trust behind CREW's lawsuit was an impressive roster of leading Constitutional law scholars, including Edward Chemerinsky, Laurence Tribe, and Zephyr Teachout. The lawsuit was filed in the Federal Court for the Southern District of New York on January 23rd, and claimed standing on the basis of the considerable drain on the organization's resources for education and research needed because of Mr. Trump's continuing foreign interests.

The standing issue is a threshold inquiry, and could be used by judges as a means to dismiss the case and avoid dealing with the more politically charged issues. A majority on the Supreme Court sided with Justice Scalia in a sequence of decisions during the 1990s creating a much stricter set of standing tests.[116] To establish "the irreducible constitutional minimum of standing," a plaintiff must "clearly ... allege facts demonstrating" that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." [117] An "injury-in-fact" has been defined as '"an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[118]

These tests amount to malleable yet effective tools for dismissing cases that would involve difficult public policy issues; they have even been applied when federal laws clearly spelled out the right of any citizen to bring a suit in court.[119] CREW had a relatively weak standing claim, as its "injuries" were alleged to be the "drain on the organization's resources." CREW amended its complaint to add several plaintiffs with more concrete and particularized interests, adding as plaintiffs Jill Phaneuf, who books events for the Carlyle Hotel and the Glover Park Hotel in Washington, and Restaurant Opportunities Centers United, Inc. Both alleged tangible financial harm from the new Trump International Hotel on Pennsylvania Avenue, with more particularity than CREW could muster with its "drain on the

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113 Jessica Taylor, *GOP Leaders Ready to Pivot from 'Do Nothing' to Doing a Lot in 2017*. NPR Politics, Jan. 2, 2017. Available at https://www.npr.org/2017/01/02/507582299/gop-leaders-ready-to-pivot-from-do-nothing-to-doing-a-lot-in-2017.

114 The CREW website provided a press release dated Jan. 22, 2017, entitled "Crew Sues Trump Over Emoluments." http://www.citizensforethics.org/press-release/crew-sues-trump-emoluments/.

115 Both the Congressional Democrats case (*Blumenthal et al. v. Trump*) and the D.C.—Maryland v. Trump cases have thus far overcome the "standing" objections of the President. *See* Blumenthal et al. v. Trump, 2018 U.S. Dist. LEXIS 167411 (Sept. 28, 2018), and District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018).

116 *See* Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, 14 J. Envtl. L. & Litig. (2009).

117 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

118 *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

119 Sulkowski, *supra* note 116.

organization's resources" allegation. [120] Indeed, they represent the parties who most obviously suffered business losses due to Trump's ownership of the new Trump International Hotel on Pennsylvania Avenue. They can point out that individuals representing foreign interests and domestic interests have opted to frequent and stay at the Trump International Hotel.[121] Representatives of foreign interests were staying at Trump's hotel so that in meetings they could mention it and compliment him.[122] According to one report, Trump's organization may be going so far as to pressure representatives of foreign interests to change their plans and take their business to his hotel in Washington.[123]

But the opinion of Judge George W. Daniels in December, 2017 rejected not only the standing of CREW, but also the standing of the additional plaintiffs.[124] Judge Daniels dismissed the CREW lawsuit granting the President's motion to dismiss for lack of subject matter jurisdiction. His analysis of the standing issue consisted of sixteen pages, and should be compared to the standing analysis of Judge Peter Messitte in another emoluments case brought by the Attorney Generals of D.C. and Maryland.[125] Judge Daniels reviewed the plaintiffs' competitive injury claims and the prospects that they could, at a trial, actually demonstrate injury that could be redressed. He concluded that the plaintiffs "have failed to properly allege that Defendant's actions *caused* Plaintiffs competitive injury and that such an injury is *redressable* by this Court. Article III 'requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and for which 'prospective relief will remove the harm.'"[126]

Judge Daniels determined it to be "wholly speculative whether the Hospitality Plaintiffs' loss of business is fairly traceable to Defendant's 'incentives' or instead results from government officials' independent desire to patronize Defendant's businesses."[127] Because the President had amassed considerable wealth and fame before he took office, he would be competing against the Hospitality Plaintiffs in any case, and it was "only natural" that interest in his properties "has generally increased since he became President."[128] Judge Daniels noted a number of reasons

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120 Sharon LaFraniere, *Watchdog Group Expands Lawsuit Against Trump*, Apr. 17, 2018, N.Y. Times. https://www.nytimes.com/2017/04/18/us/politics/trump-crew-lawsuit-constitution.html.

121 Jonathan O'Connell and Mary Jordan, *For Foreign Diplomats, Trump Hotel Is the Place to Be*, Wash. Post, November 18, 2016. https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.bc0de2220dc4.

122 *Id.*

123 Sophia Tesfaye, *Trump Organization Applies "Political Pressure" on Foreign Diplomats to Stay at Donald Trump's D.C. Hotel: Report*, Salon, Dec. 20, 2016. http://www.salon.com/2016/12/20/trump-organization-applies-political-pressure-on-foreign-diplomats-to-stay-at-donald-trumps-d-c-hotel-report/.

