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## THE FOREIGN EMOLUMENTS CLAUSE

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## INTRODUCTION

The term “emolument” or “emoluments” is used three times in the United States Constitution: in the Foreign Emoluments Clause (sometimes referred to, confusingly, as *the* Emoluments Clause);<sup>1</sup> the Presidential Compensation Clause (now, because of the new prominence of the Foreign Emoluments Clause, often referred to as the *Domestic* Emoluments Clause);<sup>2</sup> and what is called (by the few who pay attention to this sort of thing) the Ineligibility Clause, which is also known as the Incompatibility or the Sinecure Clause.<sup>3</sup> The term “emolument” was also used twice in the Articles of Confederation; one provision was a precursor of the Foreign Emoluments Clause.<sup>4</sup> As standard as the term may have been in late eighteenth century legal texts, however, its meaning had attracted little attention in the modern era—until recently.<sup>5</sup>

How times have changed. Because of the foreign business dealings of President Donald Trump and his family members, interpreting the Foreign Emoluments Clause has become a nearly fulltime job for political pundits, with stories about the clause appearing in every conceivable (and, it seems, inconceivable) media outlet.<sup>6</sup>

<sup>1</sup> U.S. CONST. art. I, § 9, cl. 8; *see infra* text accompanying note 7.

<sup>2</sup> U.S. CONST. art. II, § 1, cl. 7; *see infra* text accompanying note 17.

<sup>3</sup> The Ineligibility Clause of the U.S. Constitution states:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art. I, § 6, cl. 2.

<sup>4</sup> *See infra* text accompanying note 25.

<sup>5</sup> Hillary Clinton’s nomination as Secretary of State, effective in 2009, raised Ineligibility Clause issues, *see supra*, note 3, but the meaning of “emoluments” was not one of them. *See* Ashby Jones, *Is ‘Secretary of State Hillary Clinton’ Unconstitutional? Some Say Yes*, WALL ST. J. L. BLOG (Dec. 1, 2008), <https://blogs.wsj.com/law/2008/12/01/is-secretary-of-state-hillary-clinton-unconstitutional-some-say-yes/>. The questions were (1) whether Clinton could serve before 2013 given that, after her 2006 reelection to the Senate, the Secretary’s salary had been raised; and (2) whether any problem could be solved by limiting Clinton’s salary to the figure in place before her second term. That remedy had been used before, without challenge—e.g., when Senator William Saxbe became Attorney General in 1974—but, by its terms, the Ineligibility Clause seems to be an absolute prohibition. *See* Jones, *supra*.

<sup>6</sup> Professor Jay Wexler has said, with tongue in cheek, “I don’t think anyone even knew how to pronounce the word ‘emoluments,’ much less know what it means, before Trump took office.” Adam Liptak, *New on This Fall’s Law School Syllabus: Trump*, N.Y. TIMES (Aug. 15, 2017),

The Foreign Emoluments Clause provides that “no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of Congress, accept of [sic] any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”<sup>7</sup> If the President is benefitting economically from business dealings with foreign governments (or organizations that might be treated as agencies of foreign governments)<sup>8</sup> and the benefits constitute emoluments, he is arguably violating the clause. Even if the clause does not apply to the President, and a serious argument has been made to that effect,<sup>9</sup> it still might apply to family members who have unpaid positions in the administration.<sup>10</sup> And it would unquestionably apply to other appointed officials who are actually on the government payroll.

The Office of Legal Counsel in the Department of Justice has generally assumed that the Foreign Emoluments Clause applies to the President,<sup>11</sup> but the possible application of the clause to a sitting President has

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[https://www.nytimes.com/2017/08/14/us/politics/trump-constitution-law-schools.html?\\_r=0](https://www.nytimes.com/2017/08/14/us/politics/trump-constitution-law-schools.html?_r=0).

<sup>7</sup> U.S. CONST. art. I, § 9, cl. 8; *see also* JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 139–56 (2012) (discussing one aspect of the Foreign Emoluments Clause, its prohibition of acceptance by American officers of titles from foreign states, without congressional consent).

<sup>8</sup> *See infra* Section II.A.

<sup>9</sup> *See infra* Section II.B.

<sup>10</sup> Maybe a non-paying position is not an “office of profit,” particularly if that term is understood to refer to an office in which the holder has a proprietary interest, but it could still be one of trust. *See* Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 645 (2017) [hereinafter Grewal, *The Foreign Emoluments Clause*]. Professor Grewal notes that the Office of Legal Counsel in the Department of Justice has expressed doubt that the terms “profit” and “trust” were intended to affect the scope of the Foreign Emoluments Clause. *Id.* The full phrase probably was nothing more than a long-winded way of saying “office under the United States.” *Id.* at 106–07 (citing OFF. OF LEGAL COUNS., APPLICATION OF THE EMOLUMENTS CLAUSE TO A MEMBER OF THE PRESIDENT’S COUNCIL ON BIOETHICS 70–71 (Mar. 9, 2005), [https://www.justice.gov/sites/default/files/olc/opinions/2005/03/31/050309\\_emoluments\\_clause\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2005/03/31/050309_emoluments_clause_0.pdf)).

<sup>11</sup> *See infra* Section II.B; *see also* OFF. OF LEGAL COUNS., APPLICABILITY OF THE EMOLUMENTS CLAUSE AND THE FOREIGN GIFTS AND DECORATIONS ACT TO THE PRESIDENT’S RECEIPT OF THE NOBEL PEACE PRIZE 4 (Dec. 7, 2009) [hereinafter NOBEL PEACE PRIZE OPINION], [https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace_0.pdf); OFF. OF LEGAL COUNS., PROPOSAL THAT THE PRESIDENT ACCEPT HONORARY IRISH CITIZENSHIP 278 (May 10, 1963) [hereinafter IRISH CITIZENSHIP OPINION], <https://www.justice.gov/sites/default/files/olc/opinions/1963/05/31/op-olc-supp-v001-p0278.pdf> (assuming JFK’s acceptance of “honorary Irish citizenship” would raise issues under

seldom been a hot button issue. No prior President had anything like the network of active foreign businesses that Donald Trump has had, and continues to have, through the Trump Organization.<sup>12</sup> (Unlike the President, appointed officials generally must comply with conflict-of-interest statutes, and, if they do, they are likely to be left with no serious Foreign Emoluments Clause issues<sup>13</sup>—whatever the meaning of “emolument.”) Although President Trump has made limited efforts to cabin the problems, he has not come close to full divestiture of interests in problematic businesses and investments<sup>14</sup>—a step recommended by the director of the

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the clause). Most commentators agree. *See, e.g.*, Norman L. Eisen, Richard Painter & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS 6–10 (Dec. 16, 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/g\\_s\\_121616\\_emoluments-clause1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/g_s_121616_emoluments-clause1.pdf).

<sup>12</sup> President Trump filed his Executive Branch Personnel Public Financial Disclosure Report with the Office of Government Ethics on June 14, 2017. *See* Donald J. Trump, U.S. OFF. OF GOV'T ETHICS, EXEC. BRANCH PERSONNEL PUB. FIN. DISCLOSURE REP. (OGE Form 278e) (June 14, 2017), <https://www.documentcloud.org/documents/3867112-Trump-Financial-Disclosure-2017.html>.

<sup>13</sup> Most conflict-of-interest rules do not apply to the President and Vice President partially because of “considerations relating to the conduct of their offices,” including “protocol and etiquette.” *See* 5 C.F.R. § 2635.204(j) (2017). Presidents have been treated with kid gloves also because of doubt that Congress has the power to add to rules governing eligibility for that office. (For example, the President must be at least 35 years old and a natural born citizen, and he or she must have been a U.S. resident for at least 14 years. *See* U.S. CONST. art. II, § 1, cl. 4.) But the President’s exemption from conflict-of-interest rules is not total. *See* JACK MASKELL, CONG. RESEARCH SERV., MEMORANDUM: CONFLICT OF INTEREST AND “ETHICS” PROVISIONS THAT MAY APPLY TO THE PRESIDENT (Nov. 22, 2016), [https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/wysiwyg\\_uploaded/CRS%20Memo.President%20conflict%20provisions.pdf](https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/wysiwyg_uploaded/CRS%20Memo.President%20conflict%20provisions.pdf) (citing rules “apparently inapplicable” and “potentially applicable” to the President, the latter category including the Foreign Emoluments Clause). And among the exceptions in § 2635.204(j) to the general proposition that Presidents and Vice Presidents may accept gifts are those that would “violate . . . the Constitution of the United States,” suggesting that the regulatory drafters thought the Foreign Emoluments Clause might apply. § 2635.204(j).

<sup>14</sup> If certain conditions are met, officials can defer gain on sales of appreciated assets made to satisfy statutory or regulatory conflict-of-interest rules. *See* I.R.C. § 1043 (2013). But Section 1043 is probably unavailable to a President. *See* Erik M. Jensen, *Sales of Property to Comply with Conflict-of-Interest Requirements: Section 1043 Assumes New Significance*, J. TAX’N INV. 3, 10–12 (2017). Because of the President’s vast holdings, some say he cannot be expected to divest. *See, e.g.*, Holman W. Jenkins, Jr., *The ‘Blind Trust’ Snake Oil*, WALL ST. J. (Jan. 17, 2017), <https://www.wsj.com/articles/the-blind-trust-snake-oil-1484697828> (“Of all the things to worry about with President Trump, [his business dealings] are the least important.”); William J. Watkins, Jr., *The Emoluments of Sore Losers*, NAT’L REV. (June 27, 2017), <http://www.nationalreview.com/node/448993/print> (“Before assuming office, President Trump disposed of his

Office of Government Ethics (“OGE”).<sup>15</sup> (Putting active businesses into a trust cannot create a prototypical blind trust anyway, where beneficiaries are unaware of investment decisions made by the trustee.)<sup>16</sup>

As of this writing, three suits have been filed claiming that, because of transactions with entities tied to foreign governments, President Trump has violated the Foreign Emoluments Clause, and more may be on the way. Furthermore, because the President is arguably profiting, at least indirectly, from business dealings with the United States government and the governments of some states, two of the suits allege that he has violated the Presidential Compensation Clause as well: “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.”<sup>17</sup> Maybe there is uncertainty

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publicly traded and liquid investments. He put his illiquid assets . . . into a trust. He further resigned from all official positions with the Trump Organization and turned over management of the businesses to his adult sons. None of this is enough for his enemies.”); Edwin D. Williamson, *Trump’s Conflicts*, WKLY. STANDARD (Jan. 23, 2017), <http://www.weeklystandard.com/trumps-conflicts/article/2006292> (arguing that the President has “done enough”). *But see* Jeffrey Toobin, *Behind the Democrats’ Emoluments Lawsuit Against Trump*, NEW YORKER: DAILY COMMENT (June 20, 2017), [http://www.newyorker.com/news/daily-comment/behind-the-democrats-emoluments-lawsuit-against-trump?mbid=nl\\_daily&CNDID=27289327&mbid=nl\\_170620\\_Daily&CNDID=27289327&spMailingID=11303113&spUsrID=MTMzMTgyODM1NjQwS0&spJobID=1181744895&spReportId=MTE4MTc0NDg5NQs2](http://www.newyorker.com/news/daily-comment/behind-the-democrats-emoluments-lawsuit-against-trump?mbid=nl_daily&CNDID=27289327&mbid=nl_170620_Daily&CNDID=27289327&spMailingID=11303113&spUsrID=MTMzMTgyODM1NjQwS0&spJobID=1181744895&spReportId=MTE4MTc0NDg5NQs2) (quoting Senator Richard Blumenthal: “Trump has said that these businesses are too large and complex to sell, but that is not our problem. Nobody said he had to run for President.”).

<sup>15</sup> The OGE director, Walter M. Schaub, Jr., has resigned, frustrated with “the current situation.” *See* Nicholas Fandon, *Government Ethics Chief Resigns, Casting Uncertainty over Agency*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/us/politics/walter-schaub-office-of-government-ethics-resign.html>. Former OGE Director Schaub has characterized America’s ethical standing in the world, under President Trump, as “pretty close to a laughing stock.” *How Donald Trump is monetising his presidency*, THE ECONOMIST (July 20, 2017), <https://www.economist.com/news/business/21725303-six-months-mr-trumps-conflicts-interest-look-even-worse-how-donald-trump-monetising>.

<sup>16</sup> For that matter, even if they contain only passive investment assets, “blind” trusts may have the gift of sight. *See* Eisen et al., *supra* note 11, at 20 (quoting the author stating: “What are called ‘blind trusts’ are often like the ‘blind’ beggars in *The Hunchback of Notre Dame*. With the Trump family in charge, I don’t see how anyone can even pretend blindness.”).

<sup>17</sup> U.S. CONST. art. II, § 1, cl. 7. The first suit, invoking both clauses, was filed in January 2017 by Citizens for Responsibility and Ethics in Washington (“CREW”), a self-proclaimed public interest organization. *See* Second Amended Complaint, *CREW v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. May 10, 2017), <https://s3.amazonaws.com/storage.citizensforethics.org>

about whether the Foreign Emoluments Clause applies to a President, but, with the Presidential Compensation Clause, that is obviously not an issue.

One key question in all of this is the constitutional meaning of “emolument,” but little case law exists on that point. That is in part because would-be challengers to the behavior of government officials—claiming an official has violated one emoluments clause or another—face difficult standing issues.<sup>18</sup> (Each suit against the President has such problems.)<sup>19</sup> And, even if a plaintiff can demonstrate standing to sue, other concepts,

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/wp-content/uploads/2017/05/10231055/28-Second-Amended-Complaint.pdf. Because of standing concerns, plaintiffs were added who can plausibly claim economic losses from competing with Trump enterprises, particularly the new Trump International Hotel in D.C. See Press Release, Citizens for Responsibility & Ethics in Wash., *CREW v. Trump Adds New Plaintiff* (May 10, 2017), <https://www.citizensforethics.org/press-release/crew-v-trump-adds-new-plaintiff/>. (CREW has also filed a complaint with OGE arguing that an already issued certificate of divestiture was invalid because Trump advisor and son-in-law, Jared Kushner, had not disclosed at least one significant, un-divested financial interest. See Letter from Noah Bookbinder, Exec. Dir. of Crew, to Walter M. Schaub, Jr., Dir. of OGE (July 6, 2017), <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/07/06023725/OGE-Letter-Kushner-7-6-17.pdf>. Such a certificate is needed for I.R.C. § 1043 to apply. See § 1043(b)(2); see also *supra* note 14 and accompanying text.)

In June 2017, the District of Columbia and the state of Maryland filed suit claiming that, to their detriment, the President had violated both clauses—the Trump International Hotel had taken business from governmentally connected convention centers in both jurisdictions. See Complaint, District of Columbia & State of Maryland v. Trump, No. 8-17-cv-01596 (D. Md. June 12, 2017), <https://www.documentcloud.org/documents/3862984-2017-6-12-DC-MARYLAND-vs-TRUMP.html>. (To buttress its standing argument, Maryland also said it is party to a contract, the Constitution, that generally prohibits the President from accepting foreign emoluments.)

The Presidential Compensation Clause is not at issue in the third suit, in which nearly 200 Democratic members of Congress have complained that they cannot perform their duties under the Foreign Emoluments Clause because the President continues to do business with foreign states without seeking congressional consent. See Complaint, Blumenthal v. Trump, No. 1:17-cv-01154 (D.D.C. June 14, 2017), <http://ia801507.us.archive.org/30/items/gov.uscourts.dcd.187220/gov.uscourts.dcd.187220.1.0.pdf>.

<sup>18</sup> See generally Jeremy Vendook, *The Case(s) Against Trump: Citizens are suing the President to force him to sell his businesses. But will any of their lawsuits succeed in court?*, THE ATLANTIC (Mar. 27, 2017), <https://www.theatlantic.com/business/archive/2017/03/the-search-for-standing/520467/> (explaining the difficulty of standing issues in emoluments cases).

