RESTORING TRUST WITH TRUSTS: CONSTRUCTIVE AND BLIND TRUSTS AS REMEDIES FOR PRESIDENTIAL VIOLATIONS OF THE CONSTITUTION'S EMOLUMENTS CLAUSES

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INTRODUCTION

President Trump has a way of enlarging the vocabulary of public discourse. Among the many examples, we focus on the allegations that he has received, and continues to receive, constitutionally prohibited "emoluments," a term presently frequenting newspaper headlines but which few could have spelled let alone defined two years ago.

To be sure, the term's definition remains elusive. That much if little else is made clear by the legal papers submitted in pending lawsuits attacking the legality of various Trump commercial enterprises operating concurrently with his presence in the nation's highest office. In two places the Constitution limits the

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President's receipt of "emoluments." As we detail below, to date three lawsuits have claimed that President Trump is guilty of innumerable, continuing violations of these prohibitions. While the complaints in these cases devote many words to describing the alleged unconstitutional conduct, they are surprisingly laconic and vague on what relief would be appropriate were the plaintiffs to prevail. In this essay, we bracket the merits and consider whether a constructive trust, a blind trust, or both would be appropriate remedies were a president deemed to have violated either or both Emoluments Clauses.

In section I, we first treat, admittedly in a most cursory fashion, the merits issues raised in the pending suits. In the following section, we examine the fiduciary principles underlying the Constitution's prohibition on presidential receipt of forbidden emoluments. Then we promptly pivot to discussion of the remedial issues, which arise in two categories: the retrospective (*i.e.*, what punitive or restorative remedies should follow from a determination that a President has received prohibited emoluments) and the prospective (*i.e.*, what remedies should be imposed after an initial violation to prevent future transgressions). As to the former, section III explores the doctrines governing imposition of a constructive trust, first in the context of private fiduciary relationships and later as a response to government officials' breaches of duties owed to the public. Drawing on the rationale underlying the application of the constructive trust in these contexts, we argue that a court, in the exercise of its equitable jurisdiction, would be justified in finding that the violation of either of the Emoluments Clauses by a sitting President creates a constructive trust for the benefit of the public treasury when the violation yields personal profit or gain to the President, even if such profit does not result in financial loss to the United States. Finally, as to a prospective remedy, section IV examines the possibility of a judicially mandated and administered blind trust, whereby a President would be required to place all potentially conflicted assets into an irrevocable trust, wholly beyond his control and managed by an independent administrator over whom the President has no control.

I. THE MERITS, IN BRIEF

The Constitution regulates the president's receipt of emoluments in two clauses. The first, located in Article I, section

9 governs all persons "holding any Office of Profit or Trust under" the United States and commands that none such "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."[1] Though Ben Franklin's receipt of a jewel-encrusted snuff box from the King of France often gets the credit,[2] the concept, and much of the language, of this provision, often labeled the Constitution's Foreign Emoluments Clause, pre-dates that much ballyhooed embarrassment.[3] The second prohibition is tucked into the Constitution's guarantee in Article II that the President's salary will neither be enlarged nor decreased during the term to which he has been elected, adding that "he shall not receive within that Period any other Emolument from the United States, or any of them."[4]

The purposes of these provisions are self-evident. As to the first, U.S. officeholders ought not to be beholden to foreign powers, and as to the second, the President's independence is protected from pecuniary inducements (or threats) coming from both the Congress and the States. And for two centuries, these two Emoluments Clauses[5] were virtually self-enforcing. The encyclopedic *The Constitution of the United States: Analysis and Interpretation* indicates that this Clause is one of the very few provisions of the Constitution for which there are no Supreme Court rulings to report.[6]

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1 U.S. CONST., Art. I, sec. 9, cl. 8.

2 Edmund Randolph, a delegate to the Philadelphia Convention, later invoked the example of Franklin, without naming him, in recounting the Convention's adoption of the Foreign Emoluments Clause. *See* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 465–66 (2d ed. 1891).

3 Article VI of the Articles of Confederation anticipated the Constitution in prohibiting "any person holding any office of profit or trust under the United States, or any of them" from accepting "any present, emolument, office or title" from any foreign sovereign or state. ARTICLES OF CONFEDERATION, Art. VI, sec. 1.

4 U.S. CONST., Art. II, sec. 1, cl. 7.

5 The term "[e]moluments" also appears in the Constitution's declaration that "[n]o 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 encreased during such time." U.S. CONST., Art. I, sec. 6, cl. 2.

6 S. Doc. No. 112-9, at 402–03 n.2014 & 485 n.127 (2017) (citing no cases). To be sure, innumerable Department of Justice Office of Legal Counsel opinions address issues arising under the Clauses, but this is in part what is meant by self-enforcing.

That may soon change. In 2017 no less than three separate lawsuits were filed in federal courts alleging that President Trump's on-going business arrangements violate both of these clauses. The first, filed on January 23d in the Southern District of New York by Citizens for Responsibility and Ethics in Washington (CREW),[7] alleges (among other things) that President Trump's on-going involvement with and enrichment from his numerous U.S. and foreign rental and hospitality properties' dealings with the foreign governments, their representatives, and the entities they own and control all violate the prohibition of the Foreign Emoluments Clause.[8] In addition to seeking a judicial declaration to this effect, the only other remedy sought is an injunction ordering the President to cease "violating the Foreign Emoluments Clause, as construed by [the district court]" and "to release financial records sufficient to confirm" his compliance with the court's order.[9]

In June, the Department of Justice moved to dismiss the suit, arguing in the alternative that the plaintiffs lacked Article III standing, that they failed to state an injury within the Emoluments Clauses' zones of interests, and that, in any event, the Clause was not implicated by "benefits arising from a President's private business pursuits having nothing to do with his office or personal service to a foreign power."[10] After briefing and argument on that motion, the district court delivered the President an early Christmas present on December 21 by dismissing the suit. The court ruled that none of the plaintiffs had Article III standing and that, in any event, their complaint sought resolution of a non-justiciable political question.[11] The court's present, however welcome, was also significantly incomplete; the court expressly declined to address "whether [the] Plaintiffs' allegations state a cause of action under either the Domestic or Foreign Emoluments

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7 Compl. Citizens for Responsibility and Ethics in Washington v. Trump, No. 17 Civ. 458 (S.D.N.Y. Jan. 23, 2017). The complaint has been twice amended and refiled. *See* Second Amend. Compl., No. 17 Civ. 458 (S.D.N.Y. May 10, 2017).

8 Second Amend. Compl., *supra* note 7. The complaint also attacks the President's continued receipt of "payments from foreign-government-owned broadcasters related to rebroadcasts and foreign versions of the television program 'The Apprentice' and its spinoffs." *Id.*

9 *Id.*

10 Mem. of Law in Support of Def.'s Mot. to Dismiss, Citizens for Responsibility and Ethics in Washington v. Trump, No. 17 Civ. 458 (S.D.N.Y. June 9, 2017) at 26 (hereinafter "Def's Mot. to Dismiss").

11 Citizens for Responsibility and Ethics in Washington v. Trump, No. 17 Civ. 458, 2017 WL 6524851, at *5–*12 (S.D.N.Y. Dec. 21, 2017).

Clauses" as well as "whether the payments at issue would constitute an emolument prohibited by either Clause."[12] In any event, an appeal seems inevitable.