124 Citizens for Responsibility & Ethics in Washington (CREW) v. Trump, 276 F.Supp.3d 174 (S.D.N.Y. 2017).

125 Reasonable minds — and reasonable judges— can and will differ in analyzing standing issues. There is merit in Judge Daniels' opinion dismissing the CREW lawsuit for lack of standing, and there is merit in Judge Missette's opinion approving standing for D.C. and Maryland in their emoluments lawsuit.

126 CREW v. Trump, 276 F. Supp. 3d at 185.

127 *Id.* at 186.

128 *Id.*

other than Mr. Trump's Presidential profile why patrons might choose to visit Defendant's hotels and restaurants, "including service, quality, location, price and other factors related to individual preference."[129]

In addition, Judge Daniels also concluded that, at least with respect to claims under the Foreign Emoluments Clause, conflicts between Congress and the Executive Branch are best left to the political process. "If Congress wishes to confront Defendant over a perceived violation of the Foreign Emoluments Clause, it can take action. However, if it chooses not to, "it is not [this Court's] task to do so."[130]

The "political question doctrine" bars judges from deciding cases that are inappropriate for judicial resolution based on a lack of judicial authority or competence, or other prudential considerations. As stated by the Supreme Court in *Baker v. Carr,* a case may be dismissed on the basis of the political question doctrine if there exists: [l] a textually demonstrable constitutional commitment of the issue [at hand] to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[131]

Judge Davis finds that the "explicit language" of the Foreign Emoluments Clause requires dismissal for non-justiciability. That is, dismissal is required even if he had found that plaintiffs had standing. He writes:

> "As the explicit language of the Foreign Emoluments Clause makes clear, this is an issue committed exclusively to Congress. As the only political branch with the power to consent to violations of the Foreign Emoluments Clause, Congress is the appropriate body to determine whether, and to what extent, Defendant's conduct unlawfully infringes on that power. If Congress determines that an infringement has occurred, it is up to Congress to decide whether to challenge or acquiesce to Defendant's conduct. As such, this case presents a non-justiciable political question."[132]

A different judge might have construed the Foreign Emoluments Clause as not requiring Congress to demand a process of consent, but to put the initiative on the President to ask for consent. The plain language of the clause does seem to imply a Presidential duty to ask permission rather than a Congressional duty to demand information about the President's foreign or domestic emoluments. The assumption would be that in "normal times," a conscientious president would self-regulate and seek to avoid all appearance of a conflict of interest; but, as many have noted, these are not "normal times" in the U.S., nor is this a normal President. Long-time

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129 *Id*.

130 *Id.*

131 Citing Baker v. Carr, 369 U.S. 186, 217 (1962). Note that "or" denotes that any of these conditions may give rise to judicial abstention in a particular case.

132 CREW v. Trump,, 276 F. Supp. 3d at 193.

Republicans, such as Peter Wehner, have even suggested that Trump manifests "full scale corruption." He claims

> ... the greatest damage is being done to our civic culture and our politics. Mr. Trump and the Republican Party are right now the chief emblem of corruption and cynicism in American political life, of an ethic of might makes right. Dehumanizing others is fashionable and truth is relative. ("Truth isn't truth," in the infamous words of Mr. Trump's lawyer Rudy Giuliani.) They are stripping politics of its high purpose and nobility.[133]

Washington politics—especially the workings of the U.S. Congress for many years—now seem neither purposeful nor noble, and a strong case can be made that because of gerrymandering, money in political campaigns, and other factors, Congress has become radically dysfunctional.[134] While some members of Congress are concerned about the emoluments issue, they are all Democrats, and are–as of the time of this writing–in a minority in both the House and Senate. 200 Democrats brought an emoluments lawsuit in June of 2017,[135] and predictably the threshold arguments were about standing and "the political question" doctrine.[136] Norm Eisen, who is co-counsel on the case and also a principal of CREW, noted that since Judge Daniels had pointed to Congress as the appropriate branch to provide a remedy, members of Congress had "special standing" to claim injury for not being able to vote on (consent to) the President's ongoing train of emoluments.[137] In moving to dismiss the CREW lawsuit, Department of Justice attorneys had argued that Congress had a special capacity to deal with questions related to emoluments.

Attorneys for the Congressional Democrats argued that members of Congress had an individual right to vote on each emolument. [138] However, the language

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133 Peter Wehner, *The Full Spectrum Corruption of Donald Trump*, N.Y. Times, Aug. 25, 2018. https://www.nytimes.com/2018/08/25/opinion/sunday/corruption-donald-trump.html.

134 Thomas Mann & Norman Ornstein, The Broken Branch: How Congress is Failing America and How to Get It Back on Track (2006).

