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# RESOLVING THE MERITS OF THE EMOLUMENTS CASES: EITHER WAY, SEVERAL PRESIDENTS WERE WRONG

JESSE MENTZ\*

## INTRODUCTION

Consider the following stories.

Story 1: The Federal Government owns some land and is trying to sell it. The people the government has put in charge of selling it are highly politically connected. One of them was appointed by the president, whom we will call “Don.” Distinct from the salary he receives for his services as president of the United States, Don owns property and runs a small enterprise. He buys the land. Has Don done anything wrong? Has he violated convention? Has he used his public office for personal gain? And more importantly, even if the answer to the last three questions is yes, has he violated the Constitution?

Story 2: The Federal government owns a building and is trying to lease it. The people put in charge of managing the lease work for the president, Don. Don leases the building for his business enterprise. Has Don done anything wrong?

Story 3: The Federal government needs money. Don pools his money together with other investors and loans it to the government in exchange for annual repayment with interest. Has Don violated the Constitution?

Story 4: What if instead of loaning money to the Federal government,

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\* Executive Postscript Editor, *Southern California Law Review*, Volume 94; J.D. Candidate 2021, University of Southern California Gould School of Law; M.A. International Relations 2012, University of Southern California; B.A. International Relations 2012, University of Southern California. Thank you to my wife, Sonia, for encouraging me to pursue law school, and to my two daughters for making this stage of life so enjoyable. Additionally, thank you to Professor Franita Tolson for encouraging me to write about what interested me and helping me hone what I wanted to say. Finally, thank you to the Southern California Law Review editors for their excellent work.

Don and his fellow investors loan money to a state government? Or a city government? Or a *foreign* government?

Story 5: Don owns an agricultural business. Don exports his goods abroad for general sale. Don is not sure, but it is likely that at least some of the people who buy Don's goods are employed by a foreign government. Has Don violated the Constitution?

Story 6: Don owns a hotel company. A foreign government sends its diplomats to the United States to meet with Don and his employees. While here, they spend a substantial amount of money on hotel rooms and meeting spaces. They have a choice of hotels and venues, but they choose one owned by Don. Has Don violated the Constitution?

Finally, does the answer to any of the above change depending on who "Don" is?

All of the stories above are true. Only stories two and six exclusively involve Donald Trump. Story one is about George Washington. Story five is about George Washington, Thomas Jefferson, and James Madison. Stories three and four are about Barack Obama and very likely every other president since the invention of the bond fund. They would almost certainly apply to every modern candidate running for office.

Story six, regarding diplomatic business at the Trump International Hotel, has attracted significant media attention and several lawsuits<sup>1</sup> utilizing a Constitutional Clause never before litigated<sup>2</sup>—the Foreign Emoluments Clause, which reads "No Title of Nobility shall be granted by the United States: And no Person holding any Office or Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument,

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1. *E.g.*, Citizens for Responsibility & Ethics in Wash. v. Trump (*CREW*), 276 F. Supp. 3d 174 (S.D.N.Y. 2017); District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018); Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018), *rev'd*, 949 F.3d 14 (D.C. Cir. 2020). These three cases are the most substantive and have each made it to federal circuit courts in the Second, Fourth, and D.C. Circuits respectively, but other cases exist. *See, e.g.*, Nyabwa v. Trump, 1:17-mc-00058, 2017 U.S. Dist. LEXIS 221020, at \*2 (D.D.C. Jan. 31, 2017) (asking for injunction of inauguration until Trump divests business interests because of violation of emoluments clause; dismissed for lack of filing fee).

2. A Lexis search Shepardizing the Foreign Emoluments Clause in all cases prior to November 8, 2016 (election day), yielded only seventy-five results. Of those, only ten were Supreme Court opinions, of which two were in dissents, four referenced only that "No Title of Nobility shall be granted by the United States," one noted that United States was a plural noun in the Constitution, another listed the times "Person" was used in the United States, another listed a criminal case in which the defendant had marked several clauses in the Constitution, and one stated in a footnote that a retired military officer may lose pay if he accepts employment by a foreign government with statutory exceptions. *E.g.*, McCarty v. McCarty, 453 U.S. 210 (1981). No case has directly addressed the meaning of emoluments in the Foreign Emoluments Clause.

Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”<sup>3</sup> Story two, regarding Trump International Hotel leasing space in the Old Post Office Building from the Government Services Agency which sits in the executive branch, has also generated litigation.<sup>4</sup> The cases also allege a litany of other violations, including foreign governments buying or leasing space from Trump properties,<sup>5</sup> moving conventions and parties to Trump hotels,<sup>6</sup> paying Trump royalties for permission to air *The Apprentice*,<sup>7</sup> expediting Trump real estate developments<sup>8</sup> or Trump trademark applications,<sup>9</sup> and the State Department marketing Mar-a-Lago on its website.<sup>10</sup>

The question in these cases is whether the Foreign Emoluments Clause applies to President Trumps’ private business revenue.<sup>11</sup> While there is some debate on whether the president is included as “a Person holding any Office or Profit or Trust under” the United States,<sup>12</sup> the majority of the debate has