So the question remains: what is an emolument? One might be forgiven for thinking that the matter would have been settled after more than two centuries' experience. But as noted above the case law is non-existent, and even the Office of Legal Counsel opinions on the matter seem more to skirt than settle the question.[13] Perhaps not surprisingly, then, the legal memoranda filed in the case brought by CREW reflect widely divergent understandings of the term's constitutional significance. The plaintiffs define "emolument" as pretty much any material thing one might desire.[14] The President, through his DOJ lawyers, answers that only a benefit akin to compensation for personal services rendered is an emolument for constitutional purposes.[15] These filings make for uncommonly entertaining, if not especially enlightening, reading. They paint strikingly incompatible portraits of the relevant history, with the exemplary George Washington's recurring direction of the details of his global agricultural conglomerate[16] contrasted with Jimmy Carter's scrupulously sequestered Georgia peanut farm.[17] In both cases, as in many others, not only the inferences to be drawn but the underlying facts themselves appear to be contested by the parties. If nothing else, the litigation provides additional evidence, as though any were necessary, that lawyers make better advocates than historians.[18]

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[12] *Id.* at *1 n.1.

[13] *Compare* Pl.'s Mem. in Opp. To Def's Mot. to Dimiss, Citizens for Responsibility and Ethics in Washington v. Trump, No. 17 Civ. 458 (S.D.N.Y. Aug. 4, 2017) at 44–48 (insisting that OLC opinions, properly understood, rejected the narrow understanding of the emoluments clauses proffered by the Defendant) (hereinafter "Pl's Opp. to Def's Mot. to Dismiss"), *with* Def.'s Reply in Supp. of Mot. to Dismiss, Citizens for Responsibility and Ethics in Washington v. Trump, No. 17 Civ. 458 (S.D.N.Y. Sept. 22, 2017) at 23 (contending that the OLC opinions relied upon by the plaintiff all involved compensation received for personal services, and were accordingly inapposite).

[14] *See* Pl's Opp. to Def's Mot. to Dismiss, *supra* note 13, at 5 (ascribing to the clauses a "prophylactic rule that broadly prohibits 'any' gain or advantage 'of any kind whatever").

[15] *See* Def's Mot. to Dismiss, *supra* note 10, at 27–28.

[16] *See* Def's Mot. to Dismiss, *supra* note 10, at 36 (noting Washington's "detailed instructions to Mount Vernon" and his exportation of flour and cornmeal to Europe and Jamaica).

[17] *See* Pl's Opp. to Def's Mot. to Dismiss, *supra* note 13, at 5.

[18] *See generally* Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, 1965

Not coincidently, we make no claim to an original contribution to this debate about the merits portion of the litigation. Rather, for the sake of argument we assume that the clause has been violated and consider only the propriety of trusts, constructive and blind, as remedies for presidential receipt of forbidden emoluments.

II. FIDUCIARY PRINCIPLES UNDERLYING THE EMOLUMENTS CLAUSES

In this Part, we examine how the Founders' understanding of government service centered on fiduciary principles, and we show how, under the public fiduciary theory, those principles became interwoven within the structure, as well as many of the provisions, of the Constitution. Next, we offer a brief survey of the prevalent literature on the public fiduciary theory, and we argue that the fiduciary principle of undivided loyalty, as a central tenet underlying the Domestic and Foreign Emoluments Clauses, warrants, at the very least, application of the public fiduciary theory to the execution of those Clauses.

A. Fiduciary Principles in the Founding Generation

The entrenchment of the Emoluments Clauses in our nation's organic document flows from the Founders' overarching concern that public corruption posed one of the greatest threats to the long-term survival of the Republic, and their acknowledgment that at least some occupants of federal office would either already be corrupt or could become so. The inclusion of both the Domestic and the Foreign Emoluments Clauses was designed to check potentially corrupt conduct in advance. Presumably, the Founders intended public officials within the scope of the clauses would comply with their mandates. As noted, however, the Constitution does not specify a remedy for Emoluments Clause violations. The failure of a President to comply with either of the Emoluments Clauses could potentially constitute an impeachable offense, but that possibility does not foreclose alternative remedies. Rather, we believe that such violations may be subject to certain judicially imposed equitable remedies, but before examining those potential remedies, we first survey the broader anti-corruption principles

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that anchor the Emoluments Clauses within the constitutional order. These principles, grounded in fiduciary concepts, inform our analysis of the specific retrospective and prospective remedies that we advance for a President's Emoluments Clause violations.

Those who framed and ratified our Constitution operated within a political and legal context built upon a "fiduciary ideal of government service"[19] —i.e., the concept of a public trust doctrine applicable to public officials. This fiduciary ideal formed a core principle of founding-era standards of governance.[20] Indeed, the Founders were steeped in fiduciary law principles;[21] they discussed these principles during the drafting and ratifying debates;[22] and,

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[19] Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1083 (2004).

[20] *Id.* at 1095–1137 (examining founding era documents and concluding that the "public trust doctrine seems to have been an ideal that almost everyone agreed upon."). Elements of the public trust doctrine could be found across political divides—royalists and anti-royalists, federalists and anti-federalists alike embraced and promoted the application of well-established, fundamental fiduciary standards from private law to the duties of public officials. *Id.* at 1125–27, 1137.

[21] *See id.* (noting that the Founders' political and legal canon was replete with discussions of public trust and the attendant fiduciary obligations imposed upon public officials); *District of Columbia & State of Maryland v. Trump, No. 8:17-cv-01596-PJM (D.Md. filed June 12, 2017)* (observing that the Articles of Confederation used the language of trusts in the predecessor to the Foreign Emoluments Clause in referring to office holders to whom the provision applied, *id.* at 8, and that many state constitutions contained similar provisions which incorporated the language of trusts, *id.* at 31–32).

[22] *E.g.*, James Madison, Journal (July 20, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand, ed., 1937) (observing that a "chief Magistrate", left unchecked, would risk "betray[ing] his trust to a foreign power."); Letter from Roger Sherman (Dec. 8, 1787), *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 286 (James H. Hutson ed., 1987) ("In every government there is a trust, which may be abused . . . ."); THE FEDERALIST NO. 22, at 109 (Alexander Hamilton) (noting that persons elected to office "may find compensations for betraying their trust . . . "); Luther Martin, A Citizen of the State of Maryland: Remarks Relative to the Bill of Rights (1788), reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 92 (Merrill Jensen et al. eds., 1976) (referring to legislatures as "the trustees of the people" whose rights as against the trustees are "fiduciary" in nature); The Impartial Examiner I, Va. Indep. Chron., Feb. 20, 1788, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 389 (Merrill Jensen et al. eds., 1976) (commenting that public officials are "intrusted with power" and are obligated "to a faithful administration of their trust . . . .). *See also* See Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, n. 271 (2004) (noting the frequent use by The Federalist of the terms "public trust", "guardian" , "guardianship" , "public servant" (or words of similar import), "trustee", and "agent").

they incorporated mechanisms within the constitutional structure to ensure that fiduciary standards would be met.[23] The standards to which the Founders expected public officials to be held encompassed five core fiduciary duties borrowed from the private law of trusts: the duty to administer official responsibilities in accordance with the governing document; the duty of prudence (or reasonable care); the duty of loyalty; the duty of impartiality; and the duty to account and inform.[24]

The breach of any fiduciary duty requires the public official to be held accountable to the people. Indeed, "[a]ll of the Founders [embraced the tenet] that government officials should be accountable to the people for breach of trust"[25] and, because the Founders assumed that government officials would all too frequently be prone to succumbing to temptations resulting in a breach of trust, they included in the Constitution mechanisms to impose accountability on the faithless official. Regular and frequent elections offer one such mechanism of accountability, but the Framers also included the more draconian remedy of impeachment and removal from office for "high crimes and misdemeanors,"[26] which arguably includes "any significant breach of fiduciary duty."[27] In fact, during the ratification debates, impeachment, as a remedy for breach of public trust, received specific treatment.[28]

Nor is impeachment the only codified remedy for violating the fiduciary obligations of public office. Federal anti-corruption statutes also provide a remedy by criminalizing certain conduct that also entails breaches of the public trust.[29] But even when

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[23] *See* Natelson, *supra* note 19, at 1137–1168 (describing how various provisions of the Constitution implement core fiduciary standards from the law of trusts).