135 Blumenthal et al. v. Trump, 2018 U.S. Dist. LEXIS 167411 (Sept. 28, 2018) (D.C. Cir.) (Sullivan, J.).
The original complaint can be found at https://www.theusconstitution.org/wp-content/uploads/2018/01/Blumenthal_v_Trump_DDC_Original_Complaint_Final.pdf.

136 Ellis Kim, *Judge Grapples with Democrats' Standing in Trump Emoluments Lawsuit*, The Hill, Jun. 7, 2018. https://www.law.com/nationallawjournal/2018/06/07/judge-grapples-with-democrats-standing-in-trump-emolument-lawsuit/.

137 Tom Hamburger & Karen Tumulty, *Congressional Democrats to File Emoluments Lawsuit Against Trump*, Wash. Post, June 14, 2017. https://www.washingtonpost.com/politics/congressional-democrats-to-file-emoluments-lawsuit-against-trump/2017/06/13/270e60e6-506d-11e7-be25-3a519335381c_story.html?utm_term=.53e46acac41c. Rudy Giuliani, representing the President's legal team in the summer of 2018, said on Meet the Press that "Truth isn't truth." In May of 2018, regarding the Mueller investigation, Giuliani told the Washington Post interviewer that "They may have a different version of truth than we do." Rebecca Morin & David Cohen, *Giuliani: Truth Isn't Truth.* Politico, Aug. 19, 2018. https://www.politico.com/story/2018/08/19/giuliani-truth-todd-trump-788161. For a timeline of the investigation into possible connections between Russia and the 2016 campaign, see Mike Levine, *The Russia Probe: A Timeline From Moscow to Mueller*, ABC News, Aug. 28, 2018. https://abcnews.go.com/Politics/russia-probe-timeline-moscow-mueller/story?id=57427441.

138 Blumenthal v. Trump, 2018 U.S. Dist. LEXIS 167411 at 6. (D.C. Cir.)(Sullivan, J.)

of the Constitution speaks about Congress collectively, and does not seem to give individual Senators or Representatives a right to vote on every emolument. Accordingly, the President's attorneys argue that Congress must speak collectively, not individually.[139] But if the President does not ask for Congressional consent, and Mr. Trump clearly will not, what does Congress do then? Suppose a bipartisan resolution asking the President to provide a listing of all emoluments passes both chambers, but Mr. Trump then refuses to comply. Or suppose that, in 2019, the new Chair of the House Ways and Means Committee subpoenas Trump's tax returns from the IRS? Will the President order the IRS not to cooperate? Could he invoke executive privilege over tax return information about his business dealings undertaken prior to the Presidency?

Clearly, the judiciary will be involved in the "political question" at the point where one branch refuses to cooperate with the other; such non-cooperation between executive and legislative branches is no mere thought experiment. The Supreme Court confronted just such non-cooperation in the Nixon tapes case.[140] The Framers included a judicial branch to balance the Legislative and Executive branches, and the Supreme Court has had to intervene to decide whether the President was exceeding his Constitutional powers.[141]

The attorneys general of Maryland and the District of Columbia do believe that the judiciary has a role to play in interpreting and applying both the foreign and domestic Emoluments Clauses. Shortly before the Congressional Democrats filed their lawsuit, Maryland and the District of Columbia filed suit in the federal district court of Maryland.[142] In March 2018, Judge Peter J. Messitte found that the plaintiffs had standing to bring the lawsuit, and declined to dismiss on the basis of the "political question doctrine."[143] In July 2018 in a second opinion, Judge Messitte dealt extensively with the definition of emoluments.[144] As these opinions are the most in-depth examination of the two Emoluments Clauses as of September 2018, we will describe his findings and rationale for all three key issues.

A. Standing

The issues on standing are sufficiently complicated that readers may lose patience with all of the argumentation. But for the sake of completeness we will here survey Judge Messitte's findings and conclusions regarding those issues in the Maryland––D.C. emoluments case against President Trump. In brief, he finds that there are sufficient grounds to grant standing to the plaintiffs, and rejects some of the President's positions. But, as noted below, his determinations may be overturned on appeal, just as Judge Daniels' findings as to lack of standing for CREW and its individual plaintiffs may be overturned on appeal.

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139 *Id.,* at 37-39. Ultimately, Judge Sullivan rejected the President's arguments, and found that the Congressional plaintiffs have standing to argue for declaratory and injunctive relief on the basis of the foreign Emoluments Clause. *Id.* at 60-61.

140 United States v. Nixon, 418 U.S. 683 (1974).

141 Alicia Parlapiano & Wilson Andrews, *Limits on Presidents Acting Alone*, N.Y.Times, Jan. 20, 2015.

142 District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018).

143 *Id*.

