

EMOLUMENTS AND IMPLICATIONS FROM CONFLICT OF INTEREST LAWS AND PRIVATE SECTOR  
FIDUCIARY DUTY

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# EMOLUMENTS AND IMPLICATIONS FROM CONFLICT OF INTEREST LAWS AND PRIVATE SECTOR FIDUCIARY DUTY

## INTRODUCTION

Donald Trump stated that he can discharge his public duties as President while running his private business – and yet have no conflicts of interest.<sup>1</sup> In this article, the ethics of public service and the relatively untested Emoluments Clause of the U.S. Constitution will be considered and contrasted with the jurisprudence surrounding conflict of interest in the private sector. Part I establishes the framers’ understanding of law and ethics for U.S. public service.<sup>2</sup> Part II considers the clause itself, and whether it applies to the office of the President.<sup>3</sup> Part III relates just a few of the foreign-based business interests of the 45<sup>th</sup> U.S. President and how they could compromise his loyal discharge of duties to the nation he serves. Part III also analyzes the President’s plan to avoid conflicts of interest, finds it inadequate, and concludes that only full disclosure of his tax returns would reveal the complete range of conflicts that might color his judgment as President of the United States.<sup>4</sup>

Moving beyond the descriptive to the more normative business ethics issues, Part IV describes the insights of behavioral psychology to demonstrate how common it is for people and politicians to overlook their own conflicts of interest, even where those conflicts strongly influence their decisions.<sup>5</sup> 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 hold the office of president would be untenable in other contexts.<sup>6</sup> Returning to legal issues raised by the President’s conflicts of interest, Part VI describes the federal lawsuit filed by Citizens for Responsibility and Ethics in Washington (CREW). CREW seeks an injunction on Mr. Trump’s holding office while holding various assets subject to foreign governmental influence, and Part IV offers insight into how a challenge to standing could be overcome.<sup>7</sup> Both courts and Congress—the ultimate judges of the President’s conflicts of interest, at least until the next election cycle—should support the original intent and plain meaning of the Emoluments Clause. Without Congressional action, however, it is unlikely that the President’s conflicts of interest will be resolved early in his term of office.

## I. PUBLIC SERVICE ETHICS AND THE EMOLUMENTS CLAUSE

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 or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of

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<sup>1</sup> “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).

<sup>2</sup> See *infra* notes 8–40 and accompanying text.

<sup>3</sup> See *infra* notes 41–49 and accompanying text.

<sup>4</sup> See *infra* notes 50–77 and accompanying text.

<sup>5</sup> See *infra* notes 78–98 and accompanying text.

<sup>6</sup> See *infra* notes 99–113 and accompanying text.

<sup>7</sup> See *infra* notes 114–122 and accompanying text.

any kind whatever, from any King, Prince, or foreign State.”<sup>8</sup> This is often referred to as the Emoluments Clause, a provision that must be read in light of the history that preceded the Framers’ wording.<sup>9</sup>

In the 17<sup>th</sup> 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.”<sup>10</sup> This rule departed from long-standing European diplomatic customs where 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, King Louis XVI 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.<sup>11</sup> In 1785, the King gave Benjamin Franklin a similar miniature portrait, also set in diamonds.<sup>12</sup> Already a “Francophile,” Franklin wanted to keep the box, especially as the diamonds were quite valuable. He asked Congress for permission in 1785, which was granted in 1786.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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 the time the Articles of Confederation were ratified in 1781, Gibbons had published the second and third volumes. In 1788 and 1789, as the Constitution came into effect, the three final volumes were published.

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<sup>8</sup> Article I, section 9, U.S. Constitution.

<sup>9</sup> Neither Article II nor III contain any such provisions. More broadly, it has been noted that rules against conflicts of interest in the executive branch tend to be stricter and more easily enforced than in the legislative branch. *See* Richard Painter, *GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE* (Oxford University Press, 2009). As James Madison wrote, legislators should share a “communion of interests” with their constituents; they arguably cannot represent constituents without also sharing some of their interests. *See Id.* The execution of laws and a constructive collective foreign policy for all the citizens of all the states, on the other hand, logically rests upon an ability to distance oneself from direct connections to particular interests, especially those of foreign governments.

<sup>10</sup> JOHN BASSETT MOORE AND FRANCIS WHARTON, *A DIGEST OF INTERNATIONAL LAW* (1906), at 579.

<sup>11</sup> ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* (2014), at 24.

<sup>12</sup> *Id.* at 24.

<sup>13</sup> *Id.* at 26

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

They told the story of a great empire that rose because of the “moral habits of private men in their public roles”<sup>16</sup> 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.<sup>17</sup> 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. The king habitually used his wealth to influence members of Parliament, not on a *quid pro quo* basis for votes, but to curry favor and influence.<sup>18</sup> 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.<sup>19</sup>

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."<sup>20</sup>

To the framers, then, corruption meant excessive private interests—foreign or otherwise— influencing the exercise of public power.<sup>21</sup> In the Republican tradition, corruption was the cancer of self-love at the expense of country.<sup>22</sup> 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.<sup>23</sup>

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<sup>16</sup> *Id.* at 32.

<sup>17</sup> *Id.* at 32-35.

<sup>18</sup> *Id.* at 35.