3. U.S. CONST. art. I, § 9, cl. 8.

4. Technically, the plaintiffs in all three of the major lawsuits allege the hotel lease is a violation of the Domestic Emoluments Clause, U.S. CONST. art. II, § 1, cl. 7., but the meaning of the word “emoluments” is still at issue. See Second Amended Complaint at 43, *Blumenthal*, 335 F. Supp. 3d 45 (No. 17-cv-1154), ECF No. 87 [hereinafter *Blumenthal Complaint*]; Amended Complaint at 26–29, *District of Columbia*, 291 F. Supp. 3d 725 (No. 17-cv-1596), ECF No. 95 [hereinafter *District of Columbia Complaint*]; Second Amended Complaint at 30–34, *CREW*, 276 F. Supp. 3d 174 (No. 17-cv-458), ECF No. 28 [hereinafter *CREW Complaint*].

5. *Blumenthal Complaint*, *supra* note 4, at 46–47; *District of Columbia Complaint*, *supra* note 4, at 19–20; *CREW Complaint*, *supra* note 4, at 23–25.

6. *CREW Complaint*, *supra* note 4, at 20–21.

7. *Blumenthal Complaint*, *supra* note 4, at 47–48; *District of Columbia Complaint*, *supra* note 4, at 24; *CREW Complaint*, *supra* note 4, at 28.

8. *Blumenthal Complaint*, *supra* note 4, at 48–50; *District of Columbia Complaint*, *supra* note 4, at 24–26; *CREW Complaint*, *supra* note 4, at 28–30.

9. *Blumenthal Complaint*, *supra* note 4, at 40–42; *District of Columbia Complaint*, *supra* note 4, at 22–24; *CREW Complaint*, *supra* note 4, at 26–27.

10. *District of Columbia Complaint*, *supra* note 4, at 29–31.

11. These three cases will almost certainly be resolved on procedural issues, and the courts will decline to reach the merits, but that has not stopped the litigants from arguing the merits and will not stop us here from attempting to resolve them.

12. One of the stronger textual arguments supporting the position that the clause does not apply to the president’s actions argues that the clause does not cover the president at all. See Josh Blackman & Seth Barrett Tillman, *The Congressional Research Service Has Shifted Its Position on Whether the Foreign Emoluments Clause Applies to the President*, VOLOKH CONSPIRACY (Oct. 3, 2019, 7:30 AM), <https://reason.com/2019/10/03/the-congressional-research-service-has-shifted-its-position-on-whether-the-foreign-emoluments-clause-applies-to-the-president> [https://perma.cc/ZRR9-FDZS]. But see Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 42–45 (2012); Norman Eisen, Richard Painter & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS (Dec. 16, 2019) <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump> [https://perma.cc/VVE2-3UTD]. Regardless of the strength of Tillman’s argument here, the Department of Justice has not argued this position in the lawsuits, much to Blackman and Tillman’s apparent bewilderment. See Josh Blackman & Seth Barrett

centered on the meaning of the word “emoluments.” This argument has primarily involved two categories of evidence: evidence from language—usually historical statements of the founders, ratification-era dictionaries, and corpus linguistics; and evidence from practice—how presidents and others behaved, shedding light on the proper understanding of this clause, throughout history. I have summarized the most convincing arguments below in Part I.

In this Note, I offer a summary, a realization, a conclusion, and an explanation: a *summary* of what I found to be the most convincing arguments of each side, noting both the plaintiffs’ and defendant’s efforts to characterize history as uniquely supporting their favored interpretation; a *realization* of the impossibility of perfect historical consistency in any interpretation; a *conclusion* that in light of unavoidable historical inconsistency, the Foreign Emoluments Clause does indeed apply to President Trump’s hotel revenues; and an *explanation* of one possible way to view the inconsistent application of the clause in view of my conclusion that it does apply.

Under my proposed view, the fact patterns of all the introductory stories fall within the scope of the Emoluments Clause(s)<sup>13</sup>—they are all “emoluments” under the broad definition—but the difference in the propriety of the behavior is based primarily on what is outside the fact patterns: the appearance of the possibility of corruption. The reason these cases are being brought against the forty-fifth president and not the first has much more to do with the perception of who the presidents were and are, and the public’s corresponding intuitive sense of the possibility of corruption. This understanding is one possible explanation of how Washington could purchase land at a public auction designed to raise funds for the founding of the new capital without raising flags, but Trump cannot similarly lease hotel space from the government and avoid scrutiny.

## I. BACKGROUND

In *Blumenthal v. Trump*, in which more than two hundred members of

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Tillman, *The Office of Legal Counsel Has Not Shifted Its Position on Whether the Emoluments Clause Applies to the President. But the Civil Division Has*, VOLOKH CONSPIRACY (Oct. 4, 2019, 7:30 AM), <https://reason.com/2019/10/04/the-office-of-legal-counsel-has-not-shifted-its-position-on-whether-the-foreign-emoluments-clause-applies-to-the-president-but-the-civil-division-has> [https://perma.cc/4642-RB42] (“The government’s position emulates Schrodinger’s cat: maybe the Foreign Emoluments Clause applies to the President; maybe it doesn’t; don’t ask; we won’t tell.”).