144 District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018).

Judge Messitte recites the usual tests for standing,[145] but emphasizes that states are not "normal litigants for the purposes of invoking federal jurisdiction" and are entitled to "special solicitude" in the standing analysis.[146] There could, he noted, be an " invasion of three types of unique State interests justifying standing that were identified by the Supreme Court in being (a) sovereign interests; (b) non-sovereign interests; and (c) quasi-sovereign interests."[147] Judge Messitte's opinion focuses on the quasi-sovereign interests of both D.C. and Maryland, and includes its capability to sue based on *parens patriae*, the principle that political authority carries with it the responsibility for protection of citizens.

States in the U.S. federal system have a "quasi-sovereign-interest" in not being treated discriminatorily; to be treated so is to "deny a state its rightful status within the federal system."[148] States also have an interest in the health and well-being—both physical and economic—of their residents.[149] Taking that interest into account, the Supreme Court has said that the State may sue in its capacity as *parens patriae.* But the State must be more than a nominal party, meaning that it must allege more than an "injury to an identifiable group of individual residents."[150]

Judge Messitte dispenses with D.C. and Maryland's sovereign and non-sovereign interest claims, but does find injury in fact to its quasi-sovereign interests, as well as its *parens patriae* interests. The plaintiffs' argument was that, as states, they have been put into an "intolerable dilemma," as they are "forced to choose between granting the Trump Organization's requests for special concessions, exemptions, waivers, and the like, thereby losing revenue, and, on the other hand, denying such requests and risk being placed at a disadvantage *vis-à-vis* other States that already have been or may in the future be constrained to grant such concessions."[151] Because this dilemma supposedly violates the "fundamental principle of *equal* sovereignty among the States,"[152] Plaintiffs claim injury-in-fact, and therefore have standing to protect their "position among ... sister States."[153]

The President's position is that these claimed injuries are based on a "speculative chain of possibilities," such that they cannot be deemed "certainly impending."[154] Maryland, the President's lawyers point out, "has not alleged that it is faced with any threatened need to grant concessions to him or his Organization. In fact, according to this argument, the Amended Complaint does not even allege that the Trump Organization or the President do any business in Maryland." [155] While the District of Columbia is home to the Hotel, the President argues that if the District were to provide special treatment, it would be a "self-inflicted

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145 291 F. Supp. 3d 725,737.

146 *Id*. (citing *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007).

147 *Id.* at 737.

148 *Id.* at 737 (citing Alfred L. Snapp & Son, Inc., v. Puerto Rico ex rel. Barez, 458 U.S. 601, at 607).

149 *Id.*

150 *Id.*

151 *Id.* at 740.

152 *Id.* (citing *Shelby Cty. v. Holder*, 570 U.S 529, 544 (2013)). ("At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.").

153 *Id*. (citing *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 451 (1945)).

154 *Id*. at 741.

155 *Id*.

injury."[156] Moreover, it is "purely conjectural" that other States might grant favors or concessions to the President's businesses in violation of their own laws, and even more conjectural to suppose that he would retaliate against Plaintiffs if they failed to grant such concessions.[157] Thus, there is no "injury-in-fact" that would grant recognizable standing status under Article III.

Judge Messitte, however, notes that the Trump Organization has been granted tax concessions by at least the District of Columbia and the State of Mississippi. The District's tax authorities granted the Hotel a reduction in its 2018 tax bill for a savings of $991,367.00. Moreover, Judge Messitte stated that although tax authorities in the District of Columbia said that these tax concessions were merely "routine," there is no reason for judges to simply take their word for it; he sees a possibility that the District of Columbia may have felt itself effectively "coerced" into granting special concessions to the Hotel and that Maryland may feel itself under pressure to respond in similar fashion.[158] For example, as reported in the press, Governor Paul LePage of the State of Maine stayed at the Hotel on an official visit to Washington during the spring of 2017, met with the President, and then appeared with the President at a news conference at which the President gave something that Maine wanted; an executive order to review national monuments that are part of the National Park Service, which could apply to a park and national monument in Maine, which President Obama had established over LePage's objections in 2016.[159]

In Judge Messitte's view, these circumstances do not involve "numerous inferential leaps" to demonstrate injury to the quasi-sovereign interests of Maryland and the District of Columbia. "At least with respect to the D.C.-based Hotel's operations, Plaintiffs have adequately demonstrated that their quasi-sovereign interests in this particular way have been injured-in-fact."[160] Still, the President argues, Plaintiffs' alleged injuries are highly speculative, quite far from "certainly impending" in nature. It is not enough, says the President, for Plaintiffs to merely allege that they compete with the Hotel. They must show an "actual or imminent increase in competition, which increase ... will almost certainly cause an injury-in-fact."[161] The President claims that entities in which Plaintiffs claim a proprietary interest are not really comparable to the Hotel, and, given substantial differences between the venues and the "diffuse and competitive" hospitality market in the area, Plaintiffs have not met their burden.[162]

