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Comment

INTERPRETING EMOLUMENTS TODAY: THE FRAMERS' INTENT AND THE "PRESENT" PROBLEM

BIANCA SPINOSA*

*"The \$200 million hotel inside the federally owned Old Post Office building has become the place to see, be seen, drink, network—even live—for the still-emerging Trump set. It's a rich environment for lobbyists and anyone hoping to rub elbows with Trump-related politicians"*¹

Two provisions of the United States Constitution, the Foreign and Domestic Emoluments Clauses ("the Clauses") historically received very little attention, but for the first time, they are being interpreted in federal court. Three separate lawsuits allege President Donald Trump's business interests are violating these Clauses.² These business interests stem from President Trump's role as a well-known global businessperson and founder of the Trump Organization before becoming President.³ The Trump Organization has ten hotels in its real estate portfolio.⁴ One of these hotels, the Trump International Hotel ("Trump Hotel"), is located in the Old Post Office Building within a mile of the White House.⁵ The Old Post Office Building has been on the National Register of Historic Places since 1973⁶

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1. Julie Bykowicz, *Donald Trump's Hotel May Be Political Capital of the Nation's Capital*, BOS. GLOBE (Mar. 5, 2017), <https://www.bostonglobe.com/news/nation/2017/03/05/donald-trump-hotel-may-political-capital-nation-capital/4qXAB8GFkMRkl0w9aLYRcL/story.html>.

2. See *infra* Section I.D.

3. See *Donald J. Trump: Founder, The Trump Organization*, TRUMP ORG., <https://www.trump.com/leadership/donald-j-trump-biography> (last visited Apr. 17, 2019).

4. *The Trump Story*, TRUMP ORG., <https://www.trump.com/hotels> (last visited Apr. 17, 2019).

5. Bykowicz, *supra* note 1.

6. *Old Post Office, Washington, D.C.*, GSA, <https://www.gsa.gov/historic-buildings/old-post-office-washington-dc> (last visited Apr. 17, 2019). The Old Post Office Building was built from 1892 to 1899 and originally housed the headquarters of the U.S. Post Office Department. *Id.*

and, like other historic properties the General Services Administration (“GSA”) maintains, can be rented.⁷ In 2013, the GSA leased the Old Post Office Building to Mr. Trump.⁸

In January 2017, President-Elect Trump’s personal attorneys announced Mr. Trump would turn over management of the Trump Organization’s “investment and business assets” to a trust in order to avoid conflicts of interest.⁹ According to a Morgan Lewis White Paper, President-Elect Trump planned to put all his Trump Organization investment and business assets into a trust his sons, Donald J. Trump, Jr. and Eric Trump, would manage.¹⁰ After the inauguration, President Trump’s lawyers informed the GSA he had placed his interest in the Old Post Office Building into a trust and was not managing that interest any longer.¹¹ In March 2017, the GSA determined President Trump was complying with the lease of the Old Post Office Building.¹² According to an Office of Inspector General report on the GSA, however, the agency did not give enough attention to constitutional issues raised about whether President Trump’s interests in the Old Post Office Building ran afoul of the Emoluments Clauses.¹³

Mr. Trump amassed a larger-than-life business and reputation before he became President, but does his interest in the Trump Hotel through the Donald J. Trump Revocable Trust (“the Trust”)¹⁴ amount to violations of the Foreign and Domestic Emoluments Clauses? The press have widely reported that foreign government officials stay at the luxury Hotel while in

The building is situated on a city block in the “Federal Triangle” area of the city along Pennsylvania Avenue. *Id.*

7. *Renting GSA Property*, GSA, <https://www.gsa.gov/real-estate/gsa-properties/renting-gsa-property> (last visited Apr. 19, 2019).

8. See Jessica Taylor & Peter Overby, *Federal Watchdog Finds Government Ignored Emoluments Clause with Trump Hotel*, NPR (Jan. 16, 2019), <https://www.npr.org/2019/01/16/685977471/federal-watchdog-finds-government-ignored-emoluments-clause-with-trump-hotel>; OFFICE OF INSPECTOR GEN., U.S. GEN. SERVS. ADMIN., *EVALUATION OF GSA’S MANAGEMENT AND ADMINISTRATION OF THE OLD POST OFFICE BUILDING LEASE 2* (2019), https://www.gsaig.gov/sites/default/files/ipa-reports/JE19-002%20OIG%20EVALUATION%20REPORT-GSA%27s%20Management%20%26%20Administration%20of%20OPO%20Building%20Lease_January%2016%202019_Redacted.pdf. “Donald J. Trump” and the “Trump Old Post Office Member Corp.,” a Delaware corporation Trump wholly owned, was the tenant. *Id.*

9. MORGAN, LEWIS & BOCKIUS LLP, *CONFLICTS OF INTEREST AND THE PRESIDENT 1, 2* (2017), <https://assets.documentcloud.org/documents/3400512/Morgan-Lewis-Trump-Trust-White-Paper.pdf> [hereinafter MORGAN LEWIS WHITE PAPER].

10. *Id.* at 2.

11. OFFICE OF INSPECTOR GEN., *supra* note 8, at 8.

12. *Id.* at 10.

13. *Id.* at 5.

14. MORGAN LEWIS WHITE PAPER, *supra* note 9, at 2; *Answer of the President in His Official Capacity at 8, District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018), 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-1596-PJM).

Washington, D.C.¹⁵ The Attorneys General in Maryland and Washington, D.C. filed a lawsuit against President Trump, in his official capacity, alleging violations of the Foreign and Domestic Emoluments Clause.¹⁶ According to the lawsuit, foreign government officials said they chose to stay at the Trump Hotel because it is associated with the President.¹⁷ Maryland and Washington, D.C. Attorneys General provided a laundry list of the alleged violations involving the Trump Hotel in their Amended Complaint in *District of Columbia v. Trump*,¹⁸ including an event the Embassy of Kuwait hosted, a “National Day celebration,” at the Trump Hotel on February 22, 2017.¹⁹ The Embassy of Kuwait allegedly paid from \$40,000 to \$60,000 in connection with the celebration at the Trump Hotel.²⁰

While President Trump officially transferred management interests of the Trump Organization to the Trust in January 2017,²¹ the President remained informed about at least some of the Trump Organization’s business activities through the Trust.²² Before taking office, Mr. Trump stated the Trump Organization would donate all profits earned from foreign governments to the U.S. Treasury Department.²³ On February 25, 2019, the Trump Organization announced it had donated nearly \$200,000 to the U.S. Treasury in order not to retain profits from foreign governments using its properties.²⁴ In addition, the Trump Organization agreed not to make any

15. *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 734 (D. Md. 2018) (citing Amended Complaint at 14–16, *Trump*, 291 F. Supp. 3d 725 (No. 8:17-cv-1596-PJM)); Bykowicz, *supra* note 1; Julia Harte, *Kuwait Could Pay up to \$60,000 for Party at Trump Hotel in Washington*, REUTERS (Feb. 25, 2017), <https://www.reuters.com/article/us-usa-trump-hotel-idUSKBN1640LE>; Jackie Northam, *Kuwait Celebration at Trump Hotel Raises Conflict of Interest Questions*, NPR (Feb. 25, 2017), <https://www.npr.org/sections/parallels/2017/02/25/517039323/kuwait-celebration-at-trump-hotel-raises-conflict-of-interest-questions>.

16. Amended Complaint at 2, *Trump*, 291 F. Supp. 3d 725 (No. 8:17-cv-1596-PJM).

17. *Trump*, 291 F. Supp. 3d at 734 (citing Amended Complaint, *supra* note 16).

18. 291 F. Supp. 3d 725 (D. Md. 2018).

19. Amended Complaint, *supra* note 16, at 15.

20. *Id.*

21. *See supra* notes 10–11 and accompanying text.

22. *See Trump*, 291 F. Supp. 3d at 733–34; Answer of the President, *supra* note 14, at 17. According to the Answer, President Trump receives information about the Trust’s assets limited to “total profit or loss.” Answer of the President, *supra* note 14, at 17. The Trust “directly or indirectly owns all of the President’s investment and business assets,” the trustees control the trust assets and distribution, and “the President is the beneficiary of the Trust.” *Id.* at 16.

23. *Trump*, 291 F. Supp. 3d at 733.

24. Bernard Condon, *Trump Org Donates Nearly \$200K to Cover Foreign Profits*, ASSOCIATED PRESS (Feb. 25, 2019), <https://www.apnews.com/a4349ac80a7048bdb61f017fffd9623f>. “The Trump Organization said a check for \$191,538 sent to Treasury represents profits from embassy parties, hotel stays and other foreign government spending at its Washington Hotel and other properties” *Id.*

foreign business deals while he was in office.²⁵ But are these efforts enough?

Ethics experts from both President Barack Obama's and President George W. Bush's administrations have called on the President to do more than put his business interests and assets in a trust his sons control.²⁶ According to Norman L. Eisen, the chair of the government watchdog group Citizens for Responsibility and Ethics in Washington ("CREW")²⁷ and the White House Special Counsel for Ethics and Government Reform under President Obama; Richard W. Painter, the Associate Counsel to President G.W. Bush and chief ethics lawyer; and Laurence H. Tribe, a Constitutional Law professor at Harvard University, "Never in American history has a president . . . presented more conflict of interest questions and foreign entanglements than Donald Trump."²⁸

President Trump's business practices and the Trust formation drew attention to the Emoluments Clauses and led to ongoing litigation regarding potential violations of those Clauses.²⁹ This Comment will contribute to the ongoing conversation regarding the meaning and reach of the Emoluments Clauses³⁰ by asking the question: What theory or theories of constitutional interpretation should courts use to interpret the meaning of the Foreign and Domestic Emoluments Clauses? Rather than take a position on whether President Trump is violating the Emoluments Clauses, this Comment will analyze the courts' reasoning and explore how different theories of constitutional interpretation have and could apply to the Emoluments Clause provisions of the Constitution. This Comment will analyze how courts in the emoluments litigation adopted an originalist and purposive approach to interpreting the provisions, focusing on what the Emoluments Clauses meant at the time of the Founding.³¹

25. *Id.*; see MORGAN LEWIS WHITE PAPER, *supra* note 9, at 2, 3 (describing how the Trump Organization would not be making any new deals, the Trust Agreement does not allow any new foreign deals while Mr. Trump is President, and the Trust and the Trump Organization will not "engag[e] in any new deals with respect to the use of the 'Trump' brand . . . associated with the Trump Organization or Donald J. Trump in any foreign jurisdictions").

26. NORMAN L. EISEN ET AL., BROOKINGS INST., THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 1 (2016), <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/>. See *supra* notes 9–10 and accompanying text.

27. Eisen's watchdog group, CREW, is a plaintiff in the Emoluments Clause case in New York. Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 180 (S.D.N.Y. 2017).

28. EISEN ET AL., *supra* note 26, at 1.

29. See *infra* Section I.D.

30. See Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 34 (2012) (arguing that when the Framers included the Foreign Emoluments Clause in the Constitution they were distancing themselves from European diplomatic culture to avoid corruption); see also *infra* note 49 and accompanying text.

31. See *infra* Sections II.A.1, II.A.4.

This Comment will also argue that courts can reach the same result of finding that the plaintiffs have plausibly stated a claim of an Emoluments Clause violation by applying the Clauses' anti-corruption purpose³² to the world we live in today through a living approach to constitutional interpretation.³³ While many of the Justices on the Supreme Court are originalists, the *National Law Journal* reported Justice Kagan said some Justices think “‘original understanding’ is the ‘alpha and omega of every constitutional question,’ . . . but ‘there are other people on this bench who do not.’”³⁴ Finally, this Comment will analyze how an abstract, anti-corruption principle embedded in the Clauses can result in a living, moral reading of the provisions.³⁵ This Comment will show how courts need not be confined to one theory of constitutional interpretation to reach the same conclusion that the Emoluments Clauses are provisions that guard against corruption and undue foreign influence. In support of this argument, this Comment will examine the text of the Constitution's Foreign and Domestic Emoluments Clauses, the history and purpose of the Clauses, early cases involving emoluments, executive branch precedent, and the recent litigation.³⁶

I. BACKGROUND

Until President Trump, no President or other high-level U.S. official had faced a violation of the Foreign or Domestic Emoluments Clauses.³⁷ Meaning, no federal judge has needed to interpret the meaning of the word *emoluments*, which is undefined in the Clauses.³⁸ Professor John Mikhail of the Georgetown University Law Center said, “[I]t comes as a surprise to many people that there are terms in the Constitution . . . that . . . have never

32. See *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 53 (D.D.C. 2018) (“The Clause was intended by the Framers to guard against corruption and foreign influence.”); *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 896 (D. Md. 2018) (finding the historical record reflects an “intention that the Emoluments Clauses function as broad anti-corruption provisions.”); *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d at 188 (finding that based on the history, “there can be no doubt” the Foreign Emoluments Clause’s purpose “was to prevent official corruption and foreign influence”); see also EISEN ET AL., *supra* note 26; Deborah Samuel Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & POL’Y 63, 73 (2018); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 353 (2009); *infra* Section II.A.

33. See *infra* Section II.B.

34. Marcia Coyle, *Justice Kagan Throws Shade on Her Originalist Colleagues*, NAT’L L.J. (Dec. 6, 2018), <https://www.law.com/nationallawjournal/2018/12/06/justice-kagan-throws-shade-on-her-originalist-colleagues/?sreturn=20181126140203>.

35. See *infra* Section II.C.

36. See *infra* Section I.A–D.

37. Peter Overby, *Federal Lawsuit Against President Trump’s Business Interests Allowed to Proceed*, NPR (July 25, 2018), <https://www.npr.org/2018/07/25/632300960/federal-lawsuit-against-president-trumps-business-interests-allowed-to-proceed>.