[24] *Id.* at 1088–1168 (noting that, although the terminology and foci of emphasis varied, the core duties permeated both the sources upon which the Founders relied and the language the Founders themselves used to draft and discuss good principles of governance).

[25] *Id.* at 1159.

[26] U.S. CONST. art. II, sec. 4.

[27] Natelson, *supra* note 19, at 1170–71 (2004).

[28] THE FEDERALIST NO. 65, at 338 (Alexander Hamilton) (On the jurisdiction of a court trying impeachments, Hamilton stated: "The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the *abuse or violation of some public trust*." (emphasis added)).

[29] *See, e.g.*, 18 U.S.C. § 201(b), which provides that "whoever directly or indirectly, corruptly gives, offers or promises anything of value to any public official with intent to influence that person's official act will be fined for the offence of bribery"; 18 U.S.C. sec 219, which prohibits federal employees from

conduct breaching the public trust does not create the political will to impeach or rise to the level of criminality,[30] other potential remedies may remain. We examine two possible remedies—the constructive trust and the blind trust—in Parts III and IV, respectively. To understand the proposed justification for those remedies first requires some additional context regarding the role of fiduciary norms in the Founders conception of public service.

The Founders relied on fiduciary norms in devising the Constitution in part to ensure that public officials would be bound by those norms.[31] The judiciary has tended to embrace this notion in that courts have frequently held that, in relationship to the government, fiduciary standards apply to public officials because "their positions are ones of public trust.'[32] Standards of fiduciary duty not only provided general background information when the Founders were drafting and ratifying the Constitution, but were also to some extent integrated into various express provisions within the constitutional framework.[33] Most pertinently for our purposes is the role that the duty of loyalty plays as an integral component of the Foreign and Domestic Emoluments Clauses.

As for that duty, the exclusive loyalty of a federal office holder, including the President, is to the best interest of the nation.[34] This is true as against both domestic and foreign influence.[35] The Framers incorporated a number of mechanisms to ensure loyalty to the American public, as opposed to other branches of government, the individual states (or any of them), or a foreign

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acting as an agent or lobbyist for a foreign entity.

30 *See, e.g.*, Office of Legal Counsel Opinion "Applicability of 18 U.S.C. sec. 219 to Retired Foreign Service Officers, 11 Op. O.L.C. 67, 68 n.2 (1987) (concluding that not all conduct that violates the Emoluments Clause falls within the criminal proscription of sec. 219).

31 Natelson, *supra* note 19, at 1168 ("One of the Founders' 'general purposes' was to construct a government that would, to the extent practicable, operate according to certain fiduciary norms."). *But see* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014) (expressing skepticism of the applicability of fiduciary principles to public officials).

32 Joshua B. Bolten, *Comment, Enforcing the CIA's Secrecy Agreement Through Postpublication Civil Action*: United States v. Snepp, 32 STAN. L. REV. 409, 423 (1980).

33 *See* Natelson, *supra* note 19.

34 Citizens for Resp. & Ethics in Washington v. Trump, No. 17 Civ. 458, Compl. at 16 (S.D.N.Y. Dec. 21, 2017).

35 *Id.*

nation.[36] To minimize the likelihood of domestic corruption, the Framers included the Domestic Emoluments Clause, which bars the President from receiving any "Emolument from the United States, or any of them."[37] To decrease the possibility that the President would fall prey to foreign corrupt influences, the Constitution also includes a Foreign Emoluments Clause, which bars acceptance of emoluments from foreign sources, unless Congress authorizes their acceptance.[38] The duty of loyalty was so central to the Framers' understanding of the fiduciary nature of public office that they relied upon it as rationale for entrenching within the Constitution a means for removing from office a faithless Chief Executive who violated those principles.[39] Thus,

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[36] Among them are the checks and balances of power invested in the separate branches of government, designed to make each branch independent from the potential for undue influence from the others (Natelson, *supra* note 19, at 1147–48); the prohibition against federal legislators serving in or accepting newly-created or newly-enhanced executive offices so as to "guard against the danger of executive influence upon the legislative body," (*id.* at 1148 & n.315 (citing U.S. CONST., art. I, § 6, cl. 2 and quoting THE FEDERALIST NO. 76, at 395 (1788), George W. Carey & James McClellan eds., (2010)); the provision barring changes to executive compensation during his or her term of office, (*id.* at 1148 (citing U.S. CONST., art II, §. 1, cl. 7); and the Domestic Emoluments Clause, which was intended to minimize the likelihood of domestic corruption (U.S. CONST., art II, § 1, cl. 7).

[37] U.S. CONST. art II, § 1, cl. 7.

[38] U.S. CONST. art II, § 1, cl. 5. Other examples of loyalty-infused provisions include a requirement that only natural-born citizens are eligible for the office of the Presidency and a requirement that prior to assuming office, the President-elect swear or affirm loyalty to the United States Constitution. Natelson, *supra* note 19, at 1148 (citing U.S. CONST. art II, § 1, cl. 5); U.S. CONST. art II, § 1, cl. 7.

[39] During the Constitutional Convention debates, for example, James Madison expressed his concerns about the risk of disloyalty in his support for an impeachment provision:

> [I]t [is] indispensable that some provision should be made for defending the Community [against] the incapacity, negligence, or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He *might betray his trust* to foreign powers.

James Madison, Journal (July 20, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65-66 (Max Farrand, ed., 1937) (emphasis added). James Madison was by no means alone in his concern. For example, Gouverneur Morris reversed his position on the need to include an impeachment clause in Article II after being persuaded to do so by anti-corruption arguments. According to James Madison's notes, Morris had become "sensible of the necessity of impeachments" because of the possibility that a person in a term of elected office "may be bribed by a greater interest to *betray his trust*, and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard [against] it by displacing him." James

duty-of-loyalty principles against self-dealing and other forms of corruption motivated the constitutional entrenchment of fiduciary standards through various mechanisms.[40]

B. Public Fiduciary Theory

Nevertheless, whether, and if so to what extent, a breach of fiduciary principles should give rise to legal action against a faithless public official is open to debate. Indeed, there is a growing literature on public fiduciary theory, and while much of the scholarship tends toward holding faithless public officials accountable in an ever-increasing range of contexts, some of it expresses skepticism that fiduciary principles should form any basis at all for legal claims or remedies. For example, many commentators who embrace the public fiduciary theory rely upon the influential work of Professor Robert G. Natelson, whose thorough exposition of founding era documents reveals the extent to which those who framed and ratified the Constitution presupposed that public officials were to perform their duties in a relationship of trust to the governed and that the Constitution should be interpreted with those understandings in mind.[41] Some of these commentators have incorporated a fiduciary theory of governance in a broad swath of doctrinal areas, including, for example, administrative law,[42] environmental law,[43] and

Madison, Journal (July 20, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 68 (Max Farrand, ed., 1937) (emphasis added).

[40] Zephyr Teachout, *The Anti-corruption Principle*, 94 CORNELL L. REV. 341, 346–373 (2009).