13. Either the Foreign Emoluments Clause, U.S. CONST. art. I, § 9, cl. 8, the main clause at issue in the cases, or the Domestic Emoluments Clause, U.S. CONST. art. II, § 1, cl. 7., implicated in a few of the claims. See *supra* text accompanying note 4.

Congress sue President Donald Trump for violating the Emoluments Clause, President Trump argues that there were two definitions of emoluments in use at the time the Constitution was written and ratified: a “broad” and a “narrow” definition. The broad view, which the plaintiffs argue for, is that emoluments “refer[s] generally to benefit and advantage.”<sup>14</sup>

The narrow definition, which President Trump argues for, means “profit arising from an office or employ.”<sup>15</sup> Under this definition, only profits that are paid by a foreign government to the president in an official, employment-like relationship would apply. The clause prevents a foreign government from hiring the president, outright, as an employee. President Trump’s amici also argue that the Foreign Emoluments Clause does not apply to presidents, although President Trump has not raised this argument in his own briefs.

#### A. ARGUMENTS FROM LANGUAGE

The arguments from language support a broad view. While I cannot comprehensively recap every argument here, I have highlighted the ones that I found most convincing and added a more exhaustive list in the footnotes.<sup>16</sup>

First, Professor John Mikhail’s exhaustive study of seventeenth century dictionary definitions finds that every definition of “emolument” published in English language dictionaries from 1604 to 1806 relies on “profit,”

14. Brief for the Appellees at 47–48, *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020) (No. 19-5237).

15. Brief for the Appellant at 39–40, *Blumenthal*, 949 F.3d 14 (No. 19-5237).

16. For a more complete representation of the relevant arguments on both sides, the filings in the D.C. Circuit appeal of *Blumenthal* are particularly helpful. While over 124 amici participated, of special note are: Brief for the Appellees; Brief for the Appellant; Reply Brief; Brief for Amici Curiae Certain Legal Historians in Support of Plaintiffs-Appellees and Affirmance; and Brief of Amici Curiae Professor Clark D. Cunningham and Professor Jesse Egbert in Support of Neither Party; as well as the following Brief from the District Court ruling in *District of Columbia*: Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as Amici Curiae in Support of the Defendant, *District of Columbia v. Trump*, 344 F. Supp. 3d 828 (D. Md. 2018) (No. 17-cv-1596) [hereinafter Brief for Tillman]. The three amici briefs are summaries of more detailed scholarship by the authors, which are also worth reading, and can be found here: Clark D. Cunningham & Jesse Egbert, *Using Empirical Data to Investigate the Original Meaning of “Emolument” in the Constitution*, 36 GA. ST. U. L. REV. 465 (2020); John Mikhail, *The Definition of ‘Emolument’ in English Language and Legal Dictionaries, 1523–1806*, at 8 (July 13, 2017) (unpublished article), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2995693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693) [<https://perma.cc/TX7F-JD7N>]; Seth Barrett Tillman, *A Compilation: The Emoluments Clauses Litigation*, Volokh Conspiracy (Sept. 25, 2017–Aug. 3, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3311758> [<https://perma.cc/LCA2-UFFT>]. This last source, a collection of blogs posted on Volokh Conspiracy over the course of almost a year, articulate most of the originalist arguments in favor of the President. Finally, for a corpus linguistics argument against the position taken by Cunningham and Egbert, see James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760–1799*, 59 S. TEX. L. REV. 181, 189–96 (2017).

“advantage,” “gain,” or “benefit.”<sup>17</sup> Only 8 percent of dictionaries have any reference to “office” or “employment,” and these 8 percent also include “gain” or “advantage.”<sup>18</sup> Also, none of the founders or ratifiers owned the only two dictionaries that President Trump cites for his definitions, and all of the dictionaries they owned define “emolument” in the broad sense.<sup>19</sup>

Second, contrary to the argument that emolument had an alternate specific technical or legal meaning, in most of the significant common law dictionaries published from 1523 to 1792, “emolument” is not defined.<sup>20</sup> In Sir William Blackstone’s treatise, with which all the founders would have been familiar, he uses “emolument” sixteen times, referring to such diverse categories as family inheritance, private ownership of land, church property, gifts to third parties, and increases in the national treasury, among other things.<sup>21</sup> Similarly, “emolument” is used twice in *The Wealth of Nations* and twice again in Basil Kennet’s translation of Samuel Pufendorf’s treatise. The founders would have been familiar with both works, and each time “emoluments” is used it refers to private market transactions.<sup>22</sup>

Third, in a corpus linguistics analysis of over 126,000 texts created between 1760 and 1799, containing over 2,800 uses of the word “emoluments,” researchers found overwhelming support for the broad definition.<sup>23</sup> The corpus included twenty-five different nouns that were referred to as types of emoluments, including: bounties, clothing, command, commissions, commutation, contracts, fees, fishing, forage, gratuity, lands, liberty, navigation, offices, pay, pensions, perquisites, places, privileges, rank, rations, subsistence, sum, tithes, and toll.<sup>24</sup> The range—from non-monetary uses like clothing, fishing, forage, liberty and navigation, to a wide variety of monetary uses pay, pensions, tithes, and tolls—makes private hotel revenues seem well within the term’s conceptual borders.