38. *Id.*

been authoritatively adjudicated.”³⁹ In the absence of a body of constitutional law on the Clauses, courts have looked to the text of the Constitution and Founding-era dictionaries to ascertain the meaning of the word emoluments.⁴⁰

The plain language of the Foreign Emoluments Clause is found in Article I, Section 9, Clause 8 of the Constitution. It provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.⁴¹

The plain language of the Domestic Emoluments Clause, found in Article II, Section 1, Clause 7, provides:

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.⁴²

While the meaning of some words in the Clauses such as, *present*, *Office*, *Title*, and *Compensation* are fairly straightforward, the meaning of the word *emoluments* is less clear.⁴³

Section I.A will evaluate the plain language and purpose of the Foreign and Domestic Emoluments Clauses and review the history of their inclusion in the Constitution.⁴⁴ Because emoluments is an archaic word, the word’s meaning is open to interpretation and at the heart of the disputes. The plaintiffs in the recent emoluments litigation argue emoluments has a broad meaning encompassing any profit, gain, or advantage.⁴⁵ President Trump argues emolument has a narrow, office-related definition—something that is accepted in exchange for performing a service or favor.⁴⁶ Section I.B will discuss early cases involving emoluments, and Section I.C. will analyze executive branch precedent wherein the Office of Legal Counsel (“OLC”) has construed the Clauses broadly as anti-corruption provisions.⁴⁷ Section I.D. will describe the three pieces of litigation involving

39. *Id.*

40. *See infra* Section I.D.

41. U.S. CONST. art. I, § 9, cl. 8.

42. U.S. CONST. art. II, § 1, cl. 7.

43. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 886 (D. Md. 2018) (interpreting the definition of an emolument after both parties offered different textual interpretations of the word).

44. *See infra* Section I.A.

45. *See infra* note 214–216 and accompanying text.

46. *See infra* notes 218–221 and accompanying text.

47. *See infra* Sections I.B, I.C.

the Foreign and Domestic Emoluments Clauses working their way through federal courts, and the different outcomes of the cases.⁴⁸

A. *Gold Snuff Boxes and Diamond-Encrusted Portraits: The Text and Historical Context of the Emoluments Clauses*

Many scholars agree that historical evidence at the time of the Founding indicates, at least to some degree, the motivation for adding the Foreign Emoluments Clause to the Constitution was to avoid corrupting influences.⁴⁹ Even before the separate states unified under the U.S. Constitution, a clause in Article VI of the Articles of Confederation of 1781 contained language about restrictions on U.S. officers accepting a present, gift, or emolument from a foreign entity:

No state without the Consent of the united states, in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the united states in congress assembled, or any of them, grant any title of nobility.⁵⁰

During the Federal Convention of 1787, James Madison wrote that South Carolina Delegate Charles Pinckney “urged the necessity of preserving foreign Ministers [and] other officers of the U.S. independent of external influence.”⁵¹ According to Madison, Delegate Pinckney suggested inserting a clause with the following language: “No person holding any office of profit or trust under the U.S. shall without the consent of the Legislature, accept of any present, emolument, office or title of any kind whatever, from

48. See *infra* Section I.D.

49. See Teachout, *supra* note 30, at 30 (discussing how the Founders were wary of officers accepting gifts because they could “influence” the officer); see also Sills, *supra* note 32, at 74 (describing how the Framers did not want officials to “be persuaded, either consciously or subconsciously, to alter their decisions to benefit foreign powers”); EISEN ET AL., *supra* note 26, at 4–5 (describing how the Foreign Emoluments Clause was not meant to apply only to diplomats and was meant to be “a broader anti-corruption measure.”); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW L. REV. COLLOQUY 180, 180 (2013) (agreeing with Professor Teachout that the purpose of the Foreign Emoluments Clause was to prevent corruption). But see Amandeep S. Grewal, *The Purposes of the Foreign Emoluments Clause*, 59 S. TEX. L. REV. 167, 168 (2017) (discussing how historical materials from the founding era indicate that the Framers intended the Foreign Emoluments Clause to “prevent corruption,” but cautions against taking a broad purposive approach to interpretation).

50. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

51. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Ferrand ed., 1911).

any King, Prince[,] or foreign State.”⁵² The provision passed “nem: contrad.”⁵³

According to Professor Zephyr Teachout’s article, *Gifts, Office, and Corruption*, the Founders were following the mold of a rule made in the Dutch Republic in 1651, more than 100 years before the adoption of the U.S. Constitution.⁵⁴ The rule banned Dutch foreign ministers from receiving “any presents, directly or indirectly, in any manner or way whatever.”⁵⁵ The Dutch rule was considered somewhat “radical” by the day’s standards, as gifts from foreign governments were a typical part of diplomacy.⁵⁶ As an example of the European tradition in diplomacy, a letter from Benjamin Franklin’s grandson, William Temple Franklin to Thomas Jefferson in 1790, described the European custom of gift giving when an Ambassador or other public Minister left a court.⁵⁷ The European country would give the diplomat a present according to how highly they were respected, or to show respect to their sovereign nation, and sometimes a present was given due to the importance of the business for which the diplomat had visited.⁵⁸ William Temple Franklin wrote these presents consisted of “[j]ewels, [p]late, [t]apestry, [p]orcelain, and sometimes money.”⁵⁹ A foreign government’s personal respect for a diplomat or the importance of the negotiations could impact the gift the foreign government gave the diplomat.⁶⁰ For example, Franklin wrote that his grandfather, whom King Louis XVI of France highly respected, received a gold snuff box from the King enameled with “a large miniature of the King set with four hundred and eight [d]iamonds of a beautiful water, forming a wreath round the picture and a [c]rown on the top.”⁶¹

52. *Id.*

53. *Id.*

54. Teachout, *supra* note 30, at 34; *see also* EISEN ET AL., *supra* note 26, at 4 (citing Teachout, *supra* note 32, at 353).

55. Teachout, *supra* note 30, at 34 (quoting 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 651 (1906)).

56. *Id.*

57. Letter from William Temple Franklin to Thomas Jefferson (Apr. 27, 1790), https://www.loc.gov/resource/mtj1.012_0397_0400/?sp=1. Teachout cites this letter in her account of the Emoluments Clauses’ history. *See* Teachout, *supra* note 30, at 35.

58. Letter from William Temple Franklin to Thomas Jefferson, *supra* note 57; Teachout, *supra* note 30, at 35 (describing a similar incident involving King Louis XVI of France’s habit of giving jeweled snuff boxes to diplomats, including giving one such box to Arthur Lee, who wrote that he was worried accepting “might excite some murmurs” (quoting 2 RICHARD HENRY LEE, LIFE OF ARTHUR LEE 143 (Boston, Wells, & Lilly 1829)).

59. Letter from William Temple Franklin to Thomas Jefferson, *supra* note 57.

60. *Id.*

61. *Id.*

During the constitutional ratification debates in Virginia, Governor Edmund Randolph said the Clause was added to “prevent corruption.”⁶² Randolph explained that people “have a natural inherent right of receiving emoluments from anyone, unless they be restrained by the regulations of the community.”⁶³ Randolph did not define emoluments.⁶⁴ However, he described an “accident” that contributed to producing the restriction, where “[a] box was presented to our ambassador by the king of our allies.”⁶⁵ This is likely referring to the bejeweled snuff box given to Benjamin Franklin.⁶⁶ “It was thought proper,” Randolph explained, “in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any *emoluments* from foreign states.”⁶⁷ Randolph was illustrating the King of France’s gift of a gold snuff box to Franklin had the potential to corrupt during a time when “we were in harmony with the king of France.”⁶⁸ Randolph went on to say, “if, at that moment . . . we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the [Revolutionary] war.”⁶⁹ Governor Randolph was worried not only about the actual impact receiving the gold snuff box would have on Ambassador Franklin, but also about the impact receiving the gold snuff box without the permission of Congress could project to others who “had supposed” the gift was corrupting.⁷⁰

As further indication the Framers were concerned about the potential of undue foreign influence, the Framers debated in the 1787 Convention about where to vest the power to declare war and sign treaties with other nations.⁷¹ Some members wanted the President alone to possess the power to make treaties, since they thought the President “would not dare” to make a treaty that was not in the best interest of the country and “from his situation he was more interested in making a good treaty than any other man in the

62. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 465–66 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1836).

63. *Id.*

64. *Id.*

65. *Id.* at 465.

66. *See supra* notes 57–61 and accompanying text.

67. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 62, at 465.

68. *Id.*

69. *Id.* at 465–66.

70. *Id.* at 465; *see EISEN ET AL.*, *supra* note 26, at 7.

71. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 263–65 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1881). The Treaty Clause of the Constitution says the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. CONST. Art II, § 2, cl. 2.

United States.”⁷² Delegate Pinckney, however, was wary of giving the President the sole power to make a treaty.⁷³ He thought a President could be more susceptible to “foreign bribery and corruption” than a King, because unlike a monarch, “[the President’s] office is not to be permanent, but temporary; and he might receive a bribe which would enable him to live in greater splendor in another country than his own.”⁷⁴ The Framers eventually agreed to give the President the power to propose treaties because the President is the “head of the Union, and to vest the Senate . . . with the power of agreeing or disagreeing to the terms proposed.”⁷⁵

The Framers were also concerned about the potential for undue influence and pressures from within the different branches of government.⁷⁶ In the *Federalist*, Alexander Hamilton wrote that without careful consideration to the President’s salary, “the separation of the executive from the legislative [branch] would be merely nominal and nugatory.”⁷⁷ Hamilton explained that if the legislature had discretion over the “salary and emoluments” of the President, they “could render him as obsequious to their will as they might think proper to make him.”⁷⁸ They could either hold back salary and emoluments or “tempt” the President with extreme generosity “to surrender at discretion his judgment to their inclinations.”⁷⁹

Hamilton thought the President should receive a set salary that would not change during their term.⁸⁰ Hamilton also wrote, “neither the Union nor any of its members” would be allowed to give the President “any other emolument,” nor would the President be allowed to receive an emolument other than a set salary.⁸¹ Hamilton’s writings on the President’s compensation in the *Federalist* mirrors the language of the Domestic Emoluments Clause of the Constitution, which provides that the President “shall not receive within that Period any other Emolument from the United States, or any of [the States].”⁸² Hamilton’s idea was that a set salary, with no other government benefits, would make it less likely for other branches of government, or the states, to exert control over the president because “[t]hey can neither weaken his fortitude by operating on his necessities nor corrupt

72. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 71, at 264.

73. *Id.*

74. *Id.*

75. *Id.* at 265.

76. See THE FEDERALIST No. 73, at 403 (Alexander Hamilton) (Colonial Press rev. ed. 1901) (discussing the provision for the support of the executive branch).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 404.

81. *Id.*

82. U.S. CONST. art. II., § 1, cl. 7.

his integrity by appealing to his avarice.”⁸³ To further this purpose and ensure the President received a set salary, the Domestic Emoluments Clause provides: “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected”⁸⁴ The Framers were concerned about potentially corrupting forces of undue influence, both at home⁸⁵ and abroad.⁸⁶

B. Early Cases Involving Emoluments Issues

Some early cases shed a light on how courts have interpreted the meaning of the word emoluments in the context of federal officers, but not in the specific context of the Emoluments Clauses.⁸⁷ In *Hoyt v. United States*,⁸⁸ a customs collector owed more than \$200,000 to the U.S. Treasury.⁸⁹ A 1799 Treasury Act⁹⁰ stated that customs collectors’ duties included receiving all money paid for duties and taking all bonds for securing the payments.⁹¹ An Act of 1822⁹² gave collectors “compensation in addition to fees and emoluments.”⁹³ The United States Supreme Court explained that the Act of 1822 “limits the *emoluments* of an office.”⁹⁴ *Hoyt* defined emoluments in the context of the statute narrowly: “What is an emolument? It is a compensation for the performance of an official duty.”⁹⁵ The Court referenced an 1839 statute⁹⁶ making appropriations for civil and diplomatic government expenses as providing that “no officer . . . whose salaries, or whose pay or emoluments, is or are fixed by law and regulations, shall receive any

83. THE FEDERALIST No. 73, at 404 (Alexander Hamilton) (rev. ed. 1901).

84. U.S. CONST. art. II, § 1, cl. 7.

85. See *supra* notes 76–79 and accompanying text.

86. See *supra* notes 67–70 and accompanying text.

87. See *United States v. MacMillan*, 253 U.S. 195, 205 (1920) (discussing whether, under a statute, a sum a clerk collected for his services was a fee or emolument); *McLean v. United States*, 226 U.S. 374, 383 (1912) (discussing how emoluments under a statute is the perquisites of office); *Hoyt v. United States*, 51 U.S. 109, 131 (1850) (discussing how the meaning of emoluments in the context of an early 1800s statute is compensation for an officer’s performance of a duty). The Department of Justice representing President Trump in the emoluments litigation references these cases in support of their argument that emoluments has a narrow, office-related meaning. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 890 (D. Md. 2018); see also Sills, *supra* note 32, at 92 (describing how the word emoluments was narrowly interpreted in *Hoyt* in the context of a statute, not an emoluments constitutional provision).

88. 51 U.S. 109 (1850).

89. *Id.* at 132.

90. Act of March 2, 1799, ch. 22, § 21, 1 Stat. 627, 642.

91. *Id.*

92. Act of May 7, 1822, ch. 62, § 8, 3 Stat. 684, 684.

93. *Hoyt*, 51 U.S. at 131; § 8, 3 Stat. at 684.

94. *Hoyt*, 51 U.S. at 131.