<sup>19</sup> See Victor Li, *Emoluments clause against Donald Trump face uphill battle*, ABA J. (June 15, 2017), [http://www.abajournal.com/news/article/emoluments\\_clause\\_lawsuits\\_against\\_donald\\_trump\\_face\\_uphill\\_battle](http://www.abajournal.com/news/article/emoluments_clause_lawsuits_against_donald_trump_face_uphill_battle). Judicial authority is sparse also because statutes require most officials to meet requirements that would satisfy constitutional dictates, as well. See *supra* note 13 and accompanying text. And, whatever the legal rules, officials generally act to minimize the appearance of impropriety. If they do so, there is no reason for a lawsuit.

like the political question doctrine, might keep suits against top officials, particularly the President, from proceeding to judgment.<sup>20</sup>

Whatever might happen in litigation, however, the meaning of “emolument” and associated issues are worth studying. (Litigation is not how matters like this should be resolved anyway. Even if officials cannot be sued, they should want to satisfy constitutional rules.) There is little doubt that some Trump enterprises have benefitted because Donald Trump is President—foreign governmental officials staying in Trump hotels, for example<sup>21</sup>—and it is easy to see connections, in some circumstances, between the Trump Organization and governments of all sorts. But, except for the presidential salary (which the President is donating to charity)<sup>22</sup> and various presidential fringe benefits (like meals and lodging), no government (so far as I know) is providing benefits directly to Donald Trump in his capacity as President.

This Article considers a number of issues, but one focus is a matter that has been addressed—unsatisfactorily in my view—in the burgeoning literature: whether the term “emolument” in the Foreign Emoluments Clause (and maybe in other constitutional clauses as well) may encompass exchanges of property for other property—what appear to be good, old-fashioned business or investment deals—or whether it is limited to compensation for services (and perhaps further limited to services performed in an individual’s capacity as an official, of one government or another).<sup>23</sup> I am not convinced that what in form seem to be value-for-value

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<sup>20</sup> For that matter, it may not be clear that, without congressional action, those constitutional clauses create causes of action. Cf. Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1829 (2016) (“The development of affirmative remedies against governmental misconduct has had a messy history. Under our contemporary jurisprudence, however, such remedies would ordinarily require a cause of action, and their creation would be seen as largely a matter for Congress.”).

<sup>21</sup> The argument is that some officials, particularly diplomats visiting Washington to meet with the President, will stay in the Trump International Hotel, rather than a competing hostelry. It is assumed that being able to say, “Mr. President, you have a great hotel!” cannot hurt in negotiations. See *infra* Section III.C. (To be sure, because of low approval ratings, Trump’s connections can have *negative* economic consequences, too.)

<sup>22</sup> See John Kruzell, *Trump donates salary for second consecutive quarter*, POLITIFACT (July 26, 2017), <http://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1341/take-no-salary/>.

<sup>23</sup> See, e.g., Eisen et al., *supra* note 11, at 11–12 (“the Clause unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state.”).

exchanges cannot give rise to emoluments, nor am I persuaded that compensation for services is an emolument only if specifically tied to the recipient's official capacity.

Part I discusses the historical background of, and the limited founding debates on, the Foreign Emoluments Clause. Part II deals with a couple of threshold issues of current relevance: whether the clause applies to transfers that are not made directly by foreign governments, but instead by legally distinct entities related to those governments, and whether the clause has any application to the President. (The answer to both, I argue, is yes.) Part III considers the meaning of "emolument" in the Foreign Emoluments Clause, questions whether the term should be interpreted in isolation, and argues for an expansive definition to further the purpose of the clause. Part IV challenges the common argument that the behavior of founders in office should be treated as conclusive evidence of constitutional meaning. Part V discusses what the legal relationship must be, for a benefit to be treated as an emolument, between an American official and a foreign state. Finally, Part VI questions the common assumption that the term "emolument" must have the same meaning in the three constitutional provisions in which it (or its plural) appears, and argues that, given the purpose of the Foreign Emoluments Clause, the term should be interpreted more expansively in that clause than is appropriate elsewhere in the Constitution.

Most of this Article is about the Foreign Emoluments Clause, but, because it is commonly argued that the term "emolument" should have the same meaning throughout the Constitution (a proposition that isn't self-evident),<sup>24</sup> along the way I will also discuss the two other clauses that refer to emoluments.

## I. FOUNDING DEBATES ON THE FOREIGN EMOLUMENTS CLAUSE

Founding debates are not very helpful in trying to understand the Foreign Emoluments Clause. The clause was not discussed much at the Constitutional Convention, presumably because a similar provision had been in the Articles of Confederation: "[N]or shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king,

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<sup>24</sup> See generally Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012) (describing different interpretations of the word "emoluments").



prince or foreign state . . . .”<sup>25</sup> With that language already on the books, the meaning of key terms was probably taken for granted. (If everyone thinks a provision has a precise meaning, no discussion may occur even if, in fact, no common understanding exists.)

The draft provision at the Convention that evolved into the Foreign Emoluments Clause of the Constitution had originally said only that “[t]he United States shall not grant any title of nobility.”<sup>26</sup> According to Madison’s notes, on August 23, 1787, Charles Pinckney of South Carolina “urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence and moved to insert” additional language to that effect—language largely cribbed from the Articles. The Pinckney motion passed without dissent.<sup>27</sup>

That language, as slightly cleaned up by the Committee of Style, became the Foreign Emoluments Clause.<sup>28</sup> The only substantive differences between the Articles clause and the one in the Constitution are that the Articles did not provide for the possibility of congressional consent to what would otherwise be an impermissible present, emolument, office, or title,<sup>29</sup> and the Articles clause forbade the same sorts of transfers from foreign governments to those holding offices of profit or trust under *state* governments.<sup>30</sup> The Foreign Emoluments Clause makes no reference to state governments, and, with the Constitution in place, those governments presumably can make their own determinations about the propriety of state officials receiving benefits from foreign states.

<sup>25</sup> ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 1; *see also infra* text accompanying note 70 (quoting ARTICLES OF CONFEDERATION OF 1781, art. V, para. 2).

<sup>26</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (Max Farrand ed., rev’d ed. 1937) [hereinafter 2 FARRAND] (entry dated Aug. 6, 1787).

<sup>27</sup> *Id.* at 389 (entry dated Aug. 23, 1787). Madison spelled the name “Pinkney” in his notes. *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> Professor Zephyr Teachout suggests that, although the clause was silent about a congressional role, the practice may have been for gift recipients—usually ambassadors who did not want to offend foreign governments by refusing presents—to seek congressional permission to keep the booty. *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 27–28 (2014). On the other hand, Professor Nicholas Parrillo suggests that the clause, “like so many positive enactments regulating official income in this era[,] had no effect. U.S. diplomats took gifts at least five times during the 1780s.” NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 79 (2013).

<sup>30</sup> *See* Eisen et al., *supra* note 11, at 5.

Edmund Randolph, Virginia governor and influential delegate to the Constitutional Convention, explained the Foreign Emoluments Clause at the Virginia ratifying convention:

The last restriction restrains any persons in office from accepting of any present or emolument, title or office, from any foreign prince or state. It must have been observed before, that although the confederation had restricted congress from exercising any powers not given them, yet they inserted it, not from any apprehension of usurpation, but for greater security. This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the king of our allies. [The cryptic reference is to a jeweled snuff box bearing the portrait of Louis XVI, which the king had given to Benjamin Franklin in 1785 when Franklin was leaving his post as American ambassador to France.]<sup>31</sup> It was thought proper, in order to exclude corruption and foreign influences, to prohibit any one in office from receiving or holding any emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.<sup>32</sup>

Even though a person can usually accept presents or emoluments from anyone, the clause was intended to make clear what was *not* permitted, without congressional authorization, for a person holding an office of profit or trust under the United States. And it would not matter, under the clause, whether a foreign state is friendly or unfriendly. For obvious reasons, an American officer may not accept a gift or emolument from a nation in conflict with the United States, but Randolph explained why a gift or emolument from a friendly state is problematic as well. In either case, a corrupting effect is possible; the officer's loyalties may be divided, or at

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<sup>31</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 327 (Max Farrand ed., rev'd ed. 1937) [hereinafter 3 FARRAND]. "Snuff box" may sound like a trinket, but this one was not. See TEACHOUT, *supra* note 29, at 1 (describing gift as "a portrait of Louis XVI, surrounded by 408 diamonds 'of a beautiful water' set in two wreathed rows around the picture, and held in a golden case of a kind sometimes called a snuff box").

<sup>32</sup> 3 FARRAND, *supra* note 31, at 327 (entry for June 17, 1788). The report of Randolph's remarks in *Elliot's Debates* is substantively identical, but with a few differences in wording, punctuation, and the date on which the remarks were reported to have been made. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 465–66 (Jonathan Elliot ed., 2d ed., 1836) (June 15, 1788) [hereinafter ELLIOT'S DEBATES]. Perhaps the snuff-box incident did motivate delegates to the Constitutional Convention, as Randolph suggested, but a similar clause was in the Articles of Confederation. See *supra* notes 29–30 and accompanying text (comparing the Foreign Emoluments Clause and the Articles of Confederation). The issue was not new in 1787.

least seem to be divided. (Randolph may not have been speaking precisely, and his statement has been challenged as authority.<sup>33</sup> Nevertheless, in parts of that passage, Randolph seemed to consider “emolument” to be an umbrella term encompassing “presents” like the snuff box, as well as other benefits.<sup>34</sup>)

How much this would matter in the real world is another matter. Justice Joseph Story, writing in his *Commentaries on the Constitution* in 1833, suggested that the clause, although “founded in a just jealousy of foreign influence of every sort,” and thus symbolically important, was unlikely to have practical effect: “A patriot will not be likely to be seduced from his duties to his country by the acceptance of any title, or present, from a foreign power. An intriguing, or corrupt agent, will not be restrained from guilty machinations in the service of a foreign state by such constitutional restrictions.”<sup>35</sup> Even if the Constitution were silent about benefits provided by foreign states, good public officials would generally act in a public-spirited way and avoid the perception of foreign influence. (The good ones do occasionally nod, however. The fact that Franklin accepted the snuff box, despite the Articles’ prohibition—what Randolph

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<sup>33</sup> See, e.g., Brief for Scholar Seth Barrett Tillman as Amicus Curiae Supporting Defendant, Citizens for Responsibility & Ethics in Wash. v. Trump, No. 1:17-cv-00458-RA, at 22–25 (S.D.N.Y. June 16, 2017) [hereinafter Tillman Brief]. As important a figure as Randolph was, this was only one statement by one delegate to the Philadelphia convention, and transcriptions of statements at the Virginia convention are not totally trustworthy. See *supra* note 32 and accompanying text.

<sup>34</sup> See *infra* notes 80–86 and accompanying text. For what it is worth, Randolph also assumed the clause would apply to the President and said the clause restrains “any person[] in office.” See *supra* text accompanying note 32. And at another point during the Virginia convention, Randolph said:

There is another provision against the danger . . . of the President receiving emoluments from foreign powers. If discovered, he may be impeached. If he be not impeached, he may be displaced at the end of the four years . . . . [And] his compensation is neither to be increased nor diminished during the time for which he shall have been elected; and he shall not, during that period, receive any emolument from the United States or any of them. I consider, therefore, that he is restrained from receiving any present or emolument whatever. It is impossible to guard better against corruption.

ELLIOT’S DEBATES, *supra* note 32, at 486. (A slightly different version of this passage was quoted in Eisen et al., *supra* note 11, at 5.) See also *infra* Section II.B (outlining and criticizing the argument that the clause does not apply to the President).

<sup>35</sup> 3 JOSEPH STORY, COMMENTS ON THE CONSTITUTION OF THE UNITED STATES § 1346 215–16 (Quid Pro Books 2013) (1833). Story used the term “present” without mentioning “emolument.”

called an “accident”—shows that legal restrictions do not always have effect.)<sup>36</sup> And, whatever the constitutional language, bad officials might fail to observe the formalities, and, worse, not act in the best interests of the United States.

Legal restrictions are most likely to be ignored or openly disobeyed when remedies for violation are unclear. The delegates to the Constitutional Convention did not discuss what mechanisms might be available to enforce the Foreign Emoluments Clause when Congress does not give its consent. For appointed officials, dismissal is a possibility—maybe coupled with disgorgement—if the recipient’s superiors know of the receipt of the benefit (and the superiors care).<sup>37</sup> However, if the clause does apply to the President, and congressional consent is not forthcoming, the nuclear option—impeachment and removal—might be the only enforcement mechanism, other than challenging the President’s reelection.<sup>38</sup> I doubt the founders anticipated lawsuits, like those filed against President Trump, to enforce the Foreign Emoluments Clause.<sup>39</sup>

## II. THRESHOLD QUESTIONS UNDER THE FOREIGN EMOLUMENTS CLAUSE

Before moving to the meaning of “emolument,” I will consider a couple of threshold questions relevant to the application of the Foreign Emoluments Clause to President Trump’s relationships with foreign parties: whether the clause comes into play only if a benefit is transferred directly from a king, prince, or foreign state to an American official, and whether the clause constrains the President at all.

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<sup>36</sup> It would not have mattered whether the snuff box was a present or an emolument. Either way, accepting it violated the Articles. *See supra* text accompanying note 25 (quoting ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 1). Maybe Franklin received congressional approval after the fact—that is not clear—but, if he did, approval might not have satisfied the Articles’ requirements anyway. *See supra* note 29 and accompanying text.

<sup>37</sup> Impeachment (and removal) is a possibility too, although unlikely for an appointed executive-branch official. In any event, statutes forbid many conflicts of interest, and dismissal for cause need not be based on the Constitution. *See generally Managing Conflicts of Interest at the U.S. Federal Level*, U.S. OFF. GOV’T ETHICS, [https://www.oge.gov/web/oge.nsf/0/31B21EC811CE29BD85257EA6006557B9/\\$FILE/9a8259865d7246de868c85df32c6a1c63.pdf](https://www.oge.gov/web/oge.nsf/0/31B21EC811CE29BD85257EA6006557B9/$FILE/9a8259865d7246de868c85df32c6a1c63.pdf) (last visited Nov. 1, 2017) (discussing a “body of enforceable standards comprised of complementary criminal statutes” that address conflicts of interest in the executive branch).

<sup>38</sup> *See supra* note 34 (quoting Randolph about impeachment as a remedy for violation of the clause).

<sup>39</sup> *See supra* note 17.

*A. Transfers from Entities Related to Foreign Governments*

Possibly problematic transfers to American officers are unlikely to come directly from “kings, princes, or foreign states” these days; transfers of that sort are also obviously constitutional violations (unless Congress consents).<sup>40</sup> But suppose the benefit is laundered through an entity legally distinct from, but controlled or influenced by, a foreign government.<sup>41</sup>

The universe of legal entities was more limited at the time of the founding than is the case now, and, as far as I can tell, the founders were not thinking about complex, legal relationships between foreign governments and other organizations. But the Foreign Emoluments Clause has to apply if the foreign government has significant control over an organization that is contemplating transfer of a present or emolument to an American official. If that were not the case, the clause could be so easily circumvented as to be meaningless, and we should not construe constitutional provisions—particularly those intended to constrain government officials—in a way that leaves the provisions with little or no effect. The founders may have had a more formalistic view of the law than American lawyers do today, but they would not have approved an interpretive principle that would eviscerate their work.

And, for what it is worth—quite a lot, I think—the Office of Legal Counsel has assumed that legally distinct entities may be treated as foreign states under the clause.<sup>42</sup> The controlling factor in the OLC analysis is the relationship of the transferor to the foreign government—the extent of the government’s control over the transferring entity<sup>43</sup>—the right question to

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<sup>40</sup> However, kings and princes remain out there who might feel unconstrained by American constitutional niceties.

<sup>41</sup> Substitute, if you wish, a word less judgmental than “laundered.”

<sup>42</sup> See Walter Dellinger, *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, JUSTICE.GOV 122 (Oct. 28, 1993), <https://www.justice.gov/sites/default/files/olc/opinions/1993/10/31/op-olc-v017-p0114.pdf> (OLC Opinion).