Finally, the founder’s own statements demonstrate that this is what

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17. Mikhail, *supra* note 16, at 8.

18. *Id.*; Brief for Amici Curiae Certain Legal Historians in Support of Plaintiffs-Appellees and Affirmance at 13-14, *Blumenthal*, 949 F.3d 14 (No. 19-5237) [hereinafter Brief for Certain Legal Historians].

19. See Brief for Certain Legal Historians, *supra* note 18, at 15-16.

20. *Id.* at 14-15.

21. *Id.* at 16-17. Blackstone even includes the term in a form lease as part of a list of benefits transferred when conveying land parcels. *Id.* at 17.

22. *Id.* at 18-19.

23. Brief of Amici Curiae Professor Clark D. Cunningham and Professor Jesse Egbert in Support of Neither Party at 13, *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020) (No. 19-5237) [hereinafter Brief of Cunningham and Egbert].

24. *Id.* at 15.

emoluments meant. George Washington, Thomas Jefferson, James Madison, James Monroe, Alexander Hamilton, and Chief Justice John Marshall all used the word “emolument” to refer to private commercial contexts.<sup>25</sup> George Mason, Edmund Randolph, William Grayson, and James Madison all used the word “emoluments” in ways that would be inconsistent with a narrow definition in the ratification debates themselves.<sup>26</sup>

In support of the narrow definition, there are only two founding era dictionaries, neither of which the founders owned. There is one corpus linguistics analysis suggesting that the narrow definition was in view in the two other emoluments clauses, but even that analysis concludes the meaning is “ambiguous” regarding the Foreign Emoluments Clause.<sup>27</sup> And I did not come across any evidence from the ratification debates supporting a narrow definition.

#### B. ARGUMENTS FROM PRACTICE

After reading the textual evidence, I had almost made up my mind that emoluments must cover private hotel revenue—until I learned that multiple presidents, including George Washington, had acted in ways apparently inconsistent with the broad definition.

In 1790, Congress implemented a plan to raise money for public buildings and to facilitate the government in moving its seat to D.C. in 1800.<sup>28</sup> Under the scheme, private owners of land within the boundaries of the new district could donate part of their land to “Trustees on behalf of the Public,” who would then hold the land until the president approved which lots would make up the District, convey ownership of the land to Commissioners who would hold the land, give half of the remaining lots back to the donors, and sell the other half of the remaining lots at public auction.<sup>29</sup> The Trustees would then use the proceeds from the auction to pay

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25. Brief for Certain Legal Historians, *supra* note 18, at 20–21.

26. *Id.* at 10–13. The authors even quote Edmund Randolph and George Mason debating whether the Foreign Emoluments Clause was strong enough to prevent “the great powers of Europe” from corrupting the president. *Id.* at 10.

27. Phillips & White, *supra* note 16, at 233–234.

28. OFFICE OF THE INSPECTOR GENERAL, U.S. GENERAL SERVICES ADMINISTRATION, JE19-002, EVALUATION OF GSA’S MANAGEMENT AND ADMINISTRATION OF THE OLD POST OFFICE BUILDING LEASE, app. A at 2 (2019). In the wake of the controversy surrounding the Old Post Office Building, the Office of the Inspector General examined Washington’s land transactions for comparison. But, they declined to reach a conclusion: “Consequently our report does not reach a definitive judgment on whether Washington’s lot purchases show a historic practice of the first President conducting private business with the United States.” *Id.* app. A at 6.

29. *Id.*

the donors £25 per acre for the land that would be used for the District.<sup>30</sup> The Commissioners, who were appointed by president Washington, conducted the auctions and advertised and presided over the sales.<sup>31</sup> In September 1793, while president, Washington purchased four lots at these auctions.<sup>32</sup> At the time, these Commissioners were David Stuart, Daniel Carroll, and Thomas Johnson.<sup>33</sup> Stuart and Johnson had been part of their states' Constitutional ratifying conventions, Carroll had been a member of the Federal Convention that drafted the Constitution, and Johnson had served as a Supreme Court Justice from January 1792 to January 1793, resigning because of his health.<sup>34</sup>

If the broad definition were correct, Trump argues, then President Washington's purchase of public land would have been a clear violation of the Domestic Emoluments Clause.<sup>35</sup> And since it is extremely unlikely that Washington would have violated the clause in public, in front of three men involved in the making of the Constitution and one who was a Supreme Court Justice, then a broad definition of emoluments must be incorrect.<sup>36</sup>

This issue is even more interesting when one considers the claim for leasing the Old Post Office building from the Government Services Agency, which sits under the Executive Branch. While one might conceivably draw a line between two types of hotel receipts and a land purchase, it is much harder to pretend the same clause condemns one President for leasing real estate from the federal government while exonerating the other for purchasing real estate from the federal government.

Professors Blackman and Tillman, authors of an amicus brief on Washington's land transactions in support of President Trump's position, recognize this and argue the point hard. Commenting on the District Court case in *Maryland* where Judge Messite adopted the broad interpretation, Blackman and Tillman write:

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30. *Id.*

31. *Id.* app. A at 3.