95. *Id.*

96. Act of March 3, 1839, ch. 82, § 3, 5 Stat. 339, 349.

extra allowance, or compensation, in any form whatever.”⁹⁷ The Court in *Hoyt* held these Acts were a “system of legislation” against public officers’ claims for extra compensation and “effectively extinguish[ed] them” except under Congress’ authority.”⁹⁸

In *United States v. MacMillan*,⁹⁹ the Court considered whether a clerk for the United States District Court for the Northern District of Illinois owed interest on the average daily balances of a bank account.¹⁰⁰ The bank account consisted of the “fees and emoluments of [the clerk’s] office” and money litigants gave the clerk for court costs.¹⁰¹ The government alleged that the interest on the bank account was “a fee or emolument of the office of the clerk,” and he should have accounted for it as public money of the United States.¹⁰² The Court, however, held the fees and emoluments the clerk collected and deposited into the bank was not money or property belonging to the United States,¹⁰³ and the interest on the sum of the fees and emoluments was not an emolument because of “the individual character of the bank deposit.”¹⁰⁴ The Court cited *United States v. Hill*¹⁰⁵ in determining that in this context, “a fee or emolument” is money a clerk received “for a service . . . pertaining to their office” or for “official services.”¹⁰⁶

In *McLean v. United States*,¹⁰⁷ Major McLean served in the Adjutant General’s department from 1875 until he died in 1884.¹⁰⁸ He was not paid during the eleven years between his resignation in 1864 and his reinstatement in 1875.¹⁰⁹ The Auditor of the War Department gave McLean’s widow the “pay and personal subsistence” the government owed her husband, but did not give the widow forage for her two horses and servants’ pay.¹¹⁰ The Court held the government owed McLean’s widow the back pay and emoluments that the government would have paid her late husband.¹¹¹ The Court explained the statute required accounting officers to pay all back pay and emoluments that would have been payable to her husband because the words “embrace all the compensation, perquisites and dues to which he was

97. *Hoyt*, 51 U.S. at 141.

98. *Id.* at 142.

99. 253 U.S. 195 (1920).

100. *Id.* at 199.

101. *Id.*

102. *Id.*

103. *Id.* at 204.

104. *Id.* at 204–05.

105. 120 U.S. 169 (1887).

106. *United States v. MacMillan*, 253 U.S. 195, 205 (1920) (citing *United States v. Hill*, 120 U.S. 169 (1887)).

107. 226 U.S. 374 (1912).

108. *Id.* at 377.

109. *Id.*

110. *Id.* at 377–78.

111. *Id.* at 381.

entitled as an officer,” including the widow’s claim for the forage for horses and servants’ pay.¹¹² The Court found the words of the statute did not make a distinction between pay and emoluments.¹¹³ The Court explained the word emoluments was the most adequate word that could have been used because “[i]t especially expresses the perquisites of an office.”¹¹⁴

In *Hoyt*, *MacMillan*, and *McLean*—cases that involved federal officials—the Supreme Court defined emoluments as the fees, dues, and compensation an officer received through performing their official duties.¹¹⁵ For example, interest on fees and emoluments was not deemed to be an emolument of office in *MacMillan* because of the “individual character of the bank deposit,”¹¹⁶ so the Court differentiated between services that were performed pertaining to a clerk’s office and services that were not. While shedding some light on how the Supreme Court has interpreted the word emoluments, the Court, in these three cases, was not interpreting emoluments in the context of the emoluments constitutional provisions.¹¹⁷

C. Executive Branch Precedent and the Emoluments Clauses

Executive branch practice and precedent has interpreted the Emoluments Clauses as it relates to the Office of the President for more than a hundred years.¹¹⁸ Every President since George Washington has turned to the Attorney General for “legal advice regarding a proposed action or policy.”¹¹⁹ The Attorney General interprets law within the Executive Branch.¹²⁰ The Attorney General delegates to the Office of Legal Counsel (“OLC”) the task of giving legal advice to the President and all executive branch agencies.¹²¹

As far back as 1902, the Acting U.S. Attorney General at the time, Henry M. Hoyt, contemplated the purpose of the Foreign Emoluments Clause, stating its language “has been viewed as particularly directed against every kind of influence by foreign *governments* upon officers of the

112. *Id.* at 379, 381.

113. *Id.* at 381–82.

114. *Id.* at 383.

115. *See supra* notes 94–95, 103, 112–114.

116. *United States v. MacMillan*, 253 U.S. 195, 204–05 (1920).

117. *See Sills, supra* note 32, at 92.

118. *See infra* notes 122–127.

119. *See* Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 220, 235–36 (2013) (discussing how the OLC provides legal advice to the President and solves disputes over legal questions within the Executive Branch).

120. *Id.* at 244.

121. *Office of Legal Counsel*, U.S. DEP’T OF JUST., <https://www.justice.gov/olc> (last visited Sept. 18, 2018).

United States, based on our historic policies as a nation.”¹²² Hoyt found a gift from Prince Henry of Prussia would not be allowed without Congress’s permission, even though he was not a reigning prince, because the Prince could potentially give “an office or title of nobility or decoration, which would clearly fall under the prohibition.”¹²³ Similarly, in 1964, the OLC analyzed the purpose of the Domestic Emoluments Clause in answering whether President Kennedy’s estate could receive naval retirement pay that Kennedy earned while President.¹²⁴ The OLC explained the Domestic Emoluments Clause “has to be interpreted in the light of its basic purposes and principles,” which is “to prevent Congress or any of the states from attempting to influence the President through financial awards or penalties.”¹²⁵

In *President Reagan’s Ability to Receive Retirement Benefits from the State of California*,¹²⁶ the OLC determined that President Reagan’s would not violate the Domestic Emoluments Clause by receiving state retirement benefits from the State of California.¹²⁷ In analyzing the Domestic Emoluments Clause, the OLC started with the text, describing the word emolument as “an archaic term” with two dictionary definitions.¹²⁸ Looking to contemporary dictionaries, the Oxford English Dictionary defined an emolument as a “profit or gain arising from station, office, or employment: reward, remuneration, salary,” and gave the “obsolete meanings of advantage, benefit, comfort.”¹²⁹ Next, the OLC analyzed the history and purpose of the Clause, finding the Clause’s inclusion in the Constitution was motivated by Hamilton’s writings on a fixed presidential salary in the *Federalist No. 73*, and the incident where the King of France gave an extravagant snuff box to Benjamin Franklin.¹³⁰ Based on historic data, the OLC determined an emolument had to do with “payments which have a potential of influencing or corrupting the integrity of the recipient.”¹³¹ This interpretation is broader

122. Gifts from Foreign Prince–Officer–Constitutional Prohibition, 24 Op. Att’y Gen. 116, 117 (1902).

123. *Id.* at 118 (“[E]ven a simple remembrance of courtesy . . . falls under the inclusion of ‘any present . . . of any kind whatever.’” (quoting U.S. CONST. art. I, § 9, cl. 8)). In this case, the question was whether gifts of portraits from the Prince of Prussia to the Navy Department, the Military Academy, and the Naval Academy would violate the Foreign Emoluments Clause. *Id.* at 117.

124. *President Reagan’s Ability to Receive Ret. Benefits from the State of Ca.*, 5 Op. O.L.C. 187, 189 (1981) (citing Letter from Assistant Attorney Gen. Schler to Gen. Counsel Keller, Gen. Accounting Office (Oct. 13, 1964)).

125. *Id.* at 189.

126. 5 Op. O.L.C. 187 (1981).

127. *Id.* at 190.

128. *Id.* at 188.

129. *Id.* at 188. The OLC noted that *Webster’s Third New International Dictionary* contained similar definitions. *Id.*

130. *Id.*; see *supra* Section I.A.

131. 5 Op. O.L.C. at 188.

than the office-related definition the Court used for other federal officers in *Hoyt*, *MacMillan*, and *McLean*.¹³² The OLC concluded Reagan's retirement benefits from the State of California were not emoluments under the Constitution because Reagan had "acquired a vested right" to those benefits six years before he became President.¹³³ According to the OLC, the retirement benefits were not emoluments in the context of the Emoluments Clauses because "such receipt does not violate the spirit of the Constitution because they do not subject the President to any improper influence."¹³⁴ Essentially, the OLC found that because the retirement benefits were not gifts¹³⁵ and were fully vested, they did not have the *potential* to unduly influence or corrupt President Reagan.¹³⁶ The OLC's opinion in the case of Reagan's retirement benefits is similar to the approach taken in earlier opinions,¹³⁷ where the OLC interpreted the purpose of the Clauses and asked whether the benefit had the potential of corrupting or unduly influencing the recipient.¹³⁸

In *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*,¹³⁹ the OLC considered whether an employee of the Nuclear Regulatory Commission who worked with the Mexican government could do short-term work with an American consulting firm that received payments from the Mexican government.¹⁴⁰ The OLC found the employee of the Nuclear Regulatory Commission would be in violation of the Foreign Emoluments Clause if he received payments from an American consulting firm for his services in connection with the construction of a power plant in Mexico if the Mexican government was the actual source of payment.¹⁴¹ The OLC reasoned the Mexican government had "ultimate control, including selection of personnel."¹⁴²

In *Applicability of the Emoluments Clause to Non-Government Members of ACUS*,¹⁴³ the OLC found profits an Administrative Conference¹⁴⁴

132. *See supra* Section I.B.

133. 5 Op. O.L.C. at 191, 192.

134. *Id.* at 192.

135. *Id.* at 191.

136. *Id.* at 192.

137. *See supra* text accompanying notes 122–125.

138. 5 Op. O.L.C. at 192.

139. 6 Op. O.L.C. 156 (1982).

140. *Id.*

141. *Id.* at 158–59.

142. *Id.* at 158. The OLC suggested that the Emoluments Clauses were intended to have a broad reach beyond diplomats and ambassadors: "Even though the Framers may have had the example of high officials such as 'foreign Ministers' in mind when discussing the clause . . . its policy would appear to be just as important as applied to subordinates." *Id.*

143. 17 Op. O.L.C. 114 (1993).

144. The Administrative Conference is made up of no more than 100 members, including "a Chairman appointed by the President with the advice and consent of the Senate, the chair-

member earned through a partnership that included money the firm received “from representing its foreign governmental clients” turned the partnership into what “would in effect be a conduit for that [foreign] government.”¹⁴⁵ The OLC noted, “some portion of the member’s income could fairly be attributed to a foreign government,” and this income was not allowed under the Foreign Emoluments Clause.¹⁴⁶ The 1993 OLC opinion interpreted emoluments as encompassing more than gifts; emoluments could be any payment or benefit received from a foreign government, including proceeds from a partnership, if that money came from a foreign government.¹⁴⁷

In *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*,¹⁴⁸ the OLC determined the Nobel Peace Prize, which the Nobel Committee awards, was not an emolument under the Foreign Emoluments Clause.¹⁴⁹ The OLC determined the Nobel Committee was not a “King, Prince, or foreign State,” and the Nobel Committee did not have the kind of ties to foreign governments that would make it an instrumentality of a foreign state.¹⁵⁰ The OLC described how going back to 1906, six federal officers accepted the Nobel Peace Prize during the time they were in office without the consent of Congress.¹⁵¹ The OLC used this historical record as reinforcement that many acceptances of the Nobel Peace Prize were not in violation of the Foreign Emoluments Clause.¹⁵² “To be sure,” the OLC explained, “this long, unbroken practice of high federal officials accepting the Nobel Peace Prize without congressional consent cannot dictate the outcome, . . . [b]ut we do think such practice strongly supports the conclusion that the President’s receipt of the Nobel Peace Prize would not conflict with the Emoluments Clause.”¹⁵³

The OLC opinions demonstrate that the Executive Branch operated under the understanding that the Foreign Emoluments Clause applied to the Office of the Presidency.¹⁵⁴ Moreover, the OLC construed the Emoluments Clauses to encompass not just fees or gifts, but any payment or benefit from a foreign government wherein the foreign government exerted control over

man . . . of each regulatory board or commission, the head . . . of each executive department or other administrative agency which is designated by the President” among others. *Id.* at 115.

145. *Id.* at 119.

146. *Id.*

147. *Id.*

148. 33 Op. O.L.C. 1 (2009).

149. *Id.* at 1.

150. *Id.* at 6–7. In this case, the OLC did not find that a foreign government exerted control or influence over the Nobel Peace Prize. *Id.* at 9.

151. *Id.* at 11.

152. *Id.* at 7.

153. *Id.* at 6.

154. *See supra* notes 124–125, 134, 149 and accompanying text.

the payment or benefit¹⁵⁵ and that payment had the potential to unduly influence or corrupt the officer.¹⁵⁶

D. *The Emoluments Clauses Litigation*

In recent litigation, the meaning and application of the Foreign and Domestic Emoluments Clauses is being put to the test, as for the first time, the constitutional provisions are being applied to a sitting President. Three separate lawsuits allege that President Trump's interest in his hotels¹⁵⁷ poses Emoluments Clauses violations. In *Citizens for Responsibility & Ethics in Washington v. Trump*¹⁵⁸ the United States District Court for the Southern District of New York determined a government watchdog group and a restaurant employee association did not have standing to sue the President for alleged Emoluments Clauses violations, and, therefore, the court did not reach the merits on the emoluments issues.¹⁵⁹ In *District of Columbia v. Trump*, however, the Maryland Federal District Court held the State of Maryland and the District of Columbia had Article III and prudential standing to sue, they had stated a plausible claim, and the matter was not a political question.¹⁶⁰ In the third case, *Blumenthal v. Trump*,¹⁶¹ the United States District Court for the District of Columbia held a group of Democratic Congressmembers had standing to sue the President.¹⁶²

1. *Citizens for Responsibility & Ethics in Washington v. Trump*

Citizens for Responsibility & Ethics in Washington v. Trump was the first lawsuit filed on the emoluments issue. The plaintiffs—CREW,¹⁶³ ROC United,¹⁶⁴ Jill Phaneuf,¹⁶⁵ and Eric Goode¹⁶⁶—alleged Trump's busi-

155. Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114, 119 (1993); Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 8 (2009).