[41] Natelson, *supra* note 19, at 1170–71. *See also* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. L. REV. & POL. 239 (2006); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003).

[42] Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

[43] *See, e.g.*, Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L. J. 315, 360–61 (2000); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009); Mary Christina Wood,

constitutional law.[44] Others have done so in areas of law that already apply fiduciary concepts, such as public corruption, ethics, and conflicts of interest.[45] By contrast, at least one scholar has rejected the notion that fiduciary principles can be generally transplanted from the private sphere to the public one because of (1) the problem of fit between the duties and beneficiaries of private fiduciaries and those of government officials; (2) the problem of intent by the Founders to create a government founded on fiduciary principles; and (3) the problem of functional efficacy in cases where courts have attempted to rely upon the notion of fiduciary government.[46]

We take no position on the more expansive questions implicated in this debate, but we do argue that, in the limited context of specific anti-corruption constitutional provisions, fiduciary principles should play a key role in fashioning suitable remedies for their violation.[47] As a baseline matter, we emphasize that we are not advocating for a broad application of fiduciary principles to every action undertaken by a public official. Our position is significantly more circumscribed. We contend that fiduciary principles informed the Founders' understanding of the anti-corruption aspects of the Constitution and that in the context of fashioning remedies for Emoluments Clause violations, the core fiduciary duty of loyalty applies to a President's conduct that involves identifiable conflicts of interest and self-dealing. We

Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance, 39 ENVTL. L. 91 (2009).

[44] *See, e.g.*, D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 706–22 (2013); Mitchell F. Crusto, *Obama's Moral Capitalism: Resuscitating the American Dream*, 63 U. MIAMI L. REV. 1011, 1021–22 (2009); Natelson (2003), *supra* note 41; Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 317–21 (2004).

[45] *See, e.g.*, Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 63; Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1640 (2011); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013).

[46] *See* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014) (rejecting the public fiduciary theory as an appropriate model).

[47] In making this argument, we embrace the precepts of the public trust doctrine, which holds that government officials are subject to fiduciary standards, and we accept as a limited principle that a fiduciary theory of government influenced the Founders' decision-making about the structure and certain anti-corruption provisions of the Constitution, including the Emoluments Clauses.

believe that even if the notion of fiduciary government broadly understood cannot be used to create rights or remedies—again, an issue on which we take no position—then that does not preclude the translation of private fiduciary concepts to public law when there is an identity of underlying principles that seek to advance the same goal. In this regard, the anti-corruption purpose of the Emoluments Clauses in the public sphere of a constitutional mandate presents a particularly close fit with the anti-self-dealing restriction imposed by the fiduciary duty of loyalty in the private law of trusts. The anti-corruption purpose of the Emoluments Clauses and the anti-self-dealing prohibition in the private law of trusts provide the rationale underlying our proposed remedies, both retrospective and prospective, for Emoluments Clause violations.

III. THE CONSTRUCTIVE TRUST AS A RETROSPECTIVE REMEDY

In this Part, we turn to the problem of retrospective remedy for Emoluments Clause violations. Our discussion begins with the doctrines governing the imposition of a constructive trust in the context of private fiduciary relationships, and then we examine the application of fiduciary principles as a response to government officials' breaches of duties owed to the public. Next, we consider the fiduciary requirement of undivided loyalty as a justifying rationale for a court, in the exercise of its equitable jurisdiction, to find that a President's violation of either or both of the Emoluments Clauses creates a constructive trust for the benefit of the public fisc when the violation yields personal profit or gain to the President, even if such profit does not result in financial loss to the United States.

A. Remedying Breach of Fiduciary Duty by Constructive Trust in the Private Law of Trusts

The use of a constructive trust for the breach of a fiduciary duty involving self-dealing is a common remedy within the private law of trusts. Such a breach in that context requires a particular legal relationship between a person holding specific property in the capacity of a trustee and a person receiving the benefit of that property. In other words, a trustee is a person who holds legal title to property for the benefit of another.

As soon as a person assumes the role of a trustee, his conduct becomes subject to the highest of fiduciary standards in all matters relating to the trust. If in that capacity he engages in any conduct that breaches the fiduciary duties to which he is subject and if such breach, however minor or unintentional, results in his own personal profit, a court may impose a constructive trust as an equitable remedy.[48] A retrospective remedy for wrongful conduct, the constructive trust prevents the breaching fiduciary from profiting from that same wrongful conduct.[49] Because the constructive trust aims to deter faithless conduct, this remedy requires the breaching trustee "to convey property to another because [the trustee] would be unjustly enriched if allowed to retain it."[50]

Among the core fiduciary standards to which a trustee must hew is the duty of loyalty, which requires the fiduciary to act solely in the best interests of the beneficiaries.[51] The duty of loyalty thus includes a strict prohibition against self-dealing, conduct which entails "the risk that the fiduciary may be enriched at the expense of the beneficiary."[52] Attendant upon this duty is an "obligation to repair any harm caused by breach" of any fiduciary duty.[53] Accordingly, a trustee who engages in conduct that fails to meet these fiduciary standards is subject to suit by the trust's

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[48] Restatement of Restitution § 197 (1937) ("Where a fiduciary in violation of his duty to the beneficiary receives or retains a . . . profit, he holds what he receives upon a constructive trust for the beneficiary.").

[49] The constructive trust is based upon "the equitable principle that no one should be permitted to profit from by his own fraud, or take advantage and profit as a result of his own wrong or crime." *In re Estate of Mahoney*, 220 A.2d 475 (Vt. 1966) (citing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)).

[50] Bolten, *supra* note 32, at 422 (citing Restatement of Restitution § 160 (1937); Restatement (Second) of Trusts, sec 1 cmt e (1959); V.A. SCOTT, THE LAW OF TRUSTS § 462, at 3413 (3d ed. 1967)). *See also* THOMAS P. GALLANIS, ED., A CONCISE RESTATEMENT OF DONATIVE TRANSFERS AND TRUSTS 458 (2017).

[51] GALLANIS, *supra* note 50, at 769. "The duty of loyalty is, for trustees, particularly strict even by comparison to the standards for other fiduciary relationships." *Id.* at 770. This fiduciary obligation is one of undivided loyalty to the beneficiaries and requires the trustee to "subordinate his own interests to the welfare of the beneficiaries" in all matters pertaining to the trust. Natelson, *supra* note 19, at 1089 (citing Bogert & Bogert § 543, at 217; R2d of Trusts §170 (1959)).

[52] Natelson, *supra* note 19, at 1089; GALLANIS, *supra* note 50, at 769 (noting that, with certain exceptions, "the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.").

[53] Natelson, *supra* note 19, at 1090 (citing Restatement (Second) of Trusts § 173 (1959)).

beneficiary,[54] who can bring an action against the trustee to hold him to account for the breach. As atonement for any wrongful conduct from which the trustee profits or gains financially in his personal capacity, a court may require the trustee to convey such monies to the beneficiary. In other words, a court may find that the trustee holds the ill-gotten gains on constructive trust in favor of the beneficiary.[55]

B. Constructive Trust as a Retrospective Remedy for a Public Official's Breach of Fiduciary Duties

Drawing on the private law of trusts, courts have long held public officials to the same fiduciary standards imposed upon private trustees. Together, these fiduciary duties form the core of the public trust doctrine.[56] And, as in the private law of trusts, it is the breach of a fiduciary duty which serves as the cornerstone for the imposition of a constructive trust when the breach allows the public official to obtain personal profit or gain.[57] "If the public can recover from the [corrupt public official] everything he gained from his misconduct, whether or not the public itself suffered direct loss, then it has a powerful weapon for protecting itself from its faithless servants."[58] In this regard, the constructive trust serves as the appropriate vehicle both to vindicate the public interest in

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54 A trust may have more than one beneficiary. For simplicity, we use the singular form of the word throughout this paper.

