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Article

The Foreign Emoluments Clause and the Chief Executive

Amandeep S. Grewal[†]

INTRODUCTION

The 2016 presidential election brought widespread attention to a part of the Constitution, the Foreign Emoluments Clause, that had previously enjoyed a peaceful spot in the dustbin of history.¹ The clause requires that persons “holding any Office of Profit or Trust under the United States” (“U.S. Officers”) obtain consent from Congress prior to accepting gifts, offices, titles, or emoluments from a foreign government.² Though the clause could apply broadly, Congress has preempted many questions through the Foreign Gifts and Decorations Act, which generally blesses the acceptance of small gifts.³ Consequently, the clause has created few significant controversies during our nation’s history.

However, Donald Trump’s successful election has ignited public and scholarly interest in the Foreign Emoluments Clause

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1. Kimberly Robinson, *Five Things You Didn’t Know About the Emoluments Clause*, BLOOMBERG L.: BIG L. BUS. (Dec. 1, 2016), <https://bol.bna.com/five-things-you-didnt-know-about-the-emoluments-clause>.

2. U.S. CONST. art. I, § 9, cl. 8.

3. See 5 U.S.C. § 7342 (2012); see also 10 U.S.C. § 1060 (granting consent, under specified procedures, to a retired military member’s employment with the military forces of a newly democratic nation, and consenting to the compensation associated with his employment, office, or position); 37 U.S.C. § 908 (providing congressional consent to retired military members’ civilian employment with foreign governments, if some procedural requirements are satisfied); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 3504, 107 Stat. 1965–66 (1993) (granting consent, under specified procedures, to non-citizen Panama Canal Commission employees’ acceptance of civil employment with the Government of Panama).

and, specifically, the meaning of the term “emolument.”⁴ Some commentators, including former Ambassador Norm Eisen, Professor Richard Painter, and Professor Laurence Tribe, have advocated a broad interpretation of that term, such that it includes essentially any payment or benefit.⁵ Under their framework, President Trump qualifies as a U.S. Officer and the activities of his business enterprise, the Trump Organization, establish Foreign Emoluments Clause violations from “day one.”⁶ The Trump Organization caters to customers globally, and payments or other benefits from foreign governments surely arise in the ordinary course of its activities.⁷

As one illustration of the problem, the commentators point to the Trump Hotel in Washington D.C. That hotel’s customers include representatives of foreign governments, and if the commentators’ approach holds, any lodging or other fees paid by

4. See, e.g., Olivia B. Waxman, *What Is an Emolument? Donald Trump Has People Talking About This Part of the Constitution*, TIME (Nov. 22, 2016) <http://time.com/4579979/emoluments-clause-constitution-donald-trump>. During the 2016 election season, some argued that Hillary Clinton violated the Foreign Emoluments Clause during her tenure as the Secretary of State, though those arguments largely failed to gain traction. See Jonathan H. Adler, *Is the Emoluments Clause a Problem for Hillary Clinton?*, WASH. POST: VOLOKH CONSPIRACY (Sept. 23, 2016), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/23/is-the-emoluments-clause-a-problem-for-hillary-clinton> (describing two professors’ competing views on the issue).

5. See NORMAN EISEN, RICHARD PAINTER & LAURENCE H. TRIBE, GOVERNANCE STUDIES AT BROOKINGS, THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 11 (2016) [hereinafter BROOKINGS REPORT], http://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf (“[T]he Clause unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state.”). The authors apparently exempt payments related to some unprofitable transactions from their definition, though it is not clear which ones. Compare *id.* at 11 (stating that the clause “covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder,” which implies an exception for unprofitable transactions), with *id.* at 18 (stating that “[w]holly apart from any actual *quid pro quo* arrangements . . . the Emoluments Clause will be violated whenever a foreign diplomat stays in a Trump hotel or hosts a reception in one,” but apparently making no allowance for the possibility that rental transactions may result in loss, after taking into account properly allocable depreciation, lease payments, carrying charges, and so on). It appears that the authors would not treat payments received in a sale of property as an emolument, where the property is sold for less than its cost to the U.S. Officer.

6. See *id.* at 10.

7. See Richard Paddock et al., *Potential Conflicts Around the Globe for Trump, the Businessman President*, N.Y. TIMES (Nov. 26, 2016), <https://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html>.

those customers would reflect payments from a foreign government to a U.S. Officer. Should President Trump fail to obtain congressional consent for these payments, the commentators argue, he will have violated the Foreign Emoluments Clause and the grounds for his impeachment will have been established.⁸

This Article argues, however, that the commentators have interpreted the Foreign Emoluments Clause too broadly. By stating that an emolument refers to any payment, they rely on an expansive definition of the term⁹ that does not apply in this context. Under the proper definition of emolument,¹⁰ abbreviated here as “office-related compensation,” the term refers only

8. See BROOKINGS REPORT, *supra* note 5, at 18 (“[T]he Emoluments Clause will be violated whenever a foreign diplomat stays in a Trump hotel.”); *id.* at 22 (“[I]f Mr. Trump enters office in what would obviously constitute a knowing and indeed intentional violation of the Emoluments Clause and then declines to cure that violation during his tenure, Congress would be well within its rights to impeach him for engaging in ‘high crimes and misdemeanors.’”).

9. See *id.* at 11 (acknowledging the office-related definition of emoluments used by the Office of Legal Counsel but stating that “[t]he word also has an older meaning of ‘advantage, benefit, comfort,’” and arguing that in the 1790s, emoluments were “understood to encompass any conferral of a benefit or advantage, whether through money, objects, titles, offices, or economically valuable waivers or relaxations of otherwise applicable requirements”).

10. In applying the Foreign Emoluments Clause to a U.S. Officer, many legal authorities apply an office-related definition, which makes sense, given that “emolument” in the clause is grouped with positions under foreign law. See, e.g., Applicability of the Emoluments Clause & the Foreign Gifts & Decorations Act to the President’s Receipt of the Nobel Peace Prize, 2009 WL 6365082 (Dec. 7, 2009) (forthcoming in 33 Op. O.L.C.) [hereinafter President’s Receipt] (illustrating a foreign government’s “conferral of [an] emolument” by referencing the “hiring [of] an employee”); Applicability of 18 U.S.C. 219 to Retired Foreign Serv. Officers, 11 Op. O.L.C. 67, 67 n.2 (1987) (“The term ‘emolument’ has been interpreted to include compensation for employment.”) (citing Comp. of Emps. Detailed to Assist Foreign Gov’ts, 40 Op. Att’y Gen. 513 (1947)); Sec’y of the Air Force, 49 Comp. Gen. 819, 820 (1970) (“‘Emolument’ is broadly defined as profit, gain, or compensation received for services rendered. . . . Reward monies received for the service . . . to [foreign] public authorities would, in our opinion, fall within [the Foreign Emoluments Clause.]”); Gordon, U.S. Coast Guard, 44 Comp. Gen. 130, 130 (1964) (“[T]he term ‘emoluments’ is defined . . . as ‘the profit arising from office or employment’ and ‘that which is received as compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites.’”); Memorandum from J. Lee Rankin, Assistant Att’y Gen., Office of Legal Counsel, to S.A. Andretta, Admin. Assistant Att’y Gen. 8 (Oct. 4, 1954) (on file with *Minnesota Law Review*) [hereinafter Rankin Memo] (“[T]he term ‘emolument’ . . . was intended to cover compensation of any sort arising out of an employment relationship with a foreign state.”) (cited favorably in Emoluments Clause & World Bank, 25 Op. O.L.C. 113, 114 (2001) (also citing, for the same proposition, Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Comm’n, 10 Op. O.L.C. 96, 98 (1986))); see also *infra* Part I.B. Early versions of modern dictionaries usually list an office-related definition as the principal definition. See, e.g., *Emolument*, A COMPLETE

to the compensation one receives for the personal performance of services, whether as an officer or employee.¹¹ Under this definition, ordinary business transactions between foreign governments and the Trump Organization do not violate the Foreign Emoluments Clause. Only transactions conducted at other than arm's length¹² or transactions involving the provision of services by the President personally establish potential violations.

AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN (1774) (“[P]rofit arising from an office or employ.”); *Emolument*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (“1. The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office, as salary, fees and perquisites. 2. Profit; advantage; gains in general.”); *Emolument*, A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (1891) (“1. Profit or gain arising from station, office, or employment; dues; reward, remuneration, salary. 2. Advantage, benefit, comfort.”) (supporting principal definition with examples from 1480, 1650, 1743, 1803, and 1881, and supporting secondary definition with examples from 1633, 1704, and 1756). The secondary definition may very well have been the principal definition at one point—various eighteenth-century sources contemplate only a general definition of emolument. *See, e.g., Emolument*, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (“Profit; advantage.”); John Mikhail, “*Emolument*” in *Blackstone’s Commentaries*, BALKINIZATION BLOG (May 28, 2017), <https://balkin.blogspot.com/2017/05/emolument-in-blackstones-commentaries.html> (arguing that William Blackstone’s *Commentaries on the Laws of England* contemplated a broad definition of emoluments). *The Federalist Papers* usually use emolument in an office-related sense. *See infra* note 47 and accompanying text. The current edition of the leading legal dictionary offers a single, office-related definition of emoluments. *See Emolument*, BLACK’S LAW DICTIONARY, (10th ed. 2014) (“Any advantage, profit, or gain received as a result of one’s employment or one’s holding of office.”). The first edition of *Black’s Law Dictionary* listed the office-related definition as the principal definition. *See Emolument*, BLACK’S LAW DICTIONARY (1st ed. 1891) (“The profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private. Webster. Any perquisite, advantage, profit, or gain arising from the possession of office.”). Further analysis could reveal different shades to the principal and secondary definitions of emolument. *See* Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. (forthcoming 2017) (on file with *Minnesota Law Review*) (describing four potential Ratification Era meanings of “emolument”).

11. *See, e.g.,* Rankin Memo, *supra* note 10 (“[T]he term ‘emolument’ . . . was intended to cover compensation of any sort arising out of an employment relationship with a foreign state.”). Technically speaking, the services may be provided as either an officer, employee, or as an independent contractor. But for ease of exposition, this Article will use “officer or employee” or similar phrases to refer to all three statuses.

12. If a foreign government makes a payment to the Trump Organization in excess of the fair market value of the goods or services provided by it, the excess amount could potentially be characterized as a disguised payment to President Trump for services personally provided by him. *See infra* Part III.B.

Part I shows that numerous legal authorities support an office-related definition of emoluments under the Constitution, including under the Foreign Emoluments Clause. The Executive and Legislative Branches have each followed the Supreme Court's office-related definition¹³ when, as is the case with the Foreign Emoluments Clause, emolument appears in relation to an office or officer.¹⁴ The office-related definition thus better fits the relevant context than the expansive definition.

Putting aside definitional disputes, vexing questions arise when determining whether an emolument arises in a transaction between a foreign government and a business entity owned or affiliated with a U.S. Officer. One can reasonably argue that payments to the entity, rather than to the U.S. Officer, are categorically exempt from the Foreign Emoluments Clause. However, Part II examines the limited authorities available and concludes otherwise, proposing a three-part business entity test to help analyze the difficult problems in this area.

The analysis in Parts I and II applies generally to U.S. Officers, but Part III turns to the sitting President. It argues that, under the framework presented here, any compensated transaction involving the provision of services by President Trump personally to a foreign government would violate the Foreign Emoluments Clause. It also argues, using a market rate analysis, that ordinary business transactions between foreign governments and Trump Organization entities do not implicate the clause. But non-market rate transactions would raise questions related to the unconstitutional acceptance of gifts, emoluments, or bribes.

These conclusions are necessarily general, given the absence of detailed public information regarding President Trump's business dealings. They may even become largely irrelevant if, as is promised, President Trump remains insulated from the Trump Organization's activities. However, Part III should offer helpful guidance if President Trump becomes entangled in the activities of the Trump Organization or personally engages in commercial transactions with foreign governments.

13. See, e.g., *Hoyt v. United States*, 51 U.S. (1 How.) 109, 135 (1850) (“[T]he term *emoluments* . . . embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of the office . . .”).

14. See *infra* Part I.B.

I. FOREIGN EMOLUMENTS CLAUSE: SCOPE & MEANING

This Part examines the definition of emolument in the Foreign Emoluments Clause. Section A first provides a brief background of the clause and describes a controversy over whether it applies to the President. Section B shows that an emolument under the Foreign Emoluments Clause refers only to the compensation that a U.S. Officer receives from providing services for a foreign government. Section C shows that the acceptance of that compensation would be constitutionally prohibited even if the services performed have nothing to do with the U.S. Officer's official government duties.

A. HISTORY

The Foreign Emoluments Clause, found in Article I, Section 9, Clause 8 of the Constitution, provides that “no Person holding any Office of Profit or Trust” under the United States may accept “any present, Emolument, Office, or Title, of any kind whatever” from a foreign government “without the Consent of Congress.”¹⁵ The clause, through somewhat outmoded language, addresses specific types of benefits provided by a foreign government to a U.S. Officer. The Articles of Confederation contained a similar provision, though it lacked any references to congressional consent.¹⁶

The limited contemporary materials available suggest that the Framers included the Foreign Emoluments Clause to “prevent corruption.”¹⁷ Virginia Governor Edmund Randolph, who

15. U.S. CONST. art. I, § 9, cl. 8.

16. See Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 33 (2012). Actual compliance with this provision may have been minimal. See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 79 (2013) (“Although the Articles of Confederation in 1781 prohibited U.S. officers from accepting presents from foreign states, this prohibition—like so many positive enactments regulating official income in this era—had no effect.”).

17. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (Max Farrand ed., rev. ed. 1966) (1911) (statement of Edmund Randolph, Governor of Virginia); see also 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 216 (Fred B. Rothman & Co. 1991) (1833) (stating that the Foreign Emoluments Clause “is founded in a just jealousy of foreign influence of every sort”). The Framers may have been prescient in this regard. See, e.g., 7 CONG. REC. 1331 (1878) (statement of Sen. Aaron A. Sargent) (“Every sort of present, from every sort of foreign potentate, from an order of nobility to a cream-jug, from the Queen of England to a king of the Cannibal Islands, seems to be grasped for with avidity by our officers, naval, military, and consular and diplomatic.”).

attended the Philadelphia Constitutional Convention, later justified the clause to his state's ratifying convention, saying that a king had previously presented a snuff box to a U.S. ambassador, and that the transfer could have subjected the ambassador to improper "foreign influence."¹⁸ Charles Pinckney, who proposed the addition of the clause in Philadelphia, broadly emphasized the "necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence."¹⁹

Many words in the Foreign Emoluments Clause may be familiar to today's readers, but the reference to an "Office of Profit or Trust" raises some interpretive questions. According to secondary sources, an office of profit historically referred to a salaried office in which the holder had a proprietary interest, such that the office could be inherited or sold.²⁰ An office of trust, by contrast, required "the exercise of discretion, judgment, experience and skill,"²¹ such that the office itself or its assigned duties could not be transferred. In a memorandum opinion to the White House, the Office of Legal Counsel (OLC) considered whether these references to profit and trust limited the types of offices covered by the clause and expressed doubt that they did, though it ultimately reserved judgment on the question.²²

Scholarly debates²³ show that whether the Foreign Emoluments Clause treats the President as a U.S. Officer remains an open question.²⁴ At first glance, it may seem implausible that

18. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 17.

19. *Id.* at 389.

20. See Application of the Emoluments Clause to a Member of the President's Council on Bioethics, 29 Op. O.L.C. 55, 61 (2005) [hereinafter President's Council] (citing various sources).

21. FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 9 (1890) (as quoted in President's Council, *supra* note 20); see also *Office*, A DICTIONARY OF AMERICAN AND ENGLISH LAW (Frederick D. Linn & Co. 1888) (1883) ("Public offices are either offices of trust, which cannot be performed by deputy . . . or ministerial offices, which may be performed by deputy.").

22. See President's Council, *supra* note 20, at 56 ("[W]e need not precisely define whether or to what extent the words 'of Profit or Trust' narrow the category of offices governed by the Emoluments Clause.").

23. For highly informative debates on the subject, see Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009); Teachout, *supra* note 16; Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. 399 (2012); 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 (2013) [hereinafter Tillman, *Public Meaning*].

24. The OLC has taken inconsistent views on this issue. See Andy Grewal, *What DOJ Opinions Say About Trump and the Foreign Emoluments Clause*,

the Constitution would exempt any member of the government from a provision designed to prevent corruption. Yet the Domestic Emoluments Clause,²⁵ which also guards against corruption,²⁶ applies only to the President and not generally to U.S. Officers, or even to the Vice President.²⁷ This suggests that the Framers may have drafted each emoluments clause to address their principal concerns, without attempting to guard against corruption of every type imaginable.²⁸

Regarding their principal concerns, the Framers may very well have believed that only appointed officers, like ambassadors, would make the types of extended visits abroad that could subject them to improper foreign influences.²⁹ The President,

YALE J. ON REG. NOTICE & COMMENT (Dec. 7, 2016), <http://yalejreg.com/nc/what-doj-opinions-say-about-trump-and-the-foreign-emoluments-clause> (comparing President's Receipt, *supra* note 10, (stating, without analysis, that the clause "surely" applies to the President), with President's Council, *supra* note 20, at 70–71 (stating that a "great majority" of OLC opinions "equated an 'Office of Profit or Trust' under the [Foreign] Emoluments Clause with an 'officer of the United States' under the Appointments Clause," until a 1982 opinion expanded the scope to some subordinate employees)).

25. U.S. CONST. art. II, § 1, cl. 7; *see infra* note 82 and accompanying text. This provision is more commonly referred to as the Presidential Compensation Clause, though given the orientation of this Article and recent public debates, it will be referred to as the Domestic Emoluments Clause.

26. THE FEDERALIST NO. 73 (Alexander Hamilton).

27. U.S. CONST. art. II, § 1, cl. 7.

28. *See* Natelson, *supra* note 10 ("The process of crafting the emoluments provisions was one of weighing values in competition with each other, compromising, fine-tuning, and drafting a carefully nuanced text.").

29. *See, e.g.*, Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 92–93 (2007) ("To the Founders, the proper exercise of such sovereign authority by officers abroad was critical for the security of the Nation. . . . [T]he [Foreign] Emoluments Clause . . . was adopted with particular reference to preventing foreign corruption of such officers."); The Constitutionality of Coop. Int'l Law Enf't Activities Under the Emoluments Clause, 20 Op. O.L.C. 346, 348 (1996) ("The Emoluments Clause was intended to protect foreign ministers, ambassadors, and other officers of the United States from undue influence and corruption by foreign governments."); *see also* PARRILLO, *supra* note 16, at 78–79 (describing the "larger practice of gift-giving that typified the culture of European diplomacy" and the U.S. diplomats who "partook of these rewards," including Benjamin Franklin, Arthur Lee, and Silas Deane); *cf.* H.R. REP. NO. 23-302, at 3 (1834) (reproducing Secretary of State John Quincy Adams's instructions to the U.S. Ambassador to England, under which it was expected that presents "made to any public minister or other officer of this Government, abroad" would be declined); Joseph P. Creekmore, *Acceptance of Foreign Employment by Retired Military Personnel*, 43 MIL. L. REV. 111, 115 (1969) ("[T]hroughout the first one hundred years of this nation's existence it was considered that this prohibition [the Foreign Emoluments Clause] was designed primarily to control the activities of our diplomatic officials . . .") (citing Marshal of Fla., 6 Op. Att'y Gen. 409 (1854); Foreign Diplomatic Comm'n,

they may have thought, would remain stateside to tend to the needs of the nation, and potential corruption would be best addressed through the Domestic Emoluments Clause.³⁰ Under this view, the exclusion of the President from the Foreign Emoluments Clause would be entirely consistent with the Framers' design.

The Framers may also have considered the differences between the compensation schemes for the President and U.S. Officers. That is, through the Constitution, they guaranteed the President a fixed salary but left many U.S. Officers in a relatively precarious position.³¹ Historically, many U.S. Officers received no set compensation but instead made their living by charging individuals for specific transactions, like for processing immigration applications or for deciding veterans' benefit claims.³² Other U.S. Officers relied on bounties and were paid only when they, for example, sunk enemy ships, caught tax evaders, or successfully prosecuted criminals.³³ Given these potentially uncertain³⁴ streams of income (that is, emoluments),³⁵ the

13 Op. Att'y Gen. 537 (1871); Gifts from Foreign Prince, 24 Op. Att'y Gen. 116 (1902); FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 757 (1886)).

30. One might point out that many U.S. Officers would also remain stateside and would not be subject to the Domestic Emoluments Clause. But this further establishes that neither of the emoluments clauses was designed to catch every improper influence related to emoluments. One could easily imagine circumstances where Congress attempts to influence the Secretary of Transportation, for example, by offering a higher salary for his post, yet the Domestic Emoluments Clause does not address this potentially problematic behavior. Cf. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 51 (1995) (describing how the "congressional committee system exists as a rivalrous and potentially dual executive structure" to administrative agencies).

31. U.S. CONST. art. II § 1, cl. 7 (granting the President a fixed compensation which cannot be reduced or increased by Congress).

32. See PARRILLO, *supra* note 16, at 1.

33. *Id.*

34. See *id.* at 12 ("Prior to the early nineteenth century, statutory intervention in officer-recipient exchanges were limited. It was difficult to enumerate officers' services and fix prices for them in advance. Services often were idiosyncratic, required variable amounts of labor or speed And even if a service were long-standing, stable, and familiar to officers and recipients, the legislature might accidentally forget to include it [in the statutes allowing the collection of fees].").

35. Various Supreme Court opinions use the term emolument to describe the sometimes idiosyncratic nature of an officer's compensation. For example, as described by the Court, in the case of an Army officer, his emoluments could include, aside from a salary, the provision of servants and forage for his horses. See *McLean v. United States*, 226 U.S. 374, 382 (1912) ("Pay and emoluments

Framers may have believed that U.S. Officers could be easily tempted by foreign payments and therefore may have included only them in the Foreign Emoluments Clause. However, no historical materials advance this understanding.

Given the exquisite uncertainty of the issues,³⁶ the remainder of this Article will assume that the Foreign Emoluments Clause applies to the President. Even if this assumption proves

are but expressions of value used to give complete recompense to a deserving officer. Their association was deliberate; emoluments were additive to pay. . . . Congress has granted them, and advisedly, knowing Major McLean's situation, knowing that they included allowance for servants and forage for horses . . ."). For the High Sheriff of Havana, her emoluments could include the legal right to slaughter cattle and receive compensation for the same. *See* O'Reilly De Camara v. Brooke, 209 U.S. 45, 48–49 (1908) ("The plaintiff is a Spanish subject and alleges a title by descent to the right to carry on the slaughter of cattle in the city of Havana and to receive compensation for the same. . . . According to the complaint the right was incident to an inheritable and alienable office; that of Alguacil Mayor or High Sheriff of Havana. The office was abolished in 1878, subject to provisions that continued the emoluments until the incumbent should be paid."). For a federal court clerk, his emoluments could include a right to keep a portion of the filing fees received. *See, e.g.*, United States v. Hill, 123 U.S. 681, 686 (1887) ("The clerk of a court of the United States collects . . . fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law."). And for a tax collector, his emoluments could include the right to a share of any penalties paid or assets forfeited. *See, e.g.*, Hoyt v. United States, 51 U.S. (1 How.) 109, 135 (1850) ("The compensation of the collector was derived from three sources;—1. fees allowed for the services already referred to; 2. commissions on the duties received; and 3. a share of the fines, penalties, and forfeitures. The emoluments of the office were dependent upon the receipts from these sources; and the officer was entitled to apply to his own use the whole amount derived from them.").

36. The two professors who have most extensively examined whether elected officials come within the Foreign Emoluments Clause, and who have come to opposite conclusions, agree that the issue is difficult. *See* Zephyr Teachout & Seth Barrett Tillman, *Common Interpretation—The Foreign Emoluments Clause: Article I, Section 9, Clause 8*, NAT'L CONST. CTR.: INTERACTIVE CONST., <https://constitutioncenter.org/interactive-constitution/articles/article-i/the-foreign-emoluments-clause-article-i-section-9-clause-8/clause/34> (last visited Nov. 5, 2017) (stating that whether the Foreign Emoluments Clause "reaches any or all federal elected positions—i.e., Representative, Senator, Vice President, President, and presidential elector—poses a difficult interpretive challenge"); *see also* William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), <http://conlaw.jotwell.com/constitutional-officers-a-very-close-reading> (reviewing Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL STUD. 95 (2016) and Seth Barrett Tillman, *Originalism & the Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59 (2014)) ("Professor Tillman's theory [which would not treat the President as a U.S. Officer under the Foreign Emoluments Clause] makes sense of patterns that most of us never saw. It brings order out of chaos. That is not to say that his position has been conclusively proven. But at this point, I think he has singlehandedly shifted the burden of proof.").

incorrect, much of the analysis here will extend to the Domestic Emoluments Clause, which unquestionably does apply. Also, appointed officers clearly qualify as U.S. Officers, so the analysis here will help determine whether they have received prohibited emoluments. Thus even those who believe that the President does not qualify as a U.S. Officer have plenty of reasons to continue reading.

B. EMOLUMENTS AND OFFICE-RELATED COMPENSATION

After one determines that a government official will be subject to the Foreign Emoluments Clause, a second set of interpretive questions arises over the scope of the clause's prohibitions. Under the clause, no U.S. Officer can accept, without congressional consent,³⁷ any "present, Emolument, Office, or Title" from a foreign government.³⁸ Any of those four prohibitions could raise tough interpretive questions,³⁹ but this Article focuses on the prohibition related to emoluments.

Some commentators, including most notably Eisen, Painter, and Tribe, interpret "emoluments" as broadly referring to any type of profit, gain, or advantage.⁴⁰ If this expansive definition applies to the Foreign Emoluments Clause, a U.S. Officer will violate the Constitution upon the acceptance of any type of payment or benefit from a foreign government. For example, if a U.S. Officer owns a business and a representative of a foreign government patronizes that business, the acceptance of that customer's payment reflects a prohibited emolument, even if the U.S. Officer does not personally participate in the operation of that business⁴¹ and even if the purchase is made at arm's length.⁴²

However, under the office-related definition of emolument, the term reaches only the various types of compensation received

37. In describing a U.S. Officer's potential acceptance of a present, emolument, office, or title from a foreign government, this Article will generally assume, for ease of exposition, that no congressional consent has been granted.

38. U.S. CONST. art. I, § 9, cl. 8.

39. See, e.g., Proposal that the President Accept Honorary Irish Citizenship, 1 Supplemental Op. O.L.C. 278 (May 10, 1963) [hereinafter Irish Citizenship].

40. See BROOKINGS REPORT, *supra* note 5.

41. See *id.* at 19.

42. See *id.* at 11.

for services personally provided.⁴³ For example, if a foreign government paid the United States Secretary of the Treasury a consultation fee in exchange for economic advice, that fee would qualify as an emolument.⁴⁴ However, under the same definition, if the Secretary sold goods to a foreign government, the acceptance of any payments would not give rise to prohibited emoluments, at least where the goods were sold at arm's length.⁴⁵

Available historical materials related to the Philadelphia Convention and the ratifying conventions do not provide any unequivocal evidence of whether the Foreign Emoluments Clause refers to the office-related definition of emoluments or the more expansive one. Governor Randolph's statement at the Virginia Ratifying Convention simply parrots the constitutional language, saying that the President "is restrained from receiving any present or emolument whatever."⁴⁶ Other ratification-related statements frequently, though not universally, assume an office-related definition.⁴⁷

43. For a historical analysis of the compensation schemes applied to officers and the shift to a salary model, see PARRILLO, *supra* note 16. The shift to a salary model may help explain why the word emolument fell out of usage, given its association with the once-unique benefits associated with an officer.

44. See, e.g., Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., Office of Legal Counsel, to H. Gerald Staub, Office of Chief Counsel, Nat'l Aeronautics & Space Admin. 2-3 (May 23, 1986) (on file with *Minnesota Law Review*) [hereinafter Alito Memo] ("[A] stipend or consulting fee from a foreign government would ordinarily be considered an 'emolument' within the meaning of the constitutional prohibition.").

45. See *infra* Part III for a discussion of how above-market payments may give rise to prohibited emoluments.

46. DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 345 (David Robertson ed., 2d ed. 1805). At other points, Randolph seemed to use emoluments as a synonym for a gift or an office. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 17 (describing the receipt of a gift by a U.S. ambassador and stating that "[i]t was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states").

47. Compare, e.g., THE FEDERALIST NO. 1, at 33-34 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that State officers might oppose the ratification of the Constitution because it may cause a "diminution of the power, emolument, and consequence of the offices they hold under the State establishments"); THE FEDERALIST NO. 36, at 222 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting that the federal government may wish to "employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments"); THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) ("Into the administration of [States] a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow."); THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) ("[M]embers of each department

However, consistent with the office-related definition, an almost endless number of legal authorities show that when emoluments is used in connection with the description of an office, officer, or employee, it refers to compensation for services performed.⁴⁸ In *Hoyt v. United States*, for example, the Supreme

should be as little dependent as possible on those of the others for the emoluments annexed to their offices.”), and 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 17, at 313 (statement of Del. Patrick Henry, Va. Ratifying Convention) (“[T]he principal source of corruption in representatives, is the hopes and expectations of offices and emoluments.”), with 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 483 (Jonathan Elliot ed., 1891) (statement of Del. James Madison, Va. Ratifying Convention) (“[I]f the states had the exclusive imposition of duties on exports, they might raise a heavy contribution from other states, for their own exclusive emolument.”), and THE FEDERALIST NO. 59, at 366 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to potential for persons in the state administrations “preferring their own emolument and advancement”).