156. President Reagan's Ability to Receive Ret. Benefits from the State of Cal., 5 Op. O.L.C. 187, 192; (1981); see *supra* note 131.

157. See *supra* notes 8–12, 17–28.

158. 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

159. *Id.* at 179. See *infra* Section I.D.1.

160. *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 756, 757 (D. Md. 2018); see *infra* Section I.D.2.

161. 335 F. Supp. 3d 45 (D.D.C. 2018).

162. *Id.* at 64, 65.

163. CREW's mission is to "protect[] the rights of citizens to be informed about the activities of government officials, ensur[e] the integrity of government officials, protect[] [the] political system against corruption, and reduc[e] the influence of money in politics." *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d at 180.

164. ROC United is a nonprofit with nearly 25,000 restaurant employees. *Id.* at 180.

165. Phaneuf focuses on hospitality and plans embassy functions. *Id.*

166. Goode is the owner of several hotels, bars, restaurants, and event spaces in New York City. *Id.*

ness interests in New York City created conflicts of interest that violated the Foreign and Domestic Emoluments Clauses.¹⁶⁷ They alleged that foreign diplomats frequented the Trump Hotel in Washington, D.C.; the Kingdom of Saudi Arabia had bought property in the Trump Tower in New York City “over the last two decades;” and the Industrial and Commercial Bank of China, a Chinese state-owned bank, was “one of the largest tenants of Trump Tower” in New York City.¹⁶⁸ The plaintiffs also alleged the lease that allowed the Trump Hotel to rent the Old Post Office Building, a federal property, ran afoul of the Domestic Emoluments Clause.¹⁶⁹ Phaneuf and Goode claimed the President’s continued stake in his hotel businesses, and the business these hotels and restaurants received from foreign “governmental sources” was increasing competition and hurting Phaneuf and Goode’s bottom line.¹⁷⁰ ROC United alleged its members suffered business losses, as well¹⁷¹ CREW’s stated injury for standing purposes was that it suffered harm from having to allocate resources away from other potential issues in order to fight for the emoluments issues.¹⁷²

The Federal District Court in the Southern District of New York found the hospitality plaintiffs failed to show President Trump’s actions caused their competitive injury, and the injury was not redressable in court.¹⁷³ The court found it was “wholly speculative” whether their loss of business was traceable to the President “or instead result[ed] from government officials’ independent desire to patronize [the] [d]efendant’s businesses.”¹⁷⁴ The court did not view a competitive injury as falling within the “zone of interests” of the Foreign Emoluments Clause because “[n]othing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition.”¹⁷⁵ Rather, the court stated the Framers intended the Clauses to protect government from “corruption and undue influence”¹⁷⁶ The court held that CREW’s claims should be dismissed because the organization did not have an injury.¹⁷⁷

167. *Id.* at 179, 180.

168. *Id.* at 182.

169. *Id.* at 183.

170. *Id.* Thus, the plaintiffs claimed competitive injuries for standing purposes. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 185.

174. *Id.* at 186.

175. *Id.* at 187.

176. *Id.* In holding the hospitality plaintiffs’ competitive injury did not fall within the “zone of interests” of the Emoluments Clauses, the court pointed out that increased competition could happen even if Congress consented to the operation of the Trump hotels and restaurants, leaving the plaintiffs with “no cognizable claim to redress in court.” *Id.* at 188.

177. *Id.*

The court then turned to the political question doctrine.¹⁷⁸ The court held that the case presented a non-justiciable political question and should be left to Congress¹⁷⁹: “As the only political branch with the power to consent to violations of the Foreign Emoluments Clause, Congress is the appropriate body to determine whether, and to what extent, [the President’s] conduct unlawfully infringes on that power.”¹⁸⁰ The court also decided the claim was not yet ripe because it involved a conflict between two co-equal branches of government that had not matured.¹⁸¹ Currently, the case is under appeal in the United States Court of Appeals for the Second Circuit.¹⁸²

2. District of Columbia v. Trump

In *District of Columbia v. Trump*, the United States District Court for the District of Maryland took a different approach towards standing and the political question doctrine.¹⁸³ The Attorneys General for the District of Columbia and the State of Maryland filed a lawsuit on June 12, 2017, alleging the President’s interests in the Trump Organization and the Trump Hotel in Washington, D.C. harmed Washington D.C.’s and Maryland’s “sovereign, quasi-sovereign, proprietary, and *parens patriae* interests.”¹⁸⁴

The Amended Complaint to the case claimed, in part, the Kingdom of Saudi Arabia “spent thousands of dollars on rooms, catering, and parking” at the Trump Hotel from January to February of 2017.¹⁸⁵ Also, according to the Amended Complaint, the Trump Hotel allegedly marketed to diplomats by hiring a “director of diplomatic sales” and holding “an event . . . pitch[ing] the Hotel to about 100 foreign diplomats.”¹⁸⁶ A Middle-Eastern diplomat reportedly told the *Washington Post*, “Believe me, all the delegations will go there,” and an Asian diplomat reportedly echoed that sentiment about the Trump Hotel saying, “Isn’t it rude to come to his city and say, ‘I am staying at your competitor?’”¹⁸⁷ The Maryland Federal District Court held Washington, D.C. and Maryland had standing to sue¹⁸⁸ with respect to the alleged Emoluments Clauses violations involving the Trump Hotel in Washington, D.C. only, and had “sufficiently alleged that the President is violating the Foreign and Domestic Emoluments Clauses . . . by

178. *Id.* at 193.

179. *Id.*

180. *Id.*

181. *Id.* at 194.

182. Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *appeal filed*, No. 18-474 (2d Cir. Feb. 16, 2018).

183. District of Columbia v. Trump, 291 F. Supp. 3d 725, 757 (D. Md. 2018).

184. *Id.* at 732.

185. Amended Complaint, *supra* note 16, at 15–16.

186. *Id.* at 14.

187. *Id.* at 14–15.

188. *Trump*, 291 F. Supp. 3d at 757.

reason of his involvement with and receipt of benefits from the Trump International Hotel . . . as well as the operations of the Trump Organization with respect to the same.”¹⁸⁹

The State of Maryland alleged injuries to its sovereign interests because the Emoluments Clauses were “material inducements to its decision to enter the Union.”¹⁹⁰ In other words, Maryland argued that it entered the Union, in 1776, as a state in part because of the Clauses.¹⁹¹ Next, Maryland and the District of Columbia alleged injuries to their “quasi-sovereign interests” because they have an interest in enforcing their respective tax, zoning, and land use laws.¹⁹² The plaintiffs also claimed injuries to their proprietary interests.¹⁹³ The Walter E. Washington Convention Center, the Washington Convention Center and Sports Authority, and the Carnegie Library “directly compete with the Hotel.”¹⁹⁴ Similarly, the Montgomery County Conference Center in the Bethesda North Marriott Hotel and the MGM Hotel in the National Harbor in Oxen Hill, Maryland also compete with the Trump Hotel for government business and patronage.¹⁹⁵ Washington, D.C. and Maryland argued the Trump Hotel has “illegally skewed the hospitality market in [President Trump’s] favor.”¹⁹⁶

Lastly, Washington, D.C. and the State of Maryland claimed *parens patriae* rights¹⁹⁷ to sue because companies and their employees lost opportunities to conduct business with diplomats due to competition from the Trump Hotel.¹⁹⁸ The remedy Washington, D.C. and Maryland sought was declaratory and injunctive relief.¹⁹⁹ While the court rejected the claim that Maryland had suffered an injury to its sovereign interests, it agreed with Washington, D.C. and Maryland that they had sufficiently alleged injuries

189. *Id.* at 757, 758.

190. *Id.* at 735.

191. *Id.*

192. *Id.* Washington, D.C. and Maryland claimed the President’s alleged receipt of emoluments from other states force the states to choose between granting exemptions or waivers to the Trump Organization, such as tax reductions, for activities conducted in Maryland and Washington, D.C. and risk losing revenue, or denying the Trump Organization’s requests and risk being placed at a disadvantage compared to other states that have agreed to grant concessions. *Id.* at 735 & n.7.

193. *Id.* at 735.

194. *Id.*

195. *Id.* at 735–36.

196. *Id.* at 736.

197. *Parens patriae* means “parent of the country.” *Id.* at 736 n.9 (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex. rel. Barez, 458 U.S. 592, 600 (1982)). It refers to a state’s right as a sovereign to sue as a guardian of its residents. *Id.*; see Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (“Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”).

198. *Trump*, 291 F. Supp. 3d at 736.

199. *Id.* at 732.

to their quasi-sovereign, proprietary, and *parens patriae* interests.²⁰⁰ Washington, D.C. and Maryland had stated a plausible claim that Emoluments Clauses violations had left them with an “inability to compete on an equal footing” with the Trump Hotel’s operations in Washington, D.C.²⁰¹ This alleged loss of competition established Article III standing regarding the Trump Hotel.²⁰² These competitive injuries, the court found, could be plausibly traced to President Trump, considering the alleged statements from foreign government officials, including one where an official said they chose the Hotel because they wanted the President to know they “love [his] new hotel.”²⁰³ The court also found the injuries could be redressable through appropriate injunctive and declaratory relief if the plaintiffs succeeded on the merits.²⁰⁴

The court turned to prudential standing and concluded the language of the Foreign Emoluments Clause was not a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”²⁰⁵ In *Baker v. Carr*,²⁰⁶ the Supreme Court listed several other factors for prudential standing, but the Maryland Federal District Court did not analyze those factors in depth.²⁰⁷ Instead, the Maryland Federal District Court leaped to the political question doctrine, determining it is the court’s job to decide “whether the President has acted within the law.”²⁰⁸ Unlike in *Citizens for Responsibility & Ethics in Washington v. Trump*, where the court held the case should be left for Congress to resolve under the political question doctrine, the court in *District of Columbia v. Trump* held the political question doctrine did not apply.²⁰⁹

For the first time, a federal court had reached the merits in interpreting the Foreign and Domestic Emoluments Clauses in the Constitution and needed to decide if the plaintiffs had stated a claim under the Clauses.²¹⁰ To interpret the Clauses, the court used an original public meaning and pur-

200. *Id.* at 752–53.

201. *Id.* at 743. The court explained, “plaintiffs with an economic interest have standing to sue to prevent a direct competitor from receiving an illegal market benefit leading to an unlawful increase in competition” when a plaintiff shows it is “sufficiently injured by the competition . . . to create a case or controversy.” *Id.* at 744 (alteration in original) (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971)).

202. *Id.* at 742. The court found it much harder to believe there would be an “actual or imminent injury to either plaintiff . . . with respect to the decision of the State of Florida or any other State to patronize the Trump Organization’s Mar-a-Lago” in Palm Beach. *Id.*

203. *Id.* at 749–50.

204. *Id.* at 752–53.

205. *Id.* at 756 (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012)).

206. 369 U.S. 186 (1962).

207. *Id.* at 217.

208. *Trump*, 291 F. Supp. 3d at 757 (quoting *Clinton v. Jones*, 520 U.S. 681, 703 (1997)).

209. *Id.* at 756. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 193, 194 (S.D.N.Y. 2017).

210. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 878 (D. Md. 2018).

positive approach.²¹¹ It was a battle of the dictionary definitions.²¹² Washington, D.C. and Maryland referenced dictionary definitions from the Founding Era²¹³ and closely analyzed the word choice within the Foreign Emoluments Clause, including the use of “any kind whatever” to modify “Emolument.”²¹⁴ Washington, D.C. and Maryland argued there were two definitions of emoluments at the time of the Founding.²¹⁵ The most common definition was that emoluments meant “profit,” “gain,” or “advantage.”²¹⁶ The second, less common, definition was “‘profit arising from an office or employ’ with ‘employ’ defined as ‘a person’s trade, [or] business.’”²¹⁷ The Department of Justice (“DOJ”) representing the President, in his official capacity, used dictionary definitions from the Founding Era²¹⁸ that supported an office-related definition of an emolument as “a profit arising from an office or employ.”²¹⁹ The President argued that under that definition, the benefit “must be predicated on services rendered in an official capacity or an employment (or equivalent) relationship and be given in exchange for the provision of a service in that relationship.”²²⁰ For example, an emolument would be a foreign government paying a federal official to take certain official actions.²²¹

The court dismissed the argument that presidents do not hold an “Office of Profit or Trust under [the United States].”²²² The court found that a broad interpretation of the meaning of the word emolument²²³ fit because

211. *Id.* at 881. Both parties were in favor of this interpretive approach. *Id.*

212. *Id.* at 880.

213. *Id.*; Memorandum of Law in Support of Plaintiffs’ Opposition to Motion to Dismiss at 31–33, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018), 315 F. Supp. 3d 875 (D. Md. 2018) (No. 18:17-cv-01596-PJM).

214. Memorandum of Law in Support of Plaintiffs’ Opposition to Motion to Dismiss, *supra* note 213, at 33.

215. *Id.* at 31–32.

216. *Id.* at 31 (first quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed., London 1785); and then quoting N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed., London 1763)).

217. *Id.* at 32 (alternation in original) (quoting BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN (n.p. 1774)). The second definition appeared in less than eight percent of Founding Era dictionaries. *Id.* (citing John Mikhail, The Definition of “Emolument” in English Language and Legal Dictionaries, 1523–1806, at 1, 2 (July 12, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693).

218. *Trump*, 315 F. Supp. 3d at 880; Memorandum in Support of Defendant’s Motion to Dismiss at 32, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018), 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-1596-PJM) (defining “emolument” as a “profit arising from an office or employ” (quoting BARCLAY, *supra* note 217)).

219. *Trump*, 315 F. Supp. 3d at 880.

220. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 218, at 32.

221. *Id.* at 32–33 (“In either case, the benefit would be predicated on the official’s rendering of services pursuant to an office or employment.”).

222. *Trump*, 315 F. Supp. 3d at 883.