<sup>43</sup> See, e.g., *id.* (concluding that non-government members of the Administrative Conference may not accept payments from commercial entities owned or controlled by foreign states, unless Congress consents).

When President Obama won the Nobel Peace Prize, OLC considered whether the cash award, if accepted and donated to charity, might be treated as coming from a foreign state, thereby potentially violating the Foreign Emoluments Clause. See NOBEL PEACE PRIZE OPINION, *supra* note 11. (I say “potentially” because the clause might not apply to the President, see *infra* Section II.B, and because there is no violation if Congress consents.) Some argued the President could not accept the cash without congressional approval. See, e.g., Ronald D.

ask.<sup>44</sup> In any event, I am going to assume that the Foreign Emoluments Clause matters.<sup>45</sup> If it does not, you can stop reading (assuming you have gotten this far to begin with).

### B. Does the Clause Apply to the President?

I am also going to assume, for reasons I will outline, that the President occupies an “office of profit or trust under [the United States]” for purposes of the Foreign Emoluments Clause.<sup>46</sup> It is counterintuitive, to put it mildly, to conclude that the President of the United States is *not* holding such an office. As the Office of Legal Counsel put it, in an opinion

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Rotunda & J. Peter Pham, *An Unconstitutional Nobel*, WASH. POST (Oct. 16, 2009), [http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101502277\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101502277_pf.html).

With a Nobel Prize, and a Democratic Congress, congressional consent might have been forthcoming anyway, but OLC concluded consent was not required because, “due to the unique organization of the Nobel Committee (including its reliance on the privately endowed Nobel Foundation), Nobel Peace Prize recipients do not receive presents or emoluments from a ‘foreign State’ for purposes of the Emoluments Clause.” NOBEL PEACE PRIZE OPINION, *supra* note 11, at 7. In contrast, “corporations owned or controlled by a foreign government are presumptively foreign states under the Emoluments Clause.” *Id.* at 7 n.6; *see also* Daniel L. Koffsky, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development*, JUSTICE.GOV (Oct. 6, 2010), [https://www.justice.gov/sites/default/files/olc/opinions/2010/10/31/goteborg\\_award\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2010/10/31/goteborg_award_0.pdf) (OLC opinion concluding that no prohibited emolument was involved because the foreign state did not make a final decision on the award). *But see infra* note 146 and accompanying text (noting the position of Kontorovich on whether corporations formed by foreign governments are “foreign states” within the meaning of the clause).

<sup>44</sup> The same sort of question can arise on the receiving end. Is an official insulated from the clause if transfers from foreign states are made to legally distinct entities over which the official has significant influence? I began paying attention to the clause because of contributions made by foreign states to the Clinton Foundation while Hillary Clinton was Secretary of State. If the concern is that an “office[r] of profit or trust” might have divided loyalties—holding a U.S. office but getting goodies from a foreign state—the clause should have been implicated. *See* Erik M. Jensen, *The corrosive influence of ‘presents’ from foreign governments per the Emoluments Clause*, CLEV. PLAIN DEALER (Sept. 23, 2016), [http://www.cleveland.com/opinion/index.ssf/2016/09/pay\\_to\\_play\\_and\\_presents\\_from.html](http://www.cleveland.com/opinion/index.ssf/2016/09/pay_to_play_and_presents_from.html) (arguing against formalistic interpretation). And it should not matter that a foreign state provides benefits to family members of a person holding an office of profit or trust. Any such benefit—in most cases, at least—ought to be attributed to the officeholder.

<sup>45</sup> I will go out on a limb and suggest that a present (or emolument) to a U.S. official from a queen or princess would be covered by the clause, even though the text mentions only kings and princes. The same thing would apply to emperors, empresses, tsars, tsarinas, sheikhs, and grand poobahs.

<sup>46</sup> U.S. CONST. art. I, § 9, cl. 8.

about President Obama's receipt of the Nobel Peace Prize, "The President surely 'hold[s] an[] Office of Profit or Trust.'"<sup>47</sup> And an influential report prepared under the auspices of the Brookings Institution characterizes the application of the Foreign Emoluments Clause to the President as an "easy question."<sup>48</sup>

The analysis may seem easy to some, but that conclusion is not uniformly accepted. Professor Seth Barrett Tillman has presented a strong argument that the clause applies only to appointed officials, not elected ones (or ones elected indirectly) like the President, Vice President, and members of Congress.<sup>49</sup>

Tillman's analysis involves a close reading of constitutional text. The terms "officer" and "office," as used elsewhere in the Constitution, generally (but not always) refer to appointed officials and their positions.<sup>50</sup> For example, the presidential appointments power applies to "Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for,"<sup>51</sup> and obviously the presidency itself is not an appointed position. The Impeachment Clause of the Constitution provides

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<sup>47</sup> NOBEL PEACE PRIZE OPINION, *supra* note 11 (emphasis added). Professor Grewal has noted that earlier OLC opinions present a "much blurrier picture." See Andy Grewal, *What DOJ Opinions Say About Trump and the Foreign Emoluments Clause*, NOTICE & COMMENT (Dec. 7, 2016), <http://yalejreg.com/nc/what-doj-opinions-say-about-trump-and-the-foreign-emoluments-clause/>. But the 2009 opinion was not the first in which OLC had concluded (or assumed) that the clause applies to the President. See, e.g., IRISH CITIZENSHIP OPINION, *supra* note 11.

<sup>48</sup> Eisen et al., *supra* note 11, at 7.

<sup>49</sup> See Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 185–86 (2013) [hereinafter Tillman, *Original Public Meaning*]; Seth Barrett Tillman, *Constitutional Restrictions on Foreign Gifts Don't Apply to Presidents*, N.Y. TIMES (Nov. 18, 2016) [hereinafter Tillman, *Constitutional Restrictions*], <http://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/constitutional-restrictions-on-foreign-gifts-dont-apply-to-presidents>; see also Tillman Brief, *supra* note 33; Will Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), <http://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/> (favorably describing Tillman's scholarship); Will Baude, *Some Misgivings About the Foreign Emoluments Clause Arguments*, WASH. POST: VOLOKH CONSPIRACY (Jan. 9, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/09/some-misgivings-about-the-foreign-emoluments-clause-arguments/?utm\\_term=.8177bc4a685e](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/09/some-misgivings-about-the-foreign-emoluments-clause-arguments/?utm_term=.8177bc4a685e) (admiring Tillman's argument).

<sup>50</sup> See Tillman, *Original Public Meaning*, *supra* note 49, at 193–94 (discussing the meaning of "office" and "officers" in constitutional text).

<sup>51</sup> U.S. CONST. art. II, § 2, cl. 2.

for the possibility of impeaching and removing “[t]he President, the Vice-President and all civil Officers of the United States,”<sup>52</sup> not “all *other* civil Officers of the United States.”<sup>53</sup> Several other examples can be provided to support the Tillman argument that, when the drafters wanted the President included in a particular category, they said so explicitly.<sup>54</sup>

On the other hand, Article II regularly refers to the President as holding an “office.”<sup>55</sup> And if the presidency is an office, surely it is an office of trust under the United States, even if the President is donating his salary to charity.<sup>56</sup>

Here, to muddy the waters, is a question only a law professor could love, but it is relevant.<sup>57</sup> Does “office of profit or trust,” as used in the Foreign Emoluments Clause,<sup>58</sup> have a meaning different from “office of

<sup>52</sup> *Id.* § 4.

<sup>53</sup> *Id.* § 2, cl. 2 (emphasis added).

<sup>54</sup> See Tillman, *Constitutional Restrictions*, *supra* note 49. Tillman also highlights a document prepared by Treasury Secretary Hamilton. *Id.* (citing 1 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 1789-1793 441, LIBR. CONG. (1820) [hereinafter JOURNAL OF THE SENATE], [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(sj001534\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(sj001534))) (entry of May 7, 1792)). Directed by the Senate to specify “every person holding any civil office of employment under the United States, (except the judges)[.]” Hamilton listed no elected officials. *Id.* at 186–88 (quoting JOURNAL OF THE SENATE (entry of May 7, 1792)). On the other hand, Tillman admits that he does not know why the founders might have exempted elected officials from the Foreign Emoluments Clause. See Tillman, *Original Public Meaning*, *supra* note 49, at 203.

<sup>55</sup> See, e.g., U.S. CONST. art. II, § 1, cl. 1 (“He shall hold his Office during the Term of four Years . . . .”); *id.* § 1, cl. 5 (“No Person except a natural born Citizen . . . shall be eligible to the Office of President . . . .”); *id.* § 1, cl. 8 (setting out Presidential oath: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States.”). On the other hand, Article II directs the President to “Commission all the Officers of the United States,” U.S. CONST. art. II, § 3, and apparently no President or Vice President has ever received a commission. (On yet another hand, it would be a bit much to interpret the Constitution as requiring that the President commission himself.)

<sup>56</sup> The President is apparently accepting the salary and donating it, rather than accepting no salary at all, because it is thought that the Presidential Compensation Clause *requires* him to be compensated by the United States. See U.S. CONST. art. II, § 1, cl. 7; *supra* text accompanying note 17. Even if he accepts no salary, however, he receives benefits that are considered compensation in other contexts, like meals and lodging. Reasonable people can disagree as to whether benefits of that sort should be treated as “compensation” for purposes of the Presidential Compensation Clause, and, if so, what might constitute a change in compensation. (Unreasonable people can disagree too.)

<sup>57</sup> As contrasted with the questions of many other law professors.

<sup>58</sup> U.S. CONST. art. I, § 9, cl. 8.



trust or profit,” as used in the provision forbidding a person holding such an office from serving as an elector?<sup>59</sup> (That is, does the ordering of “profit” and “trust” in the two clauses matter?)<sup>60</sup> That latter clause provides that “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”<sup>61</sup> That language does suggest, or more than suggest (because of the reference to “no Senator or Representative”), that members of Congress, who are elected officials, are not holding offices of trust or profit.<sup>62</sup> But does the specificity in that regard not suggest that the President, also elected (albeit in form by the electoral college) and not mentioned in the clause, is holding such an office? If the language does not mean that, a sitting President could serve as an elector, and that is a peculiar possibility.

As the electoral college functions today,<sup>63</sup> it probably would not matter if a President were an elector. But the electoral college was conceived of as a deliberative body, or actually a group of deliberative bodies, meeting state by state.<sup>64</sup> Could the founders really have meant that a sitting President could participate in the college’s consideration of his or her reelection? Think of having POTUS in the room—indeed, make it the intimidating George Washington at the meeting of the Virginia electors—as electors discuss whether he should be returned to office! If the President

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<sup>59</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>60</sup> Compare U.S. CONST. art. II, § 1, cl. 2, with U.S. CONST. art. I, § 9, cl. 8. (One might also question, if one has nothing else to do, whether there is a difference between “encrease” and “increase,” inconsistent spellings of what seems to be the same word.)

<sup>61</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>62</sup> At least indirectly. Until ratification of the Seventeenth Amendment, the Constitution provided for selection of a state’s senators by its legislature, U.S. CONST. art. I, § 3, cl. 1 (before amendment), as was the case for selection of delegates to Congress under the Articles. See *infra* note 71. Before the amendment, Senate races were in form campaigns to elect state legislators who favored the desired Senate candidate. See, e.g., *Lincoln-Douglas Debates: Facts & Summary*, HISTORY.COM, <http://www.history.com/topics/lincoln-douglas-debates> (last visited Nov. 1, 2017) (noting that the audiences for the Lincoln-Douglas debates were almost all people who would not be able to cast a vote directly for either candidate).

<sup>63</sup> See generally *What is the Electoral College?*, U.S. NAT’L ARCHIVES & RECS. ADMIN., <https://www.archives.gov/federal-register/electoral-college/about.html> (last visited Nov. 2, 2017) (describing the functions of the electoral college).

<sup>64</sup> See THE FEDERALIST NO. 68, at 380 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“It was . . . desirable that the immediate election be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.”).

cannot be an elector, as a matter of law, it must be because the President *is* holding an office of trust or profit.<sup>65</sup>

Despite the differences in wording, the reference in both the Foreign Emoluments Clause and the electoral college provision is to someone holding *either* an office of trust or an office of profit (or an office of both trust and profit). The order should not matter. If that is right, and the founders provided that members of Congress do not hold offices of trust or profit, but it did not say so for the President, might we infer that the Foreign Emoluments Clause is applicable to the President? Of course we might.<sup>66</sup>

An important point in this interpretive exercise is that a person looking at the Foreign Emoluments Clause for the first time is likely to have no doubt that the clause applies to the President. (I was in that position not so long ago. I used the word “clearly” in a blog posting about the clause without having yet read Tillman’s scholarship.) Would any reasonable person, looking at the clause in isolation, without knowing Tillman’s work, conclude to the contrary? Come on (I have heard colleagues say), we really cannot be expected to think the President is not holding an office of profit or trust under the United States. (For that matter, the House Ethics Committee assumes that the Foreign Emoluments Clause applies to members of Congress—that is, that those folks are holding offices of profit or trust under the United States.)<sup>67</sup>

Of course we should not be interpreting constitutional clauses (or anything else) in isolation. But there is nothing in the Foreign Emoluments Clause that even hints at the need to look elsewhere to understand the meaning of what seems like relatively straightforward language. I am

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<sup>65</sup> Whatever the rules, a reasonable President should not agree to be an elector (just as a reasonable member of Congress should not). We know that now, but the founders did not necessarily have that understanding. In any event, let us not allow reality to get in the way of an argument.

<sup>66</sup> So why did the founders flip the order of “profit” and “trust” in the two provisions? To get linguistic variety? Maybe, but I assume the difference in phrasing was inadvertent. The delegates to the Constitutional Convention were working under time pressures and did not have word processors. Not every linguistic difference matters.

<sup>67</sup> See U.S. HOUSE OF REPRESENTATIVES COMM. ON ETHICS, GIFTS FROM FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS, <https://ethics.house.gov/gifts/gift-exceptions-0/gifts-foreign-governments-and-international-organizations> (last visited Oct. 31, 2017).

skeptical of arguments that depend on counterintuitive readings of legal text, unless there are good reasons to reject informed intuition.

And I do not understand why the founders would have been unconcerned about the possibly divided loyalties that could result from presents, emoluments, offices, or titles being provided by foreign states to a President. (Why care about an ambassador's being influenced by presents or emoluments, but not worry about the ambassador's boss?)<sup>68</sup> The language of the Foreign Emoluments Clause came from the Articles of Confederation,<sup>69</sup> and in that document there was obviously no need to have language classifying an office, the presidency, that did not exist. Similarly, elsewhere in the Articles, a clause prohibited a delegate to Congress from "holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind."<sup>70</sup> So delegates to Congress were not holding "office[s] under the United States" for this purpose, and, as noted, there was no need for the Articles to say anything about the status of a nonexistent office, the presidency.<sup>71</sup>

Establishing the presidency was an important goal of the Constitutional Convention; it was not an afterthought. Given the central role that the new office of the presidency was going to play in American government, it is hard to imagine that, in cribbing the Foreign Emoluments Clause from the Articles, no one thought about whether it would apply to the President. If the founders had wanted to exempt this new, critical office, I would expect language in the Constitution to do that explicitly—probably in the clause itself, but, if not there, *somewhere*.<sup>72</sup> The lack of discussion about the clause at the convention points in the same, intuitive direction: the language's meaning was thought to be obvious.

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<sup>68</sup> One possible answer is that the ambassador was in Paris, making gift-giving easy, while the President was across the pond. But, even in the eighteenth century, a determined foreign state could get items of value to the President if it wished. See *infra* notes 73, 141–43 and accompanying text (noting France's gifts to President Washington).

<sup>69</sup> ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 1.

<sup>70</sup> *Id.* art. V, para. 2.

<sup>71</sup> Whether this language supports an across-the-board distinction between elected and appointed officials is another matter. All delegates to Congress under the Articles were chosen by state legislatures, so at best they were elected indirectly. See *id.* art. V, para. 1.