32. *Id.* app. A at 4.

33. Josh Blackman & Seth Barrett Tillman, *The Emoluments Clause Litigation, Part 4—an Emolument is the “Profit Derived from a Discharge of the Duties of the Office,”* VOLOKH CONSPIRACY (Sept. 29, 2017 5:14 AM) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/29/the-emoluments-clauses-litigation-part-4-an-emolument-is-the-profit-derived-from-a-discharge-of-the-duties-of-the-office> [<https://perma.cc/7LAM-8AWX>].

34. *Id.*; *Thomas Johnson*, OYEZ, [https://www.oyez.org/justices/thomas\\_johnson](https://www.oyez.org/justices/thomas_johnson) [<https://perma.cc/R6FM-BDK>].

35. “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.” U.S. CONST. art. II, § 1, cl. 7.

36. *See* Blackman & Tillman, *supra* note 33.

If President Washington was correct, then President Trump should prevail. . . . If Judge Messite’s interpretation of the Domestic Emoluments Clause and its “emoluments”-language were correct, then Washington violated the clause, and his three commissioners conspired to help him do so in full light of day. . . . [T]he 1793 Washington land purchase—at an advertised, public auction—serves as an on point Executive Branch precedent that the President is permitted to derive benefits from doing business with the federal government, notwithstanding the “emoluments” language in the Domestic Emoluments Clause.<sup>37</sup>

If the broad definition of “emoluments” is correct, it is hard to avoid the conclusion that President Washington violated at least one of the emoluments clauses.

Blackman and Tillman also bring up a number of historical examples of other early founders and presidents receiving gifts without the consent of Congress. Tillman points out that in addition to the land transactions, Washington received an extravagantly framed portrait of Louis XVI in 1791, and a painting of the Bastille along with a key to the fortress from France.<sup>38</sup> Thomas Jefferson, while president, received a bust of Czar Alexander I from the Russian government.<sup>39</sup> Jefferson also received presents from Indian tribes, which he regarded as diplomatic gifts from foreign governments, and Lewis and Clark returned from their expeditions with gifts from Indian tribes for President Jefferson.<sup>40</sup> James Madison, while President, received two elaborate ceremonial pistols from an Argentinian General. And after Madison left office, he left them to President Monroe.<sup>41</sup> If the foreign emoluments clause applied, Tillman and Blackman argue, all of these presidents would have been required to seek the consent of Congress. Yet none of them did, even though Congress had used the Foreign Emoluments Clause as early as 1798 to deny a parting gift from the French court to the outgoing U.S. ambassador to France.<sup>42</sup>

Finally, President Trump and his amici point out that a broad definition is incompatible with the practices of President Obama and almost any

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37. Josh Blackman & Seth Tillman, *Who Was Right About the Emoluments Clauses? Judge Messite or President Washington?* VOLOKH CONSPIRACY (Aug. 3, 2018, 3:17PM) <https://reason.com/2018/08/03/who-was-right-about-the-emoluments-claus/printer> [<https://perma.cc/VY9T-NHXP>].

38. Brief for Tillman, *supra* note 16, at 20.

39. Brief for Tillman, *supra* note 16, at 22.

40. Brief for Tillman, *supra* note 16, at 22.

41. Brief for Tillman, *supra* note 16, at 23.

42. Ironically enough, the ambassador denied the gift here was Charles Pinckney, the same person who moved to add the clause to the Constitution at the Federal Constitutional Convention in 1787. LIBRARY OF CONGRESS, 1 ANNALS OF CONG. 1582–93 (1789); Teachout, *supra* note 12, at 39.

conceivable presidential candidate in the modern economy. For example, a broad definition would implicate royalties that President Obama earned from foreign book sales purchased by visiting officials or public universities. Also, it would implicate anyone who owns government bonds, which are nothing less than loans to the government that the government then repays with interest. Anyone with the requisite assets to run for President almost certainly owns U.S. government bonds—for reference, Obama’s financial disclosures indicate he held between five hundred thousand and one million dollars in government bonds—and a large majority of them likely also own foreign government bonds.<sup>43</sup> Additionally, it would implicate anyone who holds stock in a business that receives income from foreign governments; indeed, it is hard to imagine many public companies who do not do business internationally, and harder still to imagine any presidential candidate not owning stock. And in a set of facts mirroring President Trump, it would implicate anyone who owns stock in Marriott International (which is a high percentage of people who own U.S. stock, since Marriott is part of the S&P 500). Almost certainly, some foreign official will stay at some Marriott hotel somewhere during a president’s term, and that president will be receiving the benefit of foreign hotel revenues from a business that he or she owns a portion of.<sup>44</sup>

In light of these examples, President Trump argues the narrow definition must be correct:

If the district court’s [broad] interpretation of the term “emolument” means that myriad government officials have always violated the Clauses . . . [i]t is a reason . . . to adopt an interpretation consistent with the plain text, historical practice, and common sense. And under that interpretation, which prohibits only compensation accepted from a foreign government for services rendered by an officer in either an official capacity or employment-type relationship, the President’s share of the profits from governmental customers of his businesses does not constitute a prohibited emolument.<sup>45</sup>

In the Department of Justice’s point of view, there is no way to differentiate the payments Trump’s businesses receive from any of the examples above. To construe the Foreign Emoluments Clause to implicate Trump is to construe it to implicate Washington, Jefferson, Madison, Monroe, and Obama as well.