48. In many, many cases, the Supreme Court refers to the statutory emoluments of an office, where it would be strange to conclude that the term referred to anything other than the compensation prescribed for or associated with that office. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 914 (1997) (discussing Hamilton’s suggestion that the “Federal Government would in some circumstances do well ‘to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments’—which surely suggests inducing state officers to come aboard by paying them, rather than merely commandeering their official services” (quoting THE FEDERALIST NO. 36, at 222 (Alexander Hamilton) (Clinton Rossiter ed., 1961))); *Davis v. Scherer*, 468 U.S. 183, 203 (1984) (“Career service employees who have attained permanent status in the career service system have acquired a property interest in their public positions and emoluments thereof—such as job security and seniority which they may not be deprived of without due process of law.” (quoting FLA. ATTY GEN., AGO 75–94, CAREER SERVICE SYSTEM—EMPLOYEE’S PRIVILEGE AGAINST SELF-INCRIMINATION IN INTRAAGENCY PROCEEDINGS—REFUSAL TO TAKE POLYGRAPH EXAMINATION (1975), <http://www.myfloridalegal.com/ago.nsf/printview/53FADB26149700ED852566BA0055662E> (alteration omitted))); *Phelps v. Bd. of Educ.*, 300 U.S. 319, 322 (1937) (“The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the Legislature at will may abolish, or whose emoluments it may change.” (quoting *Phelps v. State Bd. of Educ.*, 180 A. 220, 222 (N.J. 1935))); *Nicholas v. United States*, 257 U.S. 71, 76 (1921) (“[O]ne inducted into office or public employment is entitled to the privileges or emoluments thereof, until legally separated therefrom”); *Albright v. Territory of N.M. ex rel. Sandoval*, 200 U.S. 9, 12 (1906) (“The term of office had expired before the rendition of judgment by the Territorial Supreme Court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even though the judgment might be conclusive in such subsequent action.”); *United States v. Mitchell*, 109 U.S. 146, 149–50 (1883) (“[I]nstead of establishing a salary for interpreters at a fixed amount, and cutting off all other emoluments and allowances, Congress intended to reduce the salaries and place a fund at the disposal of the Secretary of the Interior, from which, at his discretion, additional emoluments and allowances might be given to the interpreters.”); *Blake v. United States*, 103 U.S. 227,

Court specifically defined emoluments as “embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office.”⁴⁹ In *McLean v. United States*, the Supreme Court again emphasized the connection between emoluments and offices, saying that “emoluments are but expressions of value used to give complete recompense to a deserving officer.”⁵⁰ And in *Hill v. United States* the Supreme Court affirmed its office-related definition of emoluments, concluding that “a sum collected by a clerk for a service not pertaining to his office . . . was not a fee or emolument.”⁵¹ Given that the Foreign Emoluments Clause also speaks of emoluments in connection with offices (under foreign law), one can sensibly apply these Supreme Court interpretations to the clause.⁵²

An office-related definition would also make sense of a proposed constitutional amendment that was designed to broaden

234 (1880) (discussing a statute designed to “define the pay and emoluments of certain officers of the army”); *United States v. Linn*, 40 U.S. (1 Pet.) 290, 313 (1841) (“These emoluments [related to acting as the receiver for the sale of public lands] were the considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation.”); *Minis v. United States*, 40 U.S. (1 Pet.) 423, 435–36 (1841) (“[T]he president was authorized to employ subaltern officers of the regular army, as paymasters, but their compensation was limited expressly to the pay and emoluments of a major.”); *United States v. Ringgold*, 33 U.S. (1 Pet.) 150, 160–61 (1834) (“By the act of congress . . . it is declared that the marshal shall be entitled to receive, for his services, the . . . emoluments, which are by law allowed to the marshal of the United States for the district of Maryland.”); *United States v. Ripley*, 32 U.S. (1 Pet.) 18, 18 (1833) (“The defendant was in the service of the United States from 1812 to 1817 . . . and received the pay and emoluments to which his rank entitled him.”).

49. *Hoyt v. United States*, 51 U.S. (1 How.) 109, 135 (1850).

50. *McLean v. United States*, 226 U.S. 374, 382 (1912). In *McLean*, the Court suggested a somewhat narrower definition than the one found in *Hoyt*, stating that emoluments could be understood as the benefits relating to an office *apart* from the fixed compensation.

51. *United States v. MacMillan*, 253 U.S. 195, 205 (1920) (summarizing the holding of *United States v. Hill*, 120 U.S. 169 (1887)).

52. The Supreme Court has also emphasized that the presence or absence of emoluments goes to whether a person qualifies as an officer, which again connects the definition of the term to official duties. See *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (finding that a merchant appraiser was “without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an ‘officer,’ within the meaning of the clause of the Constitution” referring to inferior officers); *United States v. Hartwell*, 73 U.S. (1 Wall.) 385, 393 (1867) (“An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.”).

the Foreign Emoluments Clause.⁵³ That amendment, introduced in 1810 and nearly ratified, provided, among other things, that any citizen who accepted a “present, pension, office or emolument of any kind whatever” from a foreign government, without the consent of Congress, would “cease to be a citizen of the United States.”⁵⁴ Given the relationship between this amendment and the Foreign Emoluments Clause, the drafters likely intended to use emolument in the same way that the Framers did.⁵⁵ Yet if this amendment incorporated the expansive definition of emolument, rather than the office-related one, it would have potentially terminated the citizenship of any American who, for example, received interest on foreign government bonds or sold some tobacco to a visiting ambassador.⁵⁶

It would be odd for an amendment with such potentially severe consequences to receive broad support.⁵⁷ But the House and Senate each passed it by wide margins, and it came within two states of ratification.⁵⁸ It thus seems likely that the proposed amendment and, by implication, the Foreign Emoluments Clause, incorporates an office-related definition of emoluments,

53. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 88-39, at 77–78 (1964).

54. See Resolution Proposing an Amendment to the Constitution of the United States, S. Res. 2, 11th Cong. (1810) (“If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.”); see also *Afroyim v. Rusk*, 387 U.S. 253, 258–59 (1967) (describing “a proposed Thirteenth Amendment, subsequently not ratified, which would have provided that a person would lose his citizenship by accepting an office or emolument from a foreign government”).

55. Of course, the proposed amendment does not enjoy independent legal effect. However, it provides helpful evidence on the public understanding of emoluments under the Constitution.

56. For the application of this approach to the Foreign Emoluments Clause, see BROOKINGS REPORT, *supra* note 5, at 11 (“[T]he best reading of the Clause covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder.”).

57. See Gideon M. Hart, *The “Original” Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment*, 94 MARQ. L. REV. 311, 328–30 (2010) (explaining that state legislative records suggest that “little debate occurred” during the early ratifications but that, after the War of 1812, the amendment was considered less pressing, decreasing public support); see also 3 STORY, *supra* note 17 (noting that the proposed thirteenth amendment “has not received the ratification of the constitutional number of states to make it obligatory, probably from a growing sense, that it is wholly unnecessary”).

58. See Hart, *supra* note 57, at 327–30.

rather than the expansive, “any payment or benefit” definition advanced by Eisen, Painter, and Tribe.⁵⁹

Federal statutes also assume an office-related definition. Under 37 U.S.C. § 908, for example,⁶⁰ Congress expressed its consent under the Foreign Emoluments Clause for some retired military personnel to receive “compensation for . . . civilian employment” with foreign governments.⁶¹ If Congress thought that emoluments reached payments unrelated to one’s office or employment with a foreign government, why would this statute restrict itself to office-related compensation? A U.S. Officer living abroad would typically enjoy payments or benefits from a foreign country beyond that related to her office or employment, whether through tax credits, driver’s licenses, home construction permits, social welfare payments, or otherwise. If Congress believed that payments or benefits other than office-related compensation came within the Foreign Emoluments Clause, it probably would have expanded the scope of its statute, rather than consign our retired servicemen and servicewomen to inevitable constitutional violations.⁶²

An OLC opinion from 1954 also interprets the Foreign Emoluments Clause using the Supreme Court’s office-related definition.⁶³ In the opinion, the OLC addressed a U.S. Officer who had served as a judge in Germany but who, under the Nazi regime, had to retire on account of his race.⁶⁴ Later, Germany passed a

59. Aside from policy consequences, the text of the 1810 proposal suggests an office-related definition, by grouping emoluments with pensions and offices. *See* *Neal v. Clark*, 95 U.S. 704, 708 (1877) (“[A] passage will be best interpreted by reference to that which precedes and follows it.”).

60. For a second statute taking this approach, see 10 U.S.C. § 1060(a) (2012) (granting consent, under specified procedures, to a retired military member’s employment with the military forces of a newly democratic nation, and granting consent for the acceptance of compensation associated with that employment, office, or position).

61. Under the statute, Congress’s consent under the Foreign Emoluments Clause is conditioned on approval from within the executive branch. *See* 37 U.S.C. § 908(b) (2012). This raises an interesting question, not further considered here, about whether Congress can delegate its consent authority this way.

62. One might argue that Congress simply did not think about the types of items that a U.S. Officer working abroad might receive. However, in enacting the statute, Congress acted carefully, specifically granting its consent to the acceptance of emoluments, offices, and titles from foreign governments, and withholding broad consent to the acceptance of gifts, the fourth item described in the Foreign Emoluments Clause. *See id.* § 908(a) (exercising authority under “the last paragraph of section 9 of article I of the Constitution, related to acceptance of emoluments, offices, or titles from a foreign government”).

63. Rankin Memo, *supra* note 10, at 7.

64. *Id.* at 1.

law to remedy the wrongs it inflicted upon those forced into retirement.⁶⁵ Under this law, the U.S. Officer claimed a two-hundred and sixty-three dollar monthly annuity from the German government.⁶⁶ This reflected the retirement benefit he would have received had he continued to serve.⁶⁷ The U.S. Officer also successfully claimed a fixed payment of approximately four-thousand dollars from Germany due to the earnings lost on account of his premature retirement.⁶⁸

The Administrative Assistant Attorney General asked the OLC to determine whether the U.S. Officer's acceptance of these payments, unquestionably from a foreign government, were prohibited under the Foreign Emoluments Clause.⁶⁹ In its response, the OLC acknowledged that these facts presented a "novel" question.⁷⁰ However, after examining the text, history, and purpose of the clause, the OLC concluded that "the term 'emolument' . . . was intended to cover compensation of any sort *arising out of an employment relationship* with a foreign state."⁷¹

The OLC then separately applied this office-related definition to the fixed payment and to the annuity payments.⁷² Regarding the fixed payment, the OLC acknowledged that the Foreign Emoluments Clause would not prevent a U.S. Officer "from receiving damages arising from some wrongful act of a foreign state."⁷³ Because the four-thousand-dollar fixed payment fit that description and did not relate to an employment relationship, the U.S. Officer could lawfully accept that payment.⁷⁴

The OLC also acknowledged the "considerable force" to the argument that the German laws were intended "solely to redress wrongs of the Nazi regime," such that the U.S. Officer could also accept the full amount of the annuity payments.⁷⁵ However, the OLC noted that retirement annuities were usually "part of the emoluments of office."⁷⁶ The OLC ultimately advised a cautious

65. *Id.*

66. *Id.* at 2.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 6.

71. *Id.* at 8 (emphasis added) (relying on *Hoyt v. United States*, 51 U.S. (1 How.) 109, 135 (1850)).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

approach, concluding that the annuity payments were not made exclusively to redress wrongs, and that they instead at least partly related to the U.S. Officer's position in the foreign government. It thus urged that the U.S. Officer seek congressional consent for the annuity payments or resign.⁷⁷

This opinion, with which the Comptroller General concurred,⁷⁸ flatly contradicts the approach of Eisen, Painter, and Tribe. Under their approach, the Foreign Emoluments Clause "reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state."⁷⁹ Yet the OLC concluded that payments from a foreign government may be accepted when they do not relate to an employment relationship with that government.⁸⁰ Had the OLC adopted the approach of the commentators, it would have stated that the four-thousand dollar fixed payment and the two-hundred and sixty-three dollar annuity payments were unquestionably emoluments, because they were payments made by a foreign government. But, like the Supreme Court does when dealing with officers, the OLC adopted an office-related definition of emoluments and separately tested the fixed payment and the annuity payments.⁸¹

The OLC has also applied the office-related definition of emoluments in the context of another constitutional provision. Under the Domestic Emoluments Clause,

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased 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.⁸²

This clause fixes the President's compensation and prohibits the receipt of emoluments from domestic government sources (that is, from the individual states and the United States).

77. *Id.* at 9.

78. *See* Acceptance of Annuity Payments Made by the German Gov't, 34 Comp. Gen. 331, 334 (1955) (addressing the same facts as in the 1954 OLC opinion and adopting the same, office-related definition, concluding that payments did not constitute emoluments because they "do not stem directly from his prior possession of an office under the German government" and could not be characterized "as compensation for services rendered"). On applying the office-related definition to the facts, the Comptroller General concluded that all payments received by the U.S. Officer, not just the fixed payment, fell outside of the Foreign Emoluments Clause.

79. *See* BROOKINGS REPORT, *supra* note 5.

80. Rankin Memo, *supra* note 10, at 9.

81. *See id.* at 6-7.

82. U.S. CONST. art. II, § 1, cl. 7.

The Domestic Emoluments Clause, like the Foreign Emoluments Clause, addresses potential corruption.⁸³ The President's fixed, irreducible compensation prevents Congress from "weaken[ing] his fortitude by operating on his necessities."⁸⁴ And the prohibition against increased emoluments encourages his independence from Congress, who will not be able to "corrupt his integrity by appealing to his avarice."⁸⁵

When President Ronald Reagan took office, a question arose under the Domestic Emoluments Clause regarding his retirement payments from the state of California.⁸⁶ State law established his right to those payments on account of his service as the Governor of California.⁸⁷ The White House Counsel asked the OLC whether the Domestic Emoluments Clause would prohibit President Reagan's receipt of them.⁸⁸

The OLC first adopted a purposive approach and examined whether the retirement benefits would subject the President to improper influence. It concluded that they would not.⁸⁹ President Reagan enjoyed those benefits as a matter of law and did not have to perform any further services as a condition to their receipt.⁹⁰ Thus, under a purpose-driven analysis, the retirement benefits were not emoluments.⁹¹

It then considered whether its result would change if emoluments were defined "exclusively on the basis of the dictionary meaning of the term."⁹² It noted that the first dictionary definition contemplated an office-related analysis, and that the second, expansive definition had become "obsolete."⁹³ Using the office-related definition, the OLC concluded that the retirement benefits were not compensation for the services provided by

83. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 642 n.151 (1996) ("The restriction on Congress's authority to raise or lower the President's emoluments nevertheless displays a clear purpose of safeguarding the President against improper congressional influence.").

84. THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

85. *Id.*

86. President Reagan's Ability to Receive Ret. Benefits from the State of Cal., 5 Op. O.L.C. 187, 187 (1981) [hereinafter President Reagan].

87. *Id.*

88. *Id.*

89. *Id.* at 192.

90. *Id.* at 189–90.

91. *Id.*

92. See *id.* at 190.

93. See *id.* at 188.

Reagan in the Governor's office.⁹⁴ Consequently, his receipt of the California retirement benefits would "not violate the language of [the Domestic Emoluments Clause] because those benefits are not emoluments in the constitutional sense."⁹⁵

Once again, the OLC did not simply treat any payment from a government as a prohibited emolument. Rather, the payments had to reflect compensation for the services the recipient had provided. This makes it consistent with the 1954 opinion, which also adopted the office-related definition.

The Legislative Emoluments Clause also adopts an office-related definition.⁹⁶ That clause provides that

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.⁹⁷

Under this clause, legislators cannot take an office when the emoluments for that office have increased during the period of their Congressional representation. As with the Foreign Emoluments Clause, it addresses potential corruption among government officials.⁹⁸ The clause deters a legislator from voting to increase the emoluments of an office with the hope of taking that office after she leaves the House or Senate.⁹⁹

This clause must refer only to office-related compensation. That, after all, is the matter over which Congress enjoys control.

94. *See id.* at 191 ("Under California law retirement benefits . . . constitute an incident of the pensionable status. They are neither a gift nor a part of the retiree's compensation, earned while employed, the payment of which is deferred until after his retirement."). The OLC's conclusion on this point seems doubtful, and the Comptroller General adopted a different line of analysis when he opined on the issue. *See infra* Part III.C.

95. *See* President Reagan, *supra* note 86, at 192.

96. U.S. CONST. art. I, § 6, cl. 2. This provision is more commonly referred to as the Ineligibility Clause, but given the orientation of this Article, it will be referred to as the Legislative Emoluments Clause.

97. *Id.*

98. Teachout, *supra* note 23, at 359–60 (explaining that Framers were concerned that "members of Congress would use their position to enrich themselves and their friends, and that they would see public office as a place for gaining civil posts and preferences, instead of as a public duty").

99. Of course, given the plain language of the clause, the legislator would be prohibited from assuming the office even if she voted against any increase in the emoluments for that office.

A court could not fairly interpret the clause as prohibiting a legislator from taking an office when the prior officer enjoyed an increase in payments or benefits unrelated to her office.