<sup>72</sup> I am flipping a Tillman argument. He argues that, if the presidency is not mentioned specifically in a clause that refers to offices or officers, that clause does not apply to the President. See Tillman, *Constitutional Restrictions*, *supra* note 49. My argument, however, is that, with a provision like the Foreign Emoluments Clause, limiting what government officials can do, the President ought to be treated as an officer *unless* the clause provides otherwise.

Tillman also looks at how the founders performed in office as support for the proposition that the Foreign Emoluments Clause does not apply to the President. He notes that George Washington, while President, accepted two gifts from the French government without seeking congressional approval, and no one complained, at least not publicly, about any constitutional violation.<sup>73</sup> I will later question the weight that commentators give to practices of the founders in constitutional interpretation, particularly in situations when no one seemed to have been paying attention, one way or another, to the Constitution.<sup>74</sup> Suffice it to say for now that not everything that happened in the late eighteenth century was necessarily constitutional, and the gifts made to, and accepted by, Washington do not create an open-and-shut case for the Tillman position.

It is a gross overstatement to claim, as Professor Laurence Tribe has done, that the Tillman analysis is “singularly unpersuasive.”<sup>75</sup> Tillman’s argument is creative and grounded in constitutional language. But a multi-step analytical process is necessary to get to a counterintuitive conclusion, and that complexity should give anyone pause. The default rule ought to be that, if there is doubt whether a constitutional constraint applies to a government official, the constraint applies. Restrictions on government officials, and therefore on potential abuses of power, should be interpreted expansively, all other things’ being equal.<sup>76</sup>

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<sup>73</sup> Tillman, *Original Public Meaning*, *supra* note 49, at 188–90. The gifts were publicly reported, but this was a pre-Internet age. *Id.* at 188 (citations omitted).

<sup>74</sup> I understand that one of Tillman’s points is that no one raised constitutional issues, so far as we know, because no one saw a constitutional problem. *See generally* Tillman, *Constitutional Restrictions*, *supra* note 49 (arguing that the Foreign Emoluments Clause does not apply to the President). That strikes me as reading way too much into equivocal events (or non-events), as I discuss later. *See infra* Section IV.A.

<sup>75</sup> Adam Liptak, *Donald Trump’s Business Dealings Test a Constitutional Limit*, N.Y. TIMES (Nov. 21, 2016) <https://www.nytimes.com/2016/11/21/us/politics/donald-trump-conflict-of-interest.html>. “Unpersuasive” by itself would have done the job in a more persuasive way. And Tribe has a dog in this fight. He is on the brief in the *CREW* litigation. *See supra* note 17. He is also co-author of the *Brookings* report on the application of the Foreign Emoluments Clause to the President. *See Eisen et al.*, *supra* note 11.

<sup>76</sup> *Cf. supra* note 72 and accompanying text. Tillman concedes that the Trump Organization’s dealings with entities associated with foreign governments are not desirable, even if they are, as he thinks, consistent with constitutional demands. *See Tillman, Constitutional Restrictions, supra* note 49; *see also* Grewal, *The Foreign Emoluments Clause, supra* note 10, at 685 (“If President Trump automatically accords special treatment to foreign government patrons of the Trump Organization, without entering into an employment relationship with them, that would raise serious ethical questions, but it would not raise questions under the Foreign Emoluments

Anyway, for purposes of this Article, I assume the Foreign Emoluments Clause applies to the President. Even if Tillman has it right, however, the meaning of “emolument” still matters for appointed officials in the executive branch. The definitional issues are more exciting if the office of the presidency is implicated, to be sure, but the issues are relevant in any case. So let us cut to the chase (whatever that means).

### III. WHAT IS AN EMOLUMENT?

#### A. *The Language of the Foreign Emoluments Clause*

Commentators have focused on what seems to be a fundamental question—“what is an emolument?”<sup>77</sup>—and I shall do that too. But it is not necessarily the right question to ask. The real issue under the Foreign Emoluments Clause ought to be whether a particular transfer of value is a “present, emolument, office, or title, *of any kind whatever*.”<sup>78</sup> We should, that is, interpret the phrase as a whole, rather than one word at a time.

One of the problems in recent discussions about the Foreign Emoluments Clause is the implicit assumption that the phrase “present, emolument, office, or title” sets out four distinct categories of benefits.<sup>79</sup> As a result, it is also assumed that we must examine any proposed benefit from a foreign state to an American officer of profit or trust to determine whether the benefit is a present *or* an emolument *or* an office *or* a title. It is only if a benefit fits within one of the four boxes that the clause will apply.

But that is not the way the clause is put together, and it is not the way Governor Randolph and Justice Story spoke and wrote about the clause—Randolph generally referring only to “emoluments”<sup>80</sup> and Story only to

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Clause.”). Bad practices are not necessarily unconstitutional, to be sure, but the undesirability of particular practices should not be ignored in constitutional interpretation.

<sup>77</sup> See *infra* Section III.B.

<sup>78</sup> U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

<sup>79</sup> See, e.g., Michael Stern, *The President and the Purposes of the Foreign Emoluments Clause (Part I)*, POINT OF ORDER: A DISCUSSION OF CONG. LEGAL ISSUES (Mar. 13, 2017), <http://www.pointoforder.com/2017/03/13/the-president-and-the-purposes-of-the-foreign-emoluments-clause-part-i/> (defining the distinct types of benefits that the Foreign Emoluments Clause restricts).

<sup>80</sup> See *supra* text accompanying notes 33–34. Randolph did use both terms but not in a consistent way.

“presents,”<sup>81</sup> as shorthand ways to describe the clause’s overall prohibition.

There is nothing in the language of the Foreign Emoluments Clause to suggest that the terms “present,” “emolument,” “office,” and “title” are mutually exclusive. Moreover, the phrase “any present, emolument, office, or title, *of any kind whatever*” has an all-encompassing ring to it.<sup>82</sup> The Constitution contains other phrases where the founders’ goal seemed to be to create a comprehensive list.<sup>83</sup> A little redundancy, with overlapping categories, does no harm; indeed, it increases the likelihood that nothing the founders intended to cover would fall through the cracks. That is the case, for example, with the Taxing Clause: the terms “Taxes, Duties, Imposts and Excises” are not mutually exclusive either. The founders wanted to make it clear that Congress had the power to enact any conceivable form of taxation, subject only to some separately stated limitations on that power.<sup>84</sup>

Although not all emoluments are gifts, or all gifts emoluments, the term “emoluments” in the Foreign Emoluments Clause, in context, might be a way of ensuring that the clause picks up transfers of value more generally: if there is a gap between “present” and “office or title,”

<sup>81</sup> See *supra* text accompanying note 35.

<sup>82</sup> There might be a question as to whether the phrase “of any kind whatever” modifies only “title,” the noun closest to it, but the comma after “title” suggests otherwise. The phrase pretty clearly modifies all the terms in the list: “present, emolument, office, or title.”

<sup>83</sup> See, e.g., U.S. CONST. art. II, § 4 (setting out grounds for impeachment). This is another place in the Constitution where the goal may have been to create a comprehensive list, but whether that is so is subject to debate.

<sup>84</sup> U.S. CONST. art. I, § 8, cl. 1. The clause gives Congress the power to levy “Taxes, Duties, Imposts and Excises,” and “Duties, Imposts and Excises” must be “uniform throughout the United States.” *Id.* Although listed separately, “Duties, Imposts and Excises” are taxes too—what the founders called “indirect taxes.” “Taxes” is an umbrella term that includes both indirect and direct taxes. See Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2393–97 (1997) [hereinafter Jensen, *Taxes*]. Direct taxes must be apportioned among the states on the basis of population, see U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4, unless the tax is “on incomes,” in which case the Sixteenth Amendment exempts the tax from apportionment. See U.S. CONST. amend. XVI. To evaluate the constitutionality of a tax, it is thus necessary to classify it as direct or indirect—subject to the apportionment rule or subject to the uniformity rule—but whether an indirect tax is a duty, impost, or excise does not matter. (Indeed, an impost is a duty on imports.) See generally Jensen, *Taxes, supra*, at 2393–97 (indicating that direct taxes must be apportioned, and indirect taxes must be uniform).

“emolument” fills it.<sup>85</sup> If there is doubt about whether a benefit coming from a foreign state to an American holding an office of profit or trust is covered by the Foreign Emoluments Clause, the rational officer should refuse the benefit. Nothing should turn on whether a benefit is a present rather than an emolument, or vice versa. Either way, an American official is not supposed to be accepting the benefit from a foreign state without congressional permission.

And it is not as though the other terms in the clause have an either/or character. For example, “office” and “title” have potential overlap. If an American official were offered an “office” by a foreign state, a title would almost certainly come along as well (unless “title” is understood to refer only to an honorific tied to no office, such as a knighthood). Would an offer to an American official to be Foreign Minister of the Grand Duchy of Fenwick be an offer of an office or of a title? It would be an offer of both, and compensation from the Grand Duchy—perhaps an emolument—might arise from the arrangement as well. We should not have to shoehorn this collection of benefits into one category or another to determine that the Foreign Emoluments Clause is applicable. However the benefits are characterized, they are forbidden by the clause unless Congress gives its approval.

If the goal of the Foreign Emoluments Clause is to prevent the receipt of benefits that might lead to divided loyalties (or the appearance of divided loyalties) on the part of the recipient, what would the point be in having to worry about whether a transfer is really a present, an emolument, an office, or a title?<sup>86</sup>

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<sup>85</sup> The Foreign Emoluments Clause has no *de minimis* exception, but one might infer that trinkets are not a concern. In any event, Congress has provided by statute (and by delegating authority to administrative agencies) that keeping gifts of small value is permissible, so long as no *quid pro quo* is expected. See JACK MASKELL, CONG. RESEARCH SERV., THE RECEIPT OF GIFTS BY FEDERAL EMPLOYEES IN THE EXECUTIVE BRANCH 8 (2014) (explaining restrictions on federal officers accepting gifts).

<sup>86</sup> Professor Tillman would also have us distinguish “bribes” from “emoluments.” See Seth Barrett Tillman, *Business Transactions and President Trump’s “Emoluments” Problem*, 40 HARV. J.L. & PUB. POL’Y 759, 771 (2017) [hereinafter Tillman, *Business Transactions*] (focusing on the Presidential Compensation Clause, but arguing that “emolument” should have the same meaning elsewhere in the Constitution). Bribes are illegal, and bribes are specifically covered by the Impeachment Clause. See U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”). The Foreign Emoluments Clause therefore arguably has no application to bribes. See Tillman, *Business*

### B. Value-for-Value Exchanges and the Foreign Emoluments Clause

Many assume that the term “emoluments” (or its singular form) should have the same meaning wherever it is used in the Constitution.<sup>87</sup> More on that later.<sup>88</sup> Here I focus on a different issue. The conclusion of several recent commentators, and the Trump administration itself, is that, in all three provisions, the term does not encompass value-for-value exchanges.<sup>89</sup> With that understanding, President Trump’s worldwide business dealings would not implicate the Foreign Emoluments Clause, or so it is argued, even if we assume (as I do) that the clause applies to the President. Nor would the clause apply to family members or other officials holding appointments in the administration who engage in value-for-value exchanges with foreign governments or their agencies.<sup>90</sup>

Professor Seth Barrett Tillman (him again!), focusing on the Presidential Compensation Clause and arguing that the term “emolument” should have the same meaning in the three emoluments clauses, wrote that

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*Transactions, supra*, at 760 n.4, 771. Bribery is wrong regardless of whether the Foreign Emoluments Clause applies or not, but there is no rule that says the founders could not forbid the same behavior in more than one constitutional provision. Although not all emoluments are bribes, bribes might very well be emoluments for purposes of the Foreign Emoluments Clause. I see no good reason to have to worry whether a benefit provided by a foreign state to an American official is really a bribe rather than a present or emolument. That would create yet another conceptual pigeonhole to consider, with nothing to gain from doing so. One way or the other, the transfer is not permitted, unless Congress gives its approval (and presumably Congress would not approve something with bribe-like characteristics).

The distinction between presents and emoluments on the one hand, and bribes, on the other, does not necessarily matter for impeachment purposes anyway. If an officer accepts a present or emolument in violation of the Foreign Emoluments Clause, the understanding of at least some founders was that that would be an impeachable offense, whether or not a bribe is involved. *See supra* note 34.

However, to suggest that a bribe from a foreign state might be treated as an emolument for purposes of the Foreign Emoluments Clause does not mean that it would be one for purposes of the other two emoluments clauses. *See infra* Section VI.A (questioning whether “emolument” must have the same meaning in all clauses). What would it mean to have a bribe coming from the United States to the President of the United States for purposes of the Presidential Compensation Clause?

<sup>87</sup> *See, e.g.*, Tillman, *Business Transactions, supra* note 86, at 764–66.

<sup>88</sup> *See infra* Section VI.A.

<sup>89</sup> The President takes that position in the cases that have been filed against him. *See supra* note 17 and accompanying text.

<sup>90</sup> Whether or not the Foreign Emoluments Clause technically applies, federal conflict-of-interest rules would keep most law-abiding government officials from potential problems. *See supra* note 13 and accompanying text.



business transactions for value are *voluntary* and *private*; emoluments, by contrast, are legal entitlements *mandated* by *public* laws or regulations. The terms of business transactions are *negotiated* (or, at least, potentially negotiable) by contract; emoluments are fixed by law. . . . [T]here is simply no principled way to squeeze or translate business transactions for value into the language of “emoluments,” nor is that plain result changed by recharacterizing a business transaction for value as a present or bribe.<sup>91</sup>

(The italics are Tillman’s.) To support his position, Tillman quotes from the Supreme Court’s 1850 decision in *Hoyt v. United States*:<sup>92</sup> “[T]he term emoluments [is] more comprehensive [than ‘fees’ and ‘commissions’], embracing every species of compensation or pecuniary profit *derived from a discharge of the duties of the office*.”<sup>93</sup> The relevant office for the Presidential Compensation Clause is obviously the presidency, but the relevant office for purposes of the Foreign Emoluments Clause, say Tillman and others, is an American official’s position with a foreign state.<sup>94</sup>

Similarly, Professor Eugene Kontorovich, who, unlike Tillman, does think the President is constrained by the Foreign Emoluments Clause, argues against the idea that “any pecuniary advantage constitutes a forbidden ‘emolument.’”<sup>95</sup> (That position has been advanced by plaintiffs in ongoing litigation against President Trump,<sup>96</sup> and it is reflected in the Brookings report—authored by three of the counsel representing Citizens for Responsibility and Ethics in Washington (“CREW”) in one of the cases—on the application of the clause to the President.)<sup>97</sup>

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<sup>91</sup> Tillman, *Business Transactions*, *supra* note 86, at 771. Implicit in that passage is a rejection of the idea I advanced earlier that “present” might be treated as a subset of “emolument.”

<sup>92</sup> *Hoyt v. United States*, 51 U.S. 109 (1850).

<sup>93</sup> Tillman, *Business Transactions*, *supra* note 86, at 768 (quoting *Hoyt*, 51 U.S. at 135) (emphasis added).

<sup>94</sup> The American office is important, in that a person not holding an “office of profit or trust [under the United States]” is not subject to the Foreign Emoluments Clause to begin with. *Id.* at 760 n.2. But for such a person, says Tillman, the prohibition against accepting emoluments attributable to a foreign state relates to compensation for an office associated with that foreign state. See *infra* notes 184–85 and accompanying text.

<sup>95</sup> Eugene Kontorovich, *Did George Washington Take ‘Emoluments’?*, WALL ST. J. (Apr. 13, 2017), <https://www.wsj.com/articles/did-george-washington-take-emoluments-1492123033>.

<sup>96</sup> See *supra* note 17.

<sup>97</sup> See Eisen et al., *supra* note 11, at 11–12 (“[T]he Clause unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state.”).

