

ValpoScholar

Valparaiso University Law Review

Volume 53 | Number 3

pp.631-681

Emoluments and President Trump

John Mikhail

Follow this and additional works at: <https://scholar.valpo.edu/vulr>

 Part of the [Judges Commons](#), [Law and Politics Commons](#), and the [Litigation Commons](#)

Recommended Citation

John Mikhail, *Emoluments and President Trump*, 53 Val. U. L. Rev. 631 (2019).
Available at: <https://scholar.valpo.edu/vulr/vol53/iss3/4>

This Seegers Lecture is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Lecture

THE 2018 SEEGERS LECTURE: EMOLUMENTS AND PRESIDENT TRUMP

John Mikhail*

I. INTRODUCTION

It is an honor to deliver the 2018 Seegers Lecture. My topic is the original meaning of “emolument” and its implications for President Trump. In my remarks, I will begin by discussing the Constitution’s Emoluments Clauses and describing the three emoluments lawsuits against the president that are currently winding their way through the federal courts. I will then highlight one of the main points of contention in these lawsuits, which is the constitutional meaning of the term “emolument.” Next, I will describe some of the efforts my colleagues and I have made to investigate the historical meaning of this term and will explain how our research may impact the ultimate resolution of these lawsuits. Finally, I will discuss the landmark decision issued by a federal district court in one of these cases in July 2018, which held that “emolument” was a flexible term at the founding that referred to “any ‘profit,’ ‘gain,’ or ‘advantage,’” including profits from ordinary market transactions. Notably, a second federal judge recently denied the

* Associate Dean for Research and Academic Programs and Agnes N. Williams Research Professor, Georgetown University Law Center. This Essay is a revised and expanded version of the 2018 Seegers Lecture I delivered at Valparaiso University Law School on October 25, 2018, entitled “The Original Meaning of ‘Emolument’ and its Implications for President Trump.” Although I have largely kept to the format and content of my original lecture, this Essay also incorporates a discussion of some events which occurred after the lecture was delivered. I wish to thank Professor Jeremy Telman for inviting me to give this honorary lecture and for his gracious hospitality during my visit to Valparaiso. Thanks also to the audience for their helpful questions and to Kyle Farris and the other editors of the *Valparaiso Law Review* for their excellent editorial assistance. My research assistant, Carly Reed, provided helpful edits and suggestions during the final stages of writing this Essay. Finally, I wish to thank my former research assistant, Genevieve (Bentz) Lewis, for her exceptional contributions to the scholarship contained herein. By the time this Essay goes to print, four colleagues—Jed Shugerman, Jack Rakove, Gautham Rao, and Simon Stern—and I will have submitted a total of five amicus briefs in the emoluments lawsuits against President Trump, including two cases on appeal, with more likely forthcoming. In this Essay, I rely at various points on the collective work that went into these briefs, gratefully acknowledging the contributions of my colleagues and emphasizing that it was a team effort throughout. I do not speak for any of them here, however, and any errors are my sole responsibility.

president's motion to dismiss on the same grounds, setting the stage for what seems likely to be a pivotal issue on appeal in both cases.

II. THE CONSTITUTION'S EMOLUMENTS CLAUSES

Currently, there are three federal lawsuits against President Trump alleging violations of the Constitution's Emoluments Clauses.¹ All three cases turn in large part on the meaning of the word "emolument" in two constitutional provisions: the Foreign Emoluments Clause of Article I, Section 9; and the Domestic Emoluments Clause of Article II, Section 1. A third clause in which the word "emolument" appears, the Ineligibility Clause of Article I, Section 6, is not directly at issue in these lawsuits. Nonetheless, because the Ineligibility Clause supplies additional insight into how the founding generation used the word "emolument" in various constitutional contexts, I will include a brief discussion of it here, while focusing primarily on the other two provisions.

A. *The Text of the Emoluments Clauses*

To understand any constitutional provision, one must begin by examining its precise language. The Foreign Emoluments Clause provides that:

[N]o Person holding any Office of Profit or Trust under [the United States], 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.²

The Domestic Emoluments Clause provides that:

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

¹ See generally *Citizens for Responsibility and Ethics in Washington et al. v. Trump*, 276 F. Supp. 3d 174, 179 (S.D.N.Y. 2017); *D.C. & Maryland v. Trump*, 315 F. Supp. 3d 875, 879 (D. Md. July, 25 2018); *Senator Richard Blumenthal et al. v. Trump*, 335 F. Supp. 3d 45, 50 (D.D.C. Sept. 28, 2018). As indicated, my co-authors and I have submitted a series of amicus briefs in these cases. See, e.g., *Brief of Amicus Curiae by Certain Legal Historians on Behalf of Plaintiffs, Citizens for Responsibility and Ethics in Washington et al. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458), 2017 WL 5483629 at *2-3, *appeal docketed*, No. 18-474 (2d Cir. Feb. 16, 2018). In this Essay, I follow the convention of using the phrase "Emoluments Clauses" to refer to both the Foreign and Domestic Emoluments Clauses. The term "emolument" also appears in the Incompatibility Clause, however, as I discuss below. See *infra* notes 2-8 and accompanying text.

² See U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other *Emolument* from the United States, or any of them.³

Finally, the Ineligibility Clause provides that:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the *Emoluments* whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.⁴

What can we learn from a textual analysis of these provisions? A few basic points stand out and are worth highlighting at this juncture. First, although all three provisions place restrictions on the activities of government officials, the provisions apply to different officials in each case. The Ineligibility Clause applies exclusively to members of Congress, whereas the Domestic Emoluments Clause applies exclusively to the president. Meanwhile, the Foreign Emoluments Clause applies to anyone “holding any Office of Profit or Trust under [the United States].”⁵ What this phrase means and which government officials it encompasses are points of disagreement among commentators.⁶ Second, the emoluments to which the Ineligibility Clause refers appear to be statutory compensation for government services. Whether this reading entails that the emoluments to which the Foreign and Domestic Emoluments Clauses refer are likewise restricted to compensation for government services seems questionable, however, and the point remains in dispute. Third, the text of the Foreign Emoluments Clause suggests that, whatever emoluments are, they are at least partly distinct from presents, offices, or titles. The extent to which these categories are mutually exclusive, however, is unclear. Finally, the Foreign Emoluments Clause has an unmistakably broad sweep, which is illustrated by the fact that it uses the

³ See U.S. CONST. art. II, § 1, cl. 7 (emphasis added).

⁴ See U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

⁵ See U.S. CONST. art. I, § 9, cl. 8.

⁶ Most commentators, including the Department of Justice’s Office of Legal Counsel, have generally assumed that the scope of this phrase includes the President of the United States. The most developed view that it does not originates with Professor Seth Barrett Tillman. See, e.g., Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQ. 180 (2013).

word “any” on *four* separate occasions. The clause prohibits anyone who holds “any Office of Profit or Trust under [the United States]” from accepting “any . . . Emolument . . . of any kind whatever, from any King, Prince, or foreign State,”⁷ without congressional consent. As far as multiple uses of “any” are concerned, only one other sentence in the original Constitution of 1787—the complex and multi-faceted first clause of Article I, Section 10, prohibiting, *inter alia*, bills of attainder, *ex post facto* laws, and laws impairing contractual obligations—sweeps so broadly.⁸

B. *The Drafting History*

The drafting history of the Emoluments Clauses at the 1787 Philadelphia Convention provides only limited insight into their scope and meaning. The first part of the full clause of Article I, Section 9 to which the Foreign Emoluments Clause was later added—the prohibition on Titles of Nobility—originated in the Committee of Detail.⁹ On August 23, Charles Pinckney moved to supplement this prohibition 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 any King, Prince, or foreign State.¹⁰

According to James Madison, Pinckney’s stated rationale in offering this motion was to urge “the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence.”¹¹ The language Pinckney chose to fulfill these objectives was entirely familiar to the delegates, having been lifted directly from the Articles of Confederation.¹²

⁷ *Id.* (emphasis added).

⁸ See U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.” (emphasis added)).

⁹ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 169 (Max Farrand ed., 1911) [hereinafter FEDERAL CONVENTION RECORDS] (recording the following statement in James Wilson’s “Draft IX” on behalf of the committee: “The United States shall not grant any Title of Nobility”).

¹⁰ *Id.* at 381, 389.

¹¹ *Id.* at 389.

¹² See ARTICLES OF CONFEDERATION of 1781, art. VI (stating “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”).