A political controversy related to the clause confirms this understanding. In 1937, a vacancy opened on the Supreme Court and President Roosevelt nominated for the position Senator Hugo Black, who had voted for all of Roosevelt's New Deal initiatives.¹⁰⁰ However, during Black's Senate term, Congress had established a pension for Justices who retired at age seventy or later.¹⁰¹ Opponents of his nomination argued that this reflected an increase in the emoluments of a Justice's office, which would make Black ineligible for the appointment.¹⁰²

During the ensuing Congressional debates, Senator Burke argued that emoluments included "*everything* that makes the office attractive,"¹⁰³ including a new pension. But two Senators alleged absurd results under Burke's broad definition, saying that it would treat, as emoluments, the replacement of a hard office chair with a soft one, the installation of air conditioning in the Supreme Court building, the provision of an additional secretary, and so on.¹⁰⁴ They thus countered that emoluments included little more than the salaries fixed by Congress.¹⁰⁵ Senator Burke defended his position by arguing that emoluments included "practically" everything that made an office attractive, and not literally everything.¹⁰⁶ In the end, the Senate got past this disagreement and confirmed Senator Black's appointment.

The Senate may very well have erred in confirming Black despite the establishment of the pension regime. However, for

100. See 81 CONG. REC. 9076–86 (1937); see also John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 113–18 (1995).

101. See An Act to Provide for Retirement of the Justices of the Supreme Court, Pub. L. No. 75-10 (1937) (codified at 28 U.S.C. § 371 (2012)); see also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 219 (1974) (discussing *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam)).

102. See 81 CONG. REC. 9076–86 (1937); see also *Ex parte Levitt*, 302 U.S. at 633 (rejecting, on standing grounds, a petition to have Justice Black removed for a violation of the Legislative Emoluments Clause).

103. 81 CONG. REC. 9076 (1937) (emphasis added) (discussing *McLean v. United States*, 226 U. S. 374 (1912)).

104. *Id.* at 9086; see also *id.* at 9083 ("[T]he Senator from Nebraska[—Senator Burke—]said that this hazy sort of thing called the privilege of retiring when a man gets to be 70 years of age is an increase in the emoluments.").

105. *Id.* (statement of Sen. Connally) (acknowledging that increase in salary would qualify as an emolument).

106. *Id.* at 9077.

present purposes, the relevant point is that the Senate debates all focused on office-related compensation in defining emoluments. Even Senator Burke, the fiercest opponent of Senator Black's appointment, did not interpret an emolument to refer to *any* payment or benefit.

This provides yet another indication that the interpretation offered by Eisen, Painter, and Tribe goes too far. Emoluments refer to only the compensation received in exchange for services provided as an officer or employee. Reading the Foreign, Domestic, and Legislative Emoluments Clauses together supports this interpretation.

However, one might argue that the Foreign Emoluments Clause merits a distinct interpretation. The clause prohibits gifts, emoluments, offices, and titles, "of any kind whatever."¹⁰⁷ The quoted language suggests that emoluments under that clause may be defined more broadly than under the Legislative Emoluments Clause, at least. (The Domestic Emoluments Clause also applies to any emolument.)

Emoluments under the Foreign Emoluments Clause may very well enjoy an especially broad interpretation. Rather than act to clarify, the phrase "of any kind whatever" may expand the scope of potential emoluments. That is, though pensions might not come within the Legislative Emoluments Clause, they would come within the Foreign Emoluments Clause, along with any other office-related compensation. And gifts, no matter how small or large, would also come within it.¹⁰⁸ In this way, the final four words resolve borderline cases in favor of inclusion.¹⁰⁹

One might argue that the phrase "of any kind whatever" does even greater work. Under this potential line of analysis, "of any kind whatever" would change the meaning of emolument,

107. U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

108. See *Gifts from Foreign Prince*, *supra* note 29, at 118 ("[E]ven a simple remembrance of courtesy . . . like the photographs in this case, falls under the inclusion of 'any present . . . of any kind whatever.'"); Teachout, *supra* note 23, at 362 (explaining that the Foreign Emoluments Clause "includes the striking line 'of any kind whatever' If foreigners were to attempt to buy influence or access, or use small gifts to shift the sympathies of American agents, they needed the full consent of Congress.").

109. Eisen, Painter, and Tribe rely on the phrase "of any kind whatever" to support their broad interpretation of emoluments. See BROOKINGS REPORT, *supra* note 5. However, in attempting to give meaning to that phrase, they render meaningless part of the Foreign Emoluments Clause. That is, if emoluments include any payment or benefit of any kind, then the clause's separate reference to presents would have no effect, nor would the reference to pensions in the proposed 1810 amendment.

such that the Foreign Emoluments Clause reaches all benefits, not just office-related compensation. However, that analysis would be flawed.

The Articles of Confederation twice used the broad phrase “emolument of any kind,” once in connection with its version of the Legislative Emoluments Clause and once with its version of the Foreign Emoluments Clause.¹¹⁰ And under the Articles’ version of the Legislative Emolument Clause, the phrase “emolument of any kind” referred only to office-related compensation, with nothing suggesting that the second usage, relating to foreign emoluments, carried a different meaning.¹¹¹ The 1810 proposal to expand the Foreign Emoluments Clause also referred to an “emolument of any kind whatever,” and for reasons discussed earlier, it is highly doubtful that that phrase reached any payment from a foreign government.¹¹²

More generally, a phrase like “of any kind whatever” should not affect the threshold definition of a word that precedes it. For example, if someone asks for “a lift of any kind whatever,” he might be asking for a ride to his destination or for an elevator. The context of the statement, not the phrase “of any kind whatever,” would resolve the ambiguity. Someone stranded on a highway probably wants any kind of ride, while someone constructing a building probably wants any kind of elevator.

One might respond that a phrase like “of any kind whatever” can establish multiple meanings for a word preceding it, but this would be much too clever. No one, in ordinary English, would use the phrase “a lift of any kind whatever” to ask for either a ride or an elevator,¹¹³ and the Framers did not adopt a

110. See ARTICLES OF CONFEDERATION OF 1781, art. V, para. 2 (stating that no delegate may “be capable of holding any office under the [U]nited [S]tates, for which he, or another for his benefit, receives any salary, fees or emolument of any kind”); see also *id.* art. VI, para. 1 (“[No] person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any king, prince or foreign state . . .”).

111. The Articles’ version of the Legislative Emoluments Clause sensibly refers to office-related compensation for the same reasons that the Constitution’s version does. See *supra* notes 96–106 and accompanying text.

112. See also *Quackenbush v. United States*, 177 U.S. 20, 23 (1900) (discussing *Blake v. United States*, 103 U.S. 227 (1880), and using the phrase “emoluments of any kind” to describe the compensation related to the claimant’s position as an officer in the navy).

113. See *District of Columbia v. Heller*, 554 U.S. 570, 587 (2008) (giving a single word two meanings, as in interpreting “[h]e filled and kicked the bucket” to mean “[h]e filled the bucket and died,” would be “[g]rottesque”).

similarly strange approach in the Foreign Emoluments Clause. That is, when the clause speaks of a “Title . . . of any kind whatever,” it refers only to honorifics provided by a foreign government, not also to titles in real estate.¹¹⁴ And when it speaks of an “Office . . . of any kind whatever,” it refers only to employment positions, not also to boxed workspaces.¹¹⁵ And when it speaks of an “[e]molumen . . . of any kind whatever,”¹¹⁶ it refers only to office-related compensation,¹¹⁷ not to any “[a]dvantage, benefit, [or] comfort.”¹¹⁸

The distinction between the office-related and the expansive definition of emoluments reminds one of the different meanings imparted by modern day financial terms like “profitable.” That is, a person could, consistent with normal English usage, say that she found it profitable to read the poetry of Robert Frost. But if she said that her *business* was profitable, the listener would likely assume that the term referred to the excess of revenues over costs. In the same way, the expansive dictionary definition of emoluments reveals a nontechnical use, but when emoluments is used in connection with an office, as under the Foreign Emoluments Clause, it naturally refers to the compensation one receives in exchange for services provided.

Putting aside these textual arguments, strange results would follow if emoluments under the Constitution included things other than office-related compensation. To see why this is so, we can return to the Domestic Emoluments Clause, whose

114. See *Irish Citizenship*, *supra* note 39, at 281–82 (construing “title” under Foreign Emoluments Clause by associating it with honorifics).

115. See *Applicability of Emoluments Clause to Proposed Serv. of Gov’t Emp. on Comm’n of Int’l Historians*, 11 Op. O.L.C. 89, 91 (1987) [hereinafter *Int’l Historians*] (defining “office” by considering whether membership with a foreign commission “would create the kind of ‘official relation’ . . . that the Framers of the Constitution wished to avoid”).

116. U.S. CONST. art. I, § 9, cl. 8.

117. See *Rankin Memo*, *supra* note 10 (“[T]he term ‘emolument’ . . . particularly since it is modified by the phrase ‘of any kind whatever,’ was intended to cover compensation of any sort arising out of an employment relationship with a foreign state.”).

118. A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, *supra* note 10 (“1. Profit or gain arising from station, office, or employment; dues; reward, remuneration, salary. 2. Advantage, benefit, comfort.”); see also *McLean v. United States*, 226 U.S. 374, 383 (1912) (examining the statutory phrase “[a]ll back . . . emoluments” and concluding that “[i]t especially expresses the perquisites of an office”).

purposes and scope mirror its foreign counterpart.¹¹⁹ If that clause applies to any payment from a state or federal government, then former President Obama would have violated the Constitution. That is, his financial disclosures reveal that he owned between five-hundred thousand and one million dollars of U.S. Treasury bonds during his time in office, and that he had received interest payments on them.¹²⁰ The interest income paid by the United States to President Obama did not form part of the fixed compensation attached to his presidency, and if an emolument includes any payment, President Obama's receipt of interest income from the United States violated the Domestic Emoluments Clause. Under the approach of Eisen, Painter, and Tribe, President Obama committed a potentially impeachable offense.¹²¹

This is not a sensible result, and no potential impeachment could have properly occurred under an office-related definition of emoluments.¹²² That is, President Obama earned interest income from the United States in his capacity as a creditor, not in connection with the services he provided as President. And given the absence of any link between the interest income and his provision of services, President Obama should not have been impeached, nor should any U.S. Officers who purchase, at arm's

119. Like the Foreign Emoluments Clause, the Domestic Emoluments Clause addresses potential corruption and applies to any emolument. U.S. CONST. art. II, § 1, cl. 7.

120. See BARACK OBAMA, EXECUTIVE BRANCH PERSONNEL PUBLIC FINANCIAL DISCLOSURE REPORT (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/oge_278_cy_2015_obama_051616.pdf (reporting between five-hundred thousand and one million dollars of Treasury bonds held by Obama directly or through an IRA).

121. See BROOKINGS REPORT, *supra* note 5, at 18, 22 (arguing that violations of the Foreign Emoluments Clause establish an impeachable offense). Presumably, the authors would extend their approach to the Domestic Emoluments Clause, although that remains to be seen. In any event, the types of conduct that would justify presidential impeachment remain subject to debate. See generally Cass R. Sunstein, *Impeachment and Stability*, 67 GEO. WASH. L. REV. 699 (1999) (discussing the appropriate understanding of high crimes and misdemeanors as it relates to impeachment). Though the Constitution does not explicitly mandate impeachment for the violation of any emoluments clause, it may very well allow it.

122. See Seth B. Tillman, *Business Transactions and President Trump's "Emoluments" Problem*, 40 HARV. J.L. & PUB. POL. 759, 764–67 (2017) (“President George Washington, in a private capacity, engaged in business transactions for value with the Federal Government, notwithstanding that he received or intended to receive a pecuniary advantage. . . . [Y]et, no one then, or since, has ever impugned the propriety of his conduct, much less the legal validity or constitutionality of his purchases.”).

length, bonds from a foreign government and receive interest income on them.¹²³

Aside from monetary payments, Eisen, Painter, and Tribe's definition of emoluments reaches things like building permits, trademarks, and licenses from foreign governments.¹²⁴ Under that definition, a U.S. Officer would violate the Constitution if a foreign country granted her a building permit to modify her vacation residence there or a temporary permit to operate a motor vehicle. However, under an office-related definition, U.S. Officers can obtain a foreign government's permission to acquire these things without worrying about impeachment.

One might respond that, even aside from an office-related interpretation, a purposive interpretation of the Foreign Emoluments Clause would protect U.S. Officers from many impeachment claims. That may very well be so, depending on how one defines purpose¹²⁵ and the extent to which one incorporates that concept in constitutional interpretation (a source of never-ending debate).¹²⁶ But Eisen, Painter, and Tribe argue that *any* payment or benefit violates the Foreign Emoluments Clause, entirely "apart from any actual *quid pro quo* arrangements or demonstrable bribes or payoffs," and that even a hotel room reservation fee establishes a constitutional violation.¹²⁷ Congress

123. Statutory law may prohibit an officer from maintaining investments in foreign governments, so as to avoid conflicts of interests or other concerns. But the Foreign Emoluments Clause would not prohibit it.

124. See BROOKINGS REPORT, *supra* note 5, at 18; see also Norman Eisen, Richard W. Painter, and Laurence H. Tribe, *5 Ways You'll Know if Trump Is Playing by the Rules*, POLITICO (Jan. 10, 2017), <http://www.politico.com/magazine/story/2017/01/trump-business-ethics-eisen-painter-tribe-214619> (stating that emoluments include "building permits and trademarks").

125. In its 1954 opinion, discussed *supra* note 10, the OLC considered the purpose of the Foreign Emoluments Clause and concluded, consistent with this Article's thesis, that emoluments referred to office-related compensation. See Rankin Memo, *supra* note 10, at 9 ("Keeping in mind that the purpose of the clause was to prevent undue influence [the Foreign Emoluments Clause] was intended to cover compensation of any sort arising out of an employment relationship with a foreign state."). However, if someone assigned a different purpose to the clause, she might establish a broader or narrower definition.

126. This Article has focused heavily on published legal authorities in determining the meaning of the Foreign Emoluments Clause. Scholarly analysis under different perspectives, such as originalist or purposivist perspectives, would reflect a welcome contribution to the literature. For a contribution to the debate under a purely originalist perspective, see Natelson, *supra* note 10.

127. See BROOKINGS REPORT, *supra* note 5, at 18; see also, e.g., Memorandum from John O. McGinnis, Deputy Assistant Att'y Gen., Office of Legal Counsel, to James H. Thessin, Assistant Legal Adviser for Mgmt., U.S. Dep't of State n.2 (Aug. 29, 1988) (on file with *Minnesota Law Review*) ("[T]he application of

has also sometimes taken a strict approach to the clause, refusing Thomas Pinckney's request to accept small gifts he received from Great Britain and Spain.¹²⁸ Thus the problems associated with an excessively broad definition of emoluments cannot simply be assumed away, especially whenever Congress adopts a hostile attitude towards the President or any individual U.S. Officers.

Notably, each house of Congress, through its committees, recognizes that an office-related definition controls the interpretation of the Foreign Emoluments Clause. The House of Representatives' ethics manual, for example, recites the office-related definition of emoluments and warns that "[m]embers and employees may not . . . receive any *payment for services rendered* to official foreign interests, such as ambassadors, embassies, or agencies of a foreign government."¹²⁹ The Senate's ethics manual contains similar language, stating that an "emolument" means "any profit, gain, or compensation received for services rendered."¹³⁰ If the views of the House and Senate ethics committees were displaced by those of Eisen, Painter, and Tribe, there would be adverse consequences not only for U.S. Officers, but for U.S. representatives and senators as well.