Professor Andy S. Grewal also characterizes “emolument” for purposes of the Foreign Emoluments Clause as encompassing only “office-related compensation.”<sup>98</sup> The term, he says, “refers only to the compensation one receives for the personal performance of services, whether as an officer or an employee [of the foreign government,]”<sup>99</sup> and, “[u]nder this definition, ordinary business transactions between foreign governments and the Trump Organization do not violate the Foreign Emoluments Clause.”<sup>100</sup> Most important, “the Foreign Emoluments Clause applies to all compensation for services a U.S. Officer receives through an office or employment relationship with a foreign government.”<sup>101</sup> Grewal also quotes the language from the Supreme Court’s *Hoyt* decision in support of his position.<sup>102</sup>

And Professor Robert G. Natelson sees a common meaning in the three clauses referring to emoluments: “compensation with financial value, received by reason of public employment.”<sup>103</sup> That definition is presumably broader than Tillman’s<sup>104</sup> or Grewal’s,<sup>105</sup> in that, for purposes of the Foreign Emoluments Clause, there could be an emolument coming from the foreign government even if the U.S. official has no legally recognized employment relationship with that government. If the reason for the compensation is the officer’s public employment in the United States, that would seem to be enough to forbid it. But Natelson agrees that the clause does not pick up ordinary business transactions between American officials and foreign states: “Proceeds from unrelated market transactions were outside the scope of the clause.”<sup>106</sup>

These commentators have differences at the margins in interpreting “emolument,” but they are in fundamental agreement that the term should

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<sup>98</sup> See Grewal, *The Foreign Emoluments Clause*, *supra* note 10, at 649.

<sup>99</sup> *Id.* at 641–42 (footnote omitted).

<sup>100</sup> *Id.* at 642. “Only transactions conducted at other than arm’s length or transactions involving the provision of services by the President personally establish potential violations.” *Id.* (footnote omitted).

<sup>101</sup> *Id.* at 669.

<sup>102</sup> *Id.* at 643 n.13, 651–52.

<sup>103</sup> Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. (forthcoming 2017).

<sup>104</sup> See Tillman, *Business Transactions*, *supra* note 86, at 768 (describing emoluments as compensation for the duties of an office).

<sup>105</sup> See Grewal, *The Foreign Emoluments Clause*, *supra* note 10, at 641–42.

<sup>106</sup> Natelson, *supra* note 103 (manuscript at 57).

be understood in a narrow way, and that, as a result, the Foreign Emoluments Clause should not apply to most value-for-value exchanges between U.S. officers and foreign states.

I am not so sure. To begin with, the proposition that no value-for-value exchange can result in an emolument has to be an overstatement. At a minimum, payments (whether in cash or in kind) from a foreign state to compensate a person holding an American office of profit or trust for services performed by that person as an official of a foreign state are unquestionably emoluments. The officer might be providing full value for his compensation—the transaction, that is, can be value for value—but the Foreign Emoluments Clause would still forbid the arrangement, unless Congress approved.<sup>107</sup> (It is, therefore, also an overstatement to say that “business transactions for value” cannot be “squeezed” into the language of “emoluments.” An agreement to provide services to a foreign state is a business transaction, as most people would understand that phrase.) What better example could there be of an arrangement that might create the appearance of divided loyalties than if an American officer provides services to a foreign state and receives compensation for those services?<sup>108</sup>

I believe each of the commentators mentioned above would accept that qualification to the idea that value-for-value exchanges cannot give rise to emoluments.<sup>109</sup> Each might want to express a reservation or two about what I just wrote, but each would accept the general point (or so I think, perhaps mistakenly).

But let us move to exchanges of property for other property. In this category I include transfers of cash for property or for the use of property (that is, a transaction that is in substance a sale or lease of property). The Brookings report treats the term “emolument” as including any type of profit, gain, or advantage, which includes exchanges of value for value.<sup>110</sup> But it has been suggested that there is no economic benefit if the value

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<sup>107</sup> The authors cited have some differences in their interpretations, but I believe that all of them agree that compensation provided under the law of a foreign state to a U.S. officer who is simultaneously an officer of that foreign state is forbidden by the clause.

<sup>108</sup> If the relevant “office” is an office with the foreign government, the arrangement would seem to violate the Foreign Emoluments Clause even if no emolument is involved. *See infra* text accompanying note 192.

<sup>109</sup> Professor Grewal does so explicitly. *See* Andy Grewal, *The Trump Hotel Isn't Unconstitutional*, YALE J. ON REG. (Nov. 22, 2016) [hereinafter Grewal, *Trump Hotel*], <http://yalejreg.com/nc/the-trump-hotel-isnt-unconstitutional/>.

<sup>110</sup> *See* Eisen et al., *supra* note 11, at 11.

received equals the value given up, and no economic benefit means no present or emolument “of any kind whatever,” within the meaning of the Foreign Emoluments Clause.

Once again I am not convinced. For one thing, we know that in arm’s-length exchanges each side thinks it will be benefiting.<sup>111</sup> If that were not the case, no one would participate in the exchange. Maybe that is not enough of a benefit to constitute an emolument under the Foreign Emoluments Clause—maybe—but one can imagine the founders thinking an officer of profit or trust should shy away from arrangements of that sort with foreign states—unless Congress says it is all right to participate. I would have thought that in 1787, and I think it now.

In any event, there is another fundamental problem here. American tax lawyers, the smartest people in the world, know that a transaction that is, in form, an exchange of properties of equal value may not be that at all. Put another way: even if value-for-value exchanges cannot create an emolument for either party—I will accept that point for the sake of argument—that principle does not apply to an exchange that is not in fact of value for equal value.

How do we know whether a transaction that is in form value for value really is? Certainly documents by themselves cannot be conclusive. For example, suppose I “sell” you my property worth \$60 for \$100. The documents make this look like a straightforward sale, but, if those numbers are accepted, I am getting \$40 more than I should have for my property. For American tax purposes, we would have to characterize that extra \$40 as something other than the proceeds of a sale.<sup>112</sup> Compensation for

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<sup>111</sup> See generally *Are any arm's length transactions disadvantageous to both parties?*, INVESTOPEdia, <http://www.investopedia.com/ask/answers/012815/are-any-armlength-transactions-disadvantageous-both-parties.asp> (last visited Nov. 2, 2017) (noting that parties involved in arm’s-length transaction are acting in their own self-interest).

<sup>112</sup> For example, it might be disguised compensation for services, which should be taxed at ordinary income rates, not the special rates for long-term capital gain. (Why would I, as “seller,” want the deal to look like a straightforward sale of property? To convert what should be ordinary income into preferentially treated capital gain.) Or, depending on the relationship of the parties, it might be a gift. Cf. Treas. Reg. § 1.1015-4 (1972) (describing tax consequences of transactions that are part sale, part gift). Of course, there must be leeway in the system. If I sell an asset that I think is worth \$100, but others think is worth \$90, and still others think is worth \$110 (i.e., we are not talking about publicly traded property where the value is relatively determinate), an apparently arm’s-length sale for proceeds within that range (and slightly beyond) ought to be respected as a sale. But if the numbers get way out of whack—and we cannot tell whether that is

services, maybe, or a gift? Both are possibilities, with the ultimate characterization depending on the particular facts.

If so, for an American official selling property to a foreign government, that apparently arm's-length exchange might have a hidden, problematic aspect to it—extra value coming to the official.<sup>113</sup> I see no reason why that extra value should not be treated as a “present” or an “emolument” (it does not matter which) for purposes of the Foreign Emoluments Clause. That is a reason for interpreting the term “emolument” broadly—the term “present” too—to deter those holding an “office of profit or trust” from getting close to the line.

Of course, modern understandings of the Internal Revenue Code are not directly relevant to the meaning of constitutional provisions. But it is relevant, I think, that an apparently value-for-value exchange might not be that at all. I have convinced myself that, if the founders had focused on this question, they would have accepted the proposition that emoluments (and presents) might be hidden in transactions that seem to be something else.<sup>114</sup> The underlying principle here—this is beginning to sound like a broken record (for those who remember broken records)—is that the Foreign Emoluments Clause ought to be interpreted in a way that gives the clause effect. It should not be possible to hide a present or emolument in a transaction that, in form but perhaps not in substance, is value for value. And we should want to interpret the clause in a way that deters transactions that could have this hidden component. Because of the potential for abuse, the strong presumption ought to be that an apparent exchange of value for value is problematic for purposes of the Foreign Emoluments Clause.

### C. *A Special Case: Trump Hotels*

The new Trump International Hotel in Washington has been the subject of substantial commentary in writings about the emoluments

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the case by looking only at documentation—something else must be going on. And we should characterize that something else appropriately.

<sup>113</sup> Professor Grewal recognizes this possibility. See Grewal, *Trump Hotel*, *supra* note 109; see also *infra* note 120.

<sup>114</sup> Had they understood wiretapping—as of course they could not—the founders would have agreed that a wiretap could be an unreasonable search and seizure for Fourth Amendment purposes. The principle of the Fourth Amendment should apply in circumstances that could not have been contemplated in the late eighteenth century.

clauses.<sup>115</sup> The question is whether there might be emoluments from foreign governments if officials of those governments stay there, and hence a potential violation of the Foreign Emoluments Clause (if that clause applies to the President), or from the federal government or state governments if officials of those governments stay in the hotel, thus implicating the Presidential Compensation Clause.<sup>116</sup> That hotel and its associated entertainment and eating places are central to two of the suits filed against President Trump.<sup>117</sup>

None of the scholars I quoted earlier sees any significant Foreign Emoluments Clause problem with the hotel.<sup>118</sup> (Tillman, who thinks the clause does not apply to the President anyway, also sees no problem under the Presidential Compensation Clause if federal or state officials stay there.)<sup>119</sup> Professor Grewal has written about the hotel issues in particular.<sup>120</sup>

This probably seems like a silly issue, beneath the dignity of constitutional scholars.<sup>121</sup> Even if we know that some officials who stay in that hotel do so with the hope of getting a nudge in deliberations with the Trump administration, what is the problem if the officials (their governments, really) are paying the going rates for the rooms? Those are just value-for-value exchanges, the argument goes—an official paying, say, \$1,000 to get a night's use of a suite with a sticker price of \$1,000—and such exchanges should not be treated as presents or emoluments.<sup>122</sup>

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<sup>115</sup> See, e.g., Grewal, *Trump Hotel*, *supra* note 109; Josh Blackman, *Fair-Weather Originalists*, NAT'L REV. (Feb. 20, 2017), <https://www.nationalreview.com/magazine/2017-02-20-0000/progressives-constitutional-love-donald-trump>.

<sup>116</sup> A Presidential Compensation Clause issue was raised in the *CREW* and Maryland-D.C. cases. See *supra* note 17.

<sup>117</sup> See *id.*

<sup>118</sup> See *supra* Section III.B.

<sup>119</sup> Since Professor Tillman thinks the clause does not apply to the President anyway, he thinks there is no problem here. But even if the owner of the hotel were an unquestioned officer of profit or trust under the United States, the benefit does not fit Tillman's narrow definition of what an emolument is. See *supra* text accompanying note 91.

<sup>120</sup> See Grewal, *Trump Hotel*, *supra* note 109. Grewal does note that a Foreign Emoluments Clause issue might arise if a foreign diplomat pays *more* than the sticker price for a room in a Trump hotel. *Id.*

<sup>121</sup> Such as it is.

<sup>122</sup> See *supra* Section III.B (setting out, but rejecting, the argument that what is in form a value-for-value exchange cannot result in a present or emolument).

But even assuming there is something to the idea that most value-for-value exchanges cannot be emoluments, the issue I addressed earlier, an imaginative (or, for that matter, an unimaginative) lawyer can still find a present or emolument in the hotel example, at least some of the time. In his discussion of the issue, Professor Grewal, who concludes that the Foreign Emoluments Clause does not apply, generally assumes that guests in equivalent rooms at the Trump International Hotel, whether from the diplomatic corps or not, are paying the same rate.<sup>123</sup> But, as we know, there is no such thing as an always-applicable rate at many, if not most, hotels.<sup>124</sup> In any hotel on any given day, some guests are paying less, maybe much less, than the sticker price for their rooms,<sup>125</sup> and no two guests are necessarily paying the same rates for equivalent quarters. Under those circumstances, how do we tell what is value for value? Ordinarily we would say that value is whatever willing providers of services and willing consumers of those services agree on, but a Trump hotel's connection with the President changes the usual calculus. We can no longer assume arm's-length conditions.

Furthermore, suppose a foreign diplomat is paying the same rate as the guest in the next room, but he is occupying a room that would otherwise have been empty for the night.<sup>126</sup> Or suppose the diplomat, in selecting sleeping quarters, chooses an otherwise unoccupied luxury suite over an otherwise unoccupied, but substantially less expensive, room. In those cases, whatever is paid for the room, or the extra that is paid for the luxury suite, is mostly gravy for the hotel's owners.<sup>127</sup> Why is that not a potential

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<sup>123</sup> Grewal, *Trump Hotel*, *supra* note 109.

<sup>124</sup> You have probably seen the television commercials for online discount travel services, like Expedia.

<sup>125</sup> See, e.g., *What is a Hotel Rack Rate?*, SUPERPAGES.COM, <https://www.superpages.com/em/what-is-hotel-rack-rate/> (last visited Nov. 2, 2017) (noting that a "hotel rack room rate," or "the maximum that the hotel will charge a person who walks into the lobby without a reservation," may fluctuate according to demand).

<sup>126</sup> Reports, which I have not confirmed, suggest that the Trump International Hotel generally has unoccupied rooms. See Jonathan O'Connell, *Trump D.C. Hotel Turns \$2 Million Profit in Four Months*, WASH. POST (Aug. 10, 2017), [https://www.washingtonpost.com/politics/trump-dc-hotel-turns-2-million-profit-in-four-months/2017/08/10/23bd97f0-7e02-11e7-9d08-b79f191668ed\\_story.html](https://www.washingtonpost.com/politics/trump-dc-hotel-turns-2-million-profit-in-four-months/2017/08/10/23bd97f0-7e02-11e7-9d08-b79f191668ed_story.html) (comparing Trump International Hotel's 42.3 percent occupancy rate with the industry standard, a nearly 70 percent occupancy rate).

<sup>127</sup> Yes, there will be costs to the hotel attributable to additional guests or having guests stay in suites rather than single rooms—maid service, for example. But, unless an extra maid has to be hired, there really are not substantial additional costs—just a few dollars worth of cleaning supplies and utility costs. Cf. I.R.C. § 132(a)(1), (b) (2015) (describing one form of nontaxable

problem under the Foreign Emoluments Clause (at least if we assume that the presidency is an “office of profit or trust”)?<sup>128</sup> By any standard, the arrangement is unseemly, and by its terms the clause has no *de minimis* exception.<sup>129</sup>

#### IV. THE FOUNDERS’ BEHAVIOR IN OFFICE AND CONSTITUTIONAL INTERPRETATION

##### A. *The Founders and the Emoluments Clauses*

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fringe benefit provided by employer to employee, the “no-additional-cost service,” i.e., one that imposes no *substantial* additional cost on the employer, such as a hotel chain’s permitting employees to stay for personal purposes, at a reduced charge, in hotel rooms that would otherwise be unoccupied).

<sup>128</sup> It might well be the case that there is no violation of the Presidential Compensation Clause if officials of the United States government or of state governments stay in the hotel. *Cf. infra* Section IV.A. (That is not to say, however, that the practice is beyond reproach.)

<sup>129</sup> *See supra* note 85. That was also true with the equivalent provision under the Articles of Confederation. Some *de minimis* transfers are taken care of by statute and regulations issued under the authority of that statute. Under the constitutional clause, Congress can give its approval to otherwise impermissible transfers, and it has done so. *See* 5 U.S.C. § 7353(b)(1) (2012) (giving authority to issue regulations providing exceptions to otherwise generally applicable statutory rules); *see also* 5 C.F.R. § 2635.204(a) (2016) (providing a \$20 *de minimis* exception, with exceptions to the exception). But if Congress had not spoken, surely we would still need to interpret the clause with a sense of what the provision was directed at—to prevent American officials from having divided loyalties, to ensure that the officials are acting only in the best interests of the United States. Receipt of a leaky ballpoint pen from the French government that says “Vacation in the French Republic” on it should not be seen as even a possible violation of the clause. But what a person pays for a night at the Trump Hotel is hardly trivial, even with a discount.