As to injuries to D.C.'s quasi-sovereign interests, Judge Messitte relies on the testimony of Rachel Roginsky, a private consultant with expertise in assessing competition in the hotel industry, who indicated that both the Washington Convention Center and the Hotel host events and meetings for up to 1,200 people and offer overlapping services for such events, including high-end catering and customized menu planning. Because of their close proximity—less than one mile apart—both the Washington Convention Center and the Hotel are equally accessible to federal agencies, law firms, and large businesses that would seek to use the spaces. She

156 *Id.*
157 *Id.*
158 *Id.* at 742.
159 *Id.*
160 *Id.*
161 *Id.* at 743 (quoting *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010)).
162 *Id.*

also concludes that both facilities are of "similar class and image."[163] Additionally, Events D.C., a District of Columbia-controlled entity, caters to both foreign and domestic governments and a portion of its revenue is based on demand for use of the Washington Convention Center. He notes that the Washington Convention Center has previously hosted the Food and Drug Administration, the Treasury Department, and the Department of Commerce.[164]

The State of Maryland does have 39,000 square feet of meeting and event space at the Bethesda Marriott Conference Center, which competes directly with the Trump Hotel's 38,000 square feet of meeting and event space. The Conference Center has a large ballroom, has hosted embassy events in the past, and, compared with the Hotel, is roughly equidistant from many foreign embassies. In fact, Plaintiffs cite specific instances of foreign governments foregoing reservations at other hotels in the arena and moving them to the President's Hotel (noting that both Kuwait and Bahrain moved events from the Four Seasons and Ritz Carlton to the Hotel after the President was elected).[165] Statements from foreign diplomats have confirmed that they will almost certainly be doing likewise.

Against this, the President argues that even if Plaintiffs could bring this suit against the Federal Government, *parens patriae* standing would still fail because Plaintiffs have not alleged a concrete injury, and to bring a *parens patriae* action, the State must be "more than a nominal party," it must allege an injury suffered by a "substantial segment of its population."[166] According to the President, the Amended Complaint does not plausibly allege such an injury, positing instead a general injury caused by a single Hotel to no more than an "identifiable group of individual residents," which is not sufficient.

Yet Judge Messitte was satisfied that both the District of Columbia and Maryland are more than nominal parties. "They allege competitive injuries affecting a large segment of their populations. The Amended Complaint alleges that in 2014, visitors to the District of Columbia generated approximately $6.81 billion in spending and drove $3.86 billion in wages for 74,570 employees engaged in the hospitality industry."[167] In the Court's view, that is enough, as a "large number of Maryland and District of Columbia residents are being affected and will continue to be affected when foreign and state governments choose to stay, host events, or dine at the Hotel rather than at comparable Maryland or District of Columbia establishments, in whole or in substantial part simply because of the President's association with it."[168] He sees the Plaintiffs as trying to protect a large segment of their commercial residents and hospitality industry employees from economic harm.

These arguments could have gone the other way. A different trial judge, like Judge Daniels, could have determined that the damages were speculative, not well-enough defined, and therefore not a traceable "injury-in-fact" that would create standing. As the question of standing is a mixed question of law and fact for judges to determine, appellate judges are free to overturn such findings if they believe the law was incorrectly applied to all the facts of the case that are part of the record on

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163 *Id.* at 744.
164 *Id.* at 744-45.
165 *Id.* at 745.
166 *Id*. at 746 (citing *Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. at 607 (1982)).
167 *Id*. at 747-48.
168 *Id*. at 748.

appeal. The Fourth Circuit could so do without having to give a presumption of a fair hearing to the trial judge; ordinarily, appellate courts will accept a trial judge's findings of fact and conclusions of law that are not "clearly erroneous." Given the importance of this issue, the Fourth Circuit Court of Appeals could determine that the motion to dismiss should have been granted, either on standing or the political question doctrine issue.

B. The Political Question Doctrine

In his March 2018 opinion on standing, described above, Judge Messitte also addresses the political question doctrine, stating that the Emoluments Clauses do create a private right of action, that equitable relief against the President was well within the Supreme Court's earlier precedents, and disagrees with the conclusion reached by Judge Daniels in *CREW et al. v. Trump* that the Framers did not have competitors in mind when they composed the Emoluments Clauses. Judge Messitte writes that this would imply that "no competitors anywhere are ever within the zone of interests of the Clauses. But the Emoluments Clauses clearly were and are meant to protect all Americans."[169] Under the President's interpretation, he notes, only Congress would ever be able to enforce these constitutional provisions.