Evidently, the proposal was uncontroversial, and Pinckney's motion was unanimously approved. A few weeks later, the Committee of Style made only a few minor changes to these provisions and reported them back to the convention in the language in which they were ultimately adopted.¹³

The drafting history of the Domestic Emoluments Clause is not particularly edifying, either. One of the resolutions referred to the Committee of Detail was a provision stating that the Executive should "receive a fixed Compensation for the Devotion of his Time to the public Service—to be paid out of the public Treasury."¹⁴ Edmund Randolph's initial sketch of the Constitution on behalf of the Committee of Detail contains an expanded version of that provision, which clarifies that "the quantum of [the Executive's compensation] shall be settled by the national legislature."¹⁵ Randolph's draft also includes an edit by John Rutledge that reads: "no Increase or decrease during the Term of Service for the Executive."¹⁶ Both clauses were adopted by the full committee, which reported this provision in its August 6 draft: "He shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during his continuation in office."¹⁷ When this language, which was given to the Committee of Style and emerged from that committee in almost identical form,¹⁸ received its final consideration from the convention on September 15, two changes were made. First, for reasons that are not apparent, the delegates preferred the Committee of Detail's original phrase, "receive for his services, a compensation," to the Committee of Style's revision, "receive a fixed compensation for his services," and substituted the former for the latter.¹⁹ Second, Rutledge and Benjamin Franklin moved to add the following prohibition to the end of this provision on Executive compensation: "and he (the President) shall not receive, within that period, any other emolument from the U.S. or any

¹³ See FEDERAL CONVENTION RECORDS, *supra* note 9, at 596. The Committee of Style added a comma after "title," which arguably expanded the scope of the modifying phrase, "of any kind whatever," and extended it to include "present, emolument, [and] office" as well as "title." Compare *id.* at 572 (draft language given to the Committee of Style, which does not include this comma), with *id.* at 596 (the Committee of Style's final draft, which does include this comma). However, the extent to which this effect was deliberate or intentional is unclear.

¹⁴ *Id.* at 132.

¹⁵ *Id.* at 146.

¹⁶ *Id.*

¹⁷ *Id.* at 185.

¹⁸ See *id.* at 575 ("He shall, at stated times, receive for his services, a compensation, which shall neither be encreased [sic] nor diminished during his continuation in office."); *id.* at 599 ("The president shall, at stated times, receive a fixed compensation for his services, which shall neither be encreased [sic] nor diminished during the period for which he shall have been elected.").

¹⁹ *Id.* at 621.

of them.”²⁰ A vote was taken on this motion, and it was adopted by a 7–4 margin, with an unusual group of states (Connecticut, New Jersey, Delaware, and North Carolina) voting against the Rutledge-Franklin proposal.²¹

No other direct evidence exists concerning the drafting history of either the Foreign or Domestic Emoluments Clauses. Nonetheless, as I explain below, the framers’ purpose in adding these clauses to the Constitution seems clear and indisputable: to prevent corruption, conflicts of interest, and undue influence of federal officials, as well as the appearance of them. The Foreign Emoluments Clause, in particular, can be traced to widespread concerns over corruption, outside manipulation, profiteering, and other threats to republic government that were prevalent throughout the Revolutionary War era. Three foundational documents, initially drafted just a few months apart in the summer of 1776, exemplify these concerns: the Virginia Declaration of Rights, the Articles of Confederation, and the 1776 Pennsylvania Constitution. Each of these early American state papers contains an emoluments clause—an express prohibition on using government office for private gain—thereby setting a strong “anti-corruption” tone for all subsequent American constitutions during the founding era.²²

III. THREE LAWSUITS AGAINST THE PRESIDENT

Having reviewed the text and drafting history of the Emoluments Clauses, let me turn now, more directly, to how these clauses bear on President Trump. Three lawsuits claiming the president is violating the Emoluments Clauses are currently winding their way through the federal courts.²³ Although these lawsuits differ in other respects, all of them

²⁰ *Id.* at 626.

²¹ See FEDERAL CONVENTION RECORDS, *supra* note 9, at 626 (listing the states that voted against the proposal).

²² See ARTICLES OF CONFEDERATION of 1781, art. VI; *Virginia Declaration of Rights*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/virginia.asp [<https://perma.cc/9PG3-2TMP>]; *Constitution of Pennsylvania*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/pa08.asp [<https://perma.cc/Q98E-Q6J2>]. See also text accompanying note 12 (stating the relevant clause from the Articles of Confederation); *infra* notes 66–67 and accompanying text (providing the relevant text from the Virginia Declaration of Rights and the 1776 Pennsylvania Constitution). Although the version of the Articles of Confederation formally adopted in 1781 was composed in 1777, an earlier version of the Articles containing an emoluments prohibition was drafted by John Dickinson in 1776, after the publication of the Virginia Declaration of Rights yet before the drafting of the 1776 Pennsylvania Constitution. See 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 547 (Worthington Ford ed., 1906).

²³ See *Citizens for Responsibility and Ethics in Washington et al. (CREW) v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. Dec. 21, 2017); *D.C. & Maryland v. Trump*, 315 F. Supp. 3d 875 (D.

allege that President Trump is violating the Constitution by receiving profits, benefits, and advantages from foreign, federal, and state governments at the Trump International Hotel in Washington, D.C., and other Trump Organization properties. In addition, all of the lawsuits allege that, through the president's continued ownership of The Trump Organization, he has received a variety of other illegal profits and advantages from foreign, federal, and state governments, including rental income, trademarks, licenses, regulatory rulings, and other material benefits. Finally, all three lawsuits maintain that foreign, federal, and state governments have engaged in business transactions with The Trump Organization in order to curry favor with the president. In what follows, I will first offer a brief summary of the current procedural posture of each of these cases. Then I will turn to one of the main substantive questions at issue in these lawsuits, which concerns the original meaning and scope of the term "emolument."

A. *CREW et al. v. Trump*

The first lawsuit claiming that President Trump was violating the Emoluments Clauses was brought in the United States District Court for the Southern District of New York. The plaintiffs were Citizens for Responsibility and Ethics in Washington (CREW) and several privately owned hotels and restaurants in New York and Washington, D.C., all of whom argued that they were being harmed by the president's unconstitutional emoluments.²⁴ On December 21, 2017, U.S. District Judge George Daniels granted the president's Rule 12(b)(1) motion to dismiss their lawsuit for lack of jurisdiction.²⁵ As a result, Judge Daniels did not act upon the president's Rule 12(b)(6) motion to dismiss for failure to state a claim. Although Judge Daniels made some passing remarks during a hearing and in his opinion that suggest he believes the term "[e]molument" means "[c]ompensation" — a definition which might be thought to favor the president more than the plaintiffs — he did not issue any formal decision on that question.²⁶ As a result, the meaning of "emolument" remains unsettled in this lawsuit. Judge Daniels's decision

Md. July 25, 2018); Senator Richard Blumenthal et al. v. Trump, 335 F. Supp. 3d 45 (D.D.C. Sept. 28, 2018). Again, for the purposes of this Essay, I am following the convention that has recently emerged of using the phrase "Emoluments Clauses" to refer to both the Foreign and Domestic Emoluments Clauses. See *supra* note 1 and accompanying text.

²⁴ See *CREW*, 276 F. Supp. 3d at 179–83.

²⁵ See *id.* at 195.

²⁶ *Id.* at 181–82.

granting the president's motion to dismiss is currently on appeal to the United States Court of Appeals for the Second Circuit.²⁷

B. District of Columbia and Maryland v. Trump

The second emoluments lawsuit was brought in the United States District Court for the District of Maryland by the Attorneys General of Maryland and the District of Columbia. In their complaint, the plaintiffs argued inter alia that President Trump's receipt of payments by foreign, federal, and state governments at the Trump International Hotel in Washington, D.C., and other Trump Organization properties harmed their sovereign and quasi-sovereign interests.²⁸ In response, the president again moved to dismiss the lawsuit for lack of jurisdiction and failure to state a claim.

To date, this case progressed further than either of the other two lawsuits. On March 28, 2018, U.S. District Judge Peter J. Messitte denied the president's motion to dismiss on various jurisdictional grounds, including standing, zone of interests, and the political question doctrine.²⁹ Then, on July 25, 2018, Judge Messitte denied the president's motion to dismiss for failure to state a claim under the Emoluments Clauses.³⁰ The research that my colleagues and I presented to the court played a significant role in this second decision, which adopted the broad definition of "emolument" advocated by the plaintiffs and supported by our amicus brief.³¹ On November 2, 2018, Judge Messitte denied the president's motion for a stay and certification under *Federal Rules of Civil Procedure* 1292(b) to take an interlocutory appeal.³² On December 3, 2018, Judge Messitte entered a scheduling order regarding discovery.³³ Finally, on December 17, 2018, the president filed a mandamus petition and stay application in the U.S. Court of Appeals for the Fourth Circuit.³⁴

²⁷ See Pls.' Notice of Appeal, *Citizens for Responsibility and Ethics in Washington et al. v. Trump*, Civil Action No. 1:17-cv-00458-GBD (S.D.N.Y. Feb. 16, 2018).

²⁸ See Compl. ¶¶ 103–06, *D.C. & Maryland v. Trump*, No. 8:17-cv-01596-PJM (D. Md. June 12, 2017), 2017 WL 2559732.

²⁹ See *D.C. & Maryland v. Trump*, 291 F. Supp. 3d 725, 737–57 (D. Md. Mar. 28, 2018) (analyzing constitutional standing and prudential standing considerations like zone of interest and political question).

³⁰ See *D.C. & Maryland v. Trump*, 315 F. Supp. 3d 875, 904–07 (D. Md. July 25, 2018).