<sup>19</sup> *Id.* at 34-35.

<sup>20</sup> ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, THE FEDERALIST (#22), Gideon Edition (1818) at 121-22.

<sup>21</sup> Teachout, *supra* note 11, at 38.

<sup>22</sup> *Id.* at 40. Self-love seems to be central to the personality of the 45<sup>th</sup> President of the United States. See *infra*, notes 87-90 and accompanying text.

<sup>23</sup> Teachout, *supra* note 11, at 40-44.

The framers saw their work as creating a system that would curb excessive greed or abusive power.<sup>24</sup> They believed that controlling and channeling the overweening passions 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<sup>25</sup>—but also the greater and more insidious potential of public officials being bent toward money or power 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. Pinckney “urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence.”<sup>26</sup> At the Virginia convention to ratify the Constitution, Edmund Jennings Randolph explained that the clause was “provided to prevent corruption.”<sup>27</sup>

The moral point of view prescribes 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.<sup>28</sup> It turns out that humans are all too prone to rationalizing their own morally questionable acts.<sup>29</sup> 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.”<sup>30</sup>

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.<sup>31</sup>

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<sup>24</sup> *Id.* at 60-67.

<sup>25</sup> *Citizens United v. FEC*, 558 U.S.310 (2010), opinion of Kennedy, J. 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.

<sup>26</sup> TEACHOUT, *supra* note 11, at 27.

<sup>27</sup> 3 Farrand, the Records of the Federal Convention of 1787, at 327.

<sup>28</sup> 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/>

<sup>29</sup> See *infra*, notes 78–98 and accompanying text.

<sup>30</sup> 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/>

<sup>31</sup> Kenneth Rapoza, *Transparency International Spells it Out: Politicians are the Most Corrupt*. FORBES, Jul. 9, 2013. “Transparency International says that politicians have a 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>

Until recently, Americans tend to think of public corruption as something that happened elsewhere, as in corrupt African leaders and their Swiss bank accounts.<sup>32</sup> Transparency International has tracked public corruption for many years, stating 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.”<sup>33</sup> For the most part, the United States ranks relatively high in TI’s annual corruption rankings; for example, in 2016, the U.S. ranked 18<sup>th</sup> out of 176 countries.<sup>34</sup>

But concerns over corruption in the U.S. political economy have risen over the past 30 years.<sup>35</sup> The election of 2016 saw many 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 the public server, where it could be a matter of public record, and thus transparent. Lack of transparency fit with a narrative about 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.”<sup>36</sup>

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. His statements about Ms. Clinton are entirely congruent with the definition that “corruption is the misuse of public power by an elected official or appointed civil servant for private gain.”<sup>37</sup> 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 Vladimir Putin, Trump might be less inclined to be confrontational with Russia. If there were Trump-branded hotels in foreign

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<sup>32</sup> 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.

<sup>33</sup> See Transparency International’s website, at [https://www.transparency.org/whoweare/organisation/mission\\_vision\\_and\\_values](https://www.transparency.org/whoweare/organisation/mission_vision_and_values)

<sup>34</sup> [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016#table](http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table)

<sup>35</sup> 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).

<sup>36</sup> Philip Bump, *Donald Trump’s favorite topic while introducing Mike Pence? Donald Trump*. WASH. POST, July 16, 2106.

<sup>37</sup> This is the definition of corruption provided by Corruptie.org. <http://www.corruptie.org/en/corruption/what-is-corruption/>

countries, would he impose an immigration ban on nationals from those countries, or only countries with no Trump-branded hotels?<sup>38</sup>

Given what the Founders understood of human nature, and what behavioral psychologists confirm empirically, this was a reasonable concern. That concern was dramatically 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.”<sup>39</sup> Mr. Trump then added, “The law is totally on my side, meaning, the president can’t have a conflict of interest.”<sup>40</sup> In saying this, the President-elect erroneously conflated what is legal with what is right, as if the law had already determined that Presidents could never have conflicts of interest. But he is wrong that all conflicts of interest are defined and resolved by law, and he is also wrong on what the law requires.

## II. LEGAL ISSUES WITHIN THE EMOLUMENTS CLAUSE

There are three legal issues to consider, and on each one, the greater weight of precedent and common sense come down squarely on the view that the Emoluments clause does in fact apply to the U.S. President, does address conflicts between the private gains of a federal officeholder such as the President, and lays down a general rule against personally accepting items of value from foreign governments while serving the U.S. public. The first issue is whether the Emoluments clause applies 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.”

The clause does apply to 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*.” In addition, the Presidential Oath Clause, and the Twelfth, Twenty-Second, and Twenty-Fifth Amendments, all refer to the President as occupying an “Office.”<sup>41</sup>

Again, the exact language of the 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

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<sup>38</sup> 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>.

<sup>39</sup> N.Y. Times interview, *supra* note 1.