Of course, the harsh consequences of any given interpretation should not by itself disqualify it.¹³¹ If the Constitution really

the Clause . . . does not turn upon the existence of any actual conflict of interest."); Int'l Historians, *supra* note 115, at 91 (finding that Foreign Emoluments applied to government employee but disclaiming any suggestion that he would be subject to improper foreign influence).

128. See President's Council, *supra* note 20, at 58 ("[I]n 1798, Thomas Pinckney asked Congress for permission to retain small presents he received from the Kings of Great Britain and Spain upon his departure from Europe."); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 281–84 (1997); 7 ANNALS OF CONG. 553 (1798) (Senate granting consent); 8 ANNALS OF CONG. 1593 (1798) (House refusing consent); see also, e.g., 7 CONG. REC. 1331 (1878) (statement of Sen. Aaron A. Sargent) (expressing concern that President Hayes accepted from an Indian tribe a miniature canoe, of apparently trivial value, without seeking congressional consent).

129. COMM. ON STANDARDS OF OFFICIAL CONDUCT, HOUSE ETHICS MANUAL 206 (2008) (emphasis added).

130. SELECT COMM. ON ETHICS, SENATE ETHICS MANUAL 86 (2003) (quoting Sec'y of the Air Force, 49 Comp. Gen. 819, 820 (1970)).

131. The extent to which consequences may affect constitutional interpretation reflects a continuously and hotly debated topic. For some different viewpoints on the subject, see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 18 (2005) ("[S]ince law is connected to life, judges, in applying a text in light of its purpose, should look to consequences.") (emphasis omitted); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37 (1997)

prohibits a U.S. Officer or legislator from accepting, without consent, any payment or benefit from a foreign government, and if the Constitution absolutely prohibits the President from receiving even a penny from the states or the federal government (aside from his fixed compensation), then so be it. It will be upon the people to amend the Constitution or upon the Congress (or its houses) to exercise any discretion under the relevant consent, impeachment, or removal powers. But where a term in the Constitution admits two potential meanings and one meaning avoids strange consequences, consideration of those consequences can help resolve an ambiguity.¹³² That is especially the case here, where only the office-related definition of emoluments comports with executive and legislative branch interpretations, and establishes consistency among the Constitution's three uses of the term.

C. NATURE OF SERVICES PROVIDED

Part I.B showed that an emolument under the Foreign Emoluments Clause refers to the compensation a U.S. Officer receives for services provided to a foreign government. However, an important ambiguity remains. Must the services provided relate to the U.S. Officer's position with the U.S. government (a U.S.-focused approach)? Or does the clause prohibit the acceptance of compensation related to services of any kind provided to a foreign government (a foreign-focused approach)?

The clause could arguably adopt either approach. Viewed one way, because the clause specifically applies to U.S. Officers, a U.S.-focused approach might be warranted. Viewed another way, because the clause generally prohibits things established under foreign law, like titles and offices,¹³³ a broad, foreign-focused approach should control.¹³⁴

(advocating an originalist method to constitutional interpretation, under which the original public meaning controls over any perceived policy consequences).

132. See Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 99 (2006) (arguing that even originalists "do not believe that purpose and consequence are totally irrelevant to deciding cases").

133. A foreign government has no authority to establish titles or offices under U.S. law, so it would not make sense to read the Foreign Emoluments Clause as prohibiting a U.S. Officer from accepting a U.S. title or office from a foreign power.

134. One might wonder whether reading the clause this way renders the prohibition against the acceptance of emoluments redundant. After all, if the clause already prohibits the acceptance of an office, would it not necessarily

In many cases, wrestling with this ambiguity may be avoidable because the two approaches will yield the same result. For example, suppose that a foreign government wanted to hire the United States Secretary of Transportation to consult on an urban highway project. Under a U.S.-focused approach, her acceptance of the consulting fee would create constitutional problems, because that emolument relates to her U.S. office (transportation matters). And under a foreign-focused approach, this engagement would also create problems because the emolument stems directly from her employment with the foreign government.

In other circumstances, however, the distinction between a U.S.-focused and a foreign-focused approach will make a difference. Suppose that the Secretary of Transportation wanted to accept compensation while serving as a tuba player in a foreign government's official marching band. Under a U.S.-focused approach, that acceptance would not create constitutional problems because tuba playing has nothing to do with her U.S. office. However, under a foreign-focused approach, that acceptance would create constitutional problems because the compensation stems from her employment with the foreign government.

No judicial opinions address the U.S.-versus-foreign question, but other authorities strongly favor a broad, foreign-focused approach. Recall, for example, that the constitutional amendment proposed in 1810 would have prohibited any citizen from accepting "emolument[s] of any kind whatever" from a foreign government.¹³⁵ That amendment, intended to expand the Foreign Emoluments Clause, must have referred to all compensation related to employment with a foreign government, not only to compensation related to the recipient's position with the U.S. government. After all, most persons potentially subject to the

prohibit the acceptance of office-related compensation? But that source of confusion arises only because of the shorthand (office-related compensation) that this Article has used to describe the scope of emoluments. That is, this Article argues that emoluments refer broadly to any compensation received in exchange for services provided to a foreign government and not only the compensation derived from holding an office under foreign law. However, it's at least arguable that emoluments refer only to the compensation that is derived from a foreign office. If this interpretation were followed, the separate reference to emoluments in the Foreign Emoluments Clause would not necessarily be redundant, because Congress could consent to a U.S. Officer's holding of an office under foreign law without allowing him to accept the related emoluments, or vice versa.

135. Resolution Proposing an Amendment to the Constitution of the United States, S. RES. 2, 11th Cong. (1810).

clause (all U.S. citizens) did not hold official positions with the United States.

OLC opinions generally do not delve into the U.S.-versus-foreign question, possibly because the analysis often makes no difference. However, the previously discussed 1954 opinion embraced the foreign-focused approach. That opinion, addressing the judge displaced by the Nazis, focused on whether the payments he received related to his judgeship under German law, without regard to the nature of the services he provided to the United States.¹³⁶

Congress also assumes the foreign orientation of emoluments. The previously discussed statute, 37 U.S.C. § 908, regarding retired military personnel, applies broadly to all civilian employment with a foreign power, not just to positions related to the service member's position under U.S. law.¹³⁷ Also, the Comptroller General, an officer in the legislative branch, has applied the Foreign Emoluments Clause to a U.S. Officer's compensation from a foreign government where that compensation bore no relationship to his duties under U.S. law.¹³⁸

136. Rankin Memo, *supra* note 10, at 1; *see also* Acceptance of Annuity Payments Made by the German Gov't, 34 Comp. Gen. 331, 334 (1955) (adopting a similar method of analysis).

137. Because the statute applies only to civilian employment, it potentially prohibits a U.S. Officer from taking any position with a foreign government related to his U.S. position. For example, a retired U.S. pilot could not invoke 37 U.S.C. § 908 (2012) to support his enlistment in the (non-civilian) air force of a foreign government. This further indicates congressional understanding that the Foreign Emoluments Clause addresses the compensation received for all types of positions with foreign governments, as opposed to being a measure designed to vaguely prohibit the exploitation of one's office under U.S. law. For further discussion, *see* Andy Grewal, *Exploitation of Public Office and the Foreign Emoluments Clause*, YALE J. ON REG. NOTICE & COMMENT (July 4, 2017), <http://yalejreg.com/nc/exploitation-of-public-office-and-the-foreign-emoluments-clause>.

138. Ellis, Admin. Office of the U.S. Courts, 37 Comp. Gen. 138, 140 (1957) (saying the Foreign Emoluments Clause applies to a federal court crier's receipt of a pension from the British government for war services, whether that pension qualified as a gift or an emolument); *Ward v. United States*, 1 Cl. Ct. 46 (1982) (an advisory opinion issued in connection with congressional reference procedures, *see* 28 U.S.C. §§ 1492, 2509 (2012) (outlining congressional reference case procedures)); Gordon, U.S. Coast Guard, 44 Comp. Gen. 130, 130–31 (1964) (involving a retired Chief Petty Officer of the Coast Guard subjected to the Foreign Emoluments Clause on account of a teaching position taken with a foreign public school). In a 1962 memorandum, the OLC hypothesized that if a foreign government paid for a U.S. Officer's local tour of its country, and the tour related to the officer's U.S. duties, the tour would not qualify as an emolument, because a "literal construction" is not always required under the Foreign Emoluments Clause. *See Irish Citizenship*, *supra* note 39. This hypothetical at least obliquely

These authorities show that 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. However, *solely* for the sake of being comprehensive, where a U.S.-focused approach would potentially narrow the clause's scope, this Article will examine the issues alternatively.

II. A PROPOSED BUSINESS ENTITY TEST

Settling the definition of emoluments, and the nature of services to which they relate, does not end the constitutional analysis. One must still determine, as a factual matter, whether a payment received by a U.S. Officer stems from his office or employment with a foreign government. Part III will consider that question for transactions involving President Trump. But before proceeding to that question, another important problem, related to the interposition of legal entities between foreign governments and U.S. Officers, must be addressed. After explaining the nature of the problem and describing the different tests that the Comptroller General and the OLC have used to address it, this Part will propose an alternative three-part business entity test to guide the analysis. The proposed business entity test more faithfully implements the language of the Foreign Emoluments Clause than does the Comptroller General's or the OLC's.

To understand the conceptual difficulties raised by business entities, recall that under the Foreign Emoluments Clause, no *person* holding a U.S. office may *accept*, without consent, an emolument *from* a foreign government.¹³⁹ The clause's reference to a *person* surely refers to a natural person, not an entity. After all, only individuals can qualify as U.S. Officers.

One might consequently argue that a U.S. Officer cannot violate the clause when a foreign government makes a payment only to an entity in which she owns an interest. Under this analysis, the U.S. Officer will not have accepted any emolument from a foreign government, as required by the clause. Only the entity will have made an acceptance. And any payment subsequently received by the U.S. Officer will be from the entity, not from a foreign government.

assumes that only payments related to a U.S. Officer's position with the U.S. government would meet the threshold definition of emolument, though it is quite doubtful that the implications of this hypothetical can overcome the weight of numerous contrary, direct interpretations.

139. U.S. CONST. art. I, § 9, cl. 8.

This analysis enjoys some superficial appeal, but in the context of statutory law, courts sometimes disregard the existence of an intermediary when characterizing the flow of payments. That is, a payment that literally travels from *A* to *B* to *C* may sometimes be treated as a payment from *A* to *C*.¹⁴⁰ One can reasonably conclude that, if the text of the Foreign Emoluments Clause permits, a similar analysis could apply to a payment that travels from *F* to *E* to *O* (that is, a payment that travels from a foreign government (*F*) to an entity (*E*) to a U.S. Officer (*O*)). However, the principal difficulty relates to determining when to re-characterize a transaction this way.¹⁴¹

Under one possible approach, supported by the Comptroller General, the Foreign Emoluments Clause analysis could follow general state or federal law.¹⁴² That is, a payment from *F* to *E* to *O* could be treated as a payment from *F* to *O* whenever that characterization attaches under the general principles distilled from state and federal statutes.¹⁴³ This approach has the virtue of building upon an established set of precedents.

140. See, e.g., *Minn. Tea Co. v. Helvering*, 302 U.S. 609, 613 (1938) (disregarding, for federal tax purposes, an intermediary in a corporate distribution because “[a] given result at the end of a straight path is not made a different result because reached by following a devious path”).

141. Existing law and scholarship provides little with which to work. See Alito Memo, *supra* note 44, at 1 (“We have found no judicial opinions construing the Emoluments Clause in which the identity of the source of an emolument was at issue; nor have we found any discussion of this issue in any relevant commentary.”).

142. See, e.g., Hartnett, USMC (Retired), 69 Comp. Gen. 220, 221–22 (1990) (“Our decisions concerning whether an employer-employee relationship exists for purposes of the restrictions [under the Foreign Emoluments Clause] on foreign government employment have consistently applied the five-part test formulated by the Maryland Court of Appeals in *National Paving and Contracting Co.*, 134 A.2d 296, 301 (1957).”); Hartnett, USMC, Retired, March 10, 1986, 65 Comp. Gen. 382, 382–83 (1986) (disregarding interposed entity that employed a U.S. Officer who, by contract, provided services to a foreign government, because the foreign government supervised and controlled him). These authorities do not actually negate the legal existence of an entity for all legal purposes, but rather follow general corporate veil-piercing principles in determining whether to disregard an interposed entity for purposes of the Foreign Emoluments Clause. See *Retired Marine Corps Officers*, B-217096, 1985 WL 52377 (Comp. Gen. Mar. 11, 1985) (disregarding the existence of a professional corporation interposed between U.S. Officers, who were attorneys, and the corporation’s client, a foreign government, where Virginia state law provided that such interposition did not affect the attorney-client relationship).

143. In performing this type of analysis, the Comptroller General has sometimes applied the law of a single state, see, for example, Hartnett, 69 Comp. Gen. at 221–22 (following the five-part test in *National Paving*). But because the Constitution is a national law, the meaning of its terms generally should not depend on the particularities of state law unless expressly indicated.

However, the Comptroller General's approach could severely curtail the Foreign Emoluments Clause. Under the Comptroller General's approach, an interposed entity will be disregarded where a U.S. Officer "is technically hired by a private firm but is a de facto employee of a foreign government."¹⁴⁴ In other words, the Comptroller General will pierce the corporate veil where the foreign government has the right to control the performance and manner of the U.S. Officer's work. This strict standard means that the Foreign Emoluments Clause will rarely apply to high-level U.S. Officers who perform services through business entities,¹⁴⁵ given the ease with which they can avoid employee characterization.¹⁴⁶

Cf. Nat'l Labor Relations Bd. v. Hearst Publications, Inc., 322 U.S. 111, 122 (1944) (declining to hinge the definition of "employee" in a federal statute on various local laws and relying instead on "a sort of pervading general essence distilled from state law"). Of course, to the extent that *National Paving* reflects the general common law, a point not further considered here, little harm would be caused by adopting its framework rather than a more general one. Also, the Comptroller General has sometimes looked to more general principles. See Brenningstall, Dep't of the Air Force, 53 Comp. Gen. 753 (1974) (applying common law master-servant principles, as generally stated in *Maloof v. United States*, 242 F. Supp. 175, 181 (1965), to find that a U.S. Officer, who was technically employed by a private company, was in fact treated as an employee of the foreign government-owned corporation which contracted with the private company).

144. Applicant for Sec. Clearance, ISCR Case No. 00-0244 (Dep't of Def. Appeal Bd., Jan. 29, 2001), <http://ogc.osd.mil/doha/industrial/00-0244.a1.html> (summarizing Gordon, U.S. Coast Guard, 44 Comp. Gen. 130 (1964); Brenningstall, 53 Comp. Gen.; Shaffer, USAF, Retired, 62 Comp. Gen. 432 (1983); Retired Marine Corps Officers, 1985 WL 52377; and Hartnett, 65 Comp. Gen. at 382).

145. Under statutory law, the interposed entity may be disregarded, but only under high standards. Even when it is obvious that the payor, in a substantial sense, seeks the services of an entity's owner rather than the entity itself, the form of the transaction will usually govern. For example, suppose that a patient has a favorite dentist whom he has seen for decades and that he refuses to see anyone else. Notwithstanding the patient's personal affections for the dentist, if the dentist operates her practice through a wholly-owned corporation, the customer's payment for services will generally be treated as a payment to that corporation. Also, the law will not treat the dentist as having earned income directly from the patient. She will have derived income from her corporation, whether in the form of a salary, dividend, or otherwise. The Comptroller General's approach, if applied in this context, would not pierce the corporate veil given the inability of the patient to control the performance and manner of the dentist's work.