³¹ *Id.* (citing our research approximately two dozen times). See also Fred Barbash, *Trump's "Emoluments" Battle: How a Scholar's Search of 200 Years of Dictionaries Helped Win a Historic Ruling*, WASH. POST, July 27, 2018.

³² See *D.C. & Maryland v. Trump*, 344 F. Supp. 3d 828, 832, 844 (D. Md. Nov. 2, 2018).

³³ See Scheduling Order Regarding Discovery, *D.C. & Maryland v. Trump*, 344 F. Supp. 3d 828 (D. Md. Dec. 3, 2018).

³⁴ See Petition for a Writ of Mandamus to the United States District Court for the District of Maryland and Motion for Stay of District Court Proceedings Pending Mandamus, *In re*

In his mandamus petition, President Trump asked the Fourth Circuit to order the district court to grant a 1292(b) certification or, instead, to dismiss the entire case outright.³⁵ On December 20, the plaintiffs filed an opposition to the president's stay application.³⁶ That same day, the Fourth Circuit stayed all district court proceedings, ordered full briefing on the mandamus petition, and set the case for oral argument in March 2019.³⁷ In addition, the Fourth Circuit ordered the parties to brief:

Not only the procedural issues regarding the mandamus petition but also the underlying issues of (1) whether the two Emoluments Clauses provide plaintiffs with a cause of action to seek injunctive relief and (2) whether the plaintiffs have alleged legally cognizable injuries sufficient to support standing to obtain relief against the President.³⁸

On March 19, a Fourth Circuit panel held a hearing on these issues, which did not go well for the plaintiffs — a topic to which I return.³⁹

C. Blumenthal et al. v. Trump

The third lawsuit alleging presidential violations of the Emoluments Clauses was brought in the United States District Court for the District of Columbia by nearly 200 members of Congress, led by Senator Richard Blumenthal and Representative Jerrold Nadler.⁴⁰ The plaintiffs'

Donald J. Trump (D.C. & Maryland v. Trump), No. 18-2486, (4th Cir. Dec. 17, 2018), 2018 WL 6735981.

³⁵ See *id.* at 8, at *1.

³⁶ See Respondents' Opposition to Motion for Stay of District Court Proceedings Pending Mandamus, *In re* Donald J. Trump (D.C. & Maryland v. Trump), No. 18-2486 (4th Cir. Dec. 20, 2018), 2018 WL 6839635.

³⁷ See Order, *In re* Donald J. Trump (D.C. & Maryland v. Trump), No. 18-2486 (8:17-cv-01596-PJM) (4th Cir. Dec. 20, 2018); Briefing Order, *In re* Donald J. Trump (D.C. & Maryland v. Trump), No. 18-2486 (8:17-cv-01596-PJM) (4th Cir. Dec. 20, 2018).

³⁸ *Id.* On January 10th, in light of the ongoing government shutdown, the Fourth Circuit subsequently modified its briefing schedule. See Order, *In re* Donald J. Trump (D.C. & Maryland v. Trump), No. 18-2486 (8:17-cv-01596-PJM) (4th Cir. Jan. 10, 2019). The court accepted DOJ's mandamus petition as an opening brief and ordered the plaintiffs to file their response brief on or before January 31, 2019. See *id.* Further extensions were later granted, and the plaintiffs submitted their brief on February 21. See Reply Brief for Petitioner, *In re* Donald J. Trump (D.C. & Maryland v. Trump), No. 18-2486 (8:17-cv-01596-PJM), 2019 WL 913478 (4th Cir. Feb. 21, 2019).

³⁹ See Ann E. Marimow & Jonathan O'Connell, *Judges Seem Skeptical Trump Is Illegally Profiting from His D.C. Hotel*, WASH. POST, Mar. 19, 2019.

⁴⁰ See Compl. at 17, Blumenthal et al. v. Trump, 1:17-cv-01154, 2017 WL 2561946 (D.D.C. June 14, 2017).

allegations were similar to those raised in the other two lawsuits, but their complaint also focused attention on Congress's special constitutional function with respect to the Foreign Emoluments Clause.⁴¹ On September 28, 2018, Judge Emmet Sullivan denied the president's motion to dismiss this suit on jurisdictional grounds, holding instead that the plaintiffs had standing.⁴² Judge Sullivan did not hold a hearing on the president's Rule 12(b)(6) motion; instead, he denied that motion without a hearing in a forty-eight-page opinion issued on April 30.⁴³ Like Judge Messitte, Judge Sullivan adopted the broad definition of "emolument" sought by the plaintiffs and supported by our amicus brief.⁴⁴

IV. THE HISTORICAL MEANING OF "EMOLUMENT"

The main substantive question in all of these lawsuits is the constitutional meaning of "emolument" and whether it includes profits from ordinary market transactions. Generally speaking, the litigants and other commentators have adopted two conflicting positions on this question. On the one hand, the president and his lawyers, along with some scholars, have argued that the term "emolument" as it is used in the Constitution means "profit arising from office or employ"⁴⁵—in other words, the salary or other compensation attached to official government service. Furthermore, the president and his supporters have argued that this "office-related" definition of "emolument" is the original meaning of the term—the meaning that the founders presupposed when they drafted and ratified the Constitution. By contrast, the plaintiffs and their supporters have argued that "emolument" had a much broader meaning at the founding. In particular, the plaintiffs initially maintained that an emolument could be "anything of value,"⁴⁶ including the profits from private commercial transactions. More recently, they have argued that the original meaning of "emolument" encompassed any "profit," "gain," or "advantage."⁴⁷

⁴¹ See U.S. CONST. art. I, § 9, cl. 8 (permitting accepting foreign emoluments only with "the consent of Congress").

⁴² See *Blumenthal et al. v. Trump*, 335 F. Supp. 3d 45, 52–72 (D.D.C. Sept. 28, 2018).

⁴³ See *Blumenthal et al. v. Trump*, 373 F. Supp. 3d 191 (D.D.C. April 30, 2019).

⁴⁴ *Id.* See also Marcia Coyle, 2 *Amicus Briefs Played Big Roles in Latest 'Emoluments' Ruling against Trump*, THE NAT'L L. J. (May 1, 2019).

⁴⁵ Memorandum of Law in Support of Defendant's Motion to Dismiss at 48, *Citizens for Responsibility and Ethics in Washington et al. v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. June 9, 2017) [hereinafter DOJ Brief].

⁴⁶ See *id.*

⁴⁷ See *Blumenthal et al. v. Trump*, 373 F. Supp. 3d 191 (D.D.C. April 30, 2019).

A. *The Trump White Paper*

Perhaps the most significant events shaping how this interpretive debate has unfolded occurred in the two weeks before President Trump's inauguration on January 20, 2017. On January 11, Donald Trump and his attorney, Sherri Dillon, held a press conference to explain how he planned to address potential conflicts of interest during his presidency. At the press conference, Dillon responded to the charge that unless Trump took specific measures to divest his ownership of The Trump Organization, he would soon be violating the Emoluments Clauses.⁴⁸ Later that day, Dillon and several of her colleagues published a "White Paper" on presidential conflicts of interest, an important document that laid out the basic strategy for defending against these alleged constitutional violations that the president and his representatives have pursued ever since.⁴⁹

⁴⁸ Near the end of the press conference, Dillon took up the emoluments issue and said the following:

I'm going to turn to one last topic today that has been of interest lately called emoluments. That's a word I think we've all become familiar with and perhaps had not heard before. . . .

Emoluments comes from the Constitution. The Constitution says "officials may not accept gifts, titles of nobility, or emoluments from foreign governments with respect to their office, and that no benefit should be derived by holding in office." The so-called Emoluments Clause has never been interpreted, however, to apply to fair value exchanges that have absolutely nothing to do with an office holder.

No one would have thought when the Constitution was written that paying your hotel bill was an emolument. Instead, it would have been thought of as a value-for-value exchange; not a gift, not a title, and not an emolument.

But since President-elect Trump has been elected, some people want to define emoluments to cover routine business transactions like paying for hotel rooms. They suggest that the Constitution prohibits the businesses from even arm's-length transactions that the president-elect has absolutely nothing to do with and isn't even aware of.

These people are wrong. This is not what the Constitution says. Paying for a hotel room is not a gift or a present and it has nothing to do with an office. It's not an emolument.

The Constitution does not require President-elect Trump to do anything here. But, just like with conflicts of interests, he wants to do more than what the Constitution requires.

So, President-elect Trump has decided, and we are announcing today, that he is going to voluntarily donate all profits from foreign government payments made to his hotel to the United States Treasury.

This way, it is the American people who will profit.

Donald Trump's News Conference: Full Transcript and Video, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html> [<https://perma.cc/Y8QG-LJFE>].

⁴⁹ See Press Release, Morgan Lewis, White Paper: Conflicts of Interest and the President (prepared by Morgan, Lewis & Bockius LLP) (Jan. 11, 2017) [hereinafter White Paper].