Professor Blackman has called those who have become proponents of the Foreign Emoluments Clause as it might apply to President Trump “fair-weather originalists.” *See* Blackman, *supra* note 115. He notes that no one complained that the clause might have been violated if foreign governments bought President Obama’s books. *Id.* But the concern underlying the clause is the divided loyalties that might result if an American official is receiving benefits from foreign governments. It is hard to see how that concern is relevant if an official does not know who is buying his books—where the foreign state is just another isolated consumer. (My royalty statements do not specify who bought the one book sold.) The situation is fundamentally different when an official, or the official’s representative, has direct dealings with a foreign government (or government-controlled entity) and benefits from that arrangement. I suspect there would have been complaints if it had been learned that a foreign state had purchased a thousand copies of *The Audacity of Hope*. *See* BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* (2006).



Both Professors Tillman and Kontorovich point to the practices of founders in office during the early years of the Republic as evidence of constitutional meaning.<sup>130</sup> In particular, they focus on dealings of the sainted George Washington during his presidency.<sup>131</sup> Both conclude that the practices of the time support the proposition that the term “emolument” does not apply to value-for-value exchanges involving property (with “property” for this purpose including cash).<sup>132</sup> Tillman focuses on the Presidential Compensation Clause because he does not think the Foreign Emoluments Clause applies to the President anyway, but he thinks “emolument” should have the same meaning in all the clauses in which the word appears.<sup>133</sup> Kontorovich focuses on the Foreign Emoluments Clause.<sup>134</sup>

Tillman describes George Washington’s purchases in 1793, while President, of several parcels in the area that would become the nation’s capital.<sup>135</sup> Washington made the purchases through public auctions handled by three commissioners whom he had appointed, David Stuart, Daniel Carroll, and Thomas Johnson, all distinguished founders.<sup>136</sup> (Johnson had earlier served briefly on the Supreme Court, appointed by Washington.)<sup>137</sup> And, so far as we know, no one complained about these dealings. To Tillman, this example illustrates that none of the founders thought business transactions of that sort implicated the Presidential Compensation Clause.<sup>138</sup> Even though the deals were between the President and the

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<sup>130</sup> See Tillman, *Original Public Meaning*, *supra* note 49, at 185–88; Kontorovich, *supra* note 95.

<sup>131</sup> See Tillman, *Original Public Meaning*, *supra* note 49, at 188–90; Kontorovich, *supra* note 95. Washington was a largely silent delegate to the Constitutional Convention, but his presence was felt by the other delegates. See Simeon D. Fess, *The George Washington Bicentennial*, 12 CONST. REV. 128, 131 (1928) (describing Washington as a “Godlike figure” presiding over the Convention). He was chosen unanimously as President of the Convention. See George Washington Nordham, *George Washington’s Influence Carried the Constitution*, 59 N.Y. ST. B.J. 8, 8 (1987).

<sup>132</sup> See Tillman, *Business Transactions*, *supra* note 86, at 764–66; Kontorovich, *supra* note 95.

<sup>133</sup> See Tillman, *Business Transactions*, *supra* note 86, at 766.

<sup>134</sup> See Kontorovich, *supra* note 95.

<sup>135</sup> See Tillman, *Business Transactions*, *supra* note 86, at 761.

<sup>136</sup> *Id.*

<sup>137</sup> See T. Scott Offutt, *Thomas Johnson and Constitutional Government*, 13 CONST. REV. 204, 210 (1929).

<sup>138</sup> And, because Tillman thinks “emolument” has the same meaning in the Foreign Emoluments Clause, he would see no constitutional problem with purchases of property from foreign

federal government, Washington would not have been seen as receiving additional emoluments in his capacity as President.

As Tillman pithily puts it, the four participants included:

three members of the Continental Congress; three members of pre-independence colonial legislatures or post-independence state legislatures; two members of the Federal Convention (including the Convention's president); a member of the First Congress; a Justice of the Supreme Court of the United States; a governor; a federal elector for President and Vice President; and our first President. . . . Are we really to believe that not only did all four officials willingly, openly, and notoriously participate in a conspiracy to aid and abet the President in violating the Constitution's Presidential Emoluments Clause,<sup>139</sup> but that they also left—for themselves and their posterity—a complete and signed documentary trail of their wrongdoing?<sup>140</sup>

As I noted earlier, for purposes of interpreting the Foreign Emoluments Clause, Tillman also pointed to Washington's acceptance of two gifts from the French government without seeking congressional approval, and "[t]here is no record of any anti-administration congressman or senator criticizing the President's conduct."<sup>141</sup> The gifts were presumably "presents" within the meaning of the clause,<sup>142</sup> but, Tillman argues, the lack of objections to Washington's acceptance of the presents shows that everyone who mattered understood the clause does not apply to the President.<sup>143</sup>

But back to the meaning of "emolument." Tillman writes, with his usual vigor, "The *emoluments-are-any-pecuniary-advantage* position amounts to a naked assertion by twenty-first century legal academics that they understand the Constitution's binding legal meaning better than those

states by somebody holding an office of profit or trust under the United States, apparently even if the terms of purchase are favorable to the official.

<sup>139</sup> What I have called the Presidential Compensation Clause. See *supra* notes 2, 17 and accompanying text.

<sup>140</sup> Tillman, *Business Transactions*, *supra* note 86, at 762.

<sup>141</sup> Tillman, *Constitutional Restrictions*, *supra* note 49.

<sup>142</sup> Or maybe it is not so obvious. If the practices of the founders control in constitutional interpretation, we could infer from Franklin's acceptance of the bejeweled snuff box (and the other gifts accepted by American ambassadors in that era), see *supra* notes 31–34 and accompanying text, that the snuff box was not a "present" under the foreign emoluments clause of the Articles of Confederation, and therefore, presumably could not be a present for purposes of the equivalent constitutional provision. But that inference would effectively delete "present" from the clause.

<sup>143</sup> *But see supra* Section II.B (arguing the contrary).

who drafted it, ratified it, and put it into effect during the Washington administration.”<sup>144</sup>

To help interpret the Foreign Emoluments Clause, which he believes does apply to the President, Professor Kontorovich directs us to a 1793 letter from President Washington to an officer of the U.K. Board of Agriculture asking for help in renting out some of Washington’s land, particularly to non-American renters.<sup>145</sup> Washington, that is, was dealing with an agent of a foreign state with the hope of economic benefit. And, again, the practice created no controversy, Kontorovich says, so far as we know. The point? No founder must have thought the arrangement created any problem under the Foreign Emoluments Clause. Kontorovich says the letter “suggests that either business transactions are not ‘emoluments’ at all, or foreign entities such as state banks and television stations do not fall within the scope of the clause.”<sup>146</sup> And that is relevant today: “Given the Founding Father’s precedent, the legal objections to many of Mr. Trump’s affairs would puzzle those who framed and breathed life into the Constitution.”<sup>147</sup>

I do not claim to understand the Constitution in its original form better than the founders did, and it is undoubtedly true that the founders’ performance in office is evidence of the meaning of constitutional provisions. But it cannot be conclusive evidence. It may be blasphemy to say so, but the founders were human beings, not necessarily always acting in the most high-minded ways. (The story of George Washington and the cherry tree is not true, you know; Parson Weems made it up.) Justice David Souter once rejected the proposition that public acts of the founding generation in support of religion are controlling in interpreting the Establishment Clause today. As he put it, the acts “prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle.”<sup>148</sup> Just so.

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<sup>144</sup> Tillman, *Business Transactions*, *supra* note 86, at 763. For what it is worth, we do have available today far more founding-era sources than could have been accessed in the late eighteenth century.

<sup>145</sup> Kontorovich, *supra* note 95.

<sup>146</sup> *See id.* I am not sure how the letter could establish that state *television* stations are not “foreign states” for purposes of the clause. In any event, if that interpretation is correct, the clause is a paper tiger. *See supra* Section II.A.

<sup>147</sup> Kontorovich, *supra* note 95.

<sup>148</sup> *See Lee v. Weisman*, 505 U.S. 577, 616 n.3 (1992) (Souter, J., concurring).

I admire George Washington as much as anyone does, and I would vote for him today in a minute (if he were still alive, that is). But, as great as he was, he was capable of bending or stretching the rules. He did some things to make a buck, particularly in land speculation, and, like Bill Clinton, he had to pay the bills.<sup>149</sup>

Tillman summarily rejects the idea of “four officials willingly, openly, and notoriously participat[ing] in a conspiracy to aid and abet the President in violating the Constitution’s Presidential Emoluments Clause.”<sup>150</sup> But that is the language of ridicule, not analysis. No one is accusing George Washington of being a crook.

Tillman writes that, with opaque constitutional language, “reasonable persons must look to the actual conduct of the Framers, the Ratifiers, and the original practices of the three branches when they were squarely confronted with the need to determine the meaning of a particular legal term on concrete facts.”<sup>151</sup> That is okay up to a point, but Tillman gives more weight to the public auction example than it can reasonably bear.

There is no indication that anyone involved with the auction was “squarely confront[ing]” legal issues raised by the Constitution.<sup>152</sup> Maybe Washington and friends would not have intentionally engaged in “a conspiracy to aid and abet” anything, but it is just as possible that no one was focusing on possible constitutional violations or, for that matter, on appearances of impropriety.<sup>153</sup> And the “complete and signed documentary trail” Tillman refers to was nothing but certificates of purchase.<sup>154</sup> Even though they might technically have been matters of public record, they

<sup>149</sup> See Philip Rucker, *Bill Clinton defends foundation and paid speeches: ‘I gotta pay our bills,’* WASH. POST (May 4, 2015), [https://www.washingtonpost.com/politics/bill-clinton-defends-foundation-and-paid-speeches-i-gotta-pay-our-bills/2015/05/04/d3d98b4a-f280-11e4-84a6-6d7c67c50db0\\_story.html?utm\\_term=.58e10dbff4c5](https://www.washingtonpost.com/politics/bill-clinton-defends-foundation-and-paid-speeches-i-gotta-pay-our-bills/2015/05/04/d3d98b4a-f280-11e4-84a6-6d7c67c50db0_story.html?utm_term=.58e10dbff4c5) (defending six-figure speaking fees).

<sup>150</sup> Tillman, *Business Transactions*, *supra* note 86, at 762.

<sup>151</sup> *Id.* at 763.

<sup>152</sup> I understand that this supports Tillman’s point in a way: there was nothing to think about because everyone thought no problem existed. But of course there was something to think about, and that was whether or not the transactions were technical violations of the Constitution. They looked like self-dealing of a sort that a reasonable public official should want to have nothing to do with.

<sup>153</sup> It does not have quite the same punch to suggest that four founders may have engaged in transactions without thinking about constitutional implications.

<sup>154</sup> Tillman, *Business Transactions*, *supra* note 86, at 762.

were not widely disseminated; those of us who form the founders' posterity learned of the transactions only because of the scholarly digging done by Tillman and others. Tillman provides evidence that Washington believed his purchases were known to the public<sup>155</sup>—the public having a great interest in the emoluments clauses, of course<sup>156</sup>—but realistically how much of any of this would have been generally known?

Since this was a public auction, Washington's bids for the parcels should have been higher than anyone else's to prevail, and, if that were the case, the transactions would appear to have been at arm's-length (if that matters).<sup>157</sup> But if other potential bidders knew the President of the United States was bidding, that might well have affected their enthusiasm to participate in the auctions—and therefore the prices at which Washington was able to acquire the parcels. Of course I do not know that Washington got a good deal—a purchase at a discount below fair market value—but I also do not know that the deal was fair.

Tillman emphasizes Washington's concerns about his reputation.<sup>158</sup> That may strengthen the argument that we should defer to Washington's understanding of the law, I suppose, but we might still question whether transactions like this—purchases of property facilitated by a commission, the members of which had been appointed by the President—were ones a President of the United States should have engaged in. Quite apart from constitutional language, how could any public official concerned about his reputation have thought it appropriate, while in office, to buy property from the government that he presided over? My conclusion: no one was seriously considering much of anything involving constitutional law with these transactions. (Or perhaps whatever complaints might have been made did not make it into the documents surviving from the time. How would we know?)<sup>159</sup>

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<sup>155</sup> See *id.* at 762 n.13, 763 n.14.

<sup>156</sup> Excuse the sarcasm.

<sup>157</sup> See *supra* Section III.B.

<sup>158</sup> Tillman, *Business Transactions*, *supra* note 86, at 763 n.14 (quoting Letter from George Washington to Bushrod Washington (July 27, 1789), in 30 THE PAPERS OF GEORGE WASHINGTON 366, 366 (John C. Fitzpatrick ed., 1939): "My political conduct . . . must be exceedingly circumspect and proof against just criticism, for the Eyes of Argus are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relations.").

<sup>159</sup> I noted earlier that, with respect to gifts from France accepted by President Washington, Tillman writes that "[t]here is no record of any anti-administration congressman or senator

In any event, Tillman's argument about the meaning of "emolument" in the Presidential Compensation Clause does not necessarily tell us anything about the meaning of "emolument" for purposes of the Foreign Emoluments Clause, if, as I shall argue later, the term might have different meanings in the relevant clauses.<sup>160</sup> A purchase of property at a potentially bargain price by a person holding an American office of profit or trust from a foreign state should raise red flags under the Foreign Emoluments Clause.

Professor Kontorovich also derives an incredible amount of constitutional law, in this case about the Foreign Emoluments Clause, from a small sample, that one letter in 1793.<sup>161</sup> I do not see how one founder, even the "father of his country," could create a binding "precedent" by one action.<sup>162</sup>

This would be a peculiar precedent for another reason as well: Washington insisted the letter remain private, even though he said he thought no ethical barriers had been breached.<sup>163</sup> (If anyone other than George Washington were involved, we would laugh at an official's statement that he had nothing to hide as he resists disclosure.) But even if Washington's attempted business dealings with an agency of a foreign state had been generally known among those who might care about such things, we might come to conclusions different from Kontorovich's.

For one thing, we might infer congressional acceptance of the President's behavior. This was George Washington, after all. There is no violation of the Foreign Emoluments Clause if Congress gives its consent, and the clause is silent about how that consent must be manifested.<sup>164</sup>

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criticizing the [P]resident's conduct." See *supra* text accompanying note 141. But what record would one expect? There is, after all, no "record" praising or explicitly condoning the conduct either.

<sup>160</sup> See *infra* Section VI.A.

<sup>161</sup> See *supra* text accompanying notes 145–47.

<sup>162</sup> I am not sure whether placement of the apostrophe in "Founding Father's" was intentional, see *supra* text accompanying note 147, but, as published, the term is singular, referring to one founding father, Washington himself.

<sup>163</sup> See Eugene Kontorovich, *George Washington Was the First President to Stay in the Real Estate Business*, WASH. POST: VOLOKH CONSPIRACY (Apr. 14, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/14/george-washington-was-the-first-president-to-stay-in-the-real-estate-business/?utm\\_term=.9828ad9d9b39](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/14/george-washington-was-the-first-president-to-stay-in-the-real-estate-business/?utm_term=.9828ad9d9b39).

<sup>164</sup> In other provisions, the advice and "consent" of the Senate requires a formal vote. See, e.g., U.S. CONST. art. II, § 2, cl. 2 (limiting the President's power to make treaties by requiring

In addition, even if congressional approval cannot be inferred, how the clause can be enforced against a President, short of impeachment and removal, was not clear then, just as it is not clear now.<sup>165</sup> Impeach and remove George Washington!?! I do not think so. General acceptance of the President's behavior, if it existed, might have reflected nothing more than grudging acceptance of questionable practices: we wish he would not do these things, but there is nothing realistically we can do about it.