<sup>40</sup> *Id.*

<sup>41</sup> Eisen *et al.*, *supra* note 30, at 11–12.

agent or instrumentality of the Norwegian government.<sup>42</sup> Previous Presidents, as well, sought and received “the Consent of the Congress.”<sup>43</sup>

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.”<sup>44</sup> At the time of Ratification, “emolument” was used as a generic term for many different kinds of improper 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.”<sup>45</sup> Eisen, Painter and Tribe have framed the 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.”<sup>46</sup>

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.”<sup>47</sup> This 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.<sup>48</sup> 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.<sup>49</sup>

In summary, whether any of President Trump’s foreign holdings are subject to the Emoluments Clause will depend on whether the “emolument” (the gain, or forgiveness of loss) is

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<sup>42</sup> 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>

<sup>43</sup> Eisen *et al.*, *supra* note 30, at 9–10.

<sup>44</sup> Eisen *et al.*, *supra* note 30, at 11.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> 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).

<sup>48</sup> 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.*

<sup>49</sup> 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).

conferred on the President by a foreign state or an agent or instrumentality of that state. His numerous private interests abroad with foreign states and instrumentalities provide ample room for such conflicts to flourish.

### III. CLEAR AND CONVINCING CONFLICTS OF INTEREST: THE GLOBAL BUSINESSMAN AS PRESIDENT

This part proceeds in three sections. First, facts and analysis about known conflicts of interest are listed. Second, the Trump’s plan to distance himself from his businesses is examined. Finally, we note that complete information on the President’s foreign holdings is not publically available, as he is unwilling to disclose his tax returns.

#### 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 a direct bribe or “kickback;” the Founders 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*, 51 U.S. (10 How.) 109, 135 (1850), 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.”<sup>50</sup>

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.<sup>51</sup> Ingratiating themselves with Mr. Trump, they think, will be generally advantageous.<sup>52</sup> 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

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<sup>50</sup> *Sherburne v. United States*, 16 Ct. Cl. 491, 496 (1880).

<sup>51</sup> 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>

<sup>52</sup> *Id.*

meetings between Mr. Trump and foreign heads of state, including those from 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 Sansei International (whose largest shareholder is wholly owned by the Japanese government) to close a major and highly lucrative licensing deal.<sup>53</sup> In February, the President "tweeted" his unhappiness with Nordstrom for dropping his daughter's fashion line, perhaps hoping to hurt their business by appealing to his many followers on Twitter. It was yet another indication that he is willing to use the presidential "bully pulpit" to shame or criticize private enterprises for their business decisions. Other examples early in his administration targeted Ford, Toyota, and others. Often, his remarks are critical, and result in stock price declines. (Some traders have become alert to this phenomenon and will quickly short the stock of any company that gets a negative Trump tweet.<sup>54</sup>) For purposes of the Emoluments Clause, such "tweets" from the bully pulpit are not a cause of concern, except where they may deliberately seek to influence the value of his own foreign holdings. But his evident willingness to conflate his own interests with those of the public gives rise to some realistic concerns.

Mr. Trump openly acknowledges that he has raised business issues in the course of calls to foreign public officials.<sup>55</sup> The Trump organization's debts to 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.<sup>56</sup> There are persistent rumors, underlined by Russia's evident favoritism in the run-up to the 2016 election, that the Trump organizations are heavily in debt to Russian financiers, or that the Russian government has compromising information about his personal activities in Moscow. 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.<sup>57</sup> Brazilian leaders that want to "get along" with Mr. Trump may choose to slow or end the investigation.

In the cases of Russia and China, there could be significant private benefits for Mr. Trump's businesses if he were to steer U.S. policy toward less confrontation with those

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<sup>53</sup> 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/>

<sup>54</sup> Katie Mettler, *'Trump and Dump': When POTUS tweets and stocks fall, this animal charity benefits.* WASH. POST, Jan. 31, 2017. [https://www.washingtonpost.com/news/morning-mix/wp/2017/01/31/trump-and-dump-when-potus-tweets-and-stocks-fall-this-animal-charity-benefits/?utm\\_term=.b72686dab98c](https://www.washingtonpost.com/news/morning-mix/wp/2017/01/31/trump-and-dump-when-potus-tweets-and-stocks-fall-this-animal-charity-benefits/?utm_term=.b72686dab98c)

<sup>55</sup> Rosalind S. Helderman and 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](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)

<sup>56</sup> 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>

<sup>57</sup> 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>

governments, even if a “harder line” would better serve the U.S. public interest. It’s worth noting that he has shown a rhetorical “hard line” toward China, and an unusually friendly line toward Russia and Mr. Putin. The public has every right to know what extent his private fortunes or reputation may be more or less at risk with different nations.

Other examples abound, and will no doubt surface in the first year of his Presidency. In Ireland, Mr. Trump wants to build a wall that would protect a coastline near his Trump International Golf Links course. Environmentalists, however, worry about an endangered species: the *vertigo angustior* snail. This fight will go to a national planning board. Will this governmental agency be subject to pressure from the national government if Trump chooses to apply U.S. government pressure on a matter that is entirely unrelated to U.S. foreign policy? Given Mr. Trump’s temperament and attitude toward mixing public and private business, the concern is not far-fetched; his doing so would represent a misuse of governmental power for private benefit.

In being both a tenant and, as President, a landlord at the new Trump Hotel at the old Post Office Building on Pennsylvania Avenue, there is a direct conflict of interest domestically. (The lease provides 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.”) Foreign government officials are also likely to stay there in order to please the U.S. President.<sup>58</sup> With considerable public fanfare, the Kingdom of Bahrain already has 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.<sup>59</sup> Perhaps none of this is as valuable as the diamond-encrusted snuff boxes Louis XVI used to bestow, but the pernicious effects of any form of largesse from foreign leaders was something the framers were clearly cautious about.

