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Purse Strings and Self-Dealings: How Congress Can Use the Budget to Prevent the Executive Branch's Ethics Violations

Russell Spivak[†]

Abstract

One of many potential forms of government corruption is self-dealing because officials can steer taxpayer funds into their own pockets. Unfortunately, self-dealing at the highest levels of the federal government is not exactly outlawed—in part because the laws do not clearly apply to certain important individuals and in part because there is no enforcement mechanism. This article aims to address potential instances of self-dealing by proposing a funding rider, or a rule in the budget, barring funds to be paid out to companies owned by high-ranking officials, save for particular circumstances. To do so, it begins by laying out a brief history of funding riders and reviews the current ethics regime. The article then details the particular solution—the rider—as well as necessary exceptions to the rule. Finally, the article advocates for the creation of a new private right of action such that enforcement does not depend on the executive, who may be loath to penalize his or her subordinates.

"Money often costs too much."
— Ralph Waldo Emerson[1]

† Associate, Wilmer Cutler Pickering Hale and Dorr LLP. J.D., Harvard Law School, 2017. B.S., Massachusetts Institute of Technology, 2013.

1. RALPH WALDO EMERSON, THE CONDUCT OF LIFE 107 (1860).

I. Introduction

The Appropriations Clause reads: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[2] Its constitutional complement, the Taxing and Spending Clause, reads: "The Congress shall have Power [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]"[3] Together, the two are commonly referred to as the "power of the purse" and reside squarely in the hands of Congress.

The language of the power, particularly the Appropriations Clause, is worth reflecting upon. "The Framers chose the particular language of limitation, not authorization, for the first part of the clause and placed it in Section 9 of Article I, along with other restrictions on governmental actions to limit, most notably, executive action."[4] Said another way, the Clause plays to the "negative use of appropriations."[5] These policy levers, called "riders," are often wielded in the national security and foreign policy realm.

But funding riders need not be limited to these areas. Indeed, as James Madison wrote in *The Federalist Papers*, the "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress *of every grievance*, and for carrying into effect *every just and salutary measure*."[6] In today's day and age of norm breaking, one cannot help but wonder if Congress should follow Madison's lead and use this lever more frequently to address other governmental infirmities.

One potential arena that comes to mind is President Trump's "vast web of conflicts."[7] There are myriad alleged violations of ethical norms that do not in any way involve the United States Treasury,[8] meaning no budgetary provision would provide Congress a lever to rectify them. But some violations do: in some instances of purported self-dealing, the President or his subordinates appear to be funneling taxpayer money to his benefit. This

2. U.S. CONST. art. 1, § 9, cl. 7.

3. *Id.* § 8, cl. 1.

4. *Essay on Article I: Appropriations Clause*, HERITAGE FOUNDATION, https://www.heritage.org/constitution/#!/articles/1/essays/67/appropriations-clause [https://perma.cc/3ZBT-VV87] (last visited Dec. 14, 2019).

5. Russell A. Spivak, *Co-Parenting War Powers: Congress's Authority to Escalate Conflicts*, 121 W. VA. L. REV. 135, 163 (2018).

6. THE FEDERALIST NO. 58 (James Madison) (emphasis added).

7. Darren Samuelsohn, *Trump's Vast Web of Conflicts: A User's Guide*, POLITICO (Nov. 16, 2016, 5:08 AM), https://www.politico.com/story/2016/11/donald-trump-ethics-conflicts-231454 [https://perma.cc/GWZ2-VYJQ].

8. *See* Complaint at 25–49, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2018) (17 Civ. 458).

includes military stays[9] and holiday parties[10] at his hotels, and frequent vacations to his properties,[11] all of which incur significant costs and wind up benefitting the President. If Congress could, through a funding rider, restrict the outlay of federal funds to any company owned by the President or members of his administration, it could prevent federal ethics violations at the source.

This essay begins by reviewing the constitutional underpinnings and historical use of funding riders. Next, it details the pertinent ethics laws and their application—or lack thereof—to the President and his or her Administration. The essay then suggests how Congress could use funding riders to address these instances of presidential self-dealing. Finally, the essay details how a proposed private right of action could further ensure ethics compliance.