With respect to the Emoluments Clauses, the Trump White Paper made three noteworthy claims.⁵⁰ First, explicitly endorsing originalism, it maintained that “the scope of any constitutional provision is determined by the original public meaning of the Constitution’s text. Here that text, understood through historical evidence, establishes that foreign governments’ business at a Trump International Hotel or similar enterprises is not a ‘present, Emolument, Office, or Title.’”⁵¹ Second, it claimed that “an emolument was widely understood at the framing of the Constitution to mean any compensation or privilege associated with an *office*—then, as today, an ‘emolument’ in legal usage was a payment or other benefit received as a consequence of discharging the duties of an *office*.”⁵² Drawing out the implications of this claim, the authors wrote:

Emoluments did not encompass all payments of any kind from any source, and would not have included revenues from providing standard hotel services to guests, as these services do not amount to the performance of an office, and therefore do not occur as a consequence of discharging the duties of an office.⁵³

Third, and relatedly, the Trump White Paper argued that the original meaning of “emolument” did not include ordinary “fair-market-value transactions,”⁵⁴ such as the profits derived from renting rooms at the Trump Hotel.

To defend these originalist claims, the Trump White Paper relied on three Attorney General opinions from 1819, 1831, and 1854;⁵⁵ one failed

⁵⁰ The following discussion draws from a blog post I wrote shortly after the release of the white paper. See John Mikhail, *A Note on the Original Meaning of “Emolument,”* BALKINIZATION (Jan. 18, 2017) <https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html> [<https://perma.cc/CG54-8FYB>].

⁵¹ White Paper, *supra* note 49, at 4. As commentators such as Michael Ramsey noted at the time, this embrace of originalism as the only suitable and definitive mode of constitutional analysis was a surprising posture for Trump’s lawyers to adopt in these circumstances. It is probably best understood as “ideological” the sense Professor Ramsey identifies. See Michael Ramsey, *Trump’s Emoluments Opinion as an Ideological Statement*, THE ORIGINALISM BLOG (Jan. 13, 2017), <https://originalismblog.typepad.com/the-originalism-blog/2017/01/trumps-emoluments-opinion-as-an-ideological-statementmichael-ramsey.html> [<https://perma.cc/4B9E-LWHM>].

⁵² White Paper, *supra* note 49, at 4.

⁵³ *Id.*

⁵⁴ See *id.* at 5.

⁵⁵ See *id.* at 4 n.13 (citing *Salaries of Officers of Arkansas Territory*, 1 Op. Att’y Gen. 310, 310 (1819); *Salaries to Ministers and Consuls*, 2 Op. Att’y Gen. 470, 471 (1831); and *Marshal of Florida*, 6 Op. Att’y Gen. 409, 410 (1854)).

constitutional amendment from 1810;⁵⁶ one obscure Supreme Court decision from 1850;⁵⁷ and a handful of more recent Comptroller General and Office of Legal Counsel (OLC) opinions, primarily from the 1960s, 1970s, and 1980s.⁵⁸ The only eighteenth-century source the Trump White Paper supplied to substantiate the core claim that “an emolument was widely understood at the framing . . . to mean any compensation or privilege associated with an office” was *The Federalist*.⁵⁹ What did these passages from *The Federalist* say, and do they support the president?

B. References to “Emoluments” in *The Federalist*⁶⁰

As I highlighted at the time, the authors’ originalist evidence was inadequate. Appendix 1 lists the specific passages from *The Federalist* on which the Trump White Paper relied, while Appendix 2 lists all of the remaining uses of “emolument” in *The Federalist*.⁶¹ These passages demonstrate that “emolument” was sometimes used at the founding to refer to salary or other benefits associated with discharging the duties of an office. Nevertheless, this fact is insufficient to prove the precise point at issue between President Trump and his critics. That question is not whether “emolument” was sometimes used in this restricted fashion but whether, because of its meaning, it always was – in other words, whether “salary or benefits associated with an office” was somehow built into the very definition or semantic content of “emolument” at the time. None of the passages in Appendix 1 or Appendix 2 entails or even strongly implies that the meaning of “emolument” was so restricted or necessarily excludes

⁵⁶ See *id.* at 4–5 (citing 20 ANNALS OF CONG. 671, 2050–51 (1853)).

⁵⁷ See *id.* at 4 (citing *Hoyt v. United States*, 51 U.S. 109, 135 (1850)).

⁵⁸ See *id.* at 5 n.18 (citing two opinions from the Comptroller General and four opinions from the Office of Legal Counsel).

⁵⁹ *Id.* at 4 n.12 (citing a series of *Federalist* essays).

⁶⁰ Examples and other text from Part IV.B draw directly from my blog essay, *A Note on the Original Meaning of “Emolument,” supra* note 47.

⁶¹ See *id.* On the basis of footnote 12 of their white paper, which reads “See, e.g., THE FEDERALIST 2, 177, 243, 268, 340, 379–80 (G. Carey & J. McClellan eds., 2001),” one can identify six *Federalist* essays on which the authors apparently relied: Numbers 1, 36, 46, 51, 65, and 73. Examining these essays reveals that they do not establish the meaning of “emolument” to which the white paper appeals. See *infra* Appendix 1 (outlining quotes from *Federalist* essays Numbers 1, 36, 46, 51, 65, and 73). Yet the signal “See, e.g.,” indicates that there may be other passages in *The Federalist* that support this originalist claim. Are there such passages, and if so, what do they say? The edition of *The Federalist* to which the white paper refers is the Liberty Fund reprint of the 1818 Gideon edition. By searching a PDF of this volume, one can easily locate every occurrence of “emolument” in *The Federalist*. This exercise yields six additional essays in which this term is used: Numbers 55, 59, 72, 76, 77, and 84. These essays also do not establish the meaning of “emolument” on which the white paper relies. See *infra* Appendix 2 (laying out *Federalist* Essays that contain the word “emolument” but that do not define the word).

a wider category of payments or benefits, such as the profits generated by the Trump hotels. While some passages from *The Federalist* indicate that office-related payments or benefits were characterized as emoluments, it is the *converse* of that proposition that the president needs to establish for his originalist argument to succeed. The form of that argument is not “all office-related payments or benefits are emoluments” but rather “all emoluments are office-related payments or benefits.” To assume these propositions are logically equivalent is to commit the fallacy of affirming the consequent. And to assert that the latter proposition is true as a matter of original meaning is to say something empirically false, as even a cursory look at the pertinent evidence illustrates. There is abundant evidence that “emolument” was often used at the founding in a much wider sense, one that went beyond the duties of an office and included the fruits of ordinary market transactions. Consider, to begin with, the following three examples.

1. Virginia Nonimportation Resolutions (1770)

In response to the Townshend Acts, many American colonists formed nonimportation associations, which pledged not to purchase British goods until their grievances were met. In 1770, one such group in Virginia sought to retaliate against local merchants who refused to join the boycott. Denouncing these holdouts, George Washington, Thomas Jefferson, and other Virginians professed that they would:

[A]void purchasing any commodit[y o]r article of goods whatsoever from any importer or seller of British merchandise or European goods, whom we may know or believe . . . to have preferred their own private emolument, by importing or selling articles prohibited by this association, to the destruction of the dearest rights of the people of this colony.⁶²

2. Proclamation on Intercourse with British Warships (1776)

During the Revolutionary War, the New York Committee of Safety prohibited merchants from selling goods to British warships and enlisted George Washington’s help in enforcing this ban. In response, General Washington issued a proclamation condemning those “sundry base and

⁶² *Virginia Nonimportation Resolutions*, 22 June 1770, FOUNDERS ONLINE NATIONAL ARCHIVES (Jan. 18, 2019), <https://founders.archives.gov/documents/Jefferson/01-01-02-0032> [<https://perma.cc/7W9L-C67R>] (citing *The Papers of Thomas Jefferson*, vol. 1, 1760–1776, (Julian P. Boyd, ed., Princeton: Princeton Univ. Press, 1950, pp. 43–48)).

wicked Persons, preferring their own, present private Emolument to their Country's Weal, [who] have continued to carry on" the proscribed trade, and announcing they would be punished accordingly.⁶³

3. Madison's Letter to Jefferson (1786)

In the spring of 1786, James Madison and James Monroe purchased nine hundred acres along the Mohawk River in upstate New York, near the site where the Treaty of Fort Stanwix was signed. Shortly thereafter, Madison invited Jefferson to join them in an even larger purchase. The terms of Madison's proposal called for Jefferson to borrow "four or five thousand louis" (*i.e.*, French coins) "on the obligation of Monroe and myself with your suretyship, to be laid out by Monroe and myself for our triple emolument; an interest not exceeding six per cent to be paid annually and the principal within a term not less than eight or ten years."⁶⁴

Evidently, the emoluments to which Washington, Jefferson, and Madison referred on these occasions were not "payment[s] or other benefit[s] received as a consequence of discharging the duties of an office."⁶⁵ Instead, they were the consequences of ordinary business dealings.

These illustrations are just the tip of the iceberg. As I observed at the time, the Founders Online website alone contains over 1500 occurrences of "emolument" in the papers of the six most prominent founders.⁶⁶ Other easily searchable databases—Early American Imprints, HathiTrust, HeinOnline, and others—contain thousands more. Many of these uses of "emolument" involve payments or benefits associated with the duties of an office, but many others do not. For example, each of the following illustrations also directly contradicts the historical claims advanced by the Trump White Paper.