#### B. A Permeable Wall: President Trump’s Plan to Avoid Conflicts of Interest

Mr. Trump’s belief that he could simultaneously manage the nation’s business and his own strongly suggests that he sees no conflicts between his own interests and the public interest. As public concerns mounted during the campaign, 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.<sup>60</sup> He also set up an ethics officer to review any new domestic deals, and he would donate any proceeds from foreign dignitaries staying in his hotels to the American people.<sup>61</sup>

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<sup>58</sup> 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](https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.55ffc8c4734b)

<sup>59</sup> 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>

<sup>60</sup> 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/>

<sup>61</sup> *Id.*

But many ethics experts have called these arrangements inadequate.<sup>62</sup> 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.”<sup>63</sup> 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.”<sup>64</sup> 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 matters, “not only through words but through deeds.”<sup>65</sup>

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 blind trust, which is the gold standard of removing conflicts for public officials. It is difficult to believe that critical financial matters will not be discussed between father and sons. Just one month after the January 11 news conference, Mr. Trump’s promise that the Trump organization would end all foreign deals was broken twice.<sup>66</sup> Given the frailties of human nature and Mr. Trump’s particularly strong loss-aversion bias,<sup>67</sup> the better public policy is to follow President Reagan’s “trust, but verify”<sup>68</sup> approach, by requiring transparency and accountability for all public officials. The framers would undoubtedly agree.

### C. Tax Returns and the Potential for Further Conflicts of Interest

The release of Mr. Trump’s tax returns would likely reveal more conflicts of interest. The New York Times editorial board claimed in January of 2017 that releasing them would “provide important insight into his finances.”<sup>69</sup> The editorial added that the documents would also “identify the sources of his income and debt, helping to answer questions about his links to businessmen, banks and governments in places like Russia and the Middle East, and putting a spotlight on potential conflicts of interest.”<sup>70</sup>

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<sup>62</sup> Sam Fleming and 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>

<sup>63</sup> 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](https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf)

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Venook, *supra* note 60. 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.*

<sup>67</sup> See *infra*, notes 85-87 and accompanying text.

<sup>68</sup> 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.”).

<sup>69</sup> Editorial Board, *‘We the People’ Demand Mr. Trump Release His Tax Returns*, N.Y. TIMES, Jan. 24, 2017.

<sup>70</sup> *Id.*

Yet Mr. Trump remains under IRS audit, and although he is allowed to release his returns to the public, a majority of tax experts in one brief, informal survey before the election said that it would be professional malpractice to release the returns.<sup>71</sup> The exception was Laurie Kazenoff, a New York tax attorney, who said that perhaps there was a “bombshell” in those returns “that Mr. Trump doesn’t want anyone to see right now as it will slow his momentum during the primaries. I believe he is using this audit as lame excuse not to disclose the returns he signed and filed.” *Id.*

The “bombshell” theory —also advanced by former Presidential candidate Mitt Romney—was not necessarily about conflicts of interest, but whether he was falsely boasting about his net worth, whether he was paying no taxes, or even less generous to charities than he was saying publicly. Post-election, those concerns would matter far less: post-Inauguration, he would not have to worry about the electoral consequences of the public regarding him as un-generous with charities, paying no taxes because of generous real estate deductions, or over-stating his worth. Instead, he would primarily be judged on his record as President.

But that record includes his domestic and foreign policy, and if he is “soft on Russia” in his first term (a long-standing concern among many members of Congress), conflicts of interest may be suspected. And there are clear discrepancies between how he and his closest associates talk about his Russia ties. As nominee, President Trump pointed out that the Clinton campaign tried to tarnish him over ties to Russia, but claimed that he had no business there. “I know about Russia, but not about the inner workings. I have no business there and no loans from Russia. I have a great balance sheet.”<sup>72</sup> But in 2008, President Trump’s son said that “Russians make up a pretty disproportionate cross section of a lot of our assets” and “we see a lot of money pouring in from Russia.” Trump’s tax return would tell us whether his denials of “no business there” are true in any sense.<sup>73</sup>

Others agree. Robertson Williams, the Sol Price fellow at the nonpartisan Urban-Brookings Tax Policy Center, told The Wire early in spring of 2016 that there were three items that could be learned from Trump’s tax returns: where he gets his income, how much it is, and what kind of deductions he takes. More importantly, Williams noted that if Trump had “overseas income or foreign bank accounts. . . that information would be on his tax return.”<sup>74</sup> In October of 2016, Norman Eisner and Richard Painter wrote that Trump’s 12,000-page tax return “may tell us a great deal about his Russian and other foreign business ties that is not on his 104-page campaign financial disclosure.”<sup>75</sup>

A Washington Post-ABC poll taken at the time of his Inauguration showed that his ongoing refusal to release his tax returns was unpopular, with 74 percent of Americans saying he

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<sup>71</sup> Rachael Stockman, *Legal Experts Side With Trump; It Would Be Crazy to Release His Taxes During Audit*, LAW NEWS, May 13, 2016. <http://lawnewz.com/politics/legal-experts-side-with-trump-it-would-be-totally-stupid-to-release-his-taxes-during-audit/>.