II. Negative Appropriations and a Brief History of Funding Riders

Congress first included funding riders in 1919, enacting a "cap [on] civilian defense employees' salaries."[12] Three years later, Congress enacted a similar rider to curb improper expenditures on moving war materiel.[13] Throughout the twentieth century, riders became a powerful means for Congress to enforce its policy objectives. During the Vietnam Conflict, for example, Congress "attach[ed] amendments to legislation to restrict military actions by the United States in the Indochina region, as part of a larger effort to compel the withdrawal of U.S. military forces from the area"[14] three separate times. This included the Boland Amendment, which prohibited funds from:

> be[ing] used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual,

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9. *See* Ben Schreckinger, *Air Force Crews Stayed at Trump's Turnberry Resort for Days at a Time*, POLITICO (Sep. 17, 2019, 5:00 AM), https://www.politico.com/story/2019/09/17/trump-scotland-turnberry-1499298 [https://perma.cc/FW9D-VKBE].

10. *See* Katie Benner, *Barr Plans to Throw $30,000 Holiday Party at the Trump Hotel in Washington*, N.Y. TIMES (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/us/politics/barr-trump-hotel-party.html [https://perma.cc/X79Y-E43T].

11. *See* Lauren Frias, *Secret Service Spent More Than $250,000 at Trump's Properties in the First 5 Months of His Presidency, Records Show*, BUS. INSIDER (Nov. 21, 2019, 7:32 PM), https://www.businessinsider.com/secret-service-spending-records-trump-properties-donald-trump-2019-11 [https://perma.cc/VYZ7-A5SH].

12. Spivak, *supra* note 5, at 163 n.155 (2018) (citing An Act of June 30, 1920, Pub. L. No. 66-7, 41 Stat. 104, 105 (1919)).

13. *Id.* (citing An Act of June 30, 1923, ch. 253, Pub. L. No. 67-259, 42 Stat. 716, 717 (1922)).

14. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS 1–2 (2001).

> not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.[15]

Congress has also used funding riders outside of the foreign policy realm as a means of restricting abortion access and certain scientific research programs. First passed in 1976, the Hyde Amendment reads: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."[16] Put more simply, the rider bars "Medicaid . . . from covering abortion."[17] In subsequent years, the prohibition has been expanded to "a slew of federal government programs and agencies, including Indian Health Services and the Veterans Health Administration."[18]

In a less popularized but no-less-impactful example, following increased attention to human cloning,[19] Congress barred spending federal funds for "the creation of a human embryo or embryos for research purposes; or [] research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero."[20]

Whether in the foreign or domestic policy, Congress has used its purse strings to play puppeteer to the Executive marionette. Such examples are a blueprint for how Congress could do so to ensure federal officials cannot benefit from improper self-dealing with taxpayer funds.

III. Federal Officials, Ethics Laws, and Treasury Payments

Both federal criminal law and civil regulations prohibit officials from allowing their personal financial interests to influence their governmental decision-making. Yet neither applies to the President. Moreover, a President may be loath to enforce either regime on dedicated and hard-working West Wing advisors. A loophole therefore remains in which the President and

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15. Continuing Appropriations for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982).

16. Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

17. Davida Silverman, *The Hyde Amendment: Restricting Abortion Coverage for 40 Years*, PLANNED PARENTHOOD: BLOG (Sep. 30, 2016, 2:53 P.M.), https://www.plannedparenthoodaction.org/blog/the-hyde-amendment-restricting-abortion-coverage-for-40-years [https://perma.cc/7CVN-L7NC].

18. *Id.*

19. *See generally* Russell A. Spivak, I. Glenn Cohen & Eli Y. Adashi, *Germ-Line Gene Editing and Congressional Reaction in Context: Learning From Almost 50 Years of Congressional Reactions to Biomedical Breakthroughs*, 30 J.L. & HEALTH 20 (2017).

20. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 509(a), 123 Stat. 3034, 3280–81 (2009).

high-ranking members of the Executive Administration can profit off of their decision-making roles.

A. Applicable Civil and Criminal Rules

1. Criminal Law

Federal criminal law attempts to address and penalize conflicts of interest:

> The criminal conflict of interest statutes found in §§ 203, 205, 207, 208, and 209 of title 18 U.S.C. address Federal employees': (1) representational services before the Federal Government (§§ 203 & 205); (2) post-employment activities (§ 207); (3) participation in official matters in which they have financial interests (§ 208); and (4) receipt of supplementation of salary as compensation for their official services (§ 209).[21]

Together, these laws prohibit federal employees from allowing personal financial interests to influence their decision-making on the job—under threat of criminal punishment. However, these sections apply only to "an employee" of the Executive or Legislative branches, and do not cover the President, the Vice President, members of Congress, or federal judges.[22] As a result, the President is free to steer contracts or public monies to businesses in which he maintains an interest, unencumbered by federal criminal law.

2. Civil Regulations

Just as criminal law falls short of holding the President accountable, so too does civil law. Although the Code of Federal Regulations requires that federal officials not "use public office for private gain" and "act impartially and not give preferential treatment to any private organization or individual,"[23] its scope is limited in two respects. The Code explicitly enumerates particular types of conduct that are prohibited,[24] providing that:

> An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and

21. OFFICE OF GOV'T ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 2 (2006).

22. 18 U.S.C. § 202 (2012).

23. 5 C.F.R. § 2635.101(b)(7)–(8) (2019).

24. *Id.* § 2635.702.

> persons with whom the employee has or seeks employment or business relations.[25]

The Code similarly articulates specific rules regarding the inducement or coercion of benefits,[26] the appearance of government sanction,[27] endorsements,[28] the performance of official duties affecting a private interest,[29] and the use of terms of address and ranks,[30] and provides illustrative examples for each.

But the regulations apply *only* to an "employee." That term, per another provision in the same chapter, sub-chapter, and part of the CFR, reads: "For purposes other than subparts B and C of this part, it does not include the President or Vice President."[31] Therefore, these regulations simply do not apply to the Commander in Chief.

The same reasoning is applied to civil statutes governing public officials' secondary income, which could be influenced by their role as a legislator—or an executive. Following President Trump's election, Senator Tom Carper wrote a formal letter to the then-Director of the Office of Government Ethics ("OGE") Walter Shaub asking how his office "plan[ned] to address the potential for conflicts of interest in the upcoming Administration of President-elect Donald Trump."[32] Several weeks later, Shaub replied to Carper that "provisions of the Ethics in Government Act limiting outside earned income and outside employment are inapplicable to the President because they employ the terms 'officer' and 'employee,' which are subject to definitions that exclude the President in the same title of the United States Code."[33]

The Stop Trading on Congressional Knowledge Act ("STOCK Act") similarly fails to address self-dealing and conflict of interest on behalf of the President and certain Executive officials. Under the STOCK Act, the President is barred from:

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25. *Id.*

26. *Id.* § 2635.702(a).

27. *Id.* § 2635.702(b).

28. *Id.* § 2635.702(c).

29. *Id.* § 2635.702(d).

30. *Id.* § 2635.702(e).

31. *Id.* § 2635.102(h).

32. Letter from the Honorable Tom Carper, U.S. Senator, to Walter M. Shaub, Jr., Dir., Office of Gov't Ethics (Nov. 20, 2016), https://www.hsgac.senate.gov/imo/media/doc/2016-11-21%20Carper%20Letter%20to%20OGE%20re%20Conflicts%20of%20Interest.pdf [https://perma.cc/9A3Y-X94F].

33. Memorandum from Walter M. Shaub, Jr., Dir., Office of Government Ethics, to the Honorable Tom Carper, U.S. Senator 2 (Dec. 12, 2016), https://www.hsgac.senate.gov/imo/media/doc/Office%20of%20Government%20Ethics%20Responds%20to%20Carper%20Inquiry%20on%20President%20elect%20Trumps%20Conflicts%20of%20Interest.pdf [https://perma.cc/26HC-GMBD].