He first notes that only the Foreign Emoluments Clause mentions Congress.[170] "To the extent the domestic emoluments clause gives states a cause of action, it is direct. Congress has no role to play."[171] As to the Foreign Emoluments clause granting Congress the power to consent to the receipt of certain emoluments by the President, Judge Messitte does not see in the Clause a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[172] For the proposition that the separation of powers doctrine[173] does not bar every exercise of jurisdiction over the President, he cites *Clinton v. Jones* (the Paula Jones case allowing a civil suit to go forward against a sitting President for acts committed prior to the Presidency).[174] Directly contrary to Judge Daniels' ruling in the CREW case, Judge Messitte finds that "a plain reading" of the Foreign Emoluments Clause "compels the conclusion that receiving emoluments ... is impermissible unless and until Congress consents."[175]

C. The meaning of "emoluments"

Judge Messitte's second opinion, from July 2018, provides the usual factual and procedural background, addresses standards for constitutional interpretation, and the meaning and application of the Emoluments Clauses.[176] In applying the clauses, he considers the President's motion to dismiss for failure to state a claim on which

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169 District of Columbia v. Trump, 291 F. Supp. 3d 725, 755 (2018).
170 *Id.*
171 *Id*. at 756.
172 *Id*.
173 *See* T.J. Halstead, *The Separation of Powers Doctrine: An Overview of its Rationale and Application*, Congressional Research Service (1999).
174 Clinton v. Jones, 520 U.S. 681, 703 (1997).
175 District of Columbia v. Trump, 291 F. Supp. 3d 725, 756 (2018).
176 District of Columbia v. Trump, 315 F. Supp. 3d 875, 901-04 (2018).

relief can be grounded under Federal Rules of Civil Procedure Rule12(b)(6). In support of the motion to dismiss, the President asserted that an emolument pertains "only to a payment made in connection with a particular employment over and above one's salary, as, say, President of the United States, so that payments to a federal official for any independent services rendered ... are entirely separate and apart from an 'emolument' paid to the President qua President."[177]

To interpret constitutional provisions, Judge Messitte relies on standard judicial processes such as considering the provision's text, history, and purpose, as well as executive branch precedents interpreting it. He rejects the argument that the Presidency is not an "Office of Profit or Trust under [the United States]."[178] The standard litany of interpretive approaches to the Constitution includes strict constructionism, originalism and original meaning, the purposive approach and the "living Constitution."[179] Strict constructionism relies heavily on the language of the text itself, coupled with the meaning of that text to those who wrote it, in this case, the Framers. Messitte surveys all parts of the Constitution to consider its various uses of "Office" and finds that an "Office of Profit of Trust" must include the Presidency. He also supplies a lengthy exegesis on the original public meaning and purpose of the words "Office of Profit or Trust," relying on the Federalist Papers, how the terms were used in dictionaries at the time, and executive branch practices over the years.[180]

As to the meaning of "emoluments," whether foreign or domestic, the Department of Justice in the Trump Administration has defended President Trump in this and other emoluments lawsuits, and its positions have been consistent: there is no "emolument" where the President in his personal capacity gains materially for non-official duties. That is, unless the President explicitly trades on his political position for some form of gift or income, there cannot be an "emolument" as the Framers understood the term. Judge Messitte does not agree. Following a process of strict construction, Judge Messitte takes a deep dive into textual analysis, the use of the term "emolument" in the Incompatibility Clause,[181] arguments over rules of construction such as *noscitur a sociis*, and comparisons between the Foreign Emoluments Clause and the Domestic Emoluments Clause.[182] He concludes that textual analysis favors a broad meaning for "emoluments" as profit, gain, or advantage; the narrower meaning urged by the President would require

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177 *Id*. at 880 (referencing Def.'s Mot. Dismiss, Sept. 29, 2017).

178 The argument was made by Professor Seth Tillman, as *amicus curiae*. Br. for Scholar Seth Barrett Tillman & The Judicial Education Project as *Amici Curiae* in Support of Def. (Oct. 6, 2017), ECF No. 27- 1 (Professor Tillman), at 2, 4. Tillman's argument was based on a distinction between appointed positions and elected ones. Judge Messitte noted the potentially "bizarre consequences" from Tillman's interpretations: District of Columbia v. Trump, 315 F. Supp. 3d 875, 884 (fn 17), citing Saikrishna Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L Pub. Pol'y 143, 149-51 (2009).

179 District of Columbia v. Trump, 315 F. Supp. 3d 881.

180 *Id*. at 889 – 94 and 899 –903.

181 The Incompatibility Clause, U.S. Const. art.I, §6, cl.2, provides: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."

182 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 885-89.

characterizing an emolument as "the receipt of compensation for services rendered by an official in an official capacity."[183] This narrowing, however, makes the taking of emoluments equivalent to the crime of federal bribery. That crime prohibits a federal public official from receiving or excepting "anything of value" in return for "being influenced in the performance of any official act."[184] Article II, Section 4 of the Constitution already addresses the crime of bribery, making it an impeachable offense.[185]

Judge Messitte also looks at the "original public meaning" of the term to consider what ordinary citizens at the time of the Nation's founding would have understood it to mean. The President cites somewhat more obscure dictionaries than the plaintiffs do, but even those included alternative definitions that aligned with the plaintiffs' interpretations.[186] Given the insistence by Justice Antonin Scalia that "original meanings" mattered in questions of constitutional interpretation, Judge Messitte plays a trump card in appealing to the four dictionaries which were deemed by Justice Antonin Scalia and Bryan A. Garner to be "the most authoritative English dictionaries from 1750–1800." These aligned with plaintiffs' interpretation of "emolument" as variously defined as "profit," "gain," or "advantage."[187] Further, in notes of the debates of the Constitutional Convention, "there are several instances of delegates discussing 'emoluments' in a sense that cannot be logically read to mean simply payment for services rendered in an official capacity."[188]