<sup>72</sup> Norman Eisen and Richard W. Painter, *What Trump’s Tax Returns Could Tell Us About His Dealings with Russia*, POLITICO, Oct. 31, 2017.

<sup>73</sup> Mark Berman, *Trump says he still won’t release his tax returns and claims that Americans don’t ‘care at all,’* WASH. POST, Jan. 11, 2017.

<sup>74</sup> Lori Robertson and Robert Farley, *Trump’s Tax Returns*, THE WIRE, Posted on May 12, 2016

<sup>75</sup> Eisen and Painter, *supra* note 72.

should make the documents public, including 53 percent of Republicans.<sup>76</sup> Despite the polling data, Trump spokesperson Kellyanne Conway said at the time that people just didn't care. "They voted for him, and let me make this very clear: Most Americans are — are very focused on what their tax returns will look like while President Trump is in office, not what his look like."<sup>77</sup> But whether people care more about their own tax return is irrelevant to the issue of conflicts of interest. Mr. Trump has departed from a fairly regular practice of disclosure by Presidential candidates, and while his excuse for not giving public disclosure is somewhat plausible, it seems likely that his tax returns would reveal potential conflicts of interest, which is itself a matter of substantial public interest.

#### 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.<sup>78</sup> 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.<sup>79</sup> None of this is random or senseless, according to Dan Ariely and others. As Kahneman would put it, our human biases and mental shortcuts ("heuristics"), are quite systematic and fairly predictable.<sup>80</sup>

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 who hope to have the ear of the politician, and perhaps even some influence. This leaves very little time for actual discussion and deliberation.<sup>81</sup> 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, 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."<sup>82</sup>

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<sup>76</sup> John Wagner, *Trump won't release his tax returns because people don't care, top advisor says*. Wash. Post, Jan. 22, 2017. [https://www.washingtonpost.com/news/post-politics/wp/2017/01/22/trump-wont-release-his-tax-returns-because-people-dont-care-top-adviser-says/?utm\\_term=.695f09a06fe8](https://www.washingtonpost.com/news/post-politics/wp/2017/01/22/trump-wont-release-his-tax-returns-because-people-dont-care-top-adviser-says/?utm_term=.695f09a06fe8).

<sup>77</sup> *Id.*

<sup>78</sup> 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.)

<sup>79</sup> *Id.* at 279-290.

<sup>80</sup> 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.)

<sup>81</sup> LESSIG, *supra* note 25, at 138.

<sup>82</sup> *Id.* at 151-52.

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.”<sup>83</sup>

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<sup>84</sup> 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.<sup>85</sup> But there are two other well-known biases that are also exaggerated by his 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.<sup>86</sup> 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.<sup>87</sup> 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 partly explains why Mr. Trump finds it exceedingly 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 become business leaders.) Yet many people’s tendencies toward optimism are so strong that they are unknowingly led to make irrational and injurious decisions.<sup>88</sup> Robert Prentice makes the connection between over-optimism and overconfidence in this way:

Decisional errors caused by over-optimism may be exacerbated by *overconfidence*.

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<sup>83</sup> Robert A. Prentice, *Ethical Decision Making: More Needed Than Good Intentions*, FIN. ANALYSTS J. 63(6), (2007), at 22.

<sup>84</sup> Albert H. Hastorf and Hadley Cantril, *They saw a game: a case study*, J. ABNORMAL PSYCHOL. 45 (1) (Jan. 1954), at 129-134.

<sup>85</sup> Dan P. McAdams, *The Mind of Donald Trump*, THE ATLANTIC, June 2016.

<http://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.* A deep-seated denial that he could ever be mistaken is part and parcel of the self-serving bias in President Trump.

<sup>86</sup> Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Vol. 5 (1), (Winter 1991), at 193-206.

<sup>87</sup> *Id.*

<sup>88</sup> Prentice, *supra* note 83, at 20.

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.<sup>89</sup>

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, and confident in your instincts and intuitions. But again, empirical studies undermine the rationality of any such confidence. For example, a strong 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.<sup>90</sup>

Thus, over-confidence, especially when it comes to our own ethics, is a fairly common failing.<sup>91</sup> With Mr. Trump’s narcissistic tendencies, the over-confidence is exaggerated into an extroverted swagger that stands on one extreme of the spectrum.<sup>92</sup> Although he sometimes depicts himself as the “best” negotiator ever, his actual business record may only be good to average, and certainly not “the best.” Many good businesspeople refuse to do business with him.<sup>93</sup> He has had many bankruptcies.<sup>94</sup> He has a tendency to over-leverage his assets.<sup>95</sup> He has stolen wages from illegal immigrant workers, and has often reneged on contracts. He has been both a plaintiff and a defendant far more than most businesspeople.<sup>96</sup> He has bullied ordinary

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<sup>89</sup> Prentice, *supra* note 83, at 20.

<sup>90</sup> *Id.*

<sup>91</sup> Marianne M. Jennings, *Ethics and Investment Management: True Reform*, FINANCIAL ANALYSTS JOURNAL, vol. 61 (3), (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 8.

<sup>92</sup> McAdams, *supra* note 85. (“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.”)