146. The Comptroller General opinions seem to involve low-level U.S. Officers, mostly retired, who have little choice but to follow the dictates of their employing corporation's demands, as opposed to powerful persons like the President or cabinet members, who can provide consultations with foreign governments through entities that they control.

The OLC has adopted, through several opinions, something resembling a conduit¹⁴⁷ test, which provides a second potential approach. In 1982, for example, the OLC addressed whether a U.S. Officer who worked with the Mexican government at the Nuclear Regulatory Commission could continue doing so while on leave.¹⁴⁸ To continue his work, the U.S. Officer would take up short-term employment with a small, incorporated consulting firm.¹⁴⁹ The Mexican government would hire the firm specifically to continue its relationship with the U.S. Officer and some, though not all, of the proceeds from the firm's contract would be passed along to him.¹⁵⁰

To address whether the U.S. Officer received a prohibited emolument from the Mexican government, as opposed to a salary from the consulting firm, the OLC adopted a functional analysis.¹⁵¹ It emphasized that the U.S. Officer provided the specific expertise sought by the Mexican government, and that the government chose the firm largely because of him.¹⁵² Under these facts, the OLC concluded, the interposition of the incorporated consulting firm did not exempt the U.S. Officer from the Foreign Emoluments Clause.¹⁵³

In reaching that conclusion, the OLC distinguished a prior memorandum dealing with a consulting contract between Harvard University and the Government of Indonesia.¹⁵⁴ Under that contract, Harvard itself determined the personnel who would

147. Applicability of the Emoluments Clause to Non-Gov't Members of ACUS, 17 Op. O.L.C. 114, 118 (1993) [hereinafter Non-Gov't ACUS] (“[O]ur prior opinions suggest that when an employment relationship formally exists between a domestic employer and a [U.S. Officer], the question whether the latter may be paid from foreign governmental funds that the employer receives turns on whether the employer is acting as a mere conduit for those funds.”).

148. See Application of the Emoluments Clause of the Constitution & the Foreign Gifts & Decorations Act, 6 Op. O.L.C. 156 (1982) [hereinafter Foreign Gifts].

149. *Id.*

150. *Id.*

151. *Id.* at 158.

152. *Id.*

153. *Id.*

154. See *id.* (discussing Memorandum from Leon Ulman, Deputy Assistant Att’y Gen., Office of Legal Counsel, to John G. Gaine, Gen. Counsel, Commodity Futures Trading Comm’n (Aug. 11, 1980)); see also Alito Memo, *supra* note 44, at 1 n.5.

fulfill its consulting obligations.¹⁵⁵ Thus, when Harvard proposed to staff the contract with faculty experts who were also U.S. Officers, no Foreign Emoluments Clause problems arose.¹⁵⁶

In 1993, the Administrative Conference of the United States (ACUS), a federal government agency, attempted to apply the 1982 OLC ruling to its members.¹⁵⁷ Those members, who apparently qualified as U.S. Officers, received no compensation for their U.S. government services and included, among others, persons who simultaneously practiced as partners in private law firms.¹⁵⁸ A question arose whether a member could accept a pro rata distribution of his partnership's income where his firm served foreign government clients and earned fees from them.¹⁵⁹

In arguing that the U.S. Officer could, ACUS emphasized that the member-partner did not himself represent any foreign government.¹⁶⁰ Rather, under his partnership agreement, he simply enjoyed a pro rata share of all partnership income.¹⁶¹ Relying on the 1982 OLC opinion, ACUS reasoned that no prohibited emolument arose "absent some direct personal contact or relationship between the Conference member and a foreign government."¹⁶²

The OLC, however, rejected ACUS's position. It acknowledged that its 1982 opinion embraced a conduit standard, involving circumstances where a foreign government specifically sought out the services of a U.S. Officer employed by an incorporated consulting firm.¹⁶³ But it believed that the analysis differed with partnerships.¹⁶⁴ Though its reasoning is not quite clear, the OLC apparently believed that partnerships are, by their nature, pass-through entities and must be disregarded.¹⁶⁵

155. Foreign Gifts, *supra* note 148.

156. *See id.* at 158.

157. Non-Gov't ACUS, *supra* note 147, at 118.

158. *Id.* at 115.

159. *Id.* at 117.

160. *Id.* at 118–19.

161. *Id.*

162. *Id.* at 119 (quoting letter received from ACUS).

163. *Id.* at 118.

164. *Id.*

165. *Id.* at 119. The OLC may have believed that in a services partnership, each partner's contributions to the entity compose a part of an amalgamated pool, such that whenever the partnership provides services to a client (like a foreign government), each partner is necessarily deemed to have performed services for that client. *See id.* (describing partnerships as arrangements where persons join together and contribute, among other things, "labor" and "skill," and establish a "community of interest or proportionate sharing of profits").

It thus dismissed ACUS's view, acknowledging that though the ACUS member "did not personally represent a foreign government, and indeed had no personal contact" with one, the partnership would nonetheless "be a conduit."¹⁶⁶

As between the two federal government agencies, ACUS got the analysis right. A payment from *F* to *E* to *O* should not be re-characterized as a payment from *F* to *O* if no connection exists between them. To support its contrary (though internally superseding) view,¹⁶⁷ the OLC relied on a partnership taxation case, of all things, but it erred in doing so.¹⁶⁸ Under partnership taxation law, a payment to a partnership will generally be treated as such, and will not be characterized as a payment to individual partners.¹⁶⁹ Additionally, the OLC's approach contains a major loophole—a partnership can easily circumvent the opinion through adopting special allocation provisions.¹⁷⁰ One suspects that private law firms responded to the OLC opinion by doing so.

Whatever the merits of this theory in the abstract, it seems ill-suited to the Foreign Emoluments Clause, which, as ACUS properly argued, focuses on an actual relationship between a U.S. Officer and a foreign government. Nonetheless, if the 1993 OLC opinion were followed, any U.S. Officer who personally provided services to a partnership would receive a prohibited emolument whenever her distributions of partnership income were allocable to amounts paid by foreign government clients.

166. *Id.*

167. OLC opinions, being internal interpretations provided between components of the Executive Branch, do not carry the weight of statutes, regulations, or judicial decisions. *See Cherichel v. Holder*, 591 F.3d 1002, 1016 n.17 (8th Cir. 2010) (noting that "OLC opinions are generally binding on the Executive branch" and not on the courts). Nonetheless, one gets the impression that the OLC does not hastily abandon its prior opinions, even when those opinions are issued under a previous administration. *See* Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC's Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1, 4 (2006) ("OLC opinions are generally regarded as binding throughout the executive branch."); Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 489 (1993) ("It is true that opinions of the Attorney General (and now OLC) are generally treated as binding throughout the executive department.")

168. *See* Non-Gov't ACUS, *supra* note 147, at 119 (citing *Commissioner v. Tower*, 327 U.S. 280, 286 (1946)).

169. *See* 26 U.S.C. § 703 (2012) (generally establishing a default approach under which income received by a partnership will be characterized at the partnership level).

170. Suppose that a U.S. Officer is a fifty-percent partner in a two-member partnership, and the partnership expects to earn one-hundred dollars of income from foreign governments and nine-hundred dollars from other sources. Rather than allocate profits on a pro rata basis, the partnership agreement could specify that the U.S. Officer will enjoy a one-hundred dollars priority allocation of income from nongovernment sources, and the other partner will enjoy a one-hundred dollar priority allocation of income from foreign government sources.

The OLC, under the Bush and Obama Administrations, repudiated the 1982 and 1993 opinions for defining U.S. Officers too broadly, so their precedential value remains unclear.¹⁷¹ However, if we assume that the OLC will follow the portions of those opinions that have not been repudiated, we can boil down its approach to one basic principle and one bright-line rule. Under the OLC's basic principle, if *F* pays compensation to *E* for the performance of services but those services are, in a substantial sense, provided by *O*, then *E* will be disregarded and will be treated as a mere conduit for that payment. And under the bright-line rule, when *E* is a partnership for which *O*, as a partner, provides services, then *E* will be treated as a conduit for any distributions *O* receives that are attributable to foreign government clients, even if *O* does not personally provide services to them.¹⁷² This reflects a broader approach than the Comptroller General's, which focuses heavily on the presence or absence of a de facto employer-employee relationship between *F* and *O*.¹⁷³

The tests employed by the OLC and the Comptroller General each suffer from conceptual problems, and this Article thus proposes a different test, which pays proper respect to the Foreign Emoluments Clause. Under the proposed business entity

If this allocation method were respected for purposes of constitutional analysis, the U.S. Officer would not have received income *from* a foreign government through his distributive share of partner income.

171. See President's Council, *supra* note 20 (stating that "confusion" stemmed from the 1982 abandonment of the "longstanding position that an 'Office of Profit or Trust' under the [Foreign] Emoluments Clause was synonymous with an 'officer of the United States' under the Appointments Clause"); Applicability of the Emoluments Clause to Nongovernmental Members of ACUS, 34 Op. O.L.C. 1, 8 (2010) ("[W]e do not believe ACUS's status as a statutorily created entity . . . provides sufficient ground to compel the application of the [Foreign] Emoluments Clause . . . even assuming that the Clause may apply in some instances to persons who do not hold an office under the Appointments Clause."); see also *id.* at 1 n.2 (refusing to either endorse or disclaim any of the opinions expressed in the 1993 OLC Opinion, other than issues related to the application of the Foreign Emoluments Clause to nongovernmental members of ACUS). On the precedential effect of OLC opinions, see generally Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).

172. Whether and how the 1993 OLC ruling extends to other business entities reflects a source of uncertainty. See Jeffrey Green, *Application of the Emoluments Clause to Department of Defense Civilian Employees and Military Personnel*, 2013 ARMY LAW., no. 5, 2013, at 15, 17 (describing how an office within the Department of Defense "believes that this same rationale [in the 1993 OLC ruling] applies to distributions from limited liability corporations, although this view has not been officially sanctioned by the Department of Justice").

173. In a footnote, the OLC has suggested that its approach to corporations, at least, follows that of the Comptroller General. See Non-Gov't ACUS, *supra* note 147, at 118 n.4.

test, a payment from *F* to *E* to *O* will be treated as a payment from *F* to *O* when

1. the foreign government, in a substantial sense, negotiates for the services of the U.S. Officer;
2. the U.S. Officer performs those services; and
3. the U.S. Officer enjoys control over the compensation paid by the foreign government to the interposed entity.

Unlike the OLC's and Comptroller General's tests, the proposed business entity test connects itself to the key elements of the Foreign Emoluments Clause. The OLC opinions focus heavily on whether a payment comes *from* a foreign government,¹⁷⁴ but a payment from a foreign government, by itself, does not trigger the Foreign Emoluments Clause. The payment itself must satisfy the definition of emolument (parts one and two of the proposed test), and the U.S. Officer must accept that emolument (part three). The Comptroller General focuses heavily on factors related to employer-employee relationships, but emoluments include compensation for any services personally provided, not just those provided in the capacity of an employee.

The proposed business entity test would catch those covered by the Comptroller General's test and then some. If a foreign government enjoys control over the performance and manner of a U.S. Officer's work, the first two parts of the test, at least, should be satisfied easily. But even when that control is not present, the proposed business entity test recognizes that emoluments generally relate to the provision of services, and it applies

174. To be fair to OLC, though the 1982 Opinion was largely framed in terms of whether a payment was from a foreign government, its substantive analysis adopted a different approach, and looked to the qualifications of the U.S. Officer and his preexisting relationship with Mexico. That is, to determine whether the U.S. Officer received a payment from a foreign government, the OLC did not look literally at the source of the payment, but rather examined the connection between the foreign government and the U.S. Officer. However, the 1993 Opinion focused heavily on the *from* issue and casually concluded that services performed by a partner for a partnership should be deemed to have been performed for all of the partnership's clients. If the 1993 Opinion were extended beyond partnership distributions to corporate distributions, and beyond circumstances where U.S. Officers personally provide services to an entity, then U.S. Officers who passively hold stock in publicly traded corporations would violate the Constitution whenever those corporations engaged in transactions with foreign governments. After all, the gains from those transactions would be reflected in a corporation's earnings and profits, and distributions drawn from those earnings and profits, paid to a U.S. Officer, would be from a foreign government.

the Foreign Emoluments Clause when, for example, the U.S. Officer provides services in a capacity more closely resembling that of an independent contractor.

Regarding the proposed business entity test and the OLC's test, the conclusion reached in the 1982 opinion would be unchanged. The foreign government there, in a substantial sense, specifically negotiated for the services of the U.S. Officer, and the U.S. Officer provided those services.¹⁷⁵ And his acceptance of his salary, traced to the payment provided by the foreign government to the consulting firm, reflected the U.S. Officer's acceptance of an emolument.

But the OLC's opinion on the ACUS member would come out differently. No connection existed between the foreign government and the ACUS member, and the member provided no services to it at all.¹⁷⁶ Thus, there was no emolument. A portion of his partnership distribution may have been *from* a foreign government, but that element alone does not trigger the Foreign Emoluments Clause.

The proposed business entity test will also lead to different conclusions in other contexts. Consider, for example, a hypothetical U.S. Officer who, prior to taking office, wrote a book and continues to receive a five percent royalty from the publisher for each book sold. During the U.S. Officer's period of public service, foreign governments purchase copies of the book and the publisher passes on royalty payments to him.

If the OLC's conduit approach applies here, the U.S. Officer will have received a prohibited emolument.¹⁷⁷ Given the fixed royalty figure, it will be easy to apply a conduit analysis and show that the U.S. Officer received a payment from a foreign government. And though no connection exists between the foreign government and the U.S. Officer, that fact does not control under the OLC's approach. On these hypothetical facts, based

175. By referring to the provision of services generally, the proposed business entity test assumes a foreign orientation towards emoluments. That is, as discussed in Part I.C, it assumes that compensation for the performance of any services by a U.S. Officer for a foreign government can qualify as an emolument. However, if one adopts a U.S. orientation, then the first two prongs must be narrowed such that the negotiated services bear a material relationship to the services provided by the U.S. Officer in her official capacity. In the 1982 OLC Opinion, this standard would be satisfied, given the similarity of the work performed for the NRC and Mexican government.

176. Non-Gov't ACUS, *supra* note 147, at 118.

177. No problem would arise under the Comptroller General's test, given the absence of anything resembling an employer-employee relationship.

loosely on former President Barack Obama's book royalties, the U.S. Officer will have violated the Foreign Emoluments Clause, unless Congress consents to the receipt of his royalty payments. And for book purchases made by state and federal governments, no congressional consent can save him from constitutional violations under the Domestic Emoluments Clause.¹⁷⁸

But by tying the analysis to the Foreign Emoluments Clause's language, parts one and two of the proposed business entity test spare the U.S. Officer from constitutional violations. Because the foreign government did not contract for personal services from the U.S. Officer—it simply purchased books—no emolument arises. Stated another way, the U.S. Officer may have accepted a payment from a foreign government, but because that payment does not reflect compensation for services provided to that government, he has not accepted an emolument within the meaning of the Constitution.

Regarding part three of the proposed business entity test, it will apply easily whenever the foreign government's payment to the entity is immediately transferred to the U.S. Officer in the form of a salary, dividend, royalty, or similar payment. In these circumstances, the U.S. Officer will have "accept[ed]" an emolument, as required by the Foreign Emoluments Clause. However, the absence of a transfer to the U.S. Officer should not necessarily end the analysis. If the U.S. Officer wholly owns the interposed entity, for example, she will be able to compel distribution of the foreign government's payment at her will, and the entity's acceptance of that payment may fairly be treated as an acceptance by the U.S. Officer herself. Part three of the proposed test consequently looks at whether the U.S. Officer enjoys control over the payment, rather than only at physical receipt.