> [U]sing nonpublic information for private profit; engaging in insider trading; participating in an initial public offering; intentionally influencing an employment decision or practice of a private entity solely on the basis of partisan political affiliation; and participating in a particular matter directly and predictably affecting the financial interests of any person with whom he has, or is negotiating for, an agreement of future employment or compensation.[34]

While these are important anti-corruption measures, they do not address the risk of an official's self-dealing. As such, it is unclear—at best—that either the criminal or civil regime prohibiting the use of public office for personal gain would or could dispel a President who may try to steer taxpayer dollars into his or her pockets.

B. The Remaining Loophole: Enforcement

Aside from the law's dubious application to the President, there are two additional issues regarding possible ethical violations: dutiful enforcement and standing to challenge the misconduct. The latter applies almost exclusively to constitutional questions on the Emoluments Clause[35] and is already the subject of rigorous academic debate[36] and highly scrutinized public litigation.[37] As such, it lies outside the scope of this article.

But an executive unwilling to discipline subordinates for ethics breaches presents a nearly intractable obstacle. Consider the following. On February 2, 2019, Nordstrom announced that it would not renew its purchases of Ivanka Trump's clothing line.[38] When asked about Nordstrom's decision in a television interview the following week, White House Senior Counselor Kellyanne Conway responded: "Go buy Ivanka's stuff . . . . I will go get some myself today . . . . This is just [a] wonderful line [of clothing]. I own some of it I [sic] fully—I'm going to give a free commercial here."[39]

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34. *Id.* at 1.

35. U.S. CONST., art. I, § 9, cl. 8.

36. *See e.g.*, Memorandum from Norman L. Eisen et al., Governance Studies at Brookings, on The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump (Dec. 16, 2016) (defending an interpretation that encompasses the President).

37. *E.g.* Citizens for Responsibility & Ethics in Washington v. Trump, 939 F.3d 131, 138 (2d Cir. 2019); Blumenthal v. Trump, No. 19-5237, 2020 WL 593891, at *1 (D.C. Cir. Feb. 7, 2020) (dismissing a lawsuit alleging Emoluments Clause violations by President Trump for lack of standing).

38. David A. Fahrenthold & Sarah Halzack**,** *Nordstrom Drops Ivanka Trump-Branded Clothing and Shoes*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/politics/nordstrom-drops-ivanka-trump-branded-clothing-and-shoes/2017/02/02/3f395d10-e9b6-11e6-b82f-687d6e6a3e7c_story.html [https://perma.cc/X37H-ND3G].

39. Jen Hayden, *From the White House, Kellyanne urged Fox viewers to buy Ivanka's clothing line (and broke fed law)*, DAILY KOS (Feb. 9, 2017), https://www.dailykos.com/stories/2017/2/9/1631776/-With-the-WH-as-a-backdrop-Conway-urged-Fox-viewers-to-buy-Ivanka-s-clothes-and-

Immediately, the political universe was ablaze. Notwithstanding the former and then-current officials who claimed that Conway's statements violated the law,[40] and President Trump's Executive Order requiring executive officials honor the aforementioned ethics rules that would not otherwise apply,[41] Trump did not take any action against Conway. Instead, White House Counsel "advised her that her comments regarding Ms. Trump's products implicated the prohibition on using one's official position to endorse any product or service."[42] The Conway episode shows how a president compromised by an ulterior incentive—his own self-interest or that of his confidante—is effectively left to police his or her own conduct and can easily evade ethical scrutiny.

In response to rising conflict of interest concerns, the Brennan Center proposed "a comprehensive policy agenda outlining steps Congress can take . . . to prevent self-dealing by the country's top leaders."[43] The proposal calls for an enhanced, multi-faceted enforcement regime, including affording the OGE "the same autonomy from the president that it has conferred on other independent agencies, clarify[ing] that OGE's rules are binding on all executive branch officials, and enhanc[ing] the agency's oversight over ethics officials in other federal agencies."[44] These proposed changes could theoretically enable more meaningful oversight of episodes like Conway's. But these proposed changes may not adequately police improper actions by the President himself or herself. Furthermore, inherent in this agenda is the risky presumption that the President would nominate an independent OGE director who would uphold the duties of the office free from White House influence.