223. *Id.* at 889 (“‘[P]rofit,’ ‘gain,’ or ‘advantage’ from any kind of exchange . . .”).

the narrower, office-related definition of emoluments would be equivalent to “federal bribery,” which is an impeachable offense.²²⁴ Federal bribery involves a quid pro quo, where a public official, directly or indirectly, receives or accepts anything of value from someone in exchange for doing a favor for them.²²⁵ The court found it would be redundant to include Emoluments Clauses preventing presidents from accepting money from foreign governments in exchange for official services when Article II, Section 4 of the Constitution does the same.²²⁶

Citing scholarship about the Framers’ anti-corruption purposes, the Maryland Federal District Court determined the Framers “unquestionably” adopted the Foreign Emoluments Clause because they were worried about undue foreign influence.²²⁷ Further, the court found the OLC opinions supported a definition of emoluments that encompassed the broader definition of “any profits” from foreign governments.²²⁸ The court defined emoluments broadly as “any profit, gain, or advantage, of more than *de minimis* value, received by [the President], directly or indirectly, from foreign, the federal, or domestic governments.”²²⁹ Then, the court held the plaintiffs’ allegations plausibly stated a claim under the Foreign Emoluments Clause because Trump had received, or potentially could receive, profits from foreign governments without the consent of Congress.²³⁰ The court also held the lease between President Trump and the GSA for the Trump Hotel in the Old Post Office Building constituted an emolument in violation of the Domestic Emoluments Clause.²³¹ The DOJ on behalf of the President in his official capacity filed an interlocutory appeal and a stay pending appeal of the court’s decisions.²³²

The Fourth Circuit granted the President’s petition for mandamus and stayed the lawsuit in December 2018, holding oral argument in March

224. *Id.* The court cited *McDonnell v. United States*, 136 S. Ct. 2355 (2016), where the Governor of Virginia received cash and in-kind benefits from constituents, as demonstrating the difficulty of determining what constitutes an “official act sufficient to establish a criminal quid pro quo.” *Id.* at 898 (citing *McDonnell*, 136 S. Ct. at 2372). The Court in *McDonnell* held that a criminal quid pro quo required more than simply holding a meeting, speaking to another official, or organizing an event. *Id.* (citing *McDonnell*, 136 S. Ct. at 2372).

225. *Id.* at 889 (citing 18 U.S.C. § 201(b)(2) (2012)).

226. *Id.* The U.S. Constitution provides, “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.” U.S. CONST. art. II, § 4.

227. *Trump*, 315 F. Supp. 3d at 896 (first citing Teachout, *supra* note 32, at 361; then citing Sills, *supra* note 32, at 72; then citing James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol’y 174, 174–76, 181–82 (1994)).

228. *Id.* at 900; *see supra* Section I.C.

229. *Id.* at 904.

230. *Id.* at 905–06.

231. *Id.* at 906.

232. *Id.*

2019.²³³ During oral argument, a Fourth Circuit panel of three judges directed questions towards Maryland and Washington, D.C., including whether a state could bring a suit against any other officer, such as a Secretary of State, for accepting an emolument²³⁴ and exactly what type of injunctive relief Maryland and Washington, D.C. were requesting other than divestment.²³⁵ The Fourth Circuit panel was interested in whether Maryland and Washington, D.C. had stated a claim under the Emoluments Clauses and whether anything other than divestment could satisfy their request for injunctive relief.²³⁶

3. Blumenthal v. Trump

In *Blumenthal v. Trump*,²³⁷ 201 Democratic members of Congress sued the President in his official capacity for allegedly violating the Foreign Emoluments Clause.²³⁸ As in *District of Columbia v. Trump*, the United States District Court for the District of Columbia issued a stand-alone opinion addressing the threshold question of standing.²³⁹ The court similarly held the plaintiffs had standing.²⁴⁰ The congressmembers alleged they suffered a concrete injury when the President denied them the opportunity to vote on whether to approve his alleged receipt of emoluments.²⁴¹ The President argued the case was essentially a political spat between Congress and the Executive Branch that did not belong in court because Congress could convince a majority in both Houses to pass legislation about the emoluments issues.²⁴²

The legislators stated Trump had not given Congress an opportunity to consent to any foreign emoluments he had received.²⁴³ Without the chance to give or withhold consent, the congressmembers argued they could not “force the President to comply with the Constitution absent a judicial order.”²⁴⁴ The President argued plaintiffs could enact legislation on the emoluments issue if they had the votes.²⁴⁵

233. Dave Simpson, *4th Cir. Stays DC., Md. Emoluments Suit Against Trump*, LAW360 (Dec. 20, 2018), <https://www.law360.com/articles/1113963/4th-circ-stays-dc-md-emoluments-suit-against-trump>.

234. Oral Argument at 10:12, *Trump*, 315 F. Supp. 3d 875 (No. 18-2486), <https://www.ca4.uscourts.gov/OAarchive/mp3/18-2486-20190319.mp3>.

235. *Id.* at 30:33.

236. *Id.*

237. 335 F. Supp. 3d 45 (D. D.C. 2018).

238. *Id.* at 50.

239. *Id.*; *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 732 (D. Md. 2018).

240. *Blumenthal*, 335 F. Supp. 3d at 50; *Trump*, 291 F. Supp. 3d at 732.

241. *Blumenthal*, 335 F. Supp. 3d at 50.

242. *Id.* at 50–51.

243. *Id.* at 51.

244. *Id.* (citations omitted).

245. *Id.* at 63.

The court found the plaintiffs had plausibly alleged an injury as members of Congress because the President had, in effect, nullified the Congress members' votes when he did not ask for Congress's consent before allegedly accepting foreign emoluments.²⁴⁶ The court held separations-of-powers principles did not prevent the plaintiffs from having standing because emoluments are prohibited without Congress's consent, so it is up to the President to ask for that consent, rather than the other way around.²⁴⁷ *Blumenthal v. Trump* illustrated a different view on the possibility of a legislative remedy and the role of the courts in resolving the problem than *Citizens for Responsibility & Ethics in Washington v. Trump*, which held the case was not appropriate for judicial review under the political question doctrine until Congress asserted its authority on the matter.²⁴⁸

II. ANALYSIS

District of Columbia v. Trump marks the first time a federal court has interpreted the Foreign and Domestic Emoluments Clauses and how they apply to the President. This Comment argues the courts in the emoluments litigation²⁴⁹ and executive branch practice and precedent²⁵⁰ correctly recognized the purpose of the Emoluments Clauses is to prevent corruption and undue influence on federal officials.²⁵¹ Section II.A. analyzes the originalist and purposive approach to interpretation the parties in recent Emoluments Clause litigation have taken, and analyzes their use of Founding-Era dictionaries to support a broad or narrow definition of an emolument.²⁵² Section II.B discusses how a living approach to interpretation would ask: What are today's emoluments and how have modern-day Presidents treated potential conflicts of interests?²⁵³ Section II.C. analyzes how a moral reading approach would view the Emoluments Clauses as embodying an abstract anti-corruption principle²⁵⁴ and would allow for normative judgments about how the Clauses should best be understood, independent of what the Framers may have thought.²⁵⁵ As the first case to reach the merits, these Sections focus mostly on *District of Columbia v. Trump*.

246. *Id.* at 66.

247. *Id.* at 67.

248. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 193–94 (S.D.N.Y. 2017); *see supra* notes 178–181 and accompanying text.

249. *See supra* Section I.D.1–3.

250. *See supra* Section I.C.

251. *See supra* text accompanying notes 36.

252. *See infra* Section II.A.

253. *See infra* Section II.B.

254. *See Teachout, supra* note 32, at 342, 343.

255. *See infra* Section II.C.

A. *The Textualist and Originalist Approach to the Emoluments Clauses*

The parties in *District of Columbia v. Trump* took a textualist and originalist approach to constitutional interpretation.²⁵⁶ Central to plaintiffs Washington, D.C. and Maryland's argument is an originalist question at heart: What did the Framers intend the Emoluments Clauses to mean?²⁵⁷

1. *Textualism*

In order to interpret the Emoluments Clauses, courts start with the text itself.²⁵⁸ Under a textualist approach, when the text is unambiguous and clear, "there is no room for construction" and courts should look to a word or phrase's ordinary meaning.²⁵⁹ In *District of Columbia v. Trump*, both Washington, D.C., Maryland, and the DOJ lawyers representing the President analyzed the plain language of the Foreign Emoluments Clause, using Founding-Era dictionaries in order to ascertain the ordinary meaning of the word emolument at the time of the Founding.²⁶⁰ As Justice Scalia described the philosophy of textualism, "A text . . . should be construed reasonably, to contain all that it fairly means."²⁶¹ The fact that both the plaintiffs and defendant closely examined the text of the constitutional provisions demonstrates how prevalent and mainstream the textualist approach is today. As Professor Victoria Nourse points out, Justice Kagan said, "[W]e are all constitutional textualists and originalists now."²⁶²

Black's Law Dictionary defines an emolument as "[a]ny advantage, profit, or gain received as a result of one's employment or one's holding of office."²⁶³ The word "emolument" in *Webster's Dictionary* has two meanings: "the returns arising from office or employment usually in the form of

256. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 881 (D. Md. 2018) ("Both sides embrace a blend of original public meaning and purposive analysis").

257. EISEN ET AL., *supra* note 26, at 2.

258. *Trump*, 315 F. Supp. 3d at 881 (citing *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)); *see also* *United States v. Sprague*, 282 U.S. 716, 731–32 (1931).

259. *United States v. Sprague*, 282 U.S. 716, 731–32 (1931) (citing *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816)); *see Martin*, 14 U.S. at 326 ("The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.").

260. *See Trump*, 315 F. Supp. 3d at 886–887; *supra* Section I.C.

261. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), *reprinted in* CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 177, 178 (Michael J. Gerhardt et al. eds., 3d ed. 2007).

262. *See* Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 3 n.3 (2018) (quoting Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, at 8:29, HARV. L. TODAY (Nov. 25, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/>); *see also* Coyle, *supra* note 34.

263. *Emolument*, BLACK'S LAW DICTIONARY (10th ed. 2014).

compensation or prerequisites” and “advantage.”²⁶⁴ Synonyms include: “hire,” “pay,” “salary,” “stipend,” and “wage.”²⁶⁵

The text of the Foreign Emoluments Clause contains no definition of the word emoluments. Thus, using a textualist approach, the court in *District of Columbia v. Trump* reasonably interpreted the word emoluments to give it its ordinary meaning and encompass all it could fairly mean.²⁶⁶ Both current and Founding-Era dictionary definitions provide support for a definition of emoluments as reaching any “profit,” “gain,” or “advantage.”²⁶⁷ Moreover, there are numerous examples of the Framers using the word emoluments as encompassing a general benefit during their debates.²⁶⁸ In support of an office-related definition of emoluments, President Trump argued, in the Domestic Emoluments Clause, the word compensation is next to the words “for his services,” indicating that any provision with the word emolument in it is impliedly qualified by the words “for his services.”²⁶⁹ He argued that under the *noscitur a sociis*²⁷⁰ rule of statutory construction, a word should be read in context with the other words surrounding it in a provision, such as the words “present,” “Office,” and “Title” in the Foreign Emoluments Clause.²⁷¹ The President argued that interpreting emolument to cover any profit, gain, or advantage would be redundant since the word “present,” has its own distinct, relatively straightforward meaning as a gift.²⁷²

Professor Grewal argues the office-related definition is more consistent with the text of the Emoluments Clause.²⁷³ According to Grewal, “broad purposes may have animated the introduction and ratification of the clause, but, for purposes of constitutional interpretation, the only relevant

264. *Emolument*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/emolument> (last visited Mar. 1, 2019).

265. *Id.*

266. *See supra* text accompanying notes 260–261.

267. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 880 (D. Md. 2018).

268. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 62, at 24 (“The highest honors and emoluments of this commonwealth are a poor compensation for the surrender of personal independence.”); *id.* at 36 (“[T]he conqueror will take care of his own emoluments, and have little concern for the interest of the people.”); *id.* at 66 (“Cast your eyes to your seaports: see how commerce languishes. This country, so blessed, by nature, with every advantage that can render commerce profitable, through defective legislation is deprived of all the benefits and emoluments she might otherwise reap from it.”); *id.* at 127 (“In other countries, where the fate of the poor is wretched, officers are created merely for the emolument of certain individuals . . .”).

269. *Trump*, 315 F. Supp. 3d at 887.

270. *Noscitur a sociis* is a Latin term meaning “it is known by the company it keeps” and is “the concept that the intended meaning of an ambiguous word depends on the context in which it is used.” *What is NOSCITUR A SOCIIS*, LAW DICTIONARY, <https://thelawdictionary.org/noscitur-a-sociis/> (last visited June 20, 2019); *see* U.S. CONST. art I, § 9, cl. 8.

271. *Trump*, 315 F. Supp. 3d at 886–887.

272. *Id.* at 887.

273. Grewal, *supra* note 49, at 169.

purpose is that embodied in the text itself.”²⁷⁴ Even looking beyond the purpose of the Clauses and just at the text itself, the Maryland Federal District Court reasonably found the expansive modifiers of “of any kind whatever” indicates the words in context with the other words in the Emoluments Clauses should be broadly construed.²⁷⁵ Even though there are narrower meanings of the word emolument in dictionary definitions today, the word emolument was frequently used in contexts outside of the narrow, office-related definition.²⁷⁶ Moreover, the plain meaning of the text of the Foreign Emoluments Clause does not expressly limit the Clause’s application to only civil officers and not the President. The Clause says, “no Person holding any Office of Profit or Trust.”²⁷⁷ Elected officials are not expressly excluded from the language of the Clause itself.²⁷⁸ In reaching the merits, the court in *District of Columbia v. Trump* construed the plain meaning of the Foreign Emoluments Clause reasonably as having the broader of the two possible dictionary definitions.²⁷⁹

2. *The Framers’ Intent*

Both sides rely on arguments about the Framers’ intent at the time of the Founding.²⁸⁰ While both sides ultimately came to different conclusions about the Framers’ intentions, neither the plaintiffs nor the President disputed that the Framers’ intentions were important, if not the most important, piece of the emoluments puzzle.²⁸¹ The DOJ, representing the President in the litigation, argued the Framers had no intention for the Foreign Emoluments Clause to encompass profits from foreign governments in part because Delegate Pinckney, the very same Delegate to the Constitutional Convention who suggested adding the Foreign Emoluments Clause in the first place,²⁸² ran plantations in South Carolina while serving in public office.²⁸³ Many of our earliest Presidents were plantation owners who ex-

274. *Id.* at 169.