⁶³ *Proclamation on Intercourse with British Warships*, 29 April 1776, FOUNDERS ONLINE, NATIONAL ARCHIVES (Jan. 18, 2019), <https://founders.archives.gov/documents/Washington/03-04-02-0132> [<https://perma.cc/HK7V-FRBT>] (citing *The Papers of George Washington*, Revolutionary War Series, vol. 4, 1 April 1776–15 June 1776 (Philander D. Chase, ed., Charlottesville: Univ. Press of Virginia, 1991, pp. 164–165)).

⁶⁴ *To Thomas Jefferson from James Madison*, 12 August 1786, FOUNDERS ONLINE, NATIONAL ARCHIVES (Jan. 18, 2019) <https://founders.archives.gov/documents/Jefferson/01-10-02-0154> [<https://perma.cc/MU6H-FCZZ>] (citing *The Papers of Thomas Jefferson*, vol. 10, 22 June–31 December 1786 (Julian P. Boyd, ed., Princeton: Princeton Univ. Press, 1954, pp. 229–236)).

⁶⁵ *White Paper*, *supra* note 49, at 4.

⁶⁶ See Mikhail, *A Note on the Original Meaning of "Emolument,"* BALKINIZATION (Jan. 18, 2017), <https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html> [<https://perma.cc/G543-JNDD>] [hereinafter Mikhail, *Original Meaning*].

646 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53

4. Declaration of the Causes and Necessity of Taking Up Arms (1775)

A congressional resolution co-authored by Thomas Jefferson and John Dickinson during the American Revolution asserted: "These devoted Colonies were judged to be in such a state, as to present victories without bloodshed, and all the easy emoluments of statuteable plunder."⁶⁷

5. The Farmer Refuted (1775)

In a series of essays published during the American Revolution, Alexander Hamilton wrote:

It deserves to be remarked here, that those very persons in Great Britain, who are in so mean a situation, as to be excluded from a part in elections, are in more eligible circumstances, than [we] should be in, who have every necessary qualification. They compose a part of that society, to whose government they are subject. They are nourished and maintained by it, and partake in every other emolument, for which they are qualified.⁶⁸

6. Novanglus (1775)

Responding to a series of loyalists during the American Revolution, John Adams wrote:

If a clergyman preaches against the principles of the revolution, and tells the people that upon pain of damnation they must submit to an established government of whatever character, the Tories cry him up as an excellent man, and a wonderful preacher, invite him to their tables, procure him missions from the society, and chaplainships to the navy, and flatter him with the hopes of lawn sleeves. But if a clergyman preaches Christianity, and tells the magistrates that they were not distinguished

⁶⁷ A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/arms.asp#1 [<https://perma.cc/N6MR-69N2>]. The fact that Dickinson co-authored this document seems notable in light of the fact that he also drafted the emoluments clause of the Articles of Confederation. See 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 547 (Worthington Ford ed., 1906).

⁶⁸ *The Farmer Refuted, &c.*, [23 February] 1775, FOUNDERS ONLINE, NATIONAL ARCHIVES (Jan. 18, 2019), <https://founders.archives.gov/documents/Hamilton/01-01-02-0057> [<https://perma.cc/SLZ6-H3UD>].

from their brethren for their private emolument, but for the good of the people, that the people are bound in conscience to obey a good government, but are not bound to submit to one that aims at destroying all the ends of government—Oh Sedition! Treason!⁶⁹

7. Virginia Declaration of Rights (1776)

The Virginia Declaration of Rights, which influenced the Declaration of Independence and other founding-era texts, held: “That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.”⁷⁰

8. The Constitution of Pennsylvania (1776)

The Pennsylvania Constitution, drafted in 1776, affirmed:

That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community, And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by the community judged most conducive to the public weal.⁷¹

⁶⁹ *To the Inhabitants of the Colony of Massachusetts-Bay, 13 February 1775,”* FOUNDERS ONLINE, NATIONAL ARCHIVES (Jan. 18, 2019), <https://founders.archives.gov/documents/Adams/06-02-02-0072-0005> [<https://perma.cc/QL33-Y3HG>]. See also *The News Media and the Making of America, 1730–1865*, AM. ANTIQUARIAN SOC’Y, <http://americanantiquarian.org/earlyamericannewsmedia/exhibits/show/age-of-revolution/item/63> [<https://perma.cc/4E3Y-8SSW>] (describing how Adams argued for colonists’ freedom in his response to loyalists).

⁷⁰ *Virginia Declaration of Rights*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/virginia.asp [<https://perma.cc/9PG3-2TMP>]. See also *Primary Documents in American History: Virginia Declaration of Rights*, LIBR. OF CONGRESS (June 6, 2018), <http://www.loc.gov/rr/program/bib/ourdocs/mason.html> [<https://perma.cc/LSX4-JV46>] (noting that this document, written by George Mason and edited by Thomas Ludwell Lee, influenced several other important documents of the era).

⁷¹ *Constitution of Pennsylvania*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/pa08.asp [<https://perma.cc/Q98E-Q6J2>].

9. John Adams's Draft Constitution for Massachusetts (1779)

Finally, John Adams composed a similar clause in his draft of the Massachusetts Constitution:

The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly [sic] provide for: and there shall be no suspension of any law for the private interest, advantage, or emolument, of any one man or class of men.⁷²

Do quotations like these settle the matter of how the Constitution's Emoluments Clauses were understood by the founders? Clearly not; insofar as one seeks to answer this question, what is needed is a much more thorough investigation of the relevant sources. And whether the original meaning should control how the Constitution is applied today is, of course, a complex, normative, and practical question, with many competing considerations.

Examples like these and the vast, untapped databases from which they are drawn, however, do cast serious doubt on the constitutional arguments made by the Trump White Paper. As I have emphasized, a critical feature of the Foreign Emoluments Clause is that, by its very terms, it reaches "any . . . Emolument . . . of any kind whatever, from any King, Prince or foreign State."⁷³ Because the founding generation recognized a wide range of emoluments—including various forms of "private emolument"—and ratified such a broadly worded prohibition, a heavy burden of proof would seem to fall on any attempt to categorically exclude The Trump Organization's commercial relationships with foreign governments or their agents from its scope. This is particularly true of the Trump White Paper, which seeks to do so on "textual and historical" grounds.

⁷² *The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts*, 28–31 October 1779, FOUNDERS ONLINE, NATIONAL ARCHIVES (Jan. 18, 2019), <https://founders.archives.gov/documents/Adams/06-08-02-0161-0002> [<https://perma.cc/2RY8-9V4Y>].

⁷³ See U.S. CONST. art. I, § 9, cl. 8 (emphasis added); Mikhail, *Original Meaning*, *supra* note 62.

C. “*Emolument*” in Blackstone’s Commentaries

Whenever a question about eighteenth-century Anglo-American legal history arises, it makes sense to consult William Blackstone’s *Commentaries on the Laws of England*.⁷⁴ The word “*emolument*” occurs sixteen times in Blackstone’s *Commentaries*.⁷⁵ Recall that the Trump White Paper claimed that the original public meaning of “*emolument*” was “payment or other benefit received as a consequence of discharging the duties of an *office*.”⁷⁶ Is this claim consistent with how the term is used by Blackstone?

Blackstone does not support such a narrow reading. On some occasions, he refers to the emoluments of government officials, such as postmasters, civil magistrates, and naval seamen. But the significance of these public employment contexts must be interpreted cautiously, particularly in light of how government officials were generally compensated during the founding era.⁷⁷ More importantly, most of Blackstone’s uses of “*emolument*” in the *Commentaries* involve benefits other than government salaries or perquisites and reflect a broader meaning of the term—“profit,” “gain,” “benefit,” or “advantage”—that includes the fruits of private market transactions.

For example, Blackstone uses “*emolument*” in the context of family inheritance, private employment, and private ownership of land. He refers to “the power and emoluments” of monastic orders; to “the rents and emoluments of the estate” managed by ecclesiastical corporations; and to the “pecuniary emoluments,” which the law of bankruptcy assigns to debtors.⁷⁸

Blackstone describes the advantages to third-party beneficiaries of a gift as “the emolument of third persons.”⁷⁹ He uses “*emolument of the exchequer*” to refer to an increase in the national treasury.⁸⁰ Finally, in explaining the law of corporations, he characterizes “parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe,

⁷⁴ Part IV.C draws from another blog essay I wrote during the early stages of the emoluments lawsuits. See John Mikhail, “*Emolument*” in Blackstone’s Commentaries, BALKINIZATION (May 28, 2017), <https://balkin.blogspot.com/2017/05/emolument-in-blackstones-commentaries.html> [<https://perma.cc/J256-KSP5>] [hereinafter Mikhail, *Blackstone’s Commentaries*], from which this part is largely drawn.

⁷⁵ *Id.* See also *infra* Appendix 3.

⁷⁶ White Paper, *supra* note 49, at 4.

⁷⁷ See generally NICHOLAS R. PARILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1840 (2013).