For example, consider a universe in which Apple CEO Tim Cook became President, refused to divest his stock, and either mandated that the entire Executive Branch exclusively use Apple products or steered federal contracts in any number of ways to Apple, purely to serve his personal

broke-federal-law [https://perma.cc/KM5J-9Y99] (containing transcript of Conway's interview with Fox & Friends).

40. *E.g.*, Jon Schuppe & Mark Murray, *Did Kellyanne Conway's Ivanka Trump Fashion Line Plug Violate Ethics Rules?*, NBC NEWS (Feb. 9, 2017), https://www.nbcnews.com/news/us-news/was-kellyanne-conway-s-ivanka-trump-fashion-line-plug-legal-n718831 [https://perma.cc/3S2R-8BZ3].

41. Exec. Order No. 13770, 82 Fed. Reg. 9333–38 (Feb. 3, 2017). *Cf.* WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF JULIUS CAESAR, act 3 sc. 2. ("Brutus is an honourable man").

42. Letter from Sefan C. Passantino, Deputy Counsel to the President, Compliance and Ethics, to Walter M. Shaub, Jr., Dir., U.S. Office of Gov't Ethics (Feb. 28, 2017), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Oversight%20Response%20to%20Shaub%20re%20KAC.PDF [https://perma.cc/55F7-TTAH].

43. Daniel I. Weiner, *Strengthening Presidential Ethics Law*, BRENNAN CTR. FOR JUSTICE (2017), https://www.brennancenter.org/our-work/policy-solutions/strengthening-presidential-ethics-law [https://perma.cc/5G2S-PKZT].

44. *Id.*

interest. Or suppose the next iteration of FBI cars *had* to be Teslas under an Elon Musk Administration. Or all government telephones had to use the AT&T network in a Randall Stephenson Administration. The Brennan Center's proposals, even if implemented, would not address such instances of self-dealing.

So, *quis custodiet ipsos custodes?*—who watches the watchmen? This is where Congress and the American people must be leveraged: "Ambition must be made to counteract ambition."[45]

III. A Proposed Solution

To prevent such conflicts of interest, Congress should enact a funding rider prohibiting the allocation of funds to companies owned—even in part—by the President, high-ranking members of the Executive Branch, and their families, with several key limitations.

A. The Funding Rider

Congress could introduce a rider—similar to the Boland or Hyde Amendment[46]—barring the provision of federal funds to any company owned by the President or members of the Administration. Such a rider would close existing loopholes and ensure that financial decisions were made without improper influence. Such a rider would be straightforward. But to ensure fairness and administrability, the rider's application should be limited in several important ways.

First, there should be a *de minimis* threshold. Consider a world in which Starbucks's former Chairman and CEO Howard Schultz followed through on his "serious[] consider[ation]" of running for President[47] and won, but refused to divest his significant interest in the coffee company.[48] It would not make much sense, though, for the Treasury to concern itself with an outlay of $14.99 for a government office's purchase of a pound of coffee beans, notwithstanding the conflict at play. Therefore, such a rider should likely include a minimum of some kind.

Second, the rider should only prohibit the President and members of his Administration from *knowingly* engaging in conflicts of interest and self-dealing. Instituting this standard would encourage Presidents to divest their

45. THE FEDERALIST NO. 51 (James Madison).

46. *See supra* notes 16–19 and accompanying text (describing Boland and Hyde Amendments).

47. Howard Schultz @HowardSchultz, TWITTER (Jan. 27, 2019, 6:04 PM), https://twitter.com/HowardSchultz/status/1089675490707865603 [https://perma.cc/3BXK-H7EA].