55 The constructive trust is not a trust in the true sense of the word, but merely a legal term for the equitable remedy described in this section.

56 The basic idea of the public trust doctrine is that "public officials are legally bound to [adhere to] (appropriately adapted) standards borrowed from the law regulating private fiduciaries." Natelson, *supra* note 19, at 1088–98. Professor Natelson lists the five duties as the duty to follow instructions; the duty of reasonable care; the duty of loyalty; the duty of impartiality; and the duty to account. We use "duty to administer" instead of Prof. Natelson's term "duty to follow instructions," we use "duty of prudence" instead of "duty of reasonable care," and we have adopted the modern articulation of the "duty to account" as including the "duty to inform." These minor changes in terminology reflect no major differences in substance.

57 Restatement of Restitution § 197 (1937) ("Where a fiduciary in violation of his duty to the beneficiary receives or retains a . . . profit, he holds what he receives upon a constructive trust for the beneficiary.").

58 Arthur Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office*, 54 Col. L. Rev. 214, 215 (1954). Here, the term "corrupt official" is not limited solely to those who engage in a quid pro quo form of bribery, but rather includes other types of violations of the public trust.

holding the corrupt public official to account and to deter other offenses.[59]

Applying a constructive trust as a remedy for breach of public trust makes sense, especially when viewed in the light of analogous rules from the law of agency, which has been applied to public officials in numerous cases.[60] In agency law, regardless of whether an agent holds a private office or a public one, he or she holds that position as a fiduciary in relation to his or her principal.[61] Accordingly, the agent's activities are subject to a framework of fiduciary standards similar to those found in the law of trusts. First, an agent is barred from self-dealing, regardless of motives, and regardless of whether the self-dealing causes any actual loss to the principal.[62] As applied to a constructive trust, this means proof of actual damages is not required.[63] Second, an agent who engages in self-dealing must surrender to the principal any profits obtained through the self-dealing, even if the transaction were otherwise unimpeachable in the absence of a fiduciary relationship.[64] The underlying impetus for requiring disgorgement of anything an agent receives as a consequence of having violated his fiduciary duty to the principal is "[the] deterrence of unfaithful conduct and the prevention of profit from such conduct."[65] Third,

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[59] Indeed, the constructive trust may prove to be an even more effective remedy than either impeachment or criminal prosecution because it is, as one commentator noted, "[a] sanction which divests a dishonest official of his ill-gotten rewards" and consequently "cuts the heart out of his enterprise." Lenhoff, *supra* note 58, at 215.

[60] Lenhoff, *supra* note 58, at 215.

[61] *Id.*

[62] *Id.* (observing that the agent's "attention must be given undivided to the stern demands of loyalty").

[63] For example, in *United States v. Carter*, a military officer who had secured significant kickbacks in administering construction contracts for the U.S. Army was required to disgorge all of his ill-gotten profits, "irrespective of the actual damage sustained [by the U.S. government]." United States v. Carter, 217 U.S. 286 (1910)). *See also* United States v. Kearns, 595 F.2d 729, 734 (D.C. Cir. 1978) (stating that the purpose of the constructive trust as a remedy "is not to restore particular funds to the Government, but to provide a means of enforcing the loyalty of its agents.").

[64] Lenhoff, *supra* note 58, at 215; GEORGE BOGERT, TRUSTS AND TRUSTEES, § 921 et seq. (1935); 3 AUSTIN WAKEMAN SCOTT AND WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS, § 507 (1989). In other words, under the law of agency, "[i]f an agent receives anything as a result of his violation of a duty of loyalty to the principal, his is subject to a liability to deliver it, its value, or its proceeds, to the principal." Restatement (Second) of Agency § 403 (1958).

[65] Joshua B. Bolten, *supra* note 32, at 423; *accord* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 10.5, at 696 (1973)). Similarly, deterrence of unfaithful conduct and prevention of profit from such conduct are the bases for applying a

with exceptions made for bona fide purchasers, the profits an agent has made from self-dealing can be traced through the agent's subsequent dealings and may be reached regardless of in whose possession they are found.[66]

To the extent that the imposition of a constructive trust is an appropriate remedy for a public official's violation of his or her fiduciary duties, so, too, would it be an appropriate remedy for a President's violation of the Emoluments Clause which results in that officeholder's profit or gain. This is so at least in part because in drafting and ratifying the anti-corruption provisions of the Constitution, the Founders applied the tenets of the public trust doctrine, and therefore built into those provisions the same fiduciary duties as those from the private law of trusts.[67]

Cases in areas of law outside the Emoluments Clause context bear out the notion that the constructive trust is an appropriate remedy for corruption by public officials, regardless of whether the public till suffers any actual loss. Perhaps the most well-known example is the United States Supreme Court case *United States v. Carter*.[68] There, an army officer overseeing procurements entered into a kickback arrangement with two outside contractors. In exchange for directing more contracts their way, thereby increasing their profits, the army officer received from them a portion of the contract monies paid out. The Court found that the imposition of a constructive trust was the appropriate remedy, even though the Army had not been financially aggrieved. The Court reasoned:

> It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. *The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize*

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constructive trust as a remedy for breach of public trust because the goals are to protect the fiduciary relationship and to hold the government official accountable for breach of the duty of loyalty owed to the public. Arthur Lenhoff, *supra* note 58, at 215.

66 Lenhoff, *supra* note 58, at 215.

67 *See* Natelson, *supra* note 19, at 1091 (contending that fiduciary principles are embedded throughout the Constitution).

68 United States v. Carter, 217 U.S. 286 (1910).

> *through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.*
>
> The doctrine is well established and has been applied in many relations of agency or trust. The disability results not from the subject-matter, but from the fiduciary character of the one against whom it is applied.[69]

Other examples abound, and courts have imposed constructive trusts for public-official wrong-doing in a myriad of contexts.[70] In *Jersey City v. Hague*, for instance, when three city officials banded together to force city employees to pay over to the officials three percent of the employees' salaries in an extortion scheme extending over a thirty-two year period, the city sued. In determining whether the trial court had properly granted a motion to dismiss for failure to state a claim, the Supreme Court of New Jersey reversed. The court found the city to be the real party in interest,[71] and the city officials to have held "positions of public trust,"[72] to have allegedly looted the public till,[73] and to have violated the fiduciary duties they owed to the public (if the allegations were proven).[74] Accordingly, the court held that the plaintiff's requested remedy—a constructive trust in favor of the city—was an appropriate prayer for relief.[75] The court's decision relied heavily upon the public trust doctrine.[76] Consistent across

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69 *Id.* at 306 (emphasis added).

70 *See, e.g.*, City of Minneapolis v. Canterbury, 142 N.W. 812 (Minn. Sup. Ct. 1913); City of Boston v. Santosuosso, 10 N.E.2d 271, 274 (Mass. Sup. Jud. Ct. 1937); City of Boston v. Dolan, 10 N.E.2d 275, 277, 281 (Mass. Sup. Jud. Ct. 1937); Jersey City v. Hague, 115 A.2d 8 (N.J. 1955); Chicago Park Dist. v. Kenroy, Inc., 402 N.E.2d 181 (Ill. 1980).

71 Jersey City v. Hague, 18 N.J. 584, 596 (1955).

72 *Id.* at 589.

73 *Id.* at 588–89.

74 *Id.* at 589–96.

75 *Id.* at 596.