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43. Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 663 (2017)

44. Brief for the Appellant, *supra* note 15, at 45.

45. *Id.* at 45–46.

## II. ARGUMENT

Notwithstanding the arguments and posturing, the facts given above are irreconcilable. Rigorous study of language leaves little doubt that the broad definition is correct. Meanwhile, the actions of past presidents and office holders leave little doubt that the broad definition *cannot be* correct.

The arguments for the plaintiffs were straightforward: almost all of the linguistic evidence from the founding era, including the usage of many of the founders themselves, suggests “emoluments” was a broad, catch-all term, consistent with the drafters’ intent to protect the Presidency from foreign corruption. Put simply, the Foreign Emoluments Clause has a broad definition and applies to the president. Therefore, Trump’s hotel revenues are in violation.

But the arguments for the defendants were logically compelling: adopting a broad definition and applying the clause to President Trump would be inconsistent with the practice of numerous presidents, past and present. Framed as a syllogism, President Trump’s strongest arguments can be summarized as follows.

*Premise 1:* The plaintiffs’ interpretation is inconsistent with the practice of (1) George Washington, entitled to special solicitude because his actions as Founder and first president are an excellent indication of how the Constitution was understood, (2) numerous other presidents who received gifts in office without reporting them to Congress, including Jefferson, Madison, and Monroe, and (3) almost all modern presidents and potential candidates, including Obama.

*Premise 2:* An interpretation inconsistent with the practice of Washington, numerous other presidents, and almost all modern presidents must be incorrect.<sup>46</sup>

*Conclusion:* Therefore, the plaintiffs’ interpretation is incorrect.

Considering the defendant’s argument, adopting the plaintiffs’ interpretation felt illogical. But considering the historical and linguistic evidence, *not* adopting the plaintiffs’ interpretation felt dishonest.

The plaintiffs’ main counterarguments, which, in essence, were aimed at undermining *Premise 1*, did little to help. Plaintiffs argued that President Trump’s hypotheticals were “different, and far more attenuated,” because the

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46. For a good summary of this argument, see Reply Brief at 27, *Blumenthal*, 949 F.3d 14 (No. 19-5237) (“In sum, the Members’ position, if applied consistently, would render unconstitutional the unchallenged practices of countless federal officials.”).

Clause is only violated when an official “accept[s]” an emolument.<sup>47</sup> They argued that Washington’s land sale was private, since the title was held in trust rather than owned outright by the federal government at the time of sale.<sup>48</sup> They argued that stock ownership is different because public and private companies are different, and that book sales “trigger contractual obligations. . . to increase an author’s royalty payments” but do not mean that the author has “accepted” an emolument from a foreign state.<sup>49</sup> The bond arguments they ignored altogether.<sup>50</sup>

None of these counterarguments are convincing. On the land sale: in every way that matters for the founders who were concerned about the possibility of corruption, Washington’s land purchase was public—the Commissioners in charge of the sale were all appointed by the president. On the stock argument: if stock ownership is different, are the plaintiffs suggesting that the problem with Trump’s ownership is merely that it is held in a private structure? If the Trump Organization went public, would that really be less problematic, even if Trump retained a majority of stock? Why does owning a Trump Hotel involve “accept[ing]” emoluments “from” a government while owning a Marriott Hotel does not? And on the royalties: if book royalties merely “trigger” “contractual obligations” on a publisher to “increase an author’s royalty payments,” don’t hotel stays merely trigger contractual obligations on hotel managers to increase the owner’s hotel revenues? Isn’t this just a rephrasing of the way any business works?

#### A. A REALIZATION

What finally wrested me from my position on the fence was not an outright rebuttal of either side’s main points, or a recharacterization of either side’s historical evidence, but an additional set of historical facts.

In 1830, President Andrew Jackson presented to Congress a gold coin that Colombian President Simon Bolivar had given him, which Congress told him to deposit in the Department of State.<sup>51</sup> In 1840, President Martin Van Buren told the Imam of Muscat that he was precluded from receiving “two horses, a case of rose oil, five bottles of rose water, a package of cashmere shawls, a Persian rug, a box of pearls, and a sword” because of a “fundamental law of the Republic which forbids its servants from accepting gifts from foreign States or Princes.” Like Jackson, he “deemed it his duty

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47. Brief for the Appellees, *supra* note 14, at 54.

48. *Id.* at 52–53.

49. *Id.* at 54.