48. As of February 2019, Schultz "own[ed] more than 30 million shares and ha[d] options on 5 million more." Philip M. Nichols, *Howard Schultz Must Sell His Starbucks Shares If He Runs for President*, CNN BUSINESS (Feb. 16, 2019), https://www.cnn.com/2019/02/16/perspectives/howard-schultz-starbucks-shares/index.html [https://perma.cc/EMG5-QSRP].

interests that could give rise to a conflict (and ultimately self-dealing) and place them in a blind trust, the typical vehicle for public officials. Indeed, "[p]rior to 1978, there was no federal law or regulation providing rules on 'blind trusts' for federal officials."[49] Instead, such vehicles were implemented as personal decisions to deflect potential criticisms, or to stave off criticisms arising from potential conflicts of interest, or "at the insistence of a Senate committee as a requirement for approval of a nomination."[50] But the passage of the Ethics in Government Act of 1978 changed that, putting forward "uniform guidelines for the establishment, maintenance, operation and enforcement of 'blind trusts' for federal officials" under conflict of interest law[51]—in addition to implementing the civil laws referenced above.[52] Should the official avail himself or herself of this option and, by happenstance, direct a government contract to a company he or she owns, the official should not be punished because he or she could not be said to have been intentionally self-dealing.

B. The Safeguard Exception

Because the purpose of such a rider is to prevent self-dealing, it follows that federal money can and should be directed toward companies in which the President, his or her executive officials, or their families have a financial interest. However, if this rule were applied unilaterally, its enforcement could impose a cost on the American taxpayer. Thus, the rule should not be applied if the allocation is by all measure in the government's interest; for example, it should not apply where the company validly wins the contract or deserves the allocation.

Take the Department of Defense's "JEDI [Joint Enterprise Defense Infrastructure] Cloud contract [to] provide enterprise level, commercial Infrastructure as a Service (IaaS) and Platform as a Service (PaaS) to support Department of Defense business and mission operations."[53] The contract was recently awarded to Microsoft for 10 years.[54] Now imagine Bill Gates ran for President in 2028 and won, but would not divest his Microsoft shares. When the next JEDI contract came around, should the government be forced to

49. JACK MASKELL, CONG. RESEARCH SERV., RS 21656, THE USE OF BLIND TRUSTS BY FEDERAL OFFICIALS 5 (2005).

50. *Id.*

51. *Id.*

52. *See supra* Subpart II(A).

53. *Contracts*, U.S. DEP'T OF DEF. (Oct. 25, 2019), https://www.defense.gov/Newsroom/Contracts/Contract/Article/1999639/ [https://perma.cc/M4XU-2SAA].

54. *Id.* However, Amazon has now alleged that the contract was awarded to Microsoft instead of Amazon due to President Trump's visceral hatred of Amazon founder and CEO Jeff Bezos. *See* Redacted Complaint at 2, Amazon Web Services, Inc. v. U.S. Dep't of Def., No. 19-cv-01796 (Fed. Cl. filed Dec. 9, 2019).

forego using the President Elect's company as its provider, even though it offered a better option than competitors?[55]

To address such a situation, any funding rider of this kind should include language permitting the release of federal funds to companies in which the President or a member of his or her Administration has a financial interest so long as such a contract or other allocation was cleared by the Government Accountability Office ("GAO"). As "an independent, nonpartisan agency that works for Congress" and "examines how taxpayer dollars are spent and provides Congress and federal agencies with objective, reliable information to help the government save money and work more efficiently," the GAO could determine whether the company was properly selected to serve the interest of the government—rather than the President or other officials with an ownership interest.[56]

IV. Enforcement Via Private Right of Action

The Antideficiency Act could in theory enforce the proposed funding rider. However, enforcement under the Antideficiency Act depends on disinterested executive enforcement. As laid out above,[57] that assumption may no longer be sound. Once that assumption is relaxed, the availability of alternative enforcement mechanisms becomes more important. Chief among the many options is creating a new civil cause of action to permit interested private parties—competitors or watchdogs alike—to blow the whistle on self-dealings by abusing American taxpayer funds.