Finally, if this one action of Washington's is binding precedent about the meaning of the Foreign Emoluments Clause, we could just as well infer from the Kontorovich evidence that *Tillman* got it right—that the founders understood that the clause does not apply to the President. I do not think that is right, but it is consistent with the “precedent.” And neither of the alternative inferences suggested by Kontorovich—that “business transactions are not ‘emoluments’ at all, or foreign entities such as state banks and television stations do not fall within the scope of the clause”<sup>166</sup>—is obviously superior to *Tillman*'s understanding.<sup>167</sup> If we are going to infer

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consent by two-thirds of the Senate). But with appointments, nothing can happen until the President nominates someone. See Matthew Madden, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1148 (2007). With the Foreign Emoluments Clause, it is not necessarily the case that a congressional vote is required for each present, emolument, office, or title. Today, most of this is taken care of by statute or regulation. See, e.g., U.S. HOUSE OF REPRESENTATIVES, HOUSE ETHICS MANUAL, 110TH CONG., 2ND SESS. 57–59 (2008). For the small stuff, permission is in effect given. See Foreign Gifts and Decorations Act, as codified at 5 U.S.C. § 7342(c)(1)(A) (2012) (providing permission for acceptance of gifts of “minimal value,” as defined in regulations, or where refusal might cause “offense or embarrassment”). For the more valuable items, including those accepted for reasons of protocol, the gift becomes the property of the United States, although the President may buy items at fair market value from the National Archives. See 5 U.S.C. § 7342(c)(1)(B) (2012); see also JACK MASKELL, CONG. RESEARCH SERV., GIFTS TO THE PRESIDENT OF THE UNITED STATES (2012), <https://archive.org/details/R42662GiftstothePresidentoftheUnitedStates-crs>. With *Tillman*'s argument that the Foreign Emoluments Clause does not apply to the President at all, congressional consent of course would be irrelevant. In the suit against the President filed by Democratic congressmen, *Blumenthal v. Trump*, No. 1:17-cv-01154 (D.D.C. June 6, 2017), the claim by members of Congress is that the President, to the injury of the members, continues to do business with foreign states without seeking the consent required under the Foreign Emoluments Clause. See *supra* note 17. But the clause does not say anything about an official's having to ask for consent, and presumably there is nothing to keep Congress from voting on the issue—to show its disapproval, its lack of consent, if it wishes to do so.

<sup>165</sup> See *supra* notes 37–39 and accompanying text.

<sup>166</sup> Kontorovich, *supra* note 95.

<sup>167</sup> See *supra* Section II.B.

grand conclusions from one event at the time of the founding, why not go all the way?

Or, even better, should we step back and question how much interpretive weight should be given to a few, isolated events in the past?

### B. *The Founders' Actions More Generally*

Let us put George Washington aside for a moment and consider a more general (if one can be more General than George Washington) question: Do actions of the founders provide definitive evidence of constitutional meaning? Evidence yes, definitive evidence no.

The easy example that illustrates the skepticism with which we should view practices of the founding generation was the enactment of the Alien and Sedition Acts in 1798.<sup>168</sup> (Or maybe the easy example is the portion of the Judiciary Act of 1789<sup>169</sup> struck down in *Marbury v. Madison*.<sup>170</sup> That Act was a product of the very first Congress. *How could those guys have misunderstood the Constitution?*) Almost everyone today thinks the Alien and Sedition Acts were clearly unconstitutional, as well as embarrassing, even though they were the product of a Congress still controlled by founders. Indeed, at that point the Federalists were desperately hanging on, with Washington gone (barely) and Adams in office.<sup>171</sup>

Another example of suspect behavior by the founding generation: In the Export Clause, the Constitution forbids the imposition of any “Tax or Duty” on “Articles exported from any State.”<sup>172</sup> In a 1797 Act, Congress included a provision that called the high-mindedness of Congress into question: a tax was imposed on bills of lading for “goods to be exported to any foreign port or place” at a rate higher than that applicable to domestic bills of lading.<sup>173</sup> As I noted earlier, the late eighteenth century was a

<sup>168</sup> See Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798).

<sup>169</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73.

<sup>170</sup> See *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

<sup>171</sup> Opinions of the early Supreme Court justices—Federalists trying to prop up a Federalist government—should not be taken as gospel in determining original understanding. See Jensen, *Taxes*, *supra* note 84, at 2361. The same principle applies here: we need to be careful in attributing constitutional principles to political actors who, in time-dishonored fashion, may have been trying to push the limits of their power.

<sup>172</sup> U.S. CONST. art. I, § 9, cl. 5.

<sup>173</sup> The 1797 Act, “An Act laying Duties on stamped Vellum, Parchment and Paper,” reached “any note or bill of lading, for any goods or merchandise to be exported, if from one district to



more formalistic time than today, and *maybe* a tax on bills of lading for exported goods was not as blatant a violation of the Export Clause as a tax imposed directly on the exported goods would have been. Maybe, but only maybe.

Obviously Congress legislated intending to circumvent the Export Clause, by not taxing the exported goods directly. The Export Clause was intended to be an important limitation on congressional power, and, if taxing paperwork associated with exported goods were constitutional, the Export Clause would not be worth the paper it is written on.<sup>174</sup> (The issue was not litigated, and the legislation was repealed, for reasons other than its blatant unconstitutionality.)<sup>175</sup>

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another district of the United States, not being in the same state, ten cents; if to be exported to any foreign port or place, twenty-five cents.” Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527, 528; see also Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1, 23–25 (2003).

<sup>174</sup> In *United States v. Fairbank*, 181 U.S. 283 (1901), a divided Court invalidated a statute similar to the 1797 Act in its application to, and discrimination against, exports. See Act of June 13, 1898, ch. 448, § 6, 30 Stat. 448, holding in effect that there was “clear inconsistency” between the Export Clause and the act: “when the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged.” *Fairbank*, 181 U.S. at 311.

<sup>175</sup> Similar to the four dissenters in *Fairbank*, see 181 U.S. at 312–23, dissenting Justices Kennedy and Ginsburg in *United States v. IBM*, 517 U.S. 843, 863 (1996), thought that the 1797 statute should control in determining the original meaning of the Export Clause. Justice Kennedy stated: “We have always been reluctant to say a statute of this early origin offends the Constitution, absent clear inconsistency.” *IBM*, 517 U.S. at 875 (Kennedy, J., dissenting) (citing *Knowlton v. Moore*, 178 U.S. 41, 56 (1900) (finding support in 1797 Act, which included a legacy tax for congressional power to enact apportioned estate tax)); accord *Ludecke v. Watkins*, 335 U.S. 160, 171 (1948) (stating “The [Alien Enemy Act of 1798] is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights.”)). Justices Kennedy and Ginsburg also denied that the Fifth Congress had been trying “to circumvent the Export Clause. The early Congresses were scrupulous in honoring the Export Clause by making specific exemptions for exports in laws imposing general taxes on goods.” *IBM*, 517 U.S. at 876 (Kennedy, J., dissenting). “Scrupulous” is not a word I would use in characterizing what Congress did with the tax on bills of lading, and using the 1797 Act as an indication of original understanding has a further problem. Unless we are going to revive the idea that the term “export” includes goods that merely cross state lines, we cannot defer to the Fifth Congress. See Act of July 6, 1797, Ch. 10, § 1, 1 Stat. 527, 528 (language including in category of “goods . . . exported [those transported] from one district to another district of the United States, not being in the same State.”). Some founders did think that sending goods from Maryland to Virginia involved exportation, but many did not. In any event, that view has not been accepted for over two centuries. Some founders just got it wrong.

I could supply other examples as well,<sup>176</sup> but the point, I hope, has been made: some founders were willing, in some circumstances, to push constitutional limitations to, and even beyond, the breaking point. What they did should be taken into account in trying to discern constitutional meaning, but it cannot be controlling.

## V. “EMOLUMENTS” AND COMPENSATION FOR SERVICES

As noted, Professor Seth Barrett Tillman, focusing on the Presidential Compensation Clause, has written that

business transactions for value are *voluntary* and *private*; emoluments, by contrast, are legal entitlements *mandated* by *public* laws or regulations. The terms of business transactions are *negotiated* (or, at least, potentially negotiable) by contract; emoluments are fixed by law . . . . [T]here is simply no principled way to squeeze or translate business transactions for value into the language of “emoluments.”<sup>177</sup>

In the article from which that language is taken, Tillman’s focus is the Presidential Compensation Clause,<sup>178</sup> and some of his points make sense in that context. If a President invests in Treasury notes (on the same terms that would apply to any other investor), that is a “business transaction,” I guess. The interest received nevertheless ought not to be treated as an emolument for purposes of the Presidential Compensation Clause;

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<sup>176</sup> For example, in other contexts, I have questioned the importance of what the Supreme Court said in 1796, in *Hylton v. United States*, 3 U.S. 171 (1796), in upholding a federal tax on carriages (enacted while Alexander Hamilton was Secretary of the Treasury and, after he had left Treasury, defended by him before the Court) against the argument that it was a direct tax that, under the Constitution, was required to be apportioned among the states on the basis of population. See Jensen, *Taxes*, *supra* note 84, at 2357–60. In upholding the unapportioned tax, the Court gave a cramped interpretation of the scope of the direct-tax apportionment rules, basically limiting the universe of direct taxes to capitations and taxes on land, and suggesting that no other tax, including forms of taxation unknown to the founders, could be limited by the apportionment rule. See *Hylton*, 3 U.S. at 177–80. That conception, later slightly extended by the Court to include taxes on any property, not just land, see *Pollock v. Farmers’ Loan & Tr. Co.*, 158 U.S. 601 (1895), turned the direct-tax apportionment rule into a generally insignificant limitation on congressional power. The *Hylton* dispute may seem trivial today, but the carriage tax was intended to be a significant revenue-raiser for the new Federalist government. The justices in *Hylton* were doing their best to bolster that government. And, in those pre-*Marbury* days, there was no generally accepted conception of the Court as a check on legislative and executive overreach.

<sup>177</sup> Tillman, *Business Transactions*, *supra* note 86, at 771.

<sup>178</sup> See Tillman, *Original Public Meaning*, *supra* note 49; see also U.S. CONST. art. II, § 1, cl. 7.

the investment has nothing to do with the presidential office. And, if a President invests in state or municipal bonds, the interest received ought not to be treated as an emolument from a state government for the same reason. President Ronald Reagan's pension from the state of California, where he had been governor, was blessed by the Office of Legal Counsel as not violating the clause: "it appears that the term emolument has a strong connotation of, if it is not indeed limited to, payments which have a potential of influencing or corrupting the integrity of the recipient."<sup>179</sup> The pension payments were "fixed by law," but they were not connected to Reagan's being President.<sup>180</sup>

I am not quite sure why arrangements of that sort are not "legal entitlements *mandated* by public laws or regulations," Tillman's language,<sup>181</sup> but I will accept the conclusion that those benefits are not precluded by the Presidential Compensation Clause. But I do not understand how the concepts of that clause transfer to the Foreign Emoluments Clause. Both Professors Tillman and Grewal argue that the only transactions that can give rise to emoluments are between American officials and foreign states, when an American official has a legally enforceable arrangement to provide services to the foreign state and be compensated therefor.<sup>182</sup> And "fixed by law" means, at least for Tillman, mandated by public laws or regulations of the foreign state, not negotiated by contract.<sup>183</sup>

Quoting the Supreme Court's 1850 opinion in *Hoyt*, Tillman argues that a benefit is an emolument only if it is a "species of compensation or pecuniary profit derived from a discharge of the duties of the office,"<sup>184</sup> with the relevant office being one with the foreign state. As Tillman puts it in a brief filed in one of the ongoing cases against the President: "Where the Foreign Emoluments Clause precludes those holding office . . . under the United States from receiving emoluments from foreign states, it precludes such U.S. officers from taking emoluments associated with foreign

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<sup>179</sup> See OFF. OF LEGAL COUNS., PRESIDENT REAGAN'S ABILITY TO RECEIVE RETIREMENT BENEFITS FROM THE STATE OF CALIFORNIA 188 (June 23, 1981), <https://www.justice.gov/file/22681/download>.

<sup>180</sup> Reagan had a vested right to the pension before he became President, and, therefore, he was no longer required to perform services to receive the pension. In addition, the state did not have the authority to deprive him of the pension. *Id.* at 190.

<sup>181</sup> Tillman, *Constitutional Restrictions*, *supra* note 49, at 771.

<sup>182</sup> See *id.*; see also Grewal, *The Foreign Emoluments Clause*, *supra* note 10, at 669.

<sup>183</sup> Tillman, *Constitutional Restrictions*, *supra* note 49, at 771.

<sup>184</sup> *Id.* at 768 (quoting *Hoyt v. United States*, 51 U.S. 109, 135 (1850)).

government positions, foreign government offices, and foreign government employments (e.g., civil service positions).<sup>185</sup>

Grewal generally agrees, suggesting that the term, as used in the Foreign Emoluments Clause, applies to compensation associated with an American official's being an "officer" or "employee" of, or an independent contractor for, a foreign government.<sup>186</sup>

Most employment relationships, including those between governments and particular government employees, are negotiated by contract, and that apparently does not count as "fixed by law" for these purposes. But, if the concern is the American official's potentially divided loyalties, it should not matter that the foreign government provides the compensation pursuant to a contract rather than a statute—particularly if the foreign state is one in which, because of centralized government, there is no substantive difference between the two.

The world has a lot of land area "governed," at best haphazardly, with no government clearly in power, or with governments lacking a developed legal system.<sup>187</sup> Are we to assume that a benefit provided by a king or prince to an American official for services rendered—the benefit is fixed by law only in the sense that the king or prince says it shall be so—cannot be an emolument for these purposes?<sup>188</sup> Surely we should not have to get into disputes as to whether or not the rule of law governs in another part of the world in order to determine whether a violation of the Foreign Emoluments Clause has occurred.

Furthermore, if the term "emolument" in that clause is so limited, it is hard to imagine very many real-world transfers or proposed transfers that the term could apply to. Even if there were no Foreign Emoluments Clause, under what circumstances could an American official ever legitimately receive remuneration from a foreign state, for services provided to that state, that is "fixed by law" in that foreign state? Yes, some special circumstances may exist; for example, rightly or wrongly, the military takes the position that retired military personnel cannot receive

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<sup>185</sup> Tillman Brief, *supra* note 33, at 6.

<sup>186</sup> See Grewal, *The Foreign Emoluments Clause*, *supra* note 10, at 642 n.11.

<sup>187</sup> See *The Legatum Prosperity Index 2016*, LEGATUM INST., <http://www.prosperity.com/rankings> (last visited Nov. 1, 2017).

<sup>188</sup> The characterization would not matter anyway if the transfer could be seen as a present.

compensation from foreign governments, unless Congress gives its approval.<sup>189</sup> And some other special situations may lead to a problematic “emolument,” as Tillman and Grewal understand the term.<sup>190</sup> But most of those situations are in the nature of law professors’ hypotheticals—like an American official’s receiving an offer to become the Foreign Minister of the Grand Duchy of Fenwick.<sup>191</sup> Hypotheticals like that might be useful for discussion purposes, but they are disconnected from the real world. They are so unlikely to happen that it is difficult to see why a constitutional prohibition is necessary.

And if it were right that the relevant office is one with the foreign state, why would we care whether an emolument is involved? If an American official has such an “office” with a foreign state, the Foreign

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<sup>189</sup> See OFF. OF GEN. COUNS., OFF. OF THE SEC’Y OF DEF., SUMMARY OF EMOLUMENTS CLAUSE RESTRICTIONS, [http://ogc.osd.mil/defense\\_ethics/resource\\_library/summary\\_emoluments\\_clause\\_restrictions.pdf](http://ogc.osd.mil/defense_ethics/resource_library/summary_emoluments_clause_restrictions.pdf) (last visited Nov. 23, 2017) (noting that “the Emoluments Clause prohibits receipt of consulting fees, gifts, travel expenses, honoraria, or salary by all retired military personnel . . . from a foreign government unless Congressional consent is first obtained,” and thus, a situation could arise from retired personnel connected to a partnership or LLC doing business with a foreign state). According to this memo, congressional consent is deemed to have been provided by 37 U.S.C. § 908 (2012) if “advanced approval from the relevant Service Secretary and the Secretary of State” is received before acceptance of the position. *Id.* The specific approval comes from the executive departments, but this is done pursuant to a congressional directive.