76 *Id.* at 589–91.

> [Public officials] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve . . . As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest

contexts are justifications based upon the fiduciary principles underpinning the Emoluments Clause, most notably the duty of loyalty.

C. Fiduciary Principles Applied to Emoluments Clauses

In light of the Founders' reliance on fiduciary principles from the law of trusts in the drafting and ratifying of the Constitution, the vindication of those principles achieved by applying a constructive trust as a remedy for the breach of those duties by a public official, and the general acceptance of the public trust doctrine in Anglo-American law, we now consider how the public trust doctrine operates as justification for the imposition of a constructive trust as a retrospective remedy when a President violates the Foreign Emoluments Clause, the Domestic Emoluments Clause, or both. In this regard, we apply the core fiduciary standard of the duty of loyalty to conduct that would align with that standard in the context of assessing compliance with the Emoluments Clauses and draw a contrast to conduct that would not so align.[77]

> fidelity. . . . In discharging the duties of their office they are required to display intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. . . . They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. . . . These obligations are not merely theoretical concepts or idealistic abstractions of no practical force or effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon entering public office.

Id. Recall, however, that the constructive trust is an appropriate remedy for corruption by public officials, regardless of whether the public till suffers any actual loss. *See, e.g.,* United States v. Carter, 217 U.S. 286 (1910) (finding that the imposition of a constructive trust was the appropriate remedy for Army officer's self-dealing, even though the Army had suffered no financial loss); Snepp v. United States, 444 U.S. 507 (1980) (recognizing a constructive trust, despite no financial harm to government, for breach of fiduciary duty by former CIA official who failed to abide by prepublication review agreement); United States v. Kearns, 595 F.2d 729, 734 (D.C. Cir. 1978) (stating that the purpose of the constructive trust as a remedy "is not to restore particular funds to the Government, but to provide a means of enforcing the loyalty of its agents.").

[77] By focusing solely on the duty of loyalty, we do not mean to relegate the other core fiduciary duties to a place of insignificance in the Emoluments Clause analysis. We limit our discussion to the duty of loyalty primarily because it fits especially closely with the underlying rationale of the Emoluments Clauses.

When making decisions in his official capacity, a President must do so with a singular goal in mind: the best interests of the nation. When a public official's undisclosed, private business affairs are entangled with foreign nations, , the public may reasonably be concerned that policy choices are being made on the basis of what is best for the President's private interests, or indebtedness to a foreign government, or what may be in that foreign government's best interests.[78] The Foreign Emoluments Clause was adopted specifically to ensure that the President direct his undivided loyalty to the best interests of the nation. When a President ignores the requirements of the Foreign Emoluments Clause, the public may rightly wonder whether the policy choices he makes are driven by what is best for the United States or by a corrupt motivation.

Similarly, when a public official uses taxpayer dollars to do government business at properties he owns in particular states, the public may rightly question whether policy decisions that happen to benefit that state are made based upon the best interests of the union or some favorable treatment by that state that is profitable for the official. In this regard, the Domestic Emoluments Clause was adopted to ensure that a President's loyalty remains devoted to the best interests of the union and that his judgment in that regard would not be tainted by "pecuniary inducement[s]" that would turn the presidency into "a position of both power and profit."[79]

A President who meets the strict duty of loyalty called for under fiduciary principles would ensure that public business is conducted without conflicts of interest. In this regard, the Office of Government Ethics (OGE) exists to offer legal advice to help Presidents avoid conflicts of interest, including any that may arise as a result of business investments (whether foreign or domestic) or other transactions that may implicate the Emoluments Clauses so that the President can, if necessary, seek an opinion from the Office of Legal Counsel, and in cases involving foreign emoluments, request the consent of Congress. To assist the OGE

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[78] Citizens for Resp. & Ethics in Washington v. Trump, No. 17 Civ. 458, Compl. at 41 (S.D.N.Y. Dec. 21, 2017) (citing Office of Legal Counsel Opinion "Applicability of the Emoluments Clause to Nongovernment Members of ACUS", 17 Op. O.L.C. 114, 122 (1993) (commenting on "the enduring wisdom of the Clause's central insight: that our leaders "might be biased, and [their] loyalty divided, if they received financial benefits from a foreign government.")).

[79] *Id.* at 43 (quoting Nixon v. Sampson, 389 F. Supp. 107, 137 (D.D.C. 1975) (internal quotation marks omitted)).

in the performance of this task, past Presidents have released their tax returns. In addition, sometimes on the advice of OGE, they have divested problematic or potentially problematic holdings, and have placed other problematic or potentially problematic holdings in a blind, irrevocable trust. Past presidents have also sought congressional consent on whether they could accept foreign-based emoluments and have followed congressional directives about what to do with any foreign-based emoluments already received.

If, instead of following these past practices, a President were to refuse to release his tax returns, divest his holdings, use a fully blind, irrevocable trust, follow the advice of OGE, seek congressional consent, or follow any directive from Congress, then when he makes policy decisions, the public has good reason to ask in whose interests those decisions are being made. The answer may well be disturbingly unclear, and in such a case, the public has good reason to conclude that, at best, the President's loyalty is divided, and that at worst he is, at the expense of the public weal, either profiting personally, advancing the interests of a foreign government, advancing the interests of one state over others, or some combination of all three..

A President's acceptance of foreign emoluments without obtaining the consent of Congress or acceptance of domestic emoluments at all raises troubling questions about his willingness to be bound by constitutional requirements and his commitment to the rule of law. It also fails to comply with the fiduciary duty of strict loyalty to act solely in the nation's best interests. Accordingly, if demonstrated to have violated one of the Emoluments Clauses, a President should be held to account. The violation may not constitute a crime, and it may not give rise to the political will necessary to impeach, but such a fiduciary breach should not go unaddressed. For past violations that involve self-dealing, the imposition of a constructive trust would be a justifiable retrospective remedy for the failure to meet the public official's fiduciary duty of loyalty owed to the public he ostensibly serves.

IV. BLIND TRUST AS A PROSPECTIVE REMEDY FOR A PRESIDENT'S EMOLUMENTS CLAUSE VIOLATIONS

Whereas the constructive trust may operate as a suitable remedy for Emoluments Clause violations that have already

occurred, a court which has found a sitting President to be in violation of one or more of the Emoluments Clauses may still be faced with the question of how best to deter him from future violations. One possible prospective remedy is to require the offending Executive to establish a blind trust for all conflicting assets. In this Part, we consider the blind trust as a prospective remedy for preventing a sitting President from repeating Emoluments Clause violations. We begin by examining the basic concepts and rationales underlying the use of a blind trust as an anti-corruption mechanism in government. Next, we contend that as a prospective remedy, the blind trust furthers the same fiduciary principles as the constructive trust does in the context of retrospective remedies. We note, however, that although the constructive trust has a long history as an equitable judicial remedy, a mandated blind trust lacks a similar common law anchor.

A. The Blind Trust as an Anti-corruption Mechanism

A blind trust is a device whereby a person transfers, without restriction, control and management of his private financial assets, investments, and ownerships to an independent trustee.[80] It is specifically designed to avoid both conflicts of interest and the appearance of conflicts of interest,[81] and it is commonly used in

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[80] Black's Law Dictionary defines "blind trust" as follows: "A trust in which the settlor places investments under the control of an independent trustee, usu. to avoid a conflict of interest." BLACK'S LAW DICTIONARY 7TH ED. (abridged) 1225 (2000). In the context of the federal Ethics in Government Act of 1978, an "independent trustee" is defined as a person who is "not subject to influence by, affiliated with, nor [sic] related to the government official" who is establishing a blind trust. *See also,* Jack Maskell, *The Use of Blind Trusts by Federal Officials, Congressional Research Service Report for Congress*, CONGRESSIONAL RESEARCH SERVICE, Oct. 31, 2003, at 1.