The classic private right of action for a private person to call attention to misconduct is the False Claim Act's ("FCA") *qui tam* provision, wherein the FCA "permits . . . a private party . . . to initiate a civil action alleging fraud on the Government."[58] If proven improper, the private party who referred the action will "generally receive between twenty-five and thirty percent of any recovery in the action," in addition to "reimbursement for expenses, as well as attorney's fees and costs."[59] Thus, individuals are not just impelled to flag wrongdoing out of the goodness of their hearts, but also have a monetary incentive to do so.

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55. Beth Kindig, *Opinion: Microsoft Fairly and Squarely Beat Amazon in $10 Billion Pentagon Cloud Contrac*t, MARKETWATCH (Dec. 7, 2019), https://www.marketwatch.com/story/microsoft-fairly-and-squarely-beat-amazon-in-10-billion-pentagon-cloud-contract-2019-12-03 [https://perma.cc/CF3P-K2YL].

56. *About GAO*, GOV'T ACCOUNTABILITY OFFICE, https://www.gao.gov/about/ [https://perma.cc/CXK8-PGMZ].

57. *See supra* Subpart II(B).

58. U.S. *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 932 (2009) (citing 31 U.S.C. § 3730(b)).

59. Am. Bankers Mgmt. Co., Inc. v. Heryford, 885 F.3d 629, 634 & n.6 (9th Cir. 2018) (citing 31 U.S.C. § 3730(d)(2)–(3)).

Arguably a better model is the Clayton Antitrust Act's private right of action, which enables private litigants to seek both monetary damages as well as injunctive relief for antitrust violations.[60] With respect to monetary damages, it affords anyone "injured in his business or property by reason of anything forbidden in the antitrust laws" to sue the offending party.[61] Moreover, if such a violation is found, not only would the victim be compensated for his losses, but he is also entitled to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[62] Finally, the victim can also request and be granted injunctive relief, namely when the court can enjoin the offender from carrying out further inappropriate actions.[63]

Under this scheme, the government is not, in practice, the only watchful eye over anticompetitive actions; market participants, watchdog organizations, or even academics are encouraged—not just permitted—to police such actions, as they would at minimum be made whole for the costs incurred in ensuring that the "rules when the giants play are the same as when the pygmies enter the market."[64] And because such actions are brought to court, the judiciary is also in effect brought in to protect against misconduct.

This scheme would be an ideal model: it would require not merely a percentage apportionment of the amount of money in question but the entirety of the budgetary outlay itself, and it allows for injunctive relief to halt any such improper payments. What's more, the right of action could include language directing individuals to file complaints in the Court of Federal Claims, which "is authorized to hear primarily money claims founded upon the Constitution, federal statutes, executive regulations, and contracts (express or implied in fact) with the United States" and "allow[s] citizens to file claims for money against the federal government."[65]

V. Conclusion

This Article aims to address one aspect of a multi-faceted yet nebulous enemy: corruption. It advocates for a funding rider that bars spending federal funds on companies owned by high-ranking officials unless the expenditure has been vetted thoroughly by an independent arbiter. In doing so, it encourages officials to divest their beneficial interests, lest their investments be *harmed* for sake of their ownership (by requiring increased burdens to

60. 15 U.S.C. §§ 15(a), 26 (2012).

61. 15 U.S.C. § 15(a) (2012).

62. *Id.*

63. 15 U.S.C. § 26 (2012).

64. Scherk v. Alberto-Culver Co., 417 U.S. 506, 526 (1974) (Douglas, J., dissenting).

65. *Frequently Asked Questions*, U.S. COURT OF FED. CLAIMS, https://www.uscfc.uscourts.gov/faqs [https://perma.cc/3M8G-8EB9] (last visited Feb. 8, 2020).

obtain a government contract). The rider also includes safeguards to ensure the country does not harm itself by bending over backwards in the crusade against corruption. Ultimately, this proposal does not purport to be the silver bullet in the fight against all corruption throughout the American government, but aims to offer one substantial blow in the fight.