275. *Trump*, 315 F. Supp. 3d at 887.

276. *Id.* at 877, 904; *see supra* note 268 and accompanying text.

277. U.S. CONST. art. I, § 9, cl. 8.

278. *See* Nourse, *supra* note 262, at 26–27 (discussing how the term “unelected” is not expressly written in the Foreign Emoluments Clause, but scholars who argue the Foreign Emoluments Clause does not apply to the President infer that the word is there).

279. *Trump*, 315 F. Supp. 3d at 878–88.

280. *Id.* at 881; *see, e.g.*, EISEN ET AL., *supra* note 26, at 1.

281. *See* Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 220, at 40 (arguing the history and purpose of the Emoluments Clauses did not have to do with private commercial arrangements); *see* Memorandum in Law in Support of Plaintiffs’ Opposition to Motion to Dismiss, *supra* note 213, at 34 (arguing the Clauses “reflects the Framers’ insight . . . that every person is susceptible to being influenced . . . when receiving gifts, profits, offices, or titles”).

282. *See supra* note 51–53 and accompanying text.

283. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 220, at 41 (arguing that at the time of the Founding, “government officials were not given generous compensa-

ported their cash crops overseas.²⁸⁴ At the time of the Founding, the DOJ argued on behalf of the President, government officials were not always paid well, so many federal officials worked for the government with the understanding they would be able to work and earn money outside of office.²⁸⁵ The court in *District of Columbia v. Trump* correctly pushed back on this, recognizing that the Emoluments Clauses does not ban all “private foreign or domestic transactions,” but rather only transactions that occur with foreign governments or foreign government officials without Congress’s consent.²⁸⁶ In other words, the Clauses do not prohibit federal officials from running businesses; rather, they simply prohibit doing business with representatives of foreign governments without the consent of Congress.

The Framers did not want ambassadors to be put in the position of receiving opulent gifts from foreign governments because of the potential for undue influence.²⁸⁷ During the time of the Founding, Benjamin Franklin’s grandson wrote Thomas Jefferson informing him of the tradition of ambassadors and diplomats in Europe receiving opulent gifts from heads of foreign states simply because the heads of the foreign states respected and liked the ambassadors.²⁸⁸ In the example of the gold snuff box Franklin received from the King of France, there is no indication that the gift was a quid pro quo, where the gift was in exchange for services.²⁸⁹ The Framers, however, wanted to ban these kinds of gifts without the consent of Congress, because even the slightest appearance of corruption or undue foreign influence on an American ambassador had the potential to “disturb[] that confidence” and make it difficult, if not impossible, for people to know whether a particular ambassador was beholden to a foreign country.²⁹⁰ While the court in *Citizens for Responsibility & Ethics in Washington v. Trump* did not reach the merits on the emoluments issue, that court also determined the Framers intended the Clauses to prevent corruption.²⁹¹ The

tions,” and many federal officials in public office operated under the assumption that they could still maintain their businesses).

284. *Id.*

285. *Id.*

286. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 899 (D. Md. 2018).

287. *See Sills, supra* note 32, at 73 (“In addition to actual corruption, [Governor] Randolph recognized that the perception of undue influence from foreign states was as significant as actual foreign influence itself.”); *Teachout, supra* note 30, at 38 (describing how Thomas Jefferson did not enjoy accepting gifts while he was a diplomat in Europe, finding the tradition of exchanging gifts to be “distasteful”).

288. *See supra* Section I.A.

289. Letter from William Temple Franklin to Thomas Jefferson *supra* note 57; *see Teachout, supra* note 30, at 35.

290. *Cf. Teachout, supra* note 30, at 34–35 (describing general disapproval of gifts in diplomacy during the Founders Era); *see Sills, supra* note 32, at 75 (describing how the Framers wanted to protect national security provisions through the emoluments provisions).

291. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 274 F. Supp. 3d 174, 186–87 (S.D.N.Y. 2017).

court concluded the Clauses were included in the Constitution because of “the Framers’ concern with protecting the new government from corruption and undue influence.”²⁹² The Framers wanted to avoid even the appearance of impropriety, which is why they banned the receiving of any emoluments without the consent of Congress.²⁹³

In applying an originalist approach in his scholarship on the emoluments issue, Professor Seth Barrett Tillman looks not only to what the Framers’ intended, but what they actually *did* as proof of what the Clauses should mean.²⁹⁴ Tillman argues the Clauses do not apply to the President and that the Framers did not intend to include profits and benefits received in connection with business transactions for value.²⁹⁵ Regarding the Domestic Emoluments Clause and the Trump Hotel’s location in the Old Post Office Building, Tillman argues if the Framers intended to prevent Presidents from doing business with the U.S. government, there would have been a problem with our first President George Washington doing business with the federal government and buying several lots of land in Washington, D.C. at a public auction.²⁹⁶ One such purchase occurred in September 1793, during an auction run by three commissioners who had been involved in the ratification of the Constitution.²⁹⁷ Tillman also describes how the French government gave President Washington gifts twice.²⁹⁸ On December 22, 1791, the French ambassador to the United States wrote President Washington a letter asking if he could give the President a gift of a new print of the King of France.²⁹⁹ Washington said yes, replying in a letter “the new and elegant print of the King of the French, which you have been so obliging as to send me this morning as a mark of your attachment to

292. *Id.* at 187.

293. *See supra* note 287 and accompanying text.

294. *See e.g.*, Seth Barrett Tillman, *Business Transactions and President Trump’s “Emoluments” Problem*, 40 HARV. J.L. & PUB. POL’Y 759, 761 (2017) [hereinafter Tillman, *Business Transactions*]; Tillman, *supra* note 49, at 188–89 (describing how President Washington received gifts from French leaders); Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 399, 415 (2012) [hereinafter Tillman, *Citizens United*].

295. Tillman, *Business Transactions*, *supra* note 294, at 761.

296. *Id.* at 761–62; *see* U.S. CONST. art. II, § 1, cl. 7 (providing that while the President is in office, they “shall not receive within that Period any other Emolument from the United States, or any of them”).

297. Tillman, *Business Transactions*, *supra* note 294, at 761. The three commissioners that ran the public auction, according to Professor Tillman, were David Stuart, a member of the Virginia Convention that ratified the Constitution, Daniel Carroll, who was a member of the Federal Constitutional Convention, and Thomas Johnson, who was the first Governor of Maryland and later became a U.S. Supreme Court Justice. *Id.* at 761–62.

298. Tillman, *supra* note 49, at 188–80 (describing how Washington received a key to the Bastille from Lafayette and a portrait from King Louis XVI).

299. Tillman, *Citizens United*, *supra* note 294, at 415.

my person.”³⁰⁰ Professor Tillman argues that President Washington’s acceptance of the French gift without asking first for congressional consent shows the Framers did not intend for the Foreign Emoluments Clause to apply to the President.³⁰¹

Tillman takes the position that construing the emoluments Clauses broadly to encompass profits or advantages and applying it to the President “amounts to a naked assertion by twenty-first century legal academics that they understand the Constitution’s binding legal meaning better than those who drafted it, ratified it, and put it into effect during the Washington administration.”³⁰² The premise of the argument is Washington’s actions as the first President should be dispositive of what the Framers intended the Emoluments Clauses to mean at the time of the Founding, and by extension, what they mean today. An originalist approach arguing what the Framers *actually did* should be dispositive of what the Emoluments Clauses means is limiting for many reasons, including that judges, and lawyers for that matter, are (usually) not trained historians, nor should they be expected to be.³⁰³

The Supreme Court warned of the dangers of looking exclusively to history and tradition to answer constitutional questions.³⁰⁴ Justice Kennedy discussed in *Obergefell v. Hodges*³⁰⁵ how the Founders “did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter.”³⁰⁶ If we were to take Washington’s actions as dispositive of what the Emoluments Clauses means, or is intended to mean, we would be limiting ourselves to a static understanding of the Constitution that even the Framers may not have intended.³⁰⁷

300. *Id.* at 416 (quoting Letter from George Washington to Ambassador Ternant (Dec. 22, 1791), in 9 THE PAPERS OF GEORGE WASHINGTON 306 (Mark A. Mastromarino & Jack D. Warren, Jr., eds., 2000)).

301. *Id.* at 17 (arguing that President Washington would not have perceived himself as being an “Officer” in the context of the Foreign Emoluments Clause).

302. Tillman, *Business Transaction*, *supra* note 294, at 763.

303. See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989), reprinted in CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES, *supra* note 261, at 211, 215 (“[The Framers’] shared common culture should be reflected in some degree of consensus about the meaning of texts. Even where this is true, however, discerning that consensus may require a deep knowledge of a historical period, which may be beyond the reach of anyone but historians specializing in the period.”).

304. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (discussing how rights do not come only from history and ancient sources).

305. 135 S. Ct. 2584 (2015). The Court in *Obergefell* held that same-sex couples have the right to marry under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* at 2604–05.

306. *Id.* at 2598.

307. See *id.*

3. *An Original Public Meaning Approach*

The original public meaning approach to constitutional interpretation centers on what the voters originally understood the provisions to mean, versus the actions or thoughts of the Framers.³⁰⁸ Justice Scalia wrote he consulted the writings of the delegates to the Constitutional Convention, not to glean how the delegates thought, but rather because their writings displayed how the text of the Constitution was originally understood.³⁰⁹ This approach considers the Constitution was written for the voters to understand.³¹⁰

Under an original public meaning perspective, the Maryland Federal District Court in *District of Columbia v. Trump* correctly held that emoluments were understood at the time of the founding to mean any profit, gain or advantage.³¹¹ The President's narrower definition of "emoluments" is based in part on the early cases, such as, *Hoyt v. United States*, *United States v. MacMillan*, and *McLean v. United States*, which defined emoluments as compensation and fees for the services of their office.³¹² Professor Grewal describes an office-related definition of emoluments as the original meaning of emoluments, stating that the relevant legal authority provides "that emoluments under the Constitution refer to compensation received in exchange for services provided as an officer or employee" rather than the broader definition of profits, gains, or advantages from foreign governments.³¹³ Grewal also makes the point that at the time of the Founding, it is possible that people believed only ambassadors would travel abroad extensively, so they were the ones especially susceptible to "improper foreign influences."³¹⁴ Grewal argues that determining whether a foreign government directly paid a federal officer in exchange for personal services or has indirectly paid a federal officer through payments to a business are factual differences that "must be examined closely."³¹⁵

One problem with the office-related definition of emoluments is that it would not include a scenario where a federal official received some sort of

308. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004), reprinted in CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES, *supra* note 261, at 233, 243, 244 (describing how the original public meaning approach "is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted").

309. SCALIA, *supra* note 261, at 179–80.

310. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 889 (D. Md. 2018) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2007)).

311. *Id.* at 900; see Teachout, *supra* note 30, at 30; *supra* note 229.

312. See *supra* Section I.B.

313. Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 692 (2017).

314. *Id.* at 646–47.

315. *Id.* at 692.

benefit from a foreign government official even though they did not officially return a service. Receiving a benefit in those circumstances would not necessarily rise to the same level as a quid pro quo, but it potentially could be corrupting, because the official might feel placed in a similar position as the ambassador receiving an extravagant gift.³¹⁶ In support of a broader definition of emoluments,³¹⁷ the Maryland Federal District Court explained it is difficult for people to know whether a benefit has the potential to corrupt or not.³¹⁸ The court stated, when a President maintains a luxury hotel that generates profits while he is in office—even if those profits go in a Trust—it creates the appearance of undue influence, which is enough.³¹⁹ The court stated, “How, indeed, could it ever be proven, in a given case, that he had actually been influenced by the payments? The Framers of the Clauses made it simple. Ban the offerings altogether (unless, in the foreign context at least, Congress sees fit to approve them).”³²⁰ Because actual influence is so difficult to prove, preventing even the appearance of receiving an undue influence from foreign government officials in the context of the Emoluments Clauses and without the consent of Congress makes sense.

The Maryland Federal District Court in *District of Columbia v. Trump* correctly held the reach of the Emoluments Clauses goes beyond quid pro quo corruption in the Foreign Emoluments Clause³²¹ because the original purpose of the Emoluments Clauses was to protect against both actual corruption and the appearance of corruption.³²² The court found this anticorruption interest covered more than a quid pro quo.³²³ Based on the original public meaning of the Emoluments Clauses, the court held the intent of the provision was to prevent corruption and undue foreign influences, and went “beyond simple payment for services rendered by a federal official in his official capacity, which in effect would merely restate a prohibition against

316. See *supra* notes 64–68.

317. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 898 (D. Md. 2018).

318. *Id.*

319. *Id.*

320. *Id.*; see also Teachout, *supra* note 32, at 380 (describing how the Framers tried to put structures and conditions in place to minimize corruption).

321. *Trump*, 315 F. Supp. 3d at 895 (discussing the practical difficulties of narrowly construing the Clauses because “any requirement that a *quid pro quo* for official services has been established would be easy to circumvent while at the same time difficult to prove”); *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (defining quid pro quo as a Latin phrase capturing the notion of “a direct exchange of an official act for money” or “dollars for political favors”); Sills, *supra* note 32, at 63–64 (discussing how classical republican ideals, including concerns that corruption and greed could destroy a nation, played an important role in the formation of the country); see *supra* Section II.A.