<sup>93</sup> Andrew Ross Sorkin, *Many of the most successful business people in the country refuse to support him — or do business with him, either*. N.Y. TIMES, Sept. 27, 2016.

<https://www.nytimes.com/2016/09/27/business/dealbook/trumps-a-businessman-where-his-business-backing.html>.

<sup>94</sup> *Time for Donald Trump to Choose: President or Businessman*. BOSTON GLOBE, Nov. 10, 2016.

<https://www.bostonglobe.com/news/politics/2016/11/10/time-for-donald-trump-choose-president-businessman/RoIcF8sGNCWfpP3KdYy2EN/story.html>.

<sup>95</sup> Liz Mair, *Donald Trump is a Mediocre Businessman, And His Record Proves It*. INDEP. JOURNALISM REV. (undated). <http://ijr.com/opinion/2015/09/247749-donald-trump-is-a-mediocre-businessman-and-his-record-proves-it/>.

<sup>96</sup> Neil H. Buchanan, *Will Trump bring his business ethics into the White House?* NEWSWEEK, July 30, 2016. <http://www.newsweek.com/will-trump-bring-his-business-ethics-white-house-485132>.

citizens.<sup>97</sup> In short, as a businessman and as a person, Trump has not been especially ethical, nor exceptionally successful.<sup>98</sup>

In claiming that he can both run the country and run his business, President Trump demonstrates that he is averse to losing the money he's already made, and that he is overly confident that he could do a great job if allowed to do both at the same time. By turning over management—but not ownership—of Trump Enterprises to the younger Trumps, he also demonstrates loss aversion; he just cannot let go, and there is no realistic possibility that he will somehow forget the assets and dealings that Trump Enterprises has engaged in. He may trust his sons to manage all of this without his direct interference, but conversations will likely take place; the trust he has in his sons is nowhere close to the “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.

## V. IMPLICATIONS FROM CONFLICT OF INTEREST LAWS AND PRIVATE SECTOR FIDUCIARY DUTY

For a lack of precedents related to the Emoluments Clause, it makes sense to look for persuasive authority related to conflicts of interest in other fields of law. One obvious related arena is that of conflict of interest law; simply put, as a matter of statutory law, officers of the executive branch of the federal government are barred from participating in matters that may impact their financial interests.<sup>99</sup> This is unambiguous in the context of contracting: losses or bad intent do not need to be shown, and penalties, including nullification of contracts, have been characterized as deliberately harsh.<sup>100</sup>

Another context in which conflict of interest has been addressed is in the field of business. As discussed above, we now have a CEO of the federal government with an eponymous global brand that takes money from representatives of foreign governments. Would that scenario be tolerated in the context of a corporation's leadership?

Both government and corporate officers' duties do include the fiduciary principle; that is, serving certain interests above all others.<sup>101</sup> Although fiduciary principles related to public sector actors evolved separately from those applicable in the private sector,<sup>102</sup> in all three branches of government, officials are widely seen as owing fiduciary obligations to the public.<sup>103</sup>

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<sup>97</sup> Marc Antonio Wright, *Donald Trump's Business Career Has Been One of Bullying Ordinary Citizens*, NAT'L REV., Feb. 1, 2016. <http://www.nationalreview.com/article/430628/donald-trump-business-record-bully>.

<sup>98</sup> Claire Grodin, *Donald Trump would be richer if he'd have invested in index funds*, FORTUNE. Aug. 20, 2015, <http://fortune.com/2015/08/20/donald-trump-index-funds/>.

<sup>99</sup> 18 U.S.C. § 208 as cited in Appendix, 36 FED. B. NEWS & J. 129 (1989)

<sup>100</sup> Padideh Ala'ia, *Civil Consequences of Corruption in International Commercial Contracts*, 62 AM. J. COMP. L. 185 (2014) at 191.

<sup>101</sup> Claire Hill and Richard W. Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1644 (2011).

<sup>102</sup> See RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE, 3 (2009).

<sup>103</sup> Hill and Painter, *supra* note 102, 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

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.<sup>104</sup> Starting in the 12<sup>th</sup> Century, standards and duties evolved for managing assets on behalf of someone else.<sup>105</sup> A theoretical debate has lingered regarding the question of whether fiduciary duties are therefore more accurately seen as rooted in contracts or property law.<sup>106</sup> Regardless of how its theoretical underpinnings are imagined, in the corporate setting the law concerning loyalty has been characterized as comparatively “simple,<sup>107</sup> and, more generally, “homogenized.”<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

While there is ambiguity surrounding several issues, such as whether the business judgment rule applies to officers and not just directors,<sup>111</sup> Delaware jurisprudence has reasserted that the duty of loyalty is the “the most critical” core requirement of a fiduciary.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> Outside of the election cycle, the public analog in the context of presidential duties is the impeachment process.

## VI. CREW’S EMOLUMENTS LAWSUIT AGAINST PRESIDENT TRUMP

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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)).

<sup>104</sup> See David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, B.U. L. Rev. 1011 (2011).

<sup>105</sup> *Id.* at 1014-1016.

<sup>106</sup> See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L. J. 625 (1995).

<sup>107</sup> Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?* S. CAL. L. REV. 1231, 1233 (2010).

<sup>108</sup> Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. KAN. L. REV. 923, 924-925 (2013).