[81] Jack Maskell, *Financial Disclosure by Federal Officials and Publication of Disclosure Reports*, CONGRESSIONAL RESEARCH SERVICE, Aug. 22, 2013, at 4. In discussing the blind trust provisions of the Ethics in Government Act of 1978, Maskell notes:

> The conflict of interest theory under which the 'blind trust' provisions operate is that since the government officer will eventually not know the identity of the specific assets in the trust . . . , those financial interests could not act as influences on the officer or employee's official decisions, thus avoiding real or apparent conflicts of interests.

Id. (citing S. Rpt. 95-639, 95th Cong., 2d Sess., Report of the Committee on Governmental Affairs, "Blind Trusts," at 2–5, 13 (1978); 5 C.F.R. 2634.401(a)(ii)).

both the private domain and in government.[82] As used by government officials, the purpose of the blind trust is to calibrate an appropriate balance between two potentially competing public interests: attracting qualified candidates to public service and preventing self-dealing through policymaking.[83] Each state has its own statutory framework governing blind trusts for public officials, as does the federal government. Given our focus on the blind trust as a possible prospective remedy for violations of the Emoluments Clauses of the federal Constitution, we limit our discussion to the federal rules.

In the federal scheme, in addition to relinquishing control over the management of his assets to an independent trustee,[84] a federal public official who transfers his assets to a blind trust is also limited in the communications he may have with the independent trustee.[85] These features are meant to prevent the public official from having any "knowledge of the identity of the specific assets held in the trust."[86] "The conflict of interest theory under which the blind trust provisions operate is that since the official will not know the identity of the specific assets in the trust, those assets and financial interests could not act as influences on the official decisions and governmental duties of the [transferring] official, thus avoiding potential conflict of interest problems or appearances."[87]

Blind trusts are optional in the federal scheme, and they are available as an alternative to otherwise more specific, mandatory

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[82] *See* Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 KAN. L. REV. 43, 46–48 (2007).

[83] *Id.* at 45–46.

[84] An "independent trustee" for a "qualified blind trust" means that "the trustee and trust employees [can] not be able to be influenced by the official or other interested parties in investment decisions, and not [can] not be 'associated' or 'affiliated' with, nor an employee, partner, or relative of, the public official or any interested party to the trust." Maskell, *supra* note 80, at 6 (citing 5 U.S.C. app. 102(f)(3)(A)). For the requirements for a "qualified blind trust," *see supra* note 72.

[85] Ethics in Government Act of 1978, 5 U.S.C. § 102(f)(3)(E) (2000). Limitations are also imposed upon communications between the trustee and the public official's spouse or any minor or dependent child. 5 U.S.C. § 102(f)(3)(C)(v)–(vi) (trustee precluded from providing specific information about the assets held in the trust or about sources trust income).

[86] Maskell, *supra* note 80, at 5.

[87] *Id.* at 5.

financial disclosures.[88] In other words, federal officials subject to the Ethics in Government Act must disclose detailed information about their financial assets, including the cash value—but only the cash value—of the interests in any trusts that meet the statutory requirements of a "qualified blind trust."[89] Although the federal public official is generally required to disclose the identity and value of all assets, he is not required to provide detailed disclosures of the particular interests themselves, i.e., the underlying assets, if held in a qualified blind trust.[90] Under the structure of the federal requirements, the blind trust acts a mechanism which allows the federal officeholder to maintain financial privacy (therefore making it less burdensome for persons with extensive holdings to seek public office), while simultaneously aiming to ensure that the officeholder's personal financial interests do not contaminate his policymaking decisions.[91]

Two additional points regarding the federal scheme merit attention. First, most conflicts of interest are resolved by disclosure requirements,[92] and where necessary, disqualification from governmental matters in which the public official has a personal "financial interest."[93] Second, although the President and Vice President are subject to the disclosure requirements, they are statutorily exempt from the disqualification requirements.[94] This means that, for the President and the Vice President, the primary mechanism for regulating conflicts of interest is public disclosure.

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88 *Id.* at 1 (noting that "there is no federal statute which expressly requires that particular federal officials, or categories of officials, place their assets into a 'blind trust' upon entering public service").

89 The requirements for a "qualified blind trust" are found in the Ethics of Government Act of 1978, 5 U.S.C. app. § 102(f)(3)-(6): prior approval from the appropriate supervisory ethics office; mandatory filing of trust agreement and asset list with the appropriate supervisory ethics office; designation of a wholly independent trustee; unconditional transfer of assets and power of disposal of those assets to the trustee; exclusion of prohibited assets; except for certain, specific content identified by statute, no communications with the trustee or access to information concerning the identity of any asset in the trust; and enforcement authority in Attorney General to bring civil action for violations.

90 Maskell, *supra* note 81, at 3–4 (citing 5 U.S.C. app. 102(f)(2)).

91 Megan J. Ballard, *supra* note 82, at 44–45. Whether blind trusts in fact achieve the desired balance is a question we leave for another day; it is enough for our present purposes to observe the anti-corruption rationale underlying the use of the blind trust in the federal statutory ethics scheme.

92 *See* Ethics in Government Act of 1978, 5 U.S.C. app. 101 et seq. (requiring certain high-level government officials to make detailed financial disclosures upon entering office and annually thereafter).

93 18 U.S.C. § 208 (2012).

94 18 U.S.C. § 202(c) (2012).

The President's and Vice President's respective disclosures are submitted to the Office of Government Ethics (OGE) for review, and, where potential conflicts exist, the OGE may recommend remedial action to resolve them.[95] Options for remedial action include, among other things, the establishment of a qualified blind trust.[96]

B. Fiduciary Principles underlying the Blind Trust

The anti-corruption purpose of the blind trust mirrors the anti-corruption purpose of the Emoluments Clauses.[97] The Founders feared that political corruption would work the Republic's demise, and the Emoluments Clauses were included in the Constitution to act as a brake on public officials who might succumb to the allure of attaining greater personal wealth through the misuse of their government positions. In this regard, the Emoluments Clauses evince a constitutional commitment to the fiduciary duty of undivided loyalty to the nation's best interests. Just as compliance with those clauses at least partially fulfills that duty, so, too, does a blind trust, as an means of regulating conflicts of interest, at least seek to ensure that a public official undertake government business solely with the best interests of the nation in mind.[98] The federal statutory and regulatory framework concerning government officials' private financial holdings and potential conflicts of interest, including the remedial use of a blind trust to cure any such conflicts, "is generally directed at the concern, expressed by the [United States] Supreme Court, 'that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.'"[99] Accordingly, the federal conflicts of interest rules, like the Emoluments Clauses themselves, are aimed at ensuring "that

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95 Maskell, *supra* note 80, at 2–3.

96 *Id.* at 3–4.

97 *See* discussion, *supra*, Part II.

98 "The underlying principle of federal conflict of interest regulation thus embodies the axiom 'that a public servant owes undivided loyalty to the Government.'" Maskell, *supra* note 80, at 2 (quoting H.R. Rpt. No. 748, 87th Congress, 1st Session, at 3 (1961), House Judiciary Committee report on the comprehensive amendments and revisions to conflict of interest laws in 1962).