⁷⁸ Mikhail, *Blackstone’s Commentaries*, *supra* note 74. See also Appendix 3.

⁷⁹ Mikhail, *Blackstone’s Commentaries*, *supra* note 74. See also Appendix 3.

⁸⁰ Mikhail, *Blackstone’s Commentaries*, *supra* note 74. See also Appendix 3.

and the tithes of the parish” as among the “emoluments” vested in the church parson.⁸¹

A further illustration of the fact that Blackstone understood that emoluments could relate to private market transactions can be found in the forms of “Conveyance by Lease and Release” that appear at the end of *Book II* of the *Commentaries*. In the first of these forms (“Lease, or Bargain and Sale, for a year”), Blackstone suggests the following language for conveying parcels of land:

[T]his Indenture Witnesseth, that . . . [A.B. and C.] . . . have . . . bargained, [and] sold, . . . unto [D.E. and F.G.] . . . the capital messuage called Dale Hall, . . . and all those their lands . . . called or known by the name of Wilson’s farm . . . together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, water-courses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm . . .⁸²

Blackstone uses the same language in his second form (“Deed of Release”). Both forms can also be found in his *Analysis of the Laws of England* (1756), published ten years earlier.⁸³ Yet Blackstone probably did not create these forms on his own. Many form books and other legal manuals of the period included similar templates. In Giles Jacob’s *Law-Dictionary* (1729), for instance, which included not only a dictionary of legal terms but also writs, case reports, and deeds and conveyances, one finds a “Form of a Release and Conveyance of Lands” with almost identical language, in which “A.B.” conveys to “C.D.” a piece of property together with “[A]ll . . . Easements, Profits, Commodities, Advantages, Emoluments and Hereditaments whatsoever . . .”⁸⁴

When Americans bought and sold property during the founding era, they frequently referred to emoluments in their deeds and conveyances. For example, on January 5, 1787, Francis Lewis, a prominent New Yorker who signed both the Declaration of Independence and Articles of

⁸¹ Mikhail, *Blackstone’s Commentaries*, *supra* note 74. See generally Appendix 3.

⁸² WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND BOOK II: OF THE RIGHTS OF THINGS* 355–56 (Oxford Univ. Press 2016) [hereinafter BLACKSTONE, *COMMENTARIES BOOK II*].

⁸³ See WILLIAM BLACKSTONE, *AN ANALYSIS OF THE LAWS OF ENGLAND* 143 (2d ed. 1756).

⁸⁴ GILES JACOB, *A NEW LAW-DICTIONARY* 433 (1729).

Confederation, placed a notice in *The New-York Packet* announcing the sale of land at a public auction, together with “all buildings, ways, paths, profits, commodities, advantages, emoluments and hereditaments whatsoever to the said messuage or tenement and lot of ground belonging.”⁸⁵ Like Blackstone’s and Jacob’s form contracts, the emoluments to which Lewis referred were not government salaries or fringe benefits, but benefits that belonged to and ran with the land.

Two final points worth noting about Blackstone’s understanding of “emolument” concern his last will and testament and his argument in *Tonson v. Collins*. By a clause in his will, Blackstone directed that his collection of case reports should be published after his death “[a]nd that the produce thereof be carried to, and considered as part of his personal estate.”⁸⁶ Blackstone’s brother-in-law, James Clitherow, who served as his executor, fulfilled this obligation by publishing two volumes of Blackstone’s case notes in 1781. In his preface to *Reports of Cases Determined in the Several Courts of Westminster-Hall from 1746 to 1779: Taken and Compiled by the Honourable Sir William Blackstone*, Clitherow quoted the foregoing clause to explain why he was not at liberty to give away any of these volumes as a present. Clitherow explained that “he does not think himself justified in doing, as trustee for the author’s children, to whose emolument the profits are specifically directed to be applied.”⁸⁷

In characterizing Blackstone’s profits in this manner, Clitherow may have had in mind *Tonson v. Collins*, an important copyright case in which Blackstone argued before the Court of King’s Bench in 1761 and which appears in the first volume of the Reports.⁸⁸ In summarizing his own argument in that case, Blackstone wrote: “No man has a right to make a profit, by thus publishing the works of another, without the consent of the author. It would be converting to one’s own emolument the fruits of another’s labour.”⁸⁹ Blackstone returned to this topic in the *Commentaries*, expressing similar ideas in different terms:

When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any

⁸⁵ Mikhail, *Blackstone’s Commentaries*, *supra* note 74. The advertisement ran through the spring and summer of 1787. *Id.*

⁸⁶ WILLIAM BLACKSTONE, *REPORTS OF CASES DETERMINED IN THE SEVERAL COURTS OF WESTMINSTER-HALL FROM 1746 TO 1779* xxii (1828).

⁸⁷ *Id.*

⁸⁸ *See id.* at 301.

⁸⁹ *Id.* at 323.

attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property.⁹⁰

In sum, in light of the foregoing evidence, it seems clear that Blackstone did not understand the term “emolument” in the restricted sense advocated by the Trump White Paper.

V. THE PRESIDENT’S MOTION TO DISMISS

A. *The United States Department of Justice’s Definition of “Emolument”*

On June 9, 2017, the U.S. Department of Justice (DOJ) filed its brief in support of President Trump’s Motion to Dismiss in *CREW et al. v. Trump*.⁹¹ The DOJ subsequently filed substantially the same brief in the other emoluments cases as well.⁹² In its first brief, the DOJ argued, inter alia, that:

Plaintiffs’ expansive reading of the Emoluments Clauses is contrary to the original understanding of the Clauses and to historical practice. The term “Emolument” in this context refers to benefits arising from personal service in an employment or equivalent relationship.⁹³

....

Neither the text nor the history of the [Emoluments] Clauses shows that they were intended to reach benefits arising from a President’s private business pursuits having nothing to do with his office or personal service to a foreign power.⁹⁴

....

At the time of the Nation’s founding . . . an “emolument” was a common characteristic of a federal office, and comprehensively described “every species of

⁹⁰ BLACKSTONE, COMMENTARIES BOOK II, *supra* note 78, at 275.

⁹¹ Memorandum of Law in Support of Defendant’s Motion to Dismiss, *Citizens for Responsibility and Ethics in Washington et al. v. Trump*, No. 1:17-cv-458-RA, 2017 WL 3421202 (S.D.N.Y. June 9, 2017) [hereinafter DOJ Brief].

⁹² *See, e.g.*, Memorandum in Support of Defendant’s Motion to Dismiss, *D.C. & Maryland v. Trump*, No. 8:17-cv-1596-PJM, 2017 WL 5557942 (D. Md. Sept. 29, 2017) (providing the same brief that was used in support of defendant’s motion to dismiss in *CREW et al. v. Trump*).

⁹³ DOJ Brief, *supra* note 88, at 2–3.

⁹⁴ *Id.* at 26.

compensation or pecuniary profit derived from a discharge of the duties of the office.”⁹⁵

....

In light of this common usage in the founding era and for many decades thereafter, the term “Emolument” in the Emoluments Clauses should be interpreted to refer to a “profit arising from an office or employ.”⁹⁶

....

The history and purpose of the Domestic Emoluments Clause . . . is devoid of concern about private commercial business arrangements.⁹⁷

To defend these and other historical claims,⁹⁸ the DOJ leaned heavily on two founding-era dictionaries: *A Complete and Universal English Dictionary on a New Plan* by James Barclay⁹⁹ and *The Difference Between Words, Esteemed Synonymous, in the English Language* by John Trusler.¹⁰⁰ According to the DOJ, Barclay defined “emolument” as “profit arising from an office or employ,”¹⁰¹ while Trusler explained that the term “relates to commissions and employments; intimating, not only the salaries, but, all other perquisites.”¹⁰² Repeatedly invoking these definitions in support of President Trump’s Rule 12(b)(6) motion to dismiss,¹⁰³ the DOJ argued that they justified an “office- and employment-specific” construction¹⁰⁴ of

⁹⁵ *Id.* at 27 (emphasis omitted) (citations omitted) (quoting *Hoyt v. United States*, 51 U.S. 109, 135 (1850)).

⁹⁶ *Id.* at 28 (quoting JAMES BARCLAY, *A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN* (1774)).

⁹⁷ *Id.* at 34.

⁹⁸ *See, e.g., id.* at 27 (“The Emoluments Clauses Prohibit Benefits Arising from the U.S. Official’s Provision of Service Pursuant to an Office or Employment.”); *id.* (“[T]he Emoluments Clauses apply only to the receipt of compensation for personal services and to the receipt of honors and gifts based on official position.”); *id.* (“[T]he Emoluments Clauses . . . do not prohibit any company in which the President has any financial interest from doing business with any foreign, federal, or state instrumentality.”). The DOJ does not identify these additional claims as originalist, but their context implies that it regards them as such.

⁹⁹ JAMES BARCLAY, *A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN* (1774).

¹⁰⁰ JOHN TRUSLER, *THE DIFFERENCE BETWEEN WORDS, ESTEEMED SYNONYMOUS, IN THE ENGLISH LANGUAGE* (1766).

¹⁰¹ *See* DOJ Brief, *supra* note 88, at 28 (quoting BARCLAY).