<sup>109</sup> *Id.* at 1234-1237.

<sup>110</sup> *Id.* at 1233.

<sup>111</sup> 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).

<sup>112</sup> Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti, Jeffrey M. Gorris, *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 696 (2010).

<sup>113</sup> *Id.* at 694-696.

<sup>114</sup> Elizabeth M. Dunshee, Jayne E. Juvan, and Christian Douglas Wright, *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](http://www.americanbar.org/publications/blt/2015/07/02_juvan.html).

Although President Trump was likely 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 either bring impeachment proceedings or a legal challenge. Many have called for such proceedings, but Congressional GOP leaders had a large legislative agenda of their own to get done. Three days after the Inauguration, the non-profit CREW (Citizens for Responsible Ethics in Washington) filed a lawsuit against President Trump based on the Emoluments Clause.<sup>115</sup>

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 23<sup>rd</sup>, 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 Scalia in a sequence of decisions during the 1990s creating a much stricter set of standing tests.<sup>116</sup> These tests amount to a malleable yet effective tools for dismissing cases that would involve difficult public policy issues; they were even applied when federal laws clearly spelled out the right of any citizen to bring a suit in court.<sup>117</sup>

The relatively weak standing claim in the CREW lawsuit could be remedied if a more secure plaintiff could be found and added to the complaint. The most obvious first parties who suffered business losses due to Trump's conflict of interest were Washington, D.C. hotels competing with the new Trump International Hotel on Pennsylvania Avenue—they can point out that individuals representing foreign interests and domestic interests as well—have opted to frequent and stay at the Trump International Hotel.<sup>118</sup> Representatives of foreign interests were staying at Trump's hotel so that in meetings they could mention it and compliment him.<sup>119</sup> 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.<sup>120</sup>

A plaintiff with clearly defensible standing could also be an American business or businessperson who lost an otherwise more competitive bid for a government contract to another business from a country whose government in some way transacted business with the Trump organization. This kind of direct, tangible, measurable, actual harm to a specific individual could then not be denied, and the substantive issues could then be argued and decided.

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<sup>115</sup> 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/>

<sup>116</sup> See Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, J. ENVTL. L. & LITIG. (2009).

<sup>117</sup> *Id.*

<sup>118</sup> Jonathan O'Connell and Mary Jordan, *For foreign diplomats, Trump hotel is the Place to be*, WASHINGTON POST, November 18, 2016. [https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35\\_story.html?utm\\_term=.bc0de2220dc4](https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.bc0de2220dc4).

<sup>119</sup> *Id.*

<sup>120</sup> Sophia Tesfaye, *Trump Organization applies "political pressure" on foreign diplomats to stay at Donald Trump's D.C. hotel: Report*, SALON, December 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/>.

The CREW lawsuit makes the unremarkable claims, noted above, that the Emoluments Clause does apply to the President, and that it clearly addresses conflicts of interest without requiring a *quid pro quo* exchange. The complaint asks for declaratory and injunctive relief. It also reminded court observers and historians that the separation of powers and the power of judicial review in the United States is a rare and even fragile institution. If the Court were to uphold declaratory and injunctive relief in the CREW case, it would be difficult and time-consuming for the President to comply; unlike stocks and bonds, the mass of his holdings are in less liquid holdings such as real estate, or in the licensing of his name. He might simply refuse to obey the Court, as Andrew Jackson once did.<sup>121</sup> Yet the President could appoint an independent chief executive officer, institute a list of Trump Organization executives he won't talk to, and remove his children from leadership roles there. Regardless of the outcome, the CREW lawsuit clearly identifies a fundamental problem of public interests in collision with the private interests of the 45<sup>th</sup> U.S. President.

Can we see the emoluments clause as the Constitutional equivalent of the fiduciary duty owed by trustees and corporate managers and directors? Why should the public sector have different “ethics” from the private sector, since both are managed by people with possible conflicts of interest? We *could* say that public service is somehow different from having fiduciary duties in private enterprise. 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's investors. What is the “duty” of a public official? There are federal laws that support the idea that public officials, like private sector managers, have duties to avoid conflicts of interest. President Trump has stated that those laws only apply to public officials other than the President. But for purposes of interpreting the Emoluments Clause, it's unlikely that the Framers would have assumed that the President would not have conflicts of interest. Given 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 for the rights of the people.<sup>122</sup>

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 happiness. The people retained the right to overthrow that government if it failed in its duties to insure those rights. In short, government (and by extension, the Executive) only has the power given 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.

## VI. CONCLUSION

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<sup>121</sup> “Jackson allegedly defied the Supreme Court over *Worcester v. Georgia* (1832), announcing, “John Marshall has made his decision now let him enforce it.” Matthew Warshauer, *Andrew Jackson and the Constitution*, The Gilder Lehrman Institute of American History, <https://www.gilderlehrman.org/history-by-era/age-jackson/essays/andrew-jackson-and-constitution>.

<sup>122</sup> 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>.

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.

One of those safeguards is the Emoluments Clause. The original intent of this clause is clear from the historical record and commentary of the framers themselves. In this, there is little doubt that the framers believed that any foreign influence over the young Republic was to be avoided, and that corruption included the kinds of gifts and favors routinely dispensed by royalty on the Continent and by King George III. These were gifts and favors meant to influence the policy and direction of the recipients. The notion that the Emoluments Clause was directed only toward *quid pro quo* exchanges does not withstand historical scrutiny.