Judge Messitte also engages in a "purposive" approach to interpretation, going beyond the text to consider what purpose the Framers most likely had in mind when drafting the two Emoluments Clauses. Did they intend a bulwark against Presidential conflicts of interest where state and foreign governments might seek influence? Plaintiffs cited various Federalist Papers, comments made by delegates to the Constitutional Convention, and several pre-constitution state laws that were intended to discourage conflicts of interest by public officials. The President, by contrast, argued that the Framers were most concerned in the Foreign Emoluments clause with European sovereigns bestowing gifts on American diplomats, like the gifts from Louis XVI.[189] As Judge Messitte puts it, "The President submits that it is more likely that the Framers wanted to prevent incidents such as these rather than to prevent federal officials from maintaining private businesses."[190] As to the domestic clause, the President argued that the purpose was to make sure that the President's compensation would remain unaltered during his term of office, not prevent him from conducting private business like any other citizen; the plaintiffs' interpretation would mean that Presidents and other federal officials could not hold stock in a global company "if some of that company's earnings could be traced to foreign governments." [191]

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183 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 888.
184 18 U.S.C. § 201(b)(2).
185 U.S. Const. art. II, §4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."
186 District of Columbia v. Trump, 315 F. Supp. 3d 881 at 891.
187 *Id.*
188 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 892-93.
189 *Id*. at 894.
190 *Id*.
191 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 896.

Judge Messitte does not find these arguments convincing. First, he critiques the President's chosen example of not being allowed to have stock in a global company that might have some earnings derived from foreign governments as being a "trifle," and that the Framers were "fundamentally concerned with transactions that could potentially influence the President's decisions in his dealings with specific foreign or domestic governments, not with *de minimis* situations."[192] Contrasting stock in a global company with Trump's ownership of his D.C. hotel, Judge Messitte finds it "highly doubtful" that such holdings would have the potential to unduly influence a public official. On the other hand, sole or substantial ownership of a business "that receives hundreds of thousands or millions of dollars a year in revenue from one of its hotel properties where foreign and domestic governments stay" would certainly raise the potential for undue influence, especially where governments are staying there with the "express purpose of cultivating the President's good graces."[193]

As to intent, or purpose, Judge Messitte sees the historical record as reflecting "an intention that the Emoluments Clauses function as broad anti-corruption provisions." [194] In essence, he agrees with Zephyr Teachout's analysis of the Framers' experience with corruption and their intent.[195] He again notes that the President's narrow interpretation of the Emoluments Clauses would make it an anti-bribery provision, not an anti-corruption provision; this makes the clauses redundant, and gives no credence to what the Framers knew so well from their experience: that people in positions of political power can be subconsciously swayed by making large sums of money from foreign and domestic governments. It is difficult to prove that someone in public life has actually engaged in a *quid pro quo* with a domestic or foreign government,[196] and corruption does not include only "bribes and theft from the public till."[197]

Thus, altogether banning offerings from domestic and foreign governments—unless Congress approves them—is the most reasonable explanation for the Constitution's Emoluments Clauses. He cites both Virginia and Pennsylvania laws and declarations from 1776 to demonstrate awareness among the Framers that beyond a fixed salary, additional "emoluments" should not accrue to a public servant because of his political position.[198] The concept here sounds familiar: elected politicians should not take bribes, should not put their hands in the public till, and should hold office as a public trust, just as a corporate officers or directors should take seriously the fiduciary duties that come with their offices.[199]

After an extensive review of Executive Branch precedent and practice,[200] Judge Messitte applies the Emoluments Clauses and finds potential violations of the Foreign Emoluments Clause with foreign governments patronizing the Trump International Hotel.[201] As to the Domestic Emoluments Clause, he finds

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192 *Id.* at 899.
193 *Id.*
194 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 896.
195 See *supra*, notes 14-26 and accompanying text.
196 District of Columbia v. Trump, 315 F. Supp. 3d at 881, 897.
197 *Id.,* quoting Teachout, *supra* note 14, at 2.
198 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 898.
199 See *supra* notes 95-112 and accompanying text.
200 District of Columbia v. Trump, 315 F. Supp. 3d 875, 901-05 (2018).
201 *Id*. at 905.

that the President may have unlawfully benefitted from the Government Services Administration (GSA) lease of the Old Post Office Building to the hotel,[202] and from patronage of the Hotel by state governments, and by tax concessions from the D.C. Government.[203] On a motion to dismiss by the President, a trial judge must only judge whether the allegations "plausibly state a claim" under either emoluments clause. Depending on the evidence at trial, then, the plaintiffs could establish that the President's receipt of these emoluments is unconstitutional. Discovery of relevant evidence for trial purposes was left to a joint recommendation process, with agreement due in September 2018.[204] Regardless of the outcome of the D.C.—Maryland lawsuit and the Congressional Democrats lawsuit, all the emoluments lawsuits filed since the Inauguration of the 45th U.S. President identify a fundamental problem of governance in the public interest colliding with the private interests of Donald J. Trump. He appears to see no separation, and what remains is whether either Congress or the Courts will address a Constitutional issue that has been dormant for nearly 230 years.