50. Reply Brief, *supra* note 46, at 26.

51. *Blumenthal Complaint*, *supra* note 4, at 33–34.

to lay the proposition before Congress,” and Congress similarly told him to deposit the gifts in the Department of State, and to sell anything that could not be deposited there and give the proceeds to the Department of the Treasury.<sup>52</sup> The Imam of Muscat similarly offered President John Tyler two horses in 1843. President Tyler again sought the consent of Congress, who told him to sell the horses and put the money in the Treasury.<sup>53</sup> While President, Abraham Lincoln presented to Congress two decorative elephant tusks, a sword, and a photograph from the King of Siam, writing to the King, “our laws forbid the President from receiving these rich presents as personal treasures . . . .” Congress told him to deposit the gifts with the Department of the Interior.<sup>54</sup> President Benjamin Harrison received honorary medals from Brazil and Spain, which Congress allowed him to keep in 1896.<sup>55</sup> President John F. Kennedy rejected an offer of Honorary Irish Citizenship in 1963, on the belief that it would violate the emoluments clause.<sup>56</sup> All of these Presidents sought the consent of Congress or rejected the gifts outright, because they thought the Foreign Emoluments Clause applied.

In attempting to define the foreign emoluments clause, both sides draw lines that put all the weight of historical evidence on their side.<sup>57</sup> The defendant points out that the plaintiffs’ interpretation is inconsistent with the practice of numerous presidents. But problematic for the defendant’s line-drawing exercise is that Abraham Lincoln and at least five other Presidents end up on the other side of it.

Armed with President Washington’s land transaction, scholars Blackman and Tillman portray the issue as a “simple one,” where “either (1) President Washington and his three commissioners (including a Supreme Court Justice) were right, and [the District Judge] is wrong; or (2) [the District Judge] is correct, and President Washington and his three commissioners were wrong.”<sup>58</sup> But such a description is woefully incomplete. No matter which definition one chooses, the list of who is wrong on the other side is long, includes several presidents, and either George Washington or Abraham Lincoln. Take your pick.

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52. *Id.* at 34.

53. *Id.* at 34–35.

54. *Id.* at 35.

55. *Id.*

56. *Id.* at 35–36.

57. Two of the more nuanced discussions of the emoluments clause meaning and implications are Grewal, *supra* note 43, and Robert G. Natelson, *The Original Meaning of ‘Emoluments’ in the Constitution*, 52 GA. L. REV. 1 (2017). They reach conclusions, but with some degree of humility, and both propose a new way of looking at the problem.

58. Blackman & Tillman, *supra* note 37.

In light of this choice, the more honest solution seems to be to give up the false insistence on perfect consistency in the first place.

There *is* no interpretation of the clause that is consistent with the practice of all prior presidents. The Department of Justice’s view that the narrow definition is correct is inconsistent with the statements of George Washington, Thomas Jefferson, James Madison, James Monroe, Alexander Hamilton, Chief Justice John Marshall, George Mason, Edmund Randolph, and William Grayson, who all used “emoluments” to mean something broader than “office or employment.” Tillman’s view that the clause does not apply to the president is inconsistent with the actions of Andrew Jackson, Martin Van Buren, John Tyler, Abraham Lincoln, Benjamin Harrison, and John F. Kennedy, who all believed the clause applied to them.<sup>59</sup> And the plaintiff’s view that the broad definition is correct and that the clause applies to President Trump is inconsistent with the actions (although not the statements) of Washington, Jefferson, Madison, Monroe, and Obama.

Therefore, returning to defendant’s syllogism, *Premise 2* is the better one to doubt: an interpretation inconsistent with the practice of several presidents *may in fact be correct*, because any interpretation of the clause, even that of the defendant or his amici, is inconsistent with the practice of at least some presidents.

#### B. A NECESSARY CONCLUSION AND AN EXPLANATION

The uncomfortable consequence of adopting these views—that the broad definition applies *and* that it implicates past presidents—is the conclusion that the clause has not been enforced consistently. That is, it has been applied (or not applied) with discretion.<sup>60</sup> This conclusion is descriptive

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59. *Blumenthal Complaint*, *supra* note 4, at 33–36. It is additionally inconsistent with the statements of George Mason and Edmund Randolph at the Virginia ratifying convention, who debated whether the clause was strong enough to protect the president from corruption. *See supra* text accompanying note 26.

60. In analyzing the meaning of the Emoluments Clause, Professor Grewal notes the consequences of a broad definition. “[A]n expansive interpretation of the Foreign Emoluments Clause would inevitably justify the impeachment of many future U.S. Officers and would stain those who have previously served our country with honor.” Grewal, *supra* note 43, at 692–93. While clarifying that consequences should not dictate the meaning, he recognizes that the broad interpretation implies the use of discretion. “Of course, the harsh consequences of any given interpretation should not by itself disqualify it. If the Constitution . . . absolutely prohibits the President from receiving even a penny . . . then so be it. It will be upon the people to amend the Constitution or upon the Congress (or its houses) to exercise any discretion under the relevant consent, impeachment, or removal powers.” *Id.* at 665–666 (footnotes omitted). He is particularly concerned with the potential unfairness of an approach that allows discretion. “[T]he rule of law requires that constitutional provisions apply neutrally, to all persons with their scope.” *Id.* at 692. Because Grewal thinks the term is susceptible to a narrow definition, he ultimately chooses it

rather than prescriptive. I am not attempting to say that this is the way it *should* be applied, or that this is a good or a bad thing, nor am I prescribing a remedy or arguing that any violation would be impeachable. But if the broad definition is correct, then undoubtedly this is the way it *has* been applied.