99 *Id.* at 1–2 (quoting *United States v. Mississippi Valley Generating Co*., 364 U.S. 520, 549 (1960)).

official decisions, advice and recommendations of officers of the Government be made in the *public* interest and not be tainted, even unintentionally, with influence from *private* or personal financial interests."[100]

Were a President to be found to have engaged in self-enriching conduct in violation of one or both of the Emoluments Clauses and yet remain in office, a reasonable inquiry to ask is what mechanism might hold the President in check to prevent future violations, especially if the initial violations were knowing and intentional. One option, of course, is a court-issued injunction commanding him to start complying with the Emoluments Clauses. But a more effective remedy—and one that would go farther to protect the integrity of our democratic institutions against systemic corruption—is the blind trust. If as we argue above the fiduciary duty of loyalty justifies the imposition of a constructive trust as a retrospective remedy for Emoluments Clause violations by a sitting President, so, too, does it justify a judicially mandated and independently administered blind trust as a prospective remedy to prevent an errant President from repeating similar violations.

We note, however, that as an equitable judicial remedy, a judicially mandated blind trust may lack the common law pedigree of a constructive trust. One argument against a judicially imposed blind trust as a prospective remedy rests upon the observation that, under the Ethics in Government Act, the qualified blind trust is an optional—not a mandatory—remedy for identified conflicted holdings.[101] If the common law does not already recognize the establishment of a blind trust as a prospective remedy for breach of a fiduciary duty resulting in the fiduciary's self-enrichment, and if the statutory scheme created by Congress makes the blind trust merely an optional remedy for identified conflicts, it could be argued that a judicially mandated blind trust impinges upon the legislative prerogative. In addition, it could be argued, a mandatory blind trust might operate as backdoor disqualification and may therefore run afoul of the exemption to the disqualification requirement set forth in 18 U.S.C. 202(c), which expressly excludes the President from the disqualification

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[100] *Id.* at 2 (citing H.R. Rpt. No. 748, 87th Congress, 1st Session, at 4–6 (1961), House Judiciary Committee report on the comprehensive amendments and revisions to conflict of interest laws in 1962).

[101] *See id.* at 1 (noting that "there is no federal statute which expressly requires that particular federal officials, or categories of officials, place their assets into a 'blind trust' upon entering public service").

requirement for conflicts of interest because disqualification may interfere with the President's performance of his constitutional duties.[102] A counterargument in favor of a judicially mandated blind trust rests upon the historical record of conduct undertaken by past presidents, who have, at least since Lyndon B. Johnson, voluntarily created blind trusts to mitigate conflicts and to alleviate concerns about the appearance of conflicts. This historical record, combined with the much longer history of fulsome compliance by presidents with the Emoluments Clauses, suggests that willful and ongoing violations warrant judicial intervention.

Having sketched out some of the key considerations, we leave for another day a more fulsome analysis of the blind trust as a prospective remedy for Emoluments Clause violations, and instead merely raise it at this stage as an inquiry ripe for further analysis.[103]

CONCLUSION

Given the underpinning to the Constitution of fiduciary principles, given that those same principles help to form the public trust doctrine, and given that courts have imposed a constructive trust to remedy breaches of fiduciary duty in both the law of trusts and in cases involving public officials who have violated their fiduciary duties, it seems logical that an appropriate remedy in a successful Emoluments Clause case against a President, were any plaintiff to survive pre-trial challenges and prevail upon the merits, would be the imposition of a constructive trust. As an equitable remedy, the constructive trust falls within the ambit of

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[102] *Id.* at 3 & n.9 ("Even before the express statutory exemption . . . was adopted, the disqualification law was interpreted not to apply to the President . . . since a statutory recusal might in theory interfere with such officers' duties required in the Constitution." (citing Department of Justice Letter Opinion to Senator Cannon, Chairman of the Senate Rules and Administration Committee, September 20, 1974)).

[103] As a point of departure, we recognize that current rules governing qualified blind trusts established by federal officials to avoid conflicts of interest may not necessarily achieve their intended goals. See, e.g., Ballard, *supra* note 80, at 46–48 (arguing that the rules for federal officials' blind trusts provide inadequate safeguards against conflicts of interest because they "do not include sufficient incentives to maintain blindness" and that the use of blind trusts may "can mislead the public into believing that policymakers are avoiding conflicts, when they may not be doing so.").

inherent judicial authority. Regardless of whether a President's receipt of emoluments drain money from the public fisc, a court may nevertheless reach the profits or gains obtained by self-dealing in violation of the duty of loyalty attached to public office. Accordingly, a court finding violation of the either or both Emoluments Clause could order transfer to the U.S. Treasury of the profits a President has realized in violation of the Emoluments Clause, and, to the extent they are no longer in his possession, the profits or gains can be traced to third parties and restitution ordered if not in the hands of bona fide purchasers.

As for the specific cases brought against Donald Trump, courts may be disinclined to find the constructive trust an appropriate a remedy, especially during a period of political hyper-partisanship on Capitol Hill. In addition, identifying and tracing emoluments that Trump has received would likely require extensive judicial resources, given the extent of foreign and domestic holdings and the opacity of Trump's business structure, though a court could—and probably would—appoint a special master to oversee and administer such matters, and courts do have long and successful experience disentangling byzantine business structures and complex financial transactions. Regardless, courts are notoriously conservative about recognizing new remedies or extending existing remedies to new contexts, even when within their power to do so. Accordingly, even though the courts adjudicating the Emoluments Clause cases against Donald Trump have at their disposal a powerful equitable remedy in the form of a constructive trust, they may well decline to rely upon it as a retrospective remedy for any Emoluments Clause violations that may be proven during these lawsuits. And given the absence of a common law history for the imposition of a blind trust as a remedy for fiduciary breach, courts may be even less likely to mandate a blind trust as a prospective remedy for Emoluments Clause violations.

Any judicial inaction should not be taken to mean that no alternate means are available for the imposition of a constructive trust or, potentially, a mandated blind trust. Congress may also be authorized to enact legislation to provide for remedies of a President's violations of the Emoluments Clauses (both foreign and domestic). Whether and to what extent Congress has such power, and if so, what form such legislation might take, are questions that are ripe for investigation but beyond the scope of this paper. Also beyond the scope of this paper is whether, even if Congress has such power, legislating what is a traditionally

equitable remedy would be desirable. Certainly, it would seem that, in light of statutes such as the Foreign Gifts and Decorations Act,[104] Congress does possess such power—at least for prospective violations—and even though the Foreign Gifts and Decorations Act does not establish a constructive trust as a remedy, Congress likely could codify it as such, or, alternately, could refer the question back to the courts by expressly authorizing the judicial branch to consider constructive trusts as the remedy for Emoluments Clause violations. The blind trust as a prospective remedy presents harder questions but is also ripe for future discussion.

Regardless of the extent of congressional authority to act, one or more of the courts adjudicating the current Emoluments Cases against Trump might yet embrace the constructive trust as a retrospective remedy or the blind trust as a prospective remedy (or both) if a plaintiff prevails in proving one or more violations of either or both Emoluments Clauses. In light of the anti-corruption principles at stake, and the potentially grave risk to the health of the Republic if systemic corruption were allowed to take root, we believe that courts should give serious consideration to these remedies.

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104 The Foreign Gifts Act, which operates as an exception to the otherwise "absolute ban" of the Foreign Emoluments Clause, Jeffrey Green, *Application of the Emoluments Clause to Department of Defense Civilian Employees and Military Personnel*, 2013 ARMY LAW 15, 16 (2013), covers federal employees and permits them to accept basic lodging, travel originating and ending outside the United States, meals, and gifts of "minimal value." 5 U.S.C. § 7342 (2012).