It would be impossible to prescribe a detailed test to cover the innumerable types of economic arrangements that may exist between a U.S. Officer and a business entity. However, unlike the OLC's and the Comptroller General's tests, the proposed business entity test carefully obeys the language of the Foreign Emoluments Clause. It thus sets forth superior standards to govern the analysis, even though difficult questions will inevitably arise as one applies it to complex facts.

178. See, e.g., David Jackson, *State Dept. Buys \$70K of Obama Books*, USA TODAY (Oct. 26, 2011), <http://content.usatoday.com/communities/theoval/post/2011/10/state-dept-buys-70k-of-obama-books/1#.Wb7EwMiGNPa>.

III. THE FOREIGN EMOLUMENTS CLAUSE UNDER
PRESIDENT TRUMP

The analysis thus far has examined legal questions related to the Foreign Emoluments Clause under a general approach. This Part specifically focuses on President Trump. It considers to what extent his business activities may establish violations of the Foreign Emoluments Clause.

Recall that, as described in Part I.B, an emolument refers to the compensation received from the performance of services for a foreign government. Emoluments do not broadly include any payment from a foreign government, nor do they broadly include any payment that would not be received but for one's office or employment. For example, the judge displaced by the Nazis would not have received a fixed settlement payment from Germany but for his official position, yet that payment, according to the OLC and the Comptroller General, was not an emolument.¹⁷⁹ Ronald Reagan would not have received his retirement benefits from California but for his service as Governor, yet those benefits, according to the OLC, were not an emolument.¹⁸⁰ And a pension payment to a retired Justice would not be paid but for his service on the Supreme Court,¹⁸¹ yet the Senate did not characterize pension payments as emoluments.¹⁸²

Also, recall that under the foreign-focused approach described in Part I.C, compensation for *any* services personally provided by a U.S. Officer to a foreign government will qualify as an emolument. But solely for the sake of being comprehensive, this Part will also analyze the facts using a narrower, U.S.-focused approach, under which only compensation for services that bear

179. See Rankin Memo, *supra* note 10, at 7; Acceptance of Annuity Payments Made by the German Gov't, 34 Comp. Gen. 331, 331 (1955).

180. See President Reagan, *supra* note 86, at 192.

181. See *supra* notes 100–06 and accompanying text.

182. Arguably, once an employment or official relationship has been established, any payments made but for that relationship *should* be treated as emoluments. Definitions regarding emoluments frequently refer to the compensation that “results from” or is “derived from” one's employment or office, and phrases like that, depending on the context, may trigger simple but-for analysis. See *Burrage v. United States*, 134 S. Ct. 881, 887–88 (2014) (interpreting phrases like “results from” as requiring, at a minimum, but-for causality, though sometimes more may be required). If this alternative interpretive path were followed, then the existence of an employment or official relationship with a foreign government would still be a condition to the finding of any emoluments, but once that condition were satisfied, all payments that would not have been received but for that relationship, such as pensions, would qualify as emoluments.

a connection to a U.S. Officer's official government duties qualifies as an emolument.

A. PAYMENTS TO PRESIDENT TRUMP PERSONALLY

For transactions involving President Trump personally, the analysis should be relatively straightforward. Under an office-related, U.S.-focused definition of emoluments, any payment from a foreign government directly to President Trump in exchange for services related to his official government duties should qualify as an emolument under the Foreign Emoluments Clause.¹⁸³ For example, if a foreign government paid President Trump a fifty thousand dollar fee to consult on immigration policy, that compensation would qualify as an emolument, because President Trump will have entered into a services relationship with a foreign government and the services provided would relate to one of his official presidential duties (immigration policy).

Under a foreign-focused approach, emoluments would also generally arise even if President Trump performed services unrelated to his official U.S. position. For example, suppose a foreign government hired President Trump to guest host a reality TV show. The related compensation (emolument) would stem from an employment relationship with a foreign government, and so the Foreign Emoluments Clause would apply.

One might argue that the compensation received in the game show hypothetical would be unconstitutional even under the more restrictive, U.S.-focused approach. That is, though we are dealing with hypothetical facts, it seems probable that a foreign government would have hired Donald Trump, the President of the United States, not Donald Trump, the private citizen. Viewed this way, the foreign government's payment would relate to the office of the President and would qualify as an emolument. We can even go further and say that, given the responsibilities assigned under Article II, any services personally provided by the President are presumptively made in an official capacity, particularly when interacting with foreign governments.¹⁸⁴

183. See *supra* Part I.B.

184. The Supreme Court has recognized that the President can act in a private capacity and may even be subject to lawsuits for offenses committed in that capacity. See *Clinton v. Jones*, 520 U.S. 681, 696 (1997) ("With respect to acts taken in his 'public character'—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts."). However, the Constitution contemplates an active role for the President in foreign affairs. See

Nonetheless, though we may have to imagine unusual facts, it is possible that a U.S.-focused approach will narrow the scope of foreign government compensation reached by the Foreign Emoluments Clause.

B. PAYMENTS TO THE TRUMP ORGANIZATION

President Trump has promised to separate himself from his business through the implementation of a complex independent trust arrangement.¹⁸⁵ Under the arrangement, President Trump will retain his ownership interests in the Trump Organization, but will not play an operational or managerial role.¹⁸⁶ Also, he has promised not to communicate about business matters with his sons who, along with others, will manage the organization.¹⁸⁷ Last, he has promised to donate any profits from some foreign government transactions to the United States Treasury.¹⁸⁸

If this plan effectively insulates the President from the Trump Organization (a point of some debate),¹⁸⁹ it is unlikely that any emolument will arise, though prohibited foreign gifts or bribes might. Because President Trump will perform no services for a foreign government through the Trump Organization, there can be, by definition, no office-related compensation. Even if an emolument arises, President Trump has promised to turn over at least some profits from foreign government transactions, such that those emoluments would not be accepted.¹⁹⁰

U.S. CONST. art. II, § 2 (making the President commander-in-chief of the military, and granting the power to make treaties and appoint ambassadors). Thus, when a President performs services for a foreign government, we can generally presume that he is acting in his official capacity, although this necessarily presents a factual question.

185. See MORGAN, LEWIS & BOCKIUS LLP, WHITE PAPER: CONFLICTS OF INTEREST AND THE PRESIDENT 2 (Jan. 11, 2017), <https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf> (detailing President Trump's plan to manage conflicts of interest with his business holdings).

186. *Id.*

187. *Id.*

188. *Id.* at 6.

189. See, e.g., Milan Markovic, *The President-Elect's Conflicts Plan*, LEGAL ETHICS F. (Jan. 12, 2017), <http://www.legalethicsforum.com/blog/2017/01/the-president-elects-conflicts-plan.html> (expressing some "strong misgivings" about the plan's effectiveness in addressing conflicts of interest).

190. See MORGAN, LEWIS & BOCKIUS LLP, *supra* note 185, at 6 (announcing that President Trump will "donate all profits from foreign governments' patronage of his hotels and similar businesses during his presidential term to the U.S. Treasury").

But, for the sake of completing the analysis, and to provide guidance to future presidents and other U.S. Officers, the rest of this Part will assume that the independent trust arrangement does not apply. Naturally, this counterfactual approach carries significant limitations. At most, this Article can offer a general analytical framework for anyone who must determine the legal consequences if the President's independent trust arrangement breaks down or if it otherwise fails to insulate the President from the Trump Organization.

1. Emoluments Under the Proposed Business Entity Test

Though the Trump Organization bears the President's name, it stands as a collection of entities legally separate from him. Public filings show that the Trump Organization comprises around 500 business entities of various forms (including partnerships, limited liability companies, and corporations), many of which are wholly-owned, directly or indirectly, by President Trump.¹⁹¹ While it is most commonly associated with real estate ventures, the Trump Organization operates in numerous industries.¹⁹²

The Trump Organization maintains business relationships with various foreign governments,¹⁹³ and these relationships raise potential Foreign Emoluments Clause issues. For example, foreign government representatives may patronize Trump hotels or golf courses, foreign-government-owned banks may loan money to Trump Organization entities, and foreign municipalities may pursue real estate projects with the Trump Organization.¹⁹⁴ In each of these circumstances, it is at least possible that

191. See generally DONALD TRUMP, EXECUTIVE BRANCH PERSONNEL PUBLIC FINANCIAL DISCLOSURE REPORT (2016), <https://assets.documentcloud.org/documents/2838696/Trump-2016-Financial-Disclosure.pdf>.

192. See *Donald Trump's Many, Many Business Dealings in 1 Map*, TIME (Jan. 10, 2017), <http://www.time.com/4629308/donald-trump-business-deals-world-map> (providing a list of potential conflicts President Trump may have in various countries).

193. See Megan Twohey et al., *Inside the Trump Organization, the Company that Has Run Trump's Big World*, N.Y. TIMES (Dec. 25, 2016), <https://www.nytimes.com/2016/12/25/us/politics/trump-organization-business.html> (discussing the argument that unless President Trump fully divests from his company and places someone independent of his family in control, he risks violating the Constitution by taking payments from a foreign government).

194. Under OLC guidance, an instrumentality of a foreign government, like a bank or university, is not necessarily treated as part of that government for purposes of the Foreign Emoluments Clause. Rather, where an instrumentality is sufficiently independent of the central foreign government, transactions with that instrumentality will not be covered by the clause. See President's Receipt,

a payment or benefit directed to the Trump Organization may be treated as the acceptance of an emolument by President Trump.

However, no emolument can arise for any payments made to the Trump Organization where President Trump does not personally perform any services for a foreign government. Under the first two parts of the proposed business entity test, and under the legal authorities described in Part I, the payments cannot qualify as emoluments because President Trump will have no office or employment relationship with the foreign government, directly or indirectly. Even if the amounts paid by the foreign government greatly exceed the fair market value of goods or services provided, no emolument can arise, given the absence of the requisite relationship. Instead, any Foreign Emoluments Clause analysis would have to focus on whether the excess payments reflected prohibited gifts.¹⁹⁵ If the focus moves beyond the Foreign Emoluments Clause, then excess payments could potentially qualify as impeachable bribes,¹⁹⁶ depending on the facts.

If President Trump, through the Trump Organization, personally provides services to a foreign government by, for example, agreeing to speak at a hotel event in exchange for a fee, an emolument would almost certainly arise under the first two prongs of the proposed business entity test. Under the authorities described in Part I.C, it would not matter whether the services provided related to his Presidency—all payments related

supra note 10. Whether any particular transaction between the Trump Organization and a foreign-government instrumentality is potentially covered by the Foreign Emoluments Clause will necessarily depend on the facts.

195. Ordinarily, a gift contemplates a transfer made without any consideration received in exchange. *See Gift*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.1(a) (AM. LAW INST. 2003) (“To make a gift of property, the donor must transfer an ownership interest to the donee without consideration and with donative intent.”). Where, however, one person nominally purchases, with donative intent, an item from another person for an amount greatly exceeding its fair market value, it seems appropriate to treat the excess payment as a gift, since that portion is a transfer made without consideration. There are no such authorities applying this method of analysis in the context of the Foreign Emoluments Clause, though one sees it in other contexts. *See, e.g.*, 26 C.F.R. § 1.1015-4(a) (2017) (describing tax consequences for a transfer of property that is “in part a sale and in part a gift”).

196. *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.”); *see also Bribery*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“The corrupt payment, receipt, or solicitation of a private favor for official action.”); *see generally* Perrin v. United States, 444 U.S. 37, 41–45 (1979) (discussing the original common law definition of bribery and the evolution of the term).

to services personally provided would be emoluments. However, if one adopted a U.S.-focused approach, the foreign government's payments would qualify as prohibited emoluments only if the services related to the President's official duties.

Of course, it may be difficult to determine whether President Trump has provided services to a foreign government. A foreign government might, for example, patronize the Trump Organization without explicitly negotiating, in writing, for a consultation with him. The parties might instead have an unwritten agreement ensuring that services will be provided discreetly.

In these circumstances, determining whether the foreign government paid a market rate for any goods or services provided by the Trump Organization should guide the analysis. If a market rate is paid, then no inference arises that the payment relates to the provision of services by President Trump. If, however, an above-market rate is paid, that would provide a sign that the foreign government has purchased something beyond goods and services from the Trump Organization.

To illustrate, consider room reservations made at the Trump Hotel in Washington, D.C. Many such rooms are likely reserved each day by tourists and other private persons at prevailing market rates. Though the Trump Organization may profit on each room reservation, the profit relates to the operation of a lodging business, not to the provision of services by the President. Presumably, the vast majority of persons who reserve rooms will never see or interact with the President.

The analysis should not change if a foreign diplomat, using his respective government's funds, reserves a room on the same terms as tourists or other private persons. That is, if the diplomat pays the exact same price as a tourist and receives the exact same service in return, no part of his purchase price would relate to services provided by President Trump. He might subjectively hope that the President will view his patronage favorably, but subjective wishes cannot change the economic character of a transaction. If a homeowner hires one person to mow his lawn, then, no matter how fervently he believes otherwise, he has not hired that person or a second person to give him a haircut. In the same way, a payment to the Trump Hotel for lodging services or to the hotel restaurant for a meal cannot, through subjective intentions alone, become a payment to the President in exchange for his personal services.¹⁹⁷

197. Subjective feelings alone cannot transfer the payment into a gift, either. A gift contemplates a transfer that is not made in exchange for consideration.

Of course, when a foreign diplomat stays at the Trump Hotel, the President may enjoy an economic benefit from the room reservation. And some foreign diplomats might not stay at the Trump Hotel but for the fact that Donald Trump is President. However, that alone is not enough to establish a Foreign Emoluments Clause violation.¹⁹⁸ Payments to a U.S. Officer from a foreign government must stem from an office or employment relationship with that government to qualify as an emolument. 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 Clause.

Suspicious may be properly raised if a diplomat pays a rate higher than that offered to an ordinary visitor. In these circumstances, we cannot trace the amount paid to a good or service provided by the Trump Organization. Thus, an inference arises that the foreign government paid for something else. That something else may very well be services provided by President Trump, and his acceptance of the compensation would, absent congressional consent, violate the Foreign Emoluments Clause. Even if President Trump provided no services, an above-market payment raises the possibility that an unconstitutional gift or bribe has been offered and accepted.

Unfortunately, this market-rate framework can only take us so far. Given the nature of the Trump Organization's business, it may undertake unique transactions with foreign governments involving the provision of licenses, trademarks, copyrights, or other intangible benefits. In these circumstances, it may be difficult, if not impossible, to apply a market-rate approach, given the absence of any comparable transactions. That is, we can conclude that a foreign government provides no office-related compensation when it pays the same price as a member of the public for a hotel stay, but a fair market value analysis does not translate very well to transactions involving intangible government benefits.

See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.1 cmt. b ("The relevant criterion [for a gift] is intent to transfer an ownership interest gratuitously, as opposed to engaging in an exchange transaction or making an involuntary transfer."). If a payment is made to another person in exchange for services, then the payment is classified as compensation. *See Compensation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Remuneration and other benefits received in return for services rendered.").

198. *See supra* notes 179–82 and accompanying text.

However, this problem may be moot because many intangible government benefits provided to business entities might not qualify as emoluments at all, given their restrictions on enjoyment. For example, an insurance license issued to a corporation would not ordinarily authorize any U.S. Officer-shareholders to offer insurance in the state. This makes the Foreign Emoluments Clause analysis here different from the situations examined in Part II, where a cash payment from a foreign government flowed through an entity and into a U.S. Officer's hands. If a benefit exists solely with the entity and cannot be personally enjoyed by a U.S. Officer, then it might be impossible for an emolument to arise.