<sup>190</sup> An interesting, and fortunately uncommon, situation was analyzed in the early 1950s. Richard Newkirk had been a judge in Germany, but he lost his job because of his Jewish ancestry. See JOSEPH H. CAMPBELL & FRANK H. WEITZEL, U.S. GEN. ACCT. OFF., DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES 331–34 (1955). He emigrated to the United States and ultimately became an official in the Department of Justice. *Id.* In 1954, the German government awarded Newkirk a lump-sum payment under the “Federal Supplementary Law for the Compensation of Victims of National Socialist Persecution” and an annuity for life under the “Law for the Redress of National Socialist Wrongs Inflicted on Members of the Civil Service Living Abroad.” See Memorandum from J. Lee Rankin, Office of Legal Counsel, to S.A. Andretta, Admin. Assistant Attorney Gen., (Oct. 4, 1954), <http://bit.ly/2vgexzo> (discussing payment of compensation to an individual from a foreign government). The Office of Chief Counsel determined that the lump-sum payment was in effect compensation for damages, and therefore not an emolument for purposes of the Foreign Emoluments Clause, but indicated that the annuity payments might be emoluments. OLC recommended obtaining congressional approval of those amounts—approval that presumably would have been forthcoming. See *id.* The General Accounting Office concluded, however, that the Foreign Emoluments Clause did not apply to either category. See Memorandum from Assistant Comptroller General Weitzel, to the Attorney Gen., 34 Comp. Gen. 331 (Jan. 12, 1955), <http://www.gao.gov/products/B-122100>. That was so even though the payments were “fixed by law.” See *id.*

<sup>191</sup> See *supra* text accompanying notes 85–86.

Emoluments Clause would be violated anyway, unless Congress consents, with or without any emolument.<sup>192</sup> In that case, the term “emolument” would be surplusage. We do not ordinarily think of constitutional language in that way, and academics typically do not write learned articles on the meaning of surplus language.

A more plausible reading of the Foreign Emoluments Clause is that it should have application if the benefit received from a foreign state is attributable to the beneficiary’s performance of services in his or her capacity *as an officer of the United States*.<sup>193</sup> And maybe even that conception is too narrow. The underlying concern is that the American official will benefit (or appears as if he or she might benefit) from arrangements with a foreign state, and that concern could exist if benefits are received from a foreign state, whether or not clearly tied to official American duties.<sup>194</sup>

Besides, adopting Tillman’s narrow definition of “emolument” calls into question the structure of the Foreign Emoluments Clause. The clause prohibits any “present,” a potentially wide category of gratuitous transfers, where there is no apparent quid pro quo but the arrangement is still questionable. (If it is not questionable, Congress can approve the arrangement.) But if “emolument” applies only to compensation paid by a foreign state to a United States official who is a legally recognized officer of the foreign state, we wind up with a very peculiar understanding of the Foreign Emoluments Clause.

If “present” has a wide scope, tied to no particular performance of services but where the appearance of divided loyalties could be created, and, at the other extreme, “emolument” applies only to compensation for services in very narrow (and generally unrealistic) circumstances, where there is no doubt that divided loyalties may result, we are left with a clause

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<sup>192</sup> See *supra* note 108.

<sup>193</sup> I take it that Natelson would agree with this point. See *supra* text accompanying note 103.

<sup>194</sup> For example, if a foreign government pays a holder of an American office of profit or trust to clean the windows at its embassy in Washington, that benefit ought to be treated as an emolument. It is true that, with that ridiculous hypothetical, the danger of divided loyalties would seem not to exist; doing a little window washing on the side need not compromise loyalty to the United States. But the same thing could be said about receipt of a present from a foreign state, and in that case there is no doubt the clause applies. Besides, how in the real world could we ever tell what services were being compensated? If the benefit is coming from a foreign state, should the presumption—maybe even an irrebuttable presumption—not be that the benefit is an emolument?

that is bewilderingly silent about a wide range of potentially problematic transfers that fall between those two extremes. Any transfer of value that is not gratuitous and that is not compensation for a very particular sort of services would not be covered by the clause, even though the same danger of corrupting influence would seem to exist. What principle leads to that result?

Yes, drafters of legal documents can adopt mindless positions, but that is not usually what they are trying to do. We should not assume, without clear evidence, that the founders intended apparently nonsensical results. Broadening the understanding of “emolument” to include all, or nearly all, transfers of value that are not gratuitous makes the structure of the Foreign Emoluments Clause more coherent: what is prohibited (assuming no congressional approval) is not just the extremes, but also everything in between.

Giving significant weight to the Supreme Court’s description of “emolument” in *Hoyt*, as Tillman and Grewal do, is also questionable: “[T]he term emoluments [is] more comprehensive [than ‘fees’ and ‘commissions’], embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office.”<sup>195</sup>

Tillman and Grewal interpret that passage as limiting what can be considered an emolument,<sup>196</sup> but that is not what the passage says. To say that the term “emolument” *embraces* compensation for a particular office is not to say that nothing else can be an emolument. It is to say only that “emolument” *includes* such compensation. Besides, the Court in *Hoyt* was not interpreting the term “emolument” in any of the constitutional provisions.<sup>197</sup> The Court was construing statutory, not constitutional, language, and then for a very limited purpose.<sup>198</sup> The quoted language cuts off the end of the sentence: “and such is the obvious import of it *in these acts*.”<sup>199</sup>

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<sup>195</sup> *Hoyt v. United States*, 51 U.S. 109, 135 (1850) (quoted in Tillman, *Business Transactions*, *supra* note 86, at 768; Grewal, *The Foreign Emoluments Clause*, *supra* note 10, at 643 n.13).

<sup>196</sup> See also Watkins, *supra* note 14 (interpreting *Hoyt* in same way, presumably because of Tillman’s work).

<sup>197</sup> See *Hoyt*, 51 U.S. at 135.

<sup>198</sup> See *id.*

<sup>199</sup> *Id.* (emphasis added). The issue was how much the former collector of the port of New York had been obligated to turn over to the United States Treasury. The method of computation was set out by statute.

Maybe in an ideal world<sup>200</sup> the term “emolument” should have the same meaning for constitutional and statutory purposes, but, whatever the case for consistency in meaning within the Constitution (on which more in a moment),<sup>201</sup> Congress can use words however it wishes in legislation.<sup>202</sup> *Hoyt* does not control constitutional interpretation.

## VI. DOES “EMOLUMENT” HAVE THE SAME MEANING THROUGHOUT THE CONSTITUTION?

Some of the confusion in interpreting the Foreign Emoluments Clause comes from the assumption, made by Professor Tillman and others, that the term “emolument” must have the same meaning in all constitutional provisions.<sup>203</sup> It might seem as though a word should have the same meaning throughout a single legal document. But that idea requires interpreting “emolument” without regard to the purposes the term serves in each provision.

I have suggested that the term “emolument” in the Foreign Emoluments Clause might be an umbrella term that encompasses transfers of value that does not necessarily fit easily with any of the other listed categories. My argument was that, for purposes of that clause, there is no good reason to interpret the term narrowly. Doing so can prevent the clause from doing its job—forbidding transfers from foreign governments to American officials that could call the loyalty of an official into question.<sup>204</sup>

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<sup>200</sup> Which, when last I checked, this one was not.

<sup>201</sup> See *infra* Section VI.

<sup>202</sup> For example, “income” under the Internal Revenue Code is not as all-encompassing as “income” under the Sixteenth Amendment. See I.R.C. § 61 (2013). See generally U.S. CONST. amend. XVI (discussing how income under the Sixteenth Amendment is taxable, regardless of where it comes from and without the tax having to be apportioned among the states on the basis of population). Although courts often say that, with the income tax, Congress intended to exercise the full extent of its taxing power, that is clearly not true. The Internal Revenue Code provides certain exclusions from the definition of “gross income” (and a benefit excluded from gross income winds up not being included in taxable income). See I.R.C. §§ 101–139F (2013). In general, these exclusions apply to economic benefits that, were it not for the exclusion, would be included in the income-tax base.

<sup>203</sup> See, e.g., Tillman, *Business Transactions*, *supra* note 86, at 766 (“Both the Presidential Emoluments Clause and the Foreign Emoluments Clause use precisely the same term: ‘emolument.’”); see also *id.* at 771.

<sup>204</sup> See *supra* Section III.A.



The language “of any kind whatever” in the clause<sup>205</sup> suggests that the term “emolument” might have a broader meaning in the Foreign Emoluments Clause than in the other two emoluments clauses.

A broad understanding of “emolument” does not work so well with the two other clauses. When the Ineligibility Clause refers to “the Emoluments whereof shall have been increased,”<sup>206</sup> the term “emoluments whereof” seems to refer only to compensation for the relevant civil office—what would a “present whereof” or “other benefits whereof” be?<sup>207</sup>—and the phrase almost certainly refers only to compensation coming from the national government to the occupant of that office.<sup>208</sup> Whatever the meaning of “emolument” standing alone, the addition of the “whereof” constrains the meaning in that particular situation. And the “whereof” would be unnecessary if the Tillman (and *Hoyt*) understanding were appropriate.

The Presidential Compensation Clause refers to “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.”<sup>209</sup> Professor Tillman’s argument as to the narrow meaning of “emolument” may make sense here; the term relates to compensation fixed by law for the office of the presidency. On the other hand, the phrase “other Emolument” may suggest that “emolument” is not limited to compensation. (If you

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<sup>205</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>206</sup> U.S. CONST. art. I, § 6, cl. 2; *supra* note 3.

<sup>207</sup> A purported “present” from the U.S. government to an official of the government would almost certainly be considered compensation, anyway, at least for tax purposes. *Cf.* I.R.C. § 102(c)(1) (2013) (stating that the term “gift” for federal income tax purposes does not include transfers from employers to employees).

<sup>208</sup> Tillman has plausibly argued that benefits coming from other sources cannot be treated as having “increased” the compensation of a member of Congress. *See* Tillman, *Business Transactions*, *supra* note 86, at 764–66. If that were not the case, and a benefit coming from a state government, say, were treated as an “increase” in compensation, he argues that the state government would effectively have veto power under the Ineligibility Clause, at least temporarily, over the appointment of a member of Congress to a “civil office under . . . the United States.” U.S. CONST. art. I, § 6, cl. 2. If a transfer from a state government to a sitting cabinet official, for example, were treated as an increase in emoluments for purposes of the Ineligibility Clause, any member of Congress at the relevant time would be ineligible for appointment to the office until the “Time [for which the member of Congress] was elected” had expired. *Id.* That, Tillman says, would make no sense. *See* Tillman Brief, *supra* note 33, at 6–7.

<sup>209</sup> *See supra* text accompanying note 17.

have already said that compensation cannot be increased, and “emolument” refers only to compensation, the reference is redundant.) I am not sure what a non-compensatory benefit coming from the United States, the President’s employer, would be.<sup>210</sup> I suppose a state might make a transfer to the President that is not compensatory in nature, but, even so, it is hard to imagine what that would be.<sup>211</sup> Oh, this is all so confusing . . . .

At bottom, all of this may indicate that the term “emolument” has different meanings in different provisions, given the different purposes underlying the various provisions. That sort of thing should not be surprising. As Walter Wheeler Cook noted decades ago, “The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.”<sup>212</sup> That is good advice, even if you are not inclined to guard against original sin.

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<sup>210</sup> Cf. *supra* note 207. Fringe benefits, including meals and lodging provided to the President in the White House (and elsewhere), would seem to be part of the compensation package, even if not taxable. Cf. I.R.C. § 119(a) (2013) (providing for the possibility of excluding the value of meals and lodging provided by employer to employee from the employee’s gross income); Treas. Reg. § 1.119-1(a)(2) (2017) (making it clear that the exclusion applies even if the meals and lodging are compensatory, so long as there is also a “substantial noncompensatory business reason” for the employer’s provision of the benefit). Would a new fringe benefit provided to the President “during the period for which he shall have been elected” be a violation of the Presidential Compensation Clause? Maybe, although, so far as I know, no new fringe benefits have been created recently. But presumably it is not the case that an inflationary increase in the cost (and value) of the meals and lodging (or other fringe benefit) provided during a presidential term is an invalid “encrease” in compensation. (I use “presumably” advisedly. Who knows? It is assumed that cost-of-living increases in salary cannot apply to a President during the President’s term in office, and maybe the same principle should apply to fringe benefits.)

<sup>211</sup> Let us make things more confusing, if possible. In addition to its own foreign emoluments clause, *see supra* text accompanying note 25, the Articles of Confederation included the following provision: “[N]or shall any person, being a delegate [to Congress], be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.” ARTICLES OF CONFEDERATION OF 1781, art. V, para. 2. That language makes little sense if the term “emolument” was understood to refer only to compensation for services. “Salary” and “fees” seem to do a pretty good job of describing that category. If there is a residual category of compensation that the clause was intended to pick up, one would have thought that the wording would have been “or *other* emolument of any kind.” Worded as the clause is, “emolument”—enhanced by the phrase “of any kind”—seems to apply to a different sort of benefit. What different sort of benefit? I do not know. But it is possible that the term covered economic benefits that go beyond compensation for the office.

<sup>212</sup> Walter Wheeler Cook, “*Substance*” and “*Procedure*” in the *Conflict of Laws*, 42 YALE L.J. 333, 337 (1933).

## CONCLUSION

The uncertainty about the scope of the Foreign Emoluments Clause may simply illustrate that we should not be too picky in interpreting particular passages in documents like the Articles of Confederation and the Constitution. Yes, the drafters were bright people, and they tried to be as precise as possible. But given the difficulties of drafting in committee, and with changes being made on a seemingly constant basis, some glitches were inevitably going to appear.

I would deal with the ambiguity, if ambiguity there is, by invoking a default rule. When we are dealing with a constitutional provision that is intended to constrain government officials, we should assume, absent conclusive evidence to the contrary, that the provision does apply to any official who is not specifically excepted from application of the provision. Limitations on governmental power, that is, should be construed expansively. If there is a legitimate concern about benefits being provided to U.S. officials by foreign governments creating divided loyalties (or the appearance of divided loyalties), the Foreign Emoluments Clause should be deemed to prohibit the acceptance of those benefits. Would any founder really have thought that the President or any other governmental official should be able to engage, without congressional approval, in economically beneficial relationships with foreign governments? Even if you do not think the language in the Foreign Emoluments Clause does that in an acceptably precise way, there is no damage to doctrine if the language of the clause is interpreted expansively.

The various emoluments clauses are a lot of fun, and I have had many laughs in the last year or so (illustrating my peculiar sense of humor) each time I have heard references to the Foreign Emoluments Clause on TV or radio news, or seen references to the clause in the print media and on the Internet. A provision that almost no one had paid attention to over the centuries suddenly became hot news.

But at an important level, the legal issues associated with the Foreign Emoluments Clause should be irrelevant. Clauses in the Constitution are important, of course, but all of what the Foreign Emoluments Clause unquestionably prohibits (if anything is unquestionable here) and just about everything the critics of an expansive definition say is not an emolument should not happen anyway. We should not need a Constitution to keep officials from acting in ways that could cause their loyalties to be questioned. If particular behavior might reasonably be questioned by people

of good faith, the honorable public official should stay as far away as possible from that behavior, whether or not it is unconstitutional or otherwise illegal.

If nothing else, however, the Foreign Emoluments Clause does emphasize the founders' fears about benefits coming to American officials from foreign governments. It adds a constitutional dimension to some good, old-fashioned appearance-of-impropriety concerns.