VII. Conclusion

The Emoluments Clauses are federal public officials' equivalent of the fiduciary duty owed by trustees and corporate managers and directors. It is difficult to discern why the public sector should have different "ethics" from the private sector, since both are managed by people with possible conflicts of interest. Absent any specific law on point, one could attempt to argue that there are differences, in that a trustee takes care of other people's money with very specific obligations to particular people, and a corporate manager has fiduciary duties ("the utmost care") to the company and its investors, while a public official's duties are to a more general set of stakeholders. However, as we have reviewed, there is a basis in the U.S. Constitution, the Federalist Papers, historical precedent, and related scholarship that public officials, like private sector managers, have duties to avoid confcts of interest.

We contend that, for purposes of interpreting the Emoluments Clauses, it is unlikely that the Framers would have assumed that the President could not have conflicts of interest. Given their historical experience, their reading of Gibbons' *Decline and Fall of the Roman Empire*, and the influence of John Locke's philosophy, the Framers would have seen the government generally—and not just particular offices of the government—as being trustee of the rights of the citizenry.[205] To the Framers, the social contract was clear: government received its power from the consent of the governed, and was to insure the rights of life, liberty, and the pursuit of happiness. The people retained the right to overthrow that government if it failed

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202 *Id*. at 906.
203 *Id*. at 907.
204 *Id*.
205 The Internet Encyclopedia of Philosophy, John Locke: Political Philosophy. ("For Locke, government is no more than a tool that continuously depends on the consent of the people and must not violate the maximum conditions of securing peace and property – to do so is to violate the trust that is afforded the institution.") http://www.iep.utm.edu/locke-po/#SH6d.

in its duties to protect those rights. In short, government (including the Executive branch) only has the power accorded to it by the people. Likewise, a trustee or a corporate manager should only exercise the powers given to them, and must do so in care of the rights of others.

This article has tried to make clear that the Framers had a clear understanding of corruption, an understanding that deeply mistrusted power and influence in all of its forms. They hoped for political leaders with civic virtue, but were realistic enough to provide a restraining effect on those public officials that might prefer power and money to serving the public good. We can see this in the separation of powers provided for in the Constitution: "checks and balances" as safeguards against what they understood to be well-known temptations and systemic corruption.

Those safeguards include the Emoluments Clauses. The notion that they were directed only toward *quid pro quo* exchanges does not withstand historical scrutiny. In that light, President Trump's businesses, his refusal to divest ownership while carrying out his sworn duties to protect and defend the Constitution of the United States, added to his apparent intention to profit from his position as President, are all violations of the Emoluments Clauses.

As of this writing, the D.C. and Maryland emoluments lawsuit may survive to enter into discovery phase. The 2018 mid-term elections resulted in a Democratic majority in the House of Representatives, triggering possible subpoenas for tax returns and other information by the House Ways and Means Committee. In either scenario, whether it is the result of litigation or a Congressional subpoena, the current constitutional crisis could escalate. Given the complexity of selling off assets that are essentially the Trump name itself, and the probability that Trump might ignore orders to do so, public pressure could increase upon the House of Representatives to take some further action, such as voting on articles of impeachment. But unless two-thirds of the Senate would vote to convict, the President would survive even that process; unless his own party were to agree, which is highly unlikely, there will be no impeachment process for the President's violations of the Emoluments Clauses.

It is emblematic of the political atmosphere in Washington, D.C. that only Congressional Democrats have brought up the Emoluments Clauses. A sustainable political society requires "an aristocracy of virtue and talent" rather than an aristocracy of power and wealth, and political leaders that will put love for the nation's well being above love of self or political power. It is likely that some segment of voters in the U.S. 2016 electorate confused power and wealth with virtue and talent.

Revelations related to potential obstruction of justice by Trump and his associates are rapidly emerging as this article is being written. The Trump presidency may well end for reasons other than conflicts of interest and repeated violations of the Emoluments Clauses. However, when a businessperson with an eponymous global brand also serves as the U.S. President, the political and judicial systems of a functioning democracy should be able to determine the boundaries of what is acceptable in terms of conflicts of interest. We remain hopeful that the U.S. judiciary, or perhaps even Congress, will acknowledge the clear text of the Emoluments Clauses, and affirm the Framers' understanding that a Republic can be corrupted from within by failing to deal with clear conflicts of interest among all of its public officials.