¹⁰² *Id.* at 29–30 (quoting TRUSLER).

¹⁰³ *See, e.g., id.* at 28 (quoting BARCLAY); *id.* at 30 (quoting BARCLAY); *id.* at 31 (paraphrasing BARCLAY); *id.* at 29–30 (quoting TRUSLER).

¹⁰⁴ *Id.* at 32. *See also id.* (arguing that “the term ‘Emolument’ . . . should be understood as office- and employment-specific”); *id.* at 40 (“For over two centuries, the Emoluments Clauses have been interpreted and applied in an office- and employment-specific manner.”).

“emolument,” which prevented President Trump from violating the Emoluments Clauses.¹⁰⁵

The DOJ conceded that the “[p]laintiffs’ definition of [emolument] as encompassing ‘anything of value’ resembles a broader definition that also existed at the time of the founding.”¹⁰⁶ It insisted, however, that “common usage”¹⁰⁷ at the time reflected Barclay’s narrower definition.¹⁰⁸ The DOJ also argued that if the term “emolument” is ambiguous, that ambiguity ought to be resolved in favor of Barclay’s definition.¹⁰⁹ For these and other reasons, the DOJ maintained, the plaintiffs failed to state a valid claim upon which relief can be granted.¹¹⁰

B. *The Historical Definition of “Emolument”*

When my research assistant, Genevieve (Bentz) Lewis, and I encountered the DOJ brief, we realized that there were significant problems with it.¹¹¹ The core problem on which we decided to focus our attention was the DOJ’s definition of “emolument.” Simply put, that

¹⁰⁵ *Id.* at 27–32; see generally *id.* at 26–48. As Marty Lederman observes, the DOJ’s conclusion does not necessarily follow from its premises. Even if one accepts the government’s narrow definition of the term “emolument,” at least some of the conduct alleged by the CREW plaintiffs in their complaint appears to violate the Foreign Emoluments Clause. See Marty Lederman, *How the DOJ Brief in CREW v. Trump Reveals that Donald Trump is Violating the Foreign Emoluments Clause*, TAKE CARE BLOG (June 12, 2017), <https://takecareblog.com/blog/how-the-doj-brief-in-crew-v-trump-reveals-that-donald-trump-is-violating-the-foreign-emoluments-clause> [<https://perma.cc/DF4L-WW9H>].

¹⁰⁶ See DOJ Brief, *supra* note 88, at 30.

¹⁰⁷ See *id.* at 28.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 51.

¹¹¹ Several of these problems were quickly identified by other commentators. See, e.g., Jane Chong, *Reading the Office of Legal Counsel on Emoluments: Do Super-Rich Presidents Get a Pass?*, LAWFARE (July 1, 2017), <https://www.lawfareblog.com/reading-office-legal-counsel-emoluments-do-super-rich-presidents-get-pass> [<https://perma.cc/6EET-GYG5>]; Michael C. Dorf, *Trump Emoluments Argument Mirrors His “Just a Hope,” Comey Defense*, TAKE CARE BLOG (June 14, 2017), <https://takecareblog.com/blog/trump-emoluments-argument-mirrors-his-just-a-hope-comey-defense> [<https://perma.cc/S6WX-ZWX5>]; Andy Grewal, *Three Reactions to the DOJ’s Brief in CREW v. Trump*, NOTICE & COMMENT (June 10, 2017), <http://yalejreg.com/nc/three-reactions-to-the-doj-brief-in-crew-v-trump> [<https://perma.cc/5MCA-5DHW>]; Lederman, *supra* note 105; Leah Litman, *The Two Sides of Donald Trump, As Reflected in The Government’s Motion to Dismiss in the CREW Emoluments Case*, TAKE CARE BLOG (June 12, 2017), <https://takecareblog.com/blog/the-two-sides-of-donald-trump-as-reflected-in-the-government-s-motion-to-dismiss-in-the-crew-emoluments-case> [<https://perma.cc/Z9P7-XNQW>]; Richard Primus, *Two Thoughts on the Government’s Motion to Dismiss in the CREW Emoluments Case*, BALKINIZATION (June 9, 2017), <http://balkin.blogspot.com> [<https://perma.cc/S9TC-R39M>]; Simon Stern, *Presents, Emoluments, and Corruption*, BALKINIZATION (June 20, 2017), <https://balkin.blogspot.com/2017/06/presents-emoluments-and-corruption.html> [<https://perma.cc/YXW6-JHTB>].

definition is inaccurate, unrepresentative, and misleading. Particularly because the DOJ might try to use its flawed definition in subsequent court filings, we sought to correct the historical record. We did so on the basis of a comprehensive study of how “emolument” is defined in both English language dictionaries published from 1604 to 1806 and English legal dictionaries published from 1523 to 1792.

Among other things, our research revealed that every English dictionary definition of “emolument” from 1604 to 1806 relies on one or more of the elements of the broad definition the DOJ rejected in its brief: “profit,” “advantage,” “gain,” or “benefit.” Furthermore, over 92% of these dictionaries define “emolument” *exclusively* in these terms, with no reference to “office” or “employment.”¹¹² By contrast, the DOJ’s preferred definition—“profit arising from office or employ”—appears in less than 8% of these dictionaries.¹¹³ Moreover, even these outlier dictionaries always include “gain, or advantage” in their definitions, a fact obscured by the DOJ’s selective quotation of only one part of its favored definition from Barclay (1774). The impression the DOJ creates in its brief by contrasting four historical definitions of “emolument”—two broad and two narrow—is, therefore, highly misleading.

The suggestion that “emolument” was a legal term of art at the founding, with a sharply circumscribed “office- and-employment-specific” meaning, is also inconsistent with the historical record. A vast quantity of evidence already available in the public domain suggests that the founding generation used the word “emolument” in a broad variety of contexts, including private commercial transactions. Our research added to that emerging historical consensus by documenting that none of the most significant common-law dictionaries published from 1523 to 1792 even included “emolument” in their lists of defined terms. In fact, this term is mainly used in these legal dictionaries to define other, less familiar, words and concepts. These findings reinforce the conclusion that

¹¹² For these and other findings reported in this section, see generally John Mikhail, *The Definition of “Emolument” in English Language and Legal Dictionaries, 1523–1806*, at 8 (June 30, 2017), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3001532_code395700.pdf?abstractid=2995693&mirid=1 [<https://perma.cc/57CA-9LA9>] [hereinafter Mikhail, *English Language and Legal Dictionaries*] (providing a comprehensive chart of dictionary definitions from 1604–1806 of “emolument,” as well as statistical and longitudinal analyses of the frequency with which “profit,” “advantage,” “gain” and “benefit” are used to define “emolument” in these dictionaries). See also Appendix 4. As I note at the outset of this SSRN working paper, Genevieve (Bentz) Lewis, who served as my research assistant from 2017–2019, deserves much of the credit for locating, transcribing, and assembling many of these documentary records.

¹¹³ Mikhail, *English Language and Legal Dictionaries*, *supra* note 112, at 10. See also Appendix 4.

“emolument,” at the founding, was not a term of art with a highly restricted meaning.¹¹⁴

Finally, we called attention to the fact that the government’s dictionary-based argument is flawed in another, more fundamental, respect. Little or no evidence indicates that the two historical dictionaries, Barclay (1774) and Trusler (1766), relied on by the DOJ in its brief to defend its “office- and-employment-specific” definition of “emolument” were owned, possessed, or used by the founders, let alone had any impact on them or on the American people who debated and ratified the Constitution. For example, neither of these dictionaries is mentioned in over 178,000 documents searchable through the Founders Online database, which makes publicly available the papers of the six most prominent founders.¹¹⁵ Nor do these volumes appear in other relevant databases, like the Journals of the Continental Congress, Letters of Delegates to Congress, Farrand’s Records, Elliot’s Debates, or the Documentary History of the Ratification of the Constitution. However, all of the dictionaries that the founding generation actually possessed and used regularly—for example, Johnson, Bailey, Dyche & Pardon, Ash, and Entick—define “emolument” in the broad manner favoring the plaintiffs: “profit,” “gain,” “advantage,” or “benefit.”¹¹⁶

To document these claims, our published findings included over 100 original images of English language and legal dictionaries from 1523 to 1806, as well as complete transcripts and easy-to-read tables of the definitions contained therein.¹¹⁷ We noted that a second study of dictionaries from 1806 to the present is underway, seeking to determine how and why definitions of “emolument” may have changed over time. Collectively, these inquiries were designed to do more than simply aiding judges and holding lawyers’ feet to the fire in the three emoluments cases. They also provide a basis for educating members of Congress, government officials, journalists, and the broader public about the historical meaning of this important constitutional term.

¹¹⁴ Mikhail, *English Language and Legal Dictionaries*, *supra* note 112, at 10. See also Appendix 5.

¹¹⁵ Brief of Amicus Curiae by Certain Legal Historians on Behalf of Plaintiffs, Citizens for Responsibility and Ethics in Washington et al. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458), 2017 WL 5483629 at *2-3, *appeal docketed*, No. 18-474 (2d Cir. Feb. 16, 2018) [hereinafter Amicus Brief of Legal Historians].