Of course, intangible government benefits can create indirect benefits for U.S. Officers. For example, President Trump may enjoy an increase in wealth when a foreign government grants a liquor license to a Trump Organization entity, thereby facilitating its conduct of a hospitality business. If President Trump agreed to provide U.S. government favors in exchange for that license, ethical or even bribery questions may arise.¹⁹⁹ But this potentially troubling behavior would be an awkward matter for the Foreign Emoluments Clause to address, especially if the foreign government license could not be transferred. And broadly treating intangible government benefits provided to *entities* as emoluments would surely imply that many U.S. Officers have violated the Constitution's emoluments clauses by, for example, *personally* enjoying U.S. and foreign government copyright protections in their published works.²⁰⁰

199. See, e.g., 18 U.S.C. § 201 (2012) (providing civil and criminal penalties for public officials who accept a bribe); 5 C.F.R. § 2635.204(j) (2017) (implying that the anti-bribery statute applies to the President). Whether the federal anti-bribery statute extends to the President remains unclear, though the OLC has concluded that it does. See Application of 28 U.S.C. § 458 to Presidential Appointments of Fed. Judges, 19 Op. O.L.C. 350, 357 n.11 (1995). The Constitution contemplates that bribery will establish grounds for impeachment. See U.S. CONST. art. II, § 4.

200. For example, before and during his period of public service, President Obama enjoyed U.S. and foreign copyright protection for his written works, and earned royalties from those works. See Michael Galvis, *Barack Obama's Net Worth on His 55th Birthday*, MONEY (Aug. 4, 2016), <http://www.time.com/money/4439729/barack-obama-net-worth-55th-birthday> (describing President Obama's prior earnings and noting his reporting of royalty income through 2015). If emoluments include all intangible government benefits, then the benefits associated with President Obama's continued U.S. copyright protection (or copyright renewals) would trigger violations of the Domestic Emoluments Clause. See, e.g., BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* (Broadway Books 2007) (2006) (under U.S.

In any event, if intangible government benefits provided to an entity can qualify as emoluments to a U.S. Officer, then the Foreign Emoluments Clause analysis would turn on whether President Trump provided services to the foreign government as an officer or employee of that government. If he did so, then, under parts one and two of the proposed business entity test, one would need to further examine whether any connection exists between the provision of the intangible government benefit and the services performed. If a connection exists, an emolument likely arises.

2. Acceptance of Emoluments

Even if a foreign government provides office-related compensation to President Trump through the Trump Organization, no constitutional problem arises unless President Trump accepts the emolument.²⁰¹ Under part three of the proposed business entity test, physical acceptance is not required.²⁰² Rather, acceptance can occur by enjoying control over the payment. This approach likely reaches more potential emoluments than does the Comptroller General's approach or the OLC's approach, which seem limited to actual transfers, whether via salary payments or entity distributions.

Once again, it is impossible to meaningfully apply the proposed business entity test without knowing the specific details of the Trump Organization entities. Where President Trump wholly owns an entity, whether directly or indirectly, we can probably attribute the entity's receipt of a payment to President Trump himself. Much like an amount paid to his personal bank account, President Trump would enjoy control over the funds and may face few impediments to its distribution, whether in the form of a dividend, salary, royalty, or other payment.

copyright, registered by Barack Obama in 2006). Continued copyright protection or renewals under foreign law would trigger violations of the Foreign Emoluments Clause. *See, e.g.*, BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* (Canongate Books 2008) (2006) (under U.K. copyright, registered by Barack Obama in 2006).

201. U.S. CONST. art. I, § 9, cl. 8.

202. The OLC has not addressed a circumstance where a U.S. Officer does not physically accept an emolument paid to an entity. Rather, its analysis has involved circumstances where the U.S. Officer would draw a salary or receive a distribution from an entity. It is thus unclear whether the OLC considers physical acceptance a condition to apply the Foreign Emoluments Clause. If it does, then, under the OLC's test, no emolument would arise in connection with President Trump's holdings in the Trump Organization, absent a distribution or payment.

If President Trump does not control an entity because he holds only a minority stake in it, it may be difficult to determine whether he retains control over a foreign government payment made to the entity. However, this sort of factual analysis may be unnecessary. If President Trump does not control an entity, it seems unlikely that a foreign government would make an office-related payment to it in the first place. Why would a foreign government transfer money to an entity if the President cannot get his hands on the funds, and why would the President agree to a compensation arrangement of this sort? Given the unlikelihood of compensation arrangements involving entities in which President Trump owns only a minority interest, interpretive ambiguities related to acceptance and control for that class of entities might be avoidable.²⁰³

If President Trump wholly owns an entity but does not control that entity because of the independent trust arrangement, perplexing questions may arise. In these circumstances, foreign governments might be motivated to make above-market payments to the entity, notwithstanding the trust arrangement. That is, a trustee might not tell President Trump about any above-market payments, but foreign governments themselves might. If President Trump becomes aware of a payment and performs services for the foreign government in exchange for that payment, then President Trump will have accepted an emolument. Even if no services were provided, the above-market payment would probably qualify as a prohibited gift or maybe even an impeachable bribe, if the payment were known and accepted by President Trump.

In some circumstances, President Trump may receive office-related payments but, to avoid the appearance of any improprieties, turn them over to the Treasury. One might argue that the President will have necessarily accepted a prohibited emolument, despite the subsequent transfer. But this interpretation would not comport with past practice, where U.S. Officers physically received foreign gifts and then, consistent with their constitutional obligations, sought congressional direction regarding

203. Foreign Gifts, *supra* note 147, involved office-related compensation transferred to a non-shareholder of an entity. Thus, it is at least possible that a minority shareholder or a mere employee may receive office-related compensation from a foreign government. However, in those cases, there should be additional available facts, such as actual payments or distributions, that would facilitate the analysis.

their acceptance or disposal.²⁰⁴ And general principles of common law embrace “disclaimers” of received property.²⁰⁵ Given this background, the receipt of an emolument by the President, later transferred to the U.S. Treasury, should not be treated as the prohibited acceptance of an emolument, though authorities on this issue remain sparse.²⁰⁶

C. A SLIGHT DETOUR: THE DOMESTIC EMOLUMENTS CLAUSE

Though this Article has focused on the Foreign Emoluments Clause, much of its analysis should extend to the Domestic Emoluments Clause. The two clauses share similar purposes and use similar phrasing, at least in terms of emoluments. Thus, for many of the reasons already discussed, the Domestic Emoluments Clause embraces office-related compensation and does not prohibit the receipt of all imaginable payments or benefits from the state or federal governments.

204. When a U.S. Officer receives a prohibited gift from a foreign government and Congress withholds its consent to its acceptance, Congress does not order the return or destruction of the gift. Rather, the gift must be deposited with the U.S. Treasury. See 5 U.S.C. § 7342(c)(1)(B)(i) (2012) (“[A] tangible gift of more than minimal value is deemed to have been accepted on behalf of the United States and, upon acceptance, shall become the property of the United States.”); see also Teachout, *supra* note 16, at 36, 42 (regarding the receipt of snuffboxes by Arthur Lee and Benjamin Franklin, “they clearly thought it satisfied the clause [under the Articles] to present the gift to Congress, and if Congress approved, they (and Congress) believed they could keep it without violating the rule. . . . According to John Quincy Adams, he asked friends in Holland how they interpreted the clause [under the Articles], and was told that the absolute language of the clause merely forbade the unilateral acceptance of gifts; they could be kept if the government granted permission.”); *id.* at 42 (detailing Congressional involvement and consent when Presidents Van Buren and Tyler received gifts from a foreign nation); Tillman, *Public Meaning*, *supra* note 23, at 190 (“Andrew Jackson received a gold medal from the South American revolutionary Simón Bolívar, President of Columbia. In 1830, Jackson submitted it to congressional control.”). The principle underlying this approach, under which received gifts belong to the United States as a whole, can plausibly extend to emoluments. See Kammerer, B-193562, 1979 WL 11736 at *1 (Comp. Gen. Dec. 4, 1979) (“[E]moluments received by [the U.S. Officer] are received on behalf of the United States.”). Thus, if President Trump receives an emolument and passes it along to the Treasury, he likely has not violated the Constitution, given the lack of the required acceptance.

205. See, e.g., RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 6.1(b) (AM. LAW INST. 2003) (describing a donee’s right to disclaim a gift).

206. See, e.g., Irish Citizenship, *supra* note 39, at 281 n.3 (surveying some historical practices and concluding that “[a]s a legal matter, the consent of Congress can be obtained either in advance or following receipt of anything covered by the Foreign Emoluments Clause”).

However, the relevant office or employment relationship under the two clauses *should* be different. The Domestic Emoluments Clause concerns itself with the compensation the President will receive for services provided in his official position with the United States.²⁰⁷ Thus, in testing whether a payment is an emolument, the relevant question is whether the payment relates to the services the President provides in his capacity as such. This orientation differs from the Foreign Emoluments Clause, which looks to whether a U.S. Officer receives compensation for services provided in a separate official or employment relationship with *another* government (that is, a foreign government).²⁰⁸

Unfortunately, the OLC missed this distinction when it applied the Domestic Emoluments Clause to President Reagan's retirement benefits. Its opinion, discussed earlier, examined the connection the retirement benefits had with Reagan's service as California Governor.²⁰⁹ The OLC should have examined whether those benefits had any connection to the services Reagan provided to the U.S. federal government as President.

When the Comptroller General addressed this issue, he confirmed the OLC's conclusion but followed the proper analytical path. Under his approach, emoluments could not refer to benefits that had "no connection, either direct or indirect, with the Presidency."²¹⁰ And under this line of analysis, no constitutional problem arose, given that Reagan earned his retirement benefits prior to his assumption of the Presidency, and that he received them on the same terms as any other similarly situated California public servant.²¹¹

207. U.S. CONST. art. II § 1, cl. 7 ("The President shall, at stated Times, *receive for his Services*, a Compensation . . .") (emphasis added); *see also* Griffin v. United States, 935 F. Supp. 1, 6 (D.D.C. 1995) (holding that President Nixon's presidential papers were private property, not "transferred to him by the government as compensation for his service in office," and the "proceeds derived from the sale of Mr. Nixon's presidential papers do not constitute an emolument").

208. *See supra* Part I.C.

209. *See supra* notes 86–95 and accompanying text.

210. Letter from Milton J. Socolar, Special Assistant to the Comptroller Gen., to George Mitchell, U.S. Senate (Jan. 18, 1983), <https://www.gao.gov/products/423723#mt=e-report>.

211. *Id.* The Comptroller General noted that the mere fact that the right to payments arose prior to taking office would not preclude their classification as emoluments, if the payments were connected to the Presidency. *See id.* at n.3 ("We should point out, however, that we would view as prohibited under [the Domestic Emoluments Clause] any type of additional benefit, contractual or otherwise, received by the President from a state or Federal body as having been

Like the Foreign Emoluments Clause, the Domestic Emoluments Clause presents ambiguities as one attempts to apply it to complex facts. However, a full exploration of its nuances is best left for another day. For now, one can assume that an emolument under the Domestic Emoluments Clause refers to only office-related compensation, not all payments or benefits provided by the federal or state governments.

CONCLUSION

The various limitations on the Foreign Emoluments Clause may leave one wondering whether it has any teeth. Whether it applies to this country's most important official, the President of the United States, remains unclear. And if Congress refuses to enforce the clause, it is doubtful that any private party would have standing to enforce it in court.²¹²

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story even questioned the fundamental premise of the clause. Though the Framers properly grounded the clause in a “just jealousy of foreign influence,” he wrote, whether it could “produce much effect . . . ha[d] been thought doubtful.”²¹³ A patriot, Justice Story believed, “will not be likely to be seduced” by potential emoluments, while a “corrupt” U.S. Officer would not bother with “constitutional restrictions” in the first instance.²¹⁴

With those limitations in mind, maybe one should not be surprised by the relative obscurity of the Foreign Emoluments

earned prior to his occupancy of the Office, yet made in anticipation of that event.”).

212. In some circumstances, the Comptroller General has attempted to give “substantial effect” to the Foreign Emoluments Clause by withholding the pay of a U.S. Officer who has received a prohibited emolument. *See Retired Uniformed Servs. Members Receiving Comp. from Foreign Gov'ts*, 58 Comp. Gen. 487, 490–91 (1979). However, the Comptroller General acknowledges that the Foreign Emoluments Clause does not specify a remedy for any violation. *See Breningstall, Dep't of the Air Force*, 53 Comp. Gen. 753, 758 (1974). The OLC has raised concerns with the soundness and legality of the Comptroller General's approach, especially regarding the President, whose salary the Constitution protects against diminution. *See President Reagan*, *supra* note 86, at 193. If a U.S. Officer's salary or retirement benefit is withheld on account of an alleged constitutional violation, such that she has suffered a discrete injury, she would meet the basic elements required to establish standing. *See Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992) (to establish standing, a plaintiff must generally satisfy requirements related to particularized injuries, causation, and redressability).

213. 3 STORY, *supra* note 17.

214. *Id.*

Clause. Congress, after all, has legislatively addressed many potential ethical conflicts faced by U.S. Officers.²¹⁵ And political or reputational mechanisms impose an important check on those who may otherwise be tempted to betray their public duties.

A President with ownership of a global business enterprise, however, may make one nervous about the efficacy of existing legal frameworks. The Constitution, whatever its many merits, was not designed to specifically address elected officials with worldwide business interests. As is often the case, the document must be applied to facts not envisioned by the Framers or the ratifying states.

But these potential concerns should not be addressed through giving constitutional terms an impermissible interpretation. Virtually every relevant legal authority establishes that emoluments under the Constitution refer to compensation received in exchange for services provided as an officer or employee, not payments or benefits of any sort. Legitimate questions may arise when one confronts complex facts, but a president's or U.S. Officer's acceptance of a payment from a foreign government does not, by itself, establish a constitutional violation. Instead, the facts must be examined closely, to determine whether a foreign government has directly made payments to a U.S. Officer in exchange for personal services, or has indirectly done so through above-market payments to a business controlled by him.

As importantly, the rule of law requires that constitutional provisions apply neutrally, to all persons who come within their scope.²¹⁶ But an expansive interpretation of the Foreign Emoluments Clause would inevitably justify the impeachment of many

215. See generally JACK MASKELL, CONG. RESEARCH SERV., ENTERING THE EXECUTIVE BRANCH OF GOVERNMENT: POTENTIAL CONFLICTS OF INTEREST WITH PREVIOUS EMPLOYMENTS AND AFFILIATIONS (2007) (providing an outline of issues, rules, regulations, and oversight tools for those conducting congressional oversight to conflicts of interests of executive branch employees); JACK MASKELL, CONG. RESEARCH SERV., FINANCIAL ASSETS AND CONFLICT OF INTEREST REGULATION IN THE EXECUTIVE BRANCH (2014).

216. To illustrate the rule of law problems, consider a simple example, where a statute criminalizes the importation of fruit, and numerous persons import tomatoes. It would violate the rule of law for a given court to hold that tomatoes were fruits for some criminal defendants but that they were vegetables for others. See, e.g., *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."); Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693 (1999) (emphasizing, among other things, that the rule of law con-

future U.S. Officers and would stain those who have previously served our country with honor. The resulting state of affairs—under which Congress could establish a constitutional violation for any U.S. Officer it disagreed with—may create risks far beyond those associated with a President who maintains extensive business interests. One should consider these consequences before rejecting the numerous legal authorities establishing an office-related definition of emoluments.

templates that a form of law be interpreted uniformly); *see also* *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (“[We decline to] establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.”). Returning to the Foreign Emoluments Clause, if one defines emoluments as reaching *all* payments from foreign governments, one cannot create case-by-case exceptions for this rule based on the subjective characteristics of a given U.S. Officer. To comply with rule of law principles, exceptions would have to be incorporated into the definition itself, and that definition would then have to apply uniformly to all U.S. Officers.