In that light, President Trump’s global business and his apparent intention to profit from his position as President by not divesting ownership of foreign assets and liabilities is a violation of the Emoluments Clause. His tax returns—not willingly shared with the public thus far—would likely provide at least some indication of these foreign connections. How his conflicts of interest unfold during his Presidency remains to be seen: the CREW lawsuit will eventually come before U.S. federal appellate courts, whether as an appeal from Mr. Trump or as an appeal from CREW. If standing issues do not sideline the case, federal judges following the “originalist” method of interpreting the Constitution should conclude that Mr. Trump stands in violation of the clause.

If injunctive relief were given, a constitutional crisis could well be front and center for the U.S. political system. Given the complexity of selling off assets that are essentially the Trump brand, and Mr. Trump’s well-known tendencies toward over-confidence and track record of flouting convention and established mores, it’s possible that he would not readily comply, even with an order from the Supreme Court. At the time of writing, at least one congressperson has already called for impeachment.<sup>123</sup> Ignoring court orders related to his conflicts of interest would only add to pressure for members of Congress to take extraordinary steps.

Yet the “rule of law,” which Mr. Trump invoked during the presidential campaign to say that it must be “restored,” means that the preferences and biases of individual actors within the system must be guided by overarching principles that preserve some semblance of publicly minded service and impartiality, especially where corruption is a constant threat to the republic. The framers intended the rule of law to counteract our biases for self-serving acts. The Emoluments Clause is but one law among many that serves to counteract our very human biases.

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<sup>123</sup> Nick Allen, “Democrat congressman Al Green calls for Donald Trump’s impeachment” THE TELEGRAPH (May 17, 2017), *available at*: <http://www.telegraph.co.uk/news/2017/05/17/congressman-al-green-calls-donald-trumps-impeachment/>; Jonathan Martin and Alexander Burns, “Democratic Leaders Try to Slow Calls to Impeach Trump” NEW YORK TIMES (May 18, 2017), *available at*: [https://www.nytimes.com/2017/05/18/us/politics/democrats-trump-impeachment.html?\\_r=0](https://www.nytimes.com/2017/05/18/us/politics/democrats-trump-impeachment.html?_r=0).

The U.S. has led the global fight against corruption. It has done so partly by leading through example and partly through legislation such as the Foreign Corrupt Practices Act. On both the issue of rule of law and corruption, Mr. Trump has opened the country up to accusations of double standards. Domestically, his tendency to overlook his own conflicts of interest—and those of his family—create the impression that he has no sense of separation between his private interests and the interests of the public.

Even without our knowing the full extent of his foreign interests, Mr. Trump's tweets against Nordstrom, his inclination to remain on the television show, "The Apprentice," and his wife's stated disappointment that her once-in-a-lifetime opportunity to "cash in" has been denied her, all demonstrate that Mr. Trump and his family do not understand or embrace the "civic virtue" that the framers had in mind. In fairness, it must be said that politicians, businesses, and the corporate media in the United States have not shown a great deal of civic virtue in the past thirty years, either. Representative democracy in particular has suffered serial blows from the influence of corporatization of the media, the perpetual fund raising cycle for members of Congress, and the business community's overall rejection of regulation, taxes for the public good, and its embrace of government as a source of protection or favor through subsidies and other breaks.

The G.O.P.'s silence on the Emoluments Clause early in the President's first term is a symptom of the larger dysfunctions in our political system, dysfunctions that make Benjamin Franklin's admonition about having a Republic "if we can keep it" all the more prescient. A sustainable political society requires "an aristocracy of virtue and talent" rather than an aristocracy of power and wealth. It's possible that a key segment of voters in the U.S. 2016 electorate confused power and wealth with virtue and talent. The President has repeatedly proclaimed his wealth and great talent, but not so much his virtuous character. He has deliberately obscured not only his personal assets that may cause predictable conflicts of interest for his public service, but has also sought, on many occasions, to obscure the truth itself. As John Rawls notably said, "Justice is the first virtue of social institutions." Truth, we can begin to see, could also be the first victim of a corrupted political system.

A comparison with jurisprudence related to conflict of interest in the context of both federal employees and business leaders reveals that the concept of a fiduciary duty has close analogs in both the public and private sectors. The various components of fiduciary duty reveal that loyalty is the clearest aspect of fiduciary obligations. Shareholders have a right of action to remove directors who violate their duty of loyalty; in the public realm, outside of the election cycle, the right of removal for the nation's top executive falls to Congress, acting through the impeachment process.

Revelations related to potential obstruction of justice by Trump and his associates are rapidly emerging as this paper is being written. The Trump presidency may well end for reasons other than conflict of interest and violating the Emoluments Clause. However, a businessperson with an eponymous global brand who also serves as the nation's President provides a useful opportunity to consider the boundaries of what is acceptable in terms of duties and responsibilities in the context of public leadership. In both public and private sector leadership, we find that the duty of loyalty to be the most clearly defined aspect of fiduciary duty, and the

“right of removal” for breaches of that loyalty should be available to rectify egregious conflicts of interest that undermine loyalty to the nation’s best interests.