322. See *supra* text accompanying notes 287–290.

323. *Trump*, 315 F. Supp. 3d at 898; see also Zephyr Teachout, *Love, Equality, and Corruption*, 84 *FORDHAM L. REV.* 453, 454 (2015).

bribery.”³²⁴ The text of the Clause lends supports to this reading because it includes the modifiers of “any kind whatever,” indicating the purpose of the Clause is to prevent a wide breadth of emoluments.³²⁵

The expansive modifier in the Foreign Emoluments Clause is significant because in the context of First Amendment jurisprudence, the Supreme Court has been hesitant to find an anti-corruption purpose in the Constitution beyond quid pro quo corruption. In First Amendment campaign finance cases, the Court held the government’s anti-corruption interest only covered quid pro quo corruption.³²⁶ One important distinguishing factor, however, is the plain language of the Foreign Emoluments Clause lends itself to being broadly construed to encompass influences beyond quid pro quo corruption, since the provision expressly prevents officials from accepting gifts and presents, which are arguably less corrupting than a bribe.³²⁷ Under an original public meaning approach, the court interpreted the Emoluments Clauses as anti-corruption provisions whose original meaning goes beyond payments for services rendered.³²⁸

4. A Purposive Approach

The court in *District of Columbia v. Trump* also took a purposive approach to interpretation, giving substantial weight to executive branch precedent and practice over the decades through the OLC opinions.³²⁹ A purposive approach treats historical practice “as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when the practice began after the [F]ounding [E]ra.”³³⁰ *Blumenthal v. Trump* took a purposive approach in describing how previous presidents acted under the assumption that they had to follow the Foreign Emoluments Clause.³³¹ For example, when the Republic of Colombia presented President Andrew Jackson with a gold medal, Jackson placed it “at

324. *Trump*, 315 F. Supp. 3d at 900.

325. *Id.* at 887–88.

326. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) (holding that limits on campaign advertising expenditures “have a chilling effect” on speech “extending beyond the Government’s interest in preventing *quid pro quo* corruption”); *McCutcheon*, 572 U.S. at 209 (“The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights.”).

327. *See supra* notes 322–325 and accompanying text.

328. *See supra* note 327 and accompanying text.

329. *Trump*, 315 F. Supp. 3d at 900; *see supra* Section I.C.

330. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014). In *NLRB v. Noel Canning*, Justice Breyer, writing for the majority, “put significant weight upon historical practice” since the time of the Founding in interpreting the Recess Appointments Clause of the Constitution. *Id.* at 2559.

331. *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 53 (D.D.C. 2018).

the disposal of Congress.”³³² When the King of Siam gave President Abraham Lincoln gifts, Lincoln notified Congress, and they “deposited [the gifts] in the collection of curiosities at the Department of Interior.”³³³ Presidents have consistently turned to the OLC for legal advice about all matters, including whether they could constitutionally accept gifts from foreign government officials.³³⁴ President John F. Kennedy asked the OLC whether it would be constitutional to accept an “honorary Irish citizenship.”³³⁵ The OLC determined under the “spirit of the provision,” President Kennedy should get the consent of Congress in order to accept the honorary title.³³⁶ As discussed in Section I.C., President Barack Obama turned to the OLC to provide guidance on whether accepting the Nobel Peace Prize would be accepting a prohibited emolument.³³⁷

OLC opinions demonstrate that previous administrations operated under the assumption that the Foreign Emoluments Clause applied to the President.³³⁸ The OLC under previous administrations, both Republican and Democrat, looked to the purpose of the Clauses to decide whether the benefit received from a foreign official had the potential to unduly influence or corrupt the recipient,³³⁹ and this is the approach the court took in *District of Columbia v. Trump*.³⁴⁰ On one hand, the retirement pension President

332. *Id.* (quoting Brief of Federal Jurisdiction and Constitutional Law Scholars as *Amici Curiae* in Support of Plaintiffs at 24, *Blumenthal*, 335 F. Supp. 3d 45 (No. 17-1154 (EGS))).

333. *Id.* (quoting Brief of Federal Jurisdiction and Constitutional Law Scholars, *supra* note 332, at 25).

334. *Id.* at 53–54; *see supra* Section I.C.

335. *See Blumenthal*, 335 F. Supp. 3d at 54 (citing Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 279 (1963)).

336. Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 279, 281 (1963).

337. *Id.*; *see* Section I.C.

338. *See* Amicus Brief of Former Government Ethics Officials Don Fox, et al. at 12, *District of Columbia v. Trump*, 315 F. Supp. 3d 725 (D. Md. 2018) (No. 18-2488) (recognizing that executive branch precedent considers an official’s business interests with a foreign government to be an emolument when it “plausibly create[s] a conduit for improper payments and influence”); *supra* Section I.C.

339. *See* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 4 (2009) (finding that even though the Nobel Peace Prize was an emolument, the President would not run afoul of the Foreign Emoluments Clause by accepting it because the Nobel Committee was not a foreign government); Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114, 1119 (1993) (discussing whether a member of ACUS receiving income from a partnership where a foreign government could be providing some of the money violated the Foreign Emoluments Clause); Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156, 158 (1982) (discussing whether the source of payment to an NRC employee is from a foreign State or an intermediary); President Reagan’s Ability to Receive Ret. Benefits from the State of Cal., 5 Op. O.L.C. 187, 192 (1981) (discussing whether state retirement benefits subjected President Reagan to undue influence under the Domestic Emoluments Clause).

340. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 900 (D. Md. 2018).

Reagan received as Governor of California was fully vested before Reagan became President, so the OLC determined the benefit lacked the potential to influence his decision-making.³⁴¹ On the other hand, the OLC found money a partner received from a partnership, where the partnership was a mere “conduit” for a foreign government, had the potential to influence the member and would constitute an emolument because some portion of the member’s income could be attributed to a foreign government.³⁴² The OLC opinions, while not binding precedent, are useful guidance,³⁴³ and courts in the emoluments litigation correctly gave them weight in their analysis of the Emoluments Clauses.³⁴⁴

B. A Living Approach to Interpreting the Emoluments Clauses

In *District of Columbia v. Trump*, both the DOJ representing President Trump and Washington, D.C. and Maryland interpreted the Constitution with an original public meaning and purposive analysis approach.³⁴⁵ In fact, the court expressly pointed out that neither side “lock[ed] horns” over constitutional interpretation at all.³⁴⁶ One road not yet taken by anyone in the emoluments litigation is a living constitution approach. Is it possible to derive meaning in the twenty-first century from a word that is rarely, if ever, used today, without looking exclusively to the past?³⁴⁷ Justice Brennan described the logic of the living constitution approach:

Current Justices read the Constitution in the only way we can: as twentieth-century Americans. . . . [T]he ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.³⁴⁸

Perhaps the most famous proponent of the living constitution approach was Chief Justice John Marshall who wrote in *McCulloch v. Maryland*,³⁴⁹

341. See *supra* text accompanying notes 133–136.

342. Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114, 119 (1993).

343. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

344. But see Grewal, *supra* note 49, at 170–78 (arguing courts should take a textual approach and not a purposive one because a textual approach is more consistent with legal authorities).

345. *Trump*, 315 F. Supp. 3d at 881.

346. *Id.*

347. Peter Overby, *Federal Lawsuit Against President Trump’s Business Interests Allowed to Proceed*, NPR (July 25, 2018), <https://www.npr.org/2018/07/25/632300960/federal-lawsuit-against-president-trumps-business-interests-allowed-to-proceed>.

348. Farber, *supra* note 303, at 222 (quoting William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433, 438 (1986)).

349. 17 U.S. 316 (1819).

“This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”³⁵⁰ Under a living approach, the Emoluments Clauses should not be viewed as dusty provisions frozen in time during the Founding Era and not intended to be applied to modern day circumstances. For Justice Marshall, the Constitution was fundamental and permanent.³⁵¹ Similarly, in *Brown v. Board of Education*,³⁵² Chief Justice Warren famously rejected taking a strictly historical view to interpreting the Equal Protection Clause of the Fourteenth Amendment:

In approaching this problem, we cannot turn back the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.³⁵³

Using a living approach, the *Brown* Court interpreted the Fourteenth Amendment through the modern lens of the importance of education in 1954, rather than what people at the time of the Founding would have thought of education.³⁵⁴ Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*,³⁵⁵ Justice Jackson wrote in his concurring opinion that understanding what the Framers intended had they known modern conditions “must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”³⁵⁶

The value of the living constitution approach is that it allows judges to flexibly apply the meaning of the Emoluments Clauses to modern circumstances. As Professor Grewal points out, “[The Constitution] must be applied to facts not envisioned by the Framers or the ratifying states.”³⁵⁷ A living approach may seem at odds with an originalist approach, but it need not be. According to Professor Kermit Roosevelt, the appropriate living “inquiry” decides whether the relevant constitutional provision’s words and

350. *Id.* at 415. Professor Eugene W. Hickok, Jr. references this quotation from *McCulloch v. Maryland* in his scholarship. Eugene W. Hickok, Jr., *The Birth of the “Living” Constitution*, 14 COLONIAL LAW, 6, 6 (1985).

351. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 326 (1816) (describing how the Constitution was intended to last: “The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence”); see Hickok, Jr., *supra* note 350, at 6, 7 (describing how the Framers recognized a need to allow for change in society, but also saw a need to adhere to permanent principles provided in a written Constitution).

352. 347 U.S. 483 (1954).

353. *Id.* at 492–93.

354. *Id.*

355. 343 U.S. 579, 634 (1952).

356. *Id.* at 634 (Jackson, J., concurring).

357. Grewal, *supra* note 313, at 692.

purpose are “better served by a static or flexible range of applications.”³⁵⁸ For example, based on the way provisions like the Equal Protection Clause and the Fourth Amendment were written, the Founders arguably intended for them to be flexibly applied, while their meanings stayed constant.³⁵⁹ The question, then, is whether the Emoluments Clauses’ purpose is better served by a “fixed or flexible range of applications.”³⁶⁰ The courts do not disagree that the Clauses’ purpose was to prevent corruption.³⁶¹ Since the words of the Emoluments Clauses do not limit its application to particular issues, and use the expansive modifiers of “any kind whatever,”³⁶² it makes sense to assume the Framers intended the Clauses to have a flexible application to prevent corruption, rather than a fixed one.³⁶³

A flexible application of the Emoluments Clauses would recognize, since Watergate, Presidents have taken steps on their own to avoid even the appearance of impropriety, by consulting the OLC for advisory opinions about whether something is an emolument,³⁶⁴ or divesting their assets.³⁶⁵ Since the 1970s, every President placed their assets in a trust administered by an independent trustee.³⁶⁶ The main conflicts of interest statute for government officials, the Ethics in Government Act of 1978,³⁶⁷ which was enacted in the wake of Watergate,³⁶⁸ does not require government officials to shed assets; instead, it requires them to recuse themselves from working on policies that conflict with those holdings.³⁶⁹

The Ethics in Government Act of 1978 did not extend a recusal requirement to the President because of separation of powers concerns.³⁷⁰ Despite being formally excluded from coverage under the law, scholar

358. Kermit Roosevelt, *Originalism and the Living Constitution: Reconciliation*, 1 *ADVANCE* 57, 60 (2007).

359. *Id.* at 61.

360. *Id.* at 62.

361. *See supra* note 32 and accompanying text; *supra* Section I.A.

362. *See supra* text accompanying note 275.

363. *See* Roosevelt, *supra* note 358, at 62; *see also* Brief of Former National Security Official as Amicus Curiae at 9, 21, *In re Trump*, No. 18-2486 (4th Cir. 2019, Feb. 13, 2019) (describing how the Framers wrote a Foreign Emoluments Clause that is sweeping in scope, and only a reading of the Clause that encompasses private dealings with foreign governments can adequately protect U.S. national security and foreign policy interests in the modern era).

364. *See supra* Section I.C.

365. DANIEL I. WEINER, BRENNAN CTR. FOR JUST., *STRENGTHENING PRESIDENTIAL ETHICS LAWS* 1 (2017), <https://www.brennancenter.org/sites/default/files/publications/Strengthening%20Presidential%20Ethics%20Law.%20Daniel%20Weiner.pdf>.

366. *Id.*

367. Pub. L. No. 95-521, 92 Stat. 1824 (1978).

368. Daphna Renan, *Presidential Norms and Article II*, 131 *HARV. L. REV.* 2187, 2219 (2018).

369. WEINER, *supra* note 365, at 1.

370. Renan, *supra* note 368, at 2219 (discussing how “the Ethics in Government Act did not extend the statutory requirements . . . to the President, and subsequent legislation would expressly exclude the President and Vice President from . . . coverage”).