In the D.C. District Court opinion in *Blumenthal*, Judge Sullivan implicitly acknowledged this when he referenced “the consistent Executive Branch practice of applying a totality-of-the-circumstances approach to applying the Clause.”<sup>61</sup> The placement of the adjective “consistent” is not on the application of the Clause, but rather on the application of an “approach to applying” it. Assumed in Judge Sullivan’s double use of the word “applying” is that invoking the Clause is a two-step process: before one applies the clause, one must decide when to apply it. In a word, this preliminary step is discretionary. And what Judge Sullivan describes as a “totality-of-the-circumstances” is, in a crude form, a sort of smell-test.

And by the nature of the Founders’ choice to leave the acceptance of emoluments to the consent of Congress, this seems to comport with the Constitution’s intent as well.

To me, this is the most plausible explanation—that the common-sense, “intuitive” definition is the intended one: that this clause was designed to prevent corruption, and to be a broad tool to do so, but that its enforcement is plainly discretionary. The “unchallenged practices of countless federal officials”<sup>62</sup> are just that, “unchallenged”, because they do not smell of corruption. They have gone under the radar, because there was nothing to get them on the radar to begin with.

Instead of arguing that the difference between Washington buying land from the federal government and Trump leasing a building from the federal government is whether the land was held in trust or fee simple, is it not more honest to acknowledge that one simply raised more red flags? Like Justice Stewart’s “I know it when I see it” test for pornography,<sup>63</sup> the best test of whether something is rotten is whether it smells.

While allowing for discretion in a clause’s application admittedly opens

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in order to “avoid[] strange consequences.” *Id.* at 666. Interestingly, Grewal suggests that Trump’s business revenues would still fall under the narrow definition of emoluments, and offers an innovative financial test to help differentiate the types of income likely to open the possibility of corruption, helping to solve the bond, stock, and royalty hypotheticals raised by the defendant. *Id.* at 675–66.

61. *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 204 (D.D.C. 2019).

62. Reply Brief, *supra* note 46, at 27.

63. *Jacobellis v. Ohio*, 378 U.S.184, 197 (1964) (Stewart, J., concurring).

it up to being used subjectively, politically, or maliciously, I am not convinced that makes it the wrong interpretation for two reasons. First, the framers seemed to allow for, if not outright intend, subjective and political discretionary use of a Constitutional Clause as part of our system of checks and balances when they inserted “other high Crimes and Misdemeanors”<sup>64</sup> as impeachable offenses. Second, any president who wishes to avoid malicious use of discretion can avoid it by presenting the receipts in question to Congress. Congress can either accept or reject it. If a president really wants to avoid the possibility of being sued over it, or impeached, or raked over the coals in the press by his opponents, he or she can either present everything for Congressional approval or relinquish ownership in the possible emolument-generating business for the remainder of their term. If the president believes his or her actions do not smell of corruption, they can take the risk.

Here, Congress, the courts, and the public have discretion over when to apply the clause—or, more accurately, over when to raise an uproar over its non-application when the president does not present emoluments to Congress for approval. And this will not be a substantial issue for a president whose actions do not suggest a possibility of corruption.

The simple truth is that the flow of money from one party to another has the capacity to corrupt, but often, it is just a simple market transaction. This is even more true in the context of globalization. One person pays another for goods or services honestly provided. Another pays someone for goods or services as a front for political influence. Congress was meant to be able to consent because it would allow them to smell the difference between the two. When the flow of money does not seem to be of the problematic type (for example, when President Washington, with a personal reputation for honesty, buys land from the federal government to support a program designed to aid the government in establishing its capital in D.C.), Congress does not complain about not being asked to consent.<sup>65</sup> But when it does, under the broad definition, Congress can enforce the rule.

## CONCLUSION

While the courts are unlikely to resolve the emoluments cases on the merits, the issue of whether business revenue constitutes an emolument under the Constitution is unlikely to go away. Our globalized world virtually

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64. U.S. CONST. art. II, § 4.

65. Electoral considerations may have an effect here as well, as the public’s perception of whether an action is corrupt will either punish or reward a member who sees it the same way.

guarantees that future presidents will have to resolve this question, and even those who choose to play it safe or comply with the conventional practice of pre-Trump presidents will need to consider the Clauses' application to foreign income from book sales and bond revenue.

There are three potential answers. One could adopt a narrow definition and preserve the historical reverence for George Washington and other early presidents. But to do so, one must defy the more intuitive definition, the weight of dictionary evidence, the broad anti-corruption purpose evidenced in the statements of the ratifiers, and the practice of Abraham Lincoln and multiple other presidents. And perhaps worse still, one leaves open and unpreventable the sizeable possibility of corruption through foreign governments doing business with a sitting president. Alternatively, one could adopt the broad definition but ignore the obvious implications that some of President Washington's actions were not substantively different than President Trump's, and that the modern economic consequences of globalization almost certainly expose all modern presidents to the clause. This is no solution at all.

Thirdly, one can adopt the broad definition, admit that its application implicates presidents past, present, and future, but allow that its enforcement is necessarily contingent on the appearance of corruption. This is the only solution that honestly appraises the weight of the evidence of original public meaning, the mixed history of presidential practice, and the far-reaching results of applying the broad definition to modern presidents.