Daphne Renan explains, “[T]he conflict-of-interest norm, under which Presidents conduct themselves as if bound by the formal prohibitions, became further institutionalized and regularized as a result of the Ethics in Government Act’s passage.”³⁷¹ The Office of Government Ethics (“OGE”) has advised officials over the years to divest their assets, and it has since become routine to do so, according to Walter Shaub, the former head of the OGE.³⁷² While the President is subject to some disclosure rules under the Federal Ethics in Government Act, “loopholes in those rules make it comparatively easy to avoid full disclosure of assets, sources of income, and debts that could impact official decision-making.”³⁷³

The Trump Administration expressed ambivalence about the divestment norm. For example, John Bolton, current National Security Advisor, told the Hamilton Society it is “harder to get things done” in part because of the “excessive nature of the so-called ethics checks,” which he believes is discouraging people from taking government jobs.³⁷⁴ President Trump is unique because of his wide variety of business interests³⁷⁵ that make it more difficult for him to divest. An ethics advisor to The Donald J. Trump Revocable Trust, Bobby R. Burchfield, stated, “liquidation or divestiture would not make sense” in the President’s case because his “holdings are extensive and diversified throughout the world.”³⁷⁶ According to Burchfield, divesting would “be a fire sale with a potentially draconian loss of value.”³⁷⁷ In arguing the Trust is not that unusual, Burchfield stated President Jimmy Carter put his peanut farm holdings in a trust, with his lawyer as trustee.³⁷⁸ The difference, however, is that President Trump’s sons manage his Trust and inform him periodically about how it is doing.³⁷⁹ It is difficult to argue that the Trust is truly a blind trust when Trump’s own family members are managing it day to day rather than an independent trustee.³⁸⁰ The lack of a buffer between the President’s sons running the Trust and the President

371. *Id.*

372. Ryan Lizza, *How Trump Broke the Office of Government Ethics*, NEW YORKER (July 14, 2017), <https://www.newyorker.com/news/ryan-lizza/how-trump-broke-the-office-of-government-ethics>; see Renan, *supra* note 368, at 2190 (discussing the importance of norms of presidential behavior).

373. WEINER, *supra* note 365, at 1.

374. Michael Burke, *Bolton: “Excessive Nature of the So-Called Ethics Checks” Discourages People from Joining Government*, HILL (Nov. 1, 2018), <https://thehill.com/homenews/administration/414249-bolton-excessive-nature-of-the-so-called-ethics-checks-discourages>.

375. See *infra* notes 376–377 and accompanying text.

376. Bobby R. Burchfield, *Ethics in the Executive Branch: The Constitutional, Statutory, and Ethical Issue Faced by the Ethics Advisor to a President Holding Immense Wealth*, 22 TEX. REV. L. & POL. 265, 274 (2018).

377. *Id.*

378. *Id.* at 276–77.

379. MORGAN LEWIS WHITE PAPER, *supra* note 9.

380. See *id.*; see also WEINER, *supra* note 365, at 1.

himself indicates a greater potential for Trump, through the Trust, to receive a profit, gain, or advantage from the Trump Hotel's alleged catering to foreign government officials.³⁸¹

Ultimately, the Emoluments Clause question is not whether divesting is easy or difficult. Consistent with the OLC interpretations from Democrat and Republican administrations, the question should be whether profits, benefits or advantages received from foreign government entities is an undue influence, or has the appearance of being an undue influence, necessitating the consent of Congress.³⁸² Under a living approach, the Emoluments Clauses would take into account the Clauses' purposes to prevent corruption and undue influence³⁸³ and apply them to the modern day, where for many decades, Presidents have divested to avoid even the appearance of conflicts of interest.³⁸⁴

C. A Moral Reading of the Foreign Emoluments Clause

This Section considers how a moral reading of the Clauses allows courts to consider the abstract, moral dimension of the Clauses' purpose. Ronald Dworkin, the leading constitutional theorist for a moral reading of the Constitution, explains many of the Clauses in the Constitution "are drafted in exceedingly abstract moral language."³⁸⁵ The question of interpretation, or "translation" is to try and find language of our own that best captures the Framers' intent.³⁸⁶

History helps us understand if there is a moral principle embedded in the constitutional provision, or if the provision is a straightforward one, like the Third Amendment,³⁸⁷ which insists government may not quarter soldiers in citizens' house in peacetime.³⁸⁸ According to Dworkin, one could

381. *See supra* notes 228–230.

382. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 889 (D. Md. 2018) ("How, indeed, could it ever be proven, in a given case, that he had actually been influenced by the payments?" The Framers of the Clauses made it simple. Ban the offerings altogether [unless Congress consents to an official receiving them]); *see supra* Section I.C.

383. *Trump*, 315 F. Supp. 3d at 896 (finding the historical record reflects an "intention that the Emoluments Clauses function as broad anti-corruption provisions"); *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 188 (S.D.N.Y. 2017) (finding that based on the history, "there can be no doubt" the Foreign Emoluments Clause's purpose "was to prevent official corruption and foreign influence"); *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 53 (D.D.C. 2018) ("The Clause was intended by the Framers to guard against corruption and foreign influence."); *see infra* Section II.A.

384. *See supra* notes 364–366.

385. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996), *reprinted in* *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES*, *supra* note 261, at 182, 186.

386. *Id.*

387. U.S. CONST. amend III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

388. DWORKIN, *supra* note 385, at 186.

read into the Third Amendment and glean a principle from it, but it would not make a lot of sense since it is clear what the plain language of the Third Amendment means regarding soldiers in citizens' houses during peacetime.³⁸⁹ The same reasoning leads to a different result for the Equal Protection Clause, however, because the phrase "equal protection of the laws" means something more—it is a deep statement that describes a general principle of equality under the law.³⁹⁰ Similarly, history shows the Framers were concerned about corruption and undue foreign influence, and their concern was one of the reasons the Emoluments Clauses were enacted.³⁹¹ The word "emoluments" is also relatively ambiguous since it had two meanings at the time of the Founding, and the word was not defined in the Constitution.³⁹²

A moral reasoning approach is not unfettered to the text or history. Two restraints limit the scope of a moral reasoning approach.³⁹³ First, what the Framers' intended matters.³⁹⁴ Second, constitutional interpretation "is disciplined under the moral reading by the requirement of constitutional integrity. . . . Judges may not read their own convictions into the Constitution."³⁹⁵ According to Dworkin:

The moral reading asks [judges] to find the best conception of constitutional moral principles . . . that fits the broad story of America's historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record.³⁹⁶

In other words, applying a moral reading approach, a judge would find a conception of an anti-corruption principle that "fits" America's history.³⁹⁷ The moral reading approach sees the words of the Constitution as being tied to history but also having "abstractions."³⁹⁸ Scholar Jack M. Balkin describes how lawyers use history to make legal arguments: "[W]henver lawyers use history to show purpose, they are implicitly making an argu-

389. *Id.* at 186–87.

390. *Id.* at 187.

391. See Teachout, *supra* note 30, at 54 ("[W]e should give the principle and purpose of the Constitution's anti-corruption principle real weight in deciding close cases."); Sills, *supra* note 32, at 75 ("Influenced by the classical republican principle that corrupt influences from foreign states could destroy a nation, the Framers incorporated the Emoluments Clauses into the Constitution"); *supra* Section I.A.

392. See *supra* notes 212–221 and accompanying text; *supra* Section I.D.2.

393. DWORKIN, *supra* note 385, at 187.

394. *Id.* at 187–88.

395. *Id.* at 188.

396. *Id.*

397. See *supra* Section I.A.

398. DWORKIN, *supra* note 385, at 201, 203.

ment that the best reading of a text is one that fulfills the purposes of the statute or constitutional provision, and this claim, in turn, presupposes a theory of how laws should be applied.”³⁹⁹ In other words, “the acceptable forms of legal argument” are justified by “the moral and political ideas that underwrite them.”⁴⁰⁰ Critics of this approach say it allows judges to have too much unfettered say over the law.⁴⁰¹ But really the process of unpacking an “anti-corruption principle” in the Clauses is not unmoored to the text and purpose of the Constitution, even as originalists understand it.⁴⁰²

The notion of corruption has an independent, moral component to it.⁴⁰³ Corruption has two definitions in *Black’s Law Dictionary*: “an impairment of integrity, virtue, or moral principle, esp. the impairment of a public official’s duties by bribery” and “[a] fiduciary’s or official’s use of a station or office to procure some benefit either personally or for someone else.”⁴⁰⁴ Professor Teachout argues that corruption goes even further and has “a moral sense” with the “deep core of corruption involv[ing] personal, moral failure.”⁴⁰⁵ Ms. Sills argued the Framers intended for the Emoluments Clauses “to guard against corruption in order to preserve and protect our young Republic and its institutions from ruin.”⁴⁰⁶ In *The Anti-Corruption Principle*, Professor Teachout makes the point that “an anti-corruption principle” is embedded within the Constitution,⁴⁰⁷ however, not all scholars ascribe to his view.⁴⁰⁸

399. Jack M. Balkin, *History, Rights, and the Moral Reading*, 96 B.U. L. REV. 1425, 1439 (2016).

400. *Id.*

401. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269 (1997), reprinted in CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES, *supra* note 261, 199, 200 (critiquing the moral reading approach as leading to a situation where, “[t]he ‘best reading’ is the reading that, in the judge’s own opinion, will produce the best answers, defined philosophically and not historically”).

402. See President Reagan’s Ability to Receive Ret. Benefits from the State of Ca., 5 Op. O.L.C. 187, 192 (1980). Explaining that state retirement benefits did not have the potential to corrupt President Reagan because they were fully vested, and so did not “violate the spirit of the Constitution because they do not subject the President to any improper influence.” *Id.*; see also *supra* note 49; *supra* Section II.A.4.

403. See Teachout, *supra* note 323, at 453.

404. *Corruption*, BLACK’S LAW DICTIONARY (10th ed. 2014).

405. Teachout, *supra* note 323, at 453.

406. Sills, *supra* note 32, at 72.

407. Teachout, *supra* note 32, at 342. But see Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. L. REV. 399, 404 (2012) (arguing “the Framers were not ‘obsessed’ with corruption” and the scope of the anti-corruption principle is limited to federal appointed officials, not elected officials).

408. See Martin H. Redish & Elana Nightingale Dawson, *Worse Than the Disease: The Anti-Corruption Principle, Free Expression, and the Democratic Process*, 20 WM. & MARY BILL RTS. J. 1053, 1056, 1057 (2012) (arguing that the anti-corruption principle would have the effect of limiting free speech and expression and that the Constitution does not provide for a sweeping pro-

A key to a charge of corruption, according to Professor Teachout, is intent and motive.⁴⁰⁹ Under a moral reading approach, however, Professor Teachout's take on the Clauses' purpose goes too far. The plain language of the Foreign Emoluments Clause does not have an intent element. The Framers did not probe the intent of Benjamin Franklin when he accepted the gold snuff box from the King of France.⁴¹⁰ Instead, as the court in *District of Columbia v. Trump* correctly recognized, emoluments were "ban[ned] . . . all together" without the consent of Congress because they have the *potential* to corrupt and unduly influence the recipient.⁴¹¹ In other words, gifts and emoluments were banned because they simply might look bad, not because of who was giving or receiving the gift.

The Framers understood people are not perfect, and the checks and balances built into our system of government through the Constitution represents the Framers' brilliance in building a foundation that could cope with the "moral failings of normal humans, instead of one that could only be managed by angels."⁴¹² Accepting a gift or an emolument is likely to influence the person on the receiving end.⁴¹³ Rather than examining the intent of the person giving the emolument, or the effect accepting an emolument from a foreign governmental entity has on an official, the correct inquiry, in accordance with the principle behind the Emoluments Clauses, is whether receiving the emolument from the foreign governmental entity has the *potential* to corrupt.⁴¹⁴ In that case, the official should ask Congress for permission to accept the emolument.⁴¹⁵ A moral reading approach respects the history and context of the Clauses' inclusion in the Constitution⁴¹⁶ and recognizes a moral dimension to prevent corruption. The Clauses should be construed broadly in asking whether receiving an emolument from a foreign entity without the consent of Congress violates the moral spirit of the Clause.

III. CONCLUSION

Recent emoluments litigation presents interesting questions of constitutional interpretation, as federal courts are faced with the task of interpreting two provisions that have been dormant since the Founding Era. This

hibition of corruption); Tillman, *supra* note 407, at 404 (arguing "the Framers were not 'obsessed' with corruption" and the scope of the anti-corruption principle does not reach elected officials).

409. Teachout, *supra* note 323, at 454 (describing how "corruption requires talking about questions of motive, intent, feeling, and passion").

410. *See supra* note 67–70.

411. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 898 (D. Md. 2018).

412. Teachout, *supra* note 32, at 379, 380.

413. *See supra* text accompanying note 68–69.

414. *Trump*, 315 F. Supp. 3d at 898.

415. *See supra* notes 230, 290.

416. *See supra* Section I.A.

Comment argues the United States District Court for the District of Maryland correctly interpreted the word emoluments in the Emoluments Clauses as any profit, gain, or advantage based on the plain language of the Clauses and an originalist⁴¹⁷ approach to interpretation.⁴¹⁸ Moreover, the United States District Court for the Southern District of New York, the Maryland Federal District Court, and the United States District Court for the District of Columbia faced with the Emoluments Clauses litigation correctly looked to an anti-corruption purpose motivating the provisions.⁴¹⁹ This Comment analyzes three methods of constitutional interpretation—originalism, living constitution, and a moral reading approach—and puts forth the idea courts could find an anti-corruption purpose motivating the Emoluments Clauses using all three approaches.⁴²⁰ Even for provisions that have lain dormant for centuries, a living constitution approach could help inform an understanding, not only about what the Emoluments Clauses meant at the time of the founding, but what they mean today.⁴²¹ Moreover, a moral reading of the Emoluments Clauses could account for the Clauses’ anti-corruption purpose, and consider whether receiving an emolument “violate[s] the spirit” of that purpose.⁴²²

417. *See supra* Section II.A.

418. *See supra* Section I.A.4.

419. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 896 (D. Md. 2018) (finding the historical record reflects an “intention that the Emoluments Clauses function as broad anti-corruption provisions”); *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 188 (S.D.N.Y. 2017) (finding that based on the history, “there can be no doubt” the Foreign Emoluments Clause’s purpose was to prevent official corruption and foreign influence”); *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 53 (D.D.C. 2018) (“The Clause was intended by the Framers to guard against corruption and foreign influence.”); *see supra* Section II.A.3.

420. *See supra* Section II.A.

421. *See supra* Section II.B.

422. *President Reagan’s Ability to Receive Ret. Benefits from the State of Cal.*, 5 Op. O.L.C. 187, 188, 191, 192 (1981); *see supra* Section II.C.