¹¹⁶ *Id.*

¹¹⁷ Mikhail, *English Language and Legal Dictionaries*, *supra* note 112, at A-1-A-4.

C. *The Legal Historians' Amicus Briefs*

Shortly after publishing this dictionary study, Professors Shugerman, Rakove, Rao, Stern and I submitted our first amicus briefs to the courts in the three emoluments cases.¹¹⁸ In our briefs, we explained how evidence from founding-era dictionaries supported the plaintiffs. More importantly, we outlined the broader history and purpose of the Emoluments Clauses. For example, we explained that the clauses were designed to advance core Republican goals by preventing corruption, the appearance of corruption, conflicts of interest, foreign entanglements, and the like. In particular, we emphasized that the clauses were tied to the founders' pervasive fear of political corruption. We explained that the founders were intimately familiar with one famous incident of political corruption in particular: the Treaty of Dover of 1670, which involved secret payments from King Louis XIV to Charles II in exchange for diplomatic support.¹¹⁹ This notorious case, which involved a foreign government paying the British king to influence British foreign policy, came to light in the 1770s, and it is clear that the founders were deeply affected by it. For example, Gouverneur Morris and Charles Cotesworth Pinckney each discussed the incident on separate occasions during the drafting and ratification of the Constitution.¹²⁰

In our briefs, we discussed the text and drafting history of the Emoluments Clauses to which I have referred. We also presented the courts with evidence that many state constitutions and other public documents contained emoluments clauses. We summarized the evidence from Blackstone, along with similar evidence from other legal and economic writers of the period, such as Samuel Pufendorf and Adam Smith, both of whom repeatedly use the term "emolument" to refer to profits from private market transactions.¹²¹ Finally, we presented the courts with additional sources indicating that many founders, such as James Madison, George Mason, Edmund Randolph, and George Washington, used the term "emolument" in this broader sense. For example, in a footnote we cited eight occasions in which Washington uses the term to refer to private market transactions.¹²²

¹¹⁸ Amicus Brief of Legal Historians, *supra* note 115, at 26–27.

¹¹⁹ Amicus Brief of Legal Historians, *supra* note 115, at 8 (citing FEDERAL CONVENTION RECORDS, *supra* note 9, at 68–69).

¹²⁰ FEDERAL CONVENTION RECORDS, *supra* note 9, at 68–69.

¹²¹ Amicus Brief of Legal Historians, *supra* note 115, at 5–6.

¹²² Amicus Brief of Legal Historians, *supra* note 115, at 24 n.87. This footnote contains eight letters written by George Washington in which Washington uses "emoluments" in phrases like "private emoluments" and "emoluments of individuals" to refer to private market transactions. *Id.* The footnote also contains references to letters written to Washington from

VI. THE LAWSUITS AGAINST THE PRESIDENT REVISITED

A. Judge Messitte's Decision

Our arguments had a significant effect. On July 25, 2018, Judge Messitte of the U.S. District Court for the District of Maryland issued a landmark ruling on the meaning of the Emoluments Clauses, the first such decision by a federal court. In his opinion, Judge Messitte held both that the Foreign Emoluments Clause applies to the president and that the word "emolument" as it is used in the Constitution is a broad term, which "means any 'profit,' 'gain,' or 'advantage.'"¹²³ Both holdings were clear and resounding victories for the plaintiffs.

Judge Messitte divided his analysis of the Foreign Emoluments Clause (FEC) into two main parts: the meaning of "Office of Profit or Trust under [the United States]" and the meaning of "emolument" itself.¹²⁴ With respect to the latter issue, Judge Messitte supplied a four-part analysis, focused on: (1) Text; (2) Original Public Meaning; (3) Constitutional Purpose; and (4) Executive Branch Precedent and Practice.¹²⁵ In what follows, I summarize each of these four sections of his opinion.

1. Text

Judge Messitte was struck by the multiple uses of the word "any" in the FEC. He agreed that these "expansive modifiers" gave the FEC an unquestionably broad sweep.¹²⁶ With respect to the Domestic Emoluments Clause (DEC), he held that the emoluments in question were not just compensation from the federal government or the states but, again, any kind of private benefit, gain, or advantage, including those obtained in private market transactions. Judge Messitte also concluded that by arguing for an office-specific meaning of "emolument," the DOJ was, in effect, converting both the FEC and DEC into anti-bribery provisions.¹²⁷ Essentially, the DOJ was arguing that an individual had to be directly on the take in order to violate these clauses. For sound reasons, Judge Messitte did not think that was a sensible reading of the Constitution.

Alexander Hamilton and Landon Carter, both of which use emoluments in the same context.
Id.

¹²³ D.C. & Maryland v. Trump, 315 F. Supp. 3d 875, 878, 904 (D. Md. July 25, 2018).

¹²⁴ *Id.* at 882-904.

¹²⁵ *Id.* at 886-904.

¹²⁶ *Id.* at 886.

¹²⁷ *Id.* at 888-89.

2. Original Public Meaning

Judge Messitte drew heavily on our dictionary research and the other evidence in our amicus brief from Blackstone, Smith, and other founding-era sources to ascertain the original meaning of “emolument.”¹²⁸ On this basis, he held that the plaintiffs’ broader definition of “emolument” was correct.¹²⁹ Consequently, he held that the original meaning of the term encompasses any profit, gain, or advantage, which extends to the profits arising out of ordinary market transactions.¹³⁰

3. Constitutional Purpose

With respect to this issue, Judge Messitte relied again on our amicus brief, as well as research by Professor Zephyr Teachout of Fordham Law School, to conclude that the Emolument Clauses were meant to be broad anti-corruption provisions.¹³¹ Notably, he concluded that certain *de minimis* violations could be set aside when ascertaining both the meaning and purpose of the Emoluments Clauses, an argument we did not make in our brief.¹³² For example, Judge Messitte found that such *de minimis* violations included placing presidential assets in mutual funds or other passive investments of the type many Americans hold in retirement accounts.¹³³

4. Executive Branch Precedent and Practice

Finally, Judge Messitte pointed to the fact that the long series of opinions issued on the Emoluments Clauses by OLC and various Comptrollers General also supported the plaintiffs. He found executive branch precedent and practice to be consistent with a broad interpretation of “emolument.”¹³⁴ By contrast, the president failed to cite a single executive branch opinion that conclusively supported his position.¹³⁵

After performing this four-part analysis, Judge Messitte turned to the president’s motion to dismiss and concluded that the motion should be denied. He first considered the plaintiffs’ allegations that Saudi Arabia, Kuwait, and other foreign governments had engaged in commercial transactions with the Trump International Hotel in order to curry favor

¹²⁸ *Id.* at 889–93.

¹²⁹ *D.C. & Maryland v. Trump*, 315 F. Supp. 3d 875, 889–95 (D. Md. July 25, 2018).

¹³⁰ *Id.* at 893–95.

¹³¹ *Id.* at 895–900.

¹³² *Id.* at 899–900.

¹³³ *Id.*

¹³⁴ *Id.* at 901.

¹³⁵ *D.C. & Maryland v. Trump*, 315 F. Supp. 3d 875, 901–02 (D. Md. July 25, 2018).

with the president and held that these allegations did plausibly state a claim under the FEC.¹³⁶ He also determined that the Government Services Administration (GSA) lease under which The Trump Organization operates the Trump Hotel, the patronage of the Trump Hotel by state government officials, and certain tax concessions given to The Trump Organization by the District of Columbia did plausibly state a claim under the Domestic Emoluments Clause.¹³⁷

B. *The Fourth Circuit Hearing*

The fate of Judge Messitte's decision on appeal remains uncertain. On March 19, 2019, a panel of the United States Court of Appeals for the Fourth Circuit heard arguments in connection with President Trump's petition for mandamus in the lawsuit brought against him by Maryland and the District of Columbia. Although this hearing did not go well for the plaintiffs, many of the concerns raised by the court do not seem troubling and can be easily addressed.

Much of the conversation focused on what injunctive relief the plaintiffs seek. In my judgment, the best answer to this question does not involve divestment or a blind trust, which are alternately excessive or inadequate for the reasons highlighted by the court. Instead, the best answer is a narrowly tailored injunction ordering the Trump Hotel to stop accepting payments from foreign governments. The Trump Organization is already keeping track of these payments in order to donate the profits from them to the U.S. Treasury. So in addition being directly tied to the alleged constitutional violation at issue, this relief would be both practical and administrable.

Judge Dennis Shedd questioned whether the Trump Hotel could comply with such an order without violating anti-discrimination laws. That question is easily answered, however, and poses no substantial difficulty. The supposed "discrimination" arising from treating emoluments from foreign governments differently than other receipts is *required* by the Constitution. Any statutes that conflict with this requirement must give way under the Supremacy Clause. Per Judge Shedd's question, there also would be no credible basis for excluding "all foreigners" from the Trump Hotel in the first place in order to obey an injunction to stop violating the Constitution.

Several of the judges asked whether the plaintiff's broad definition of "emolument" would imply that profits from U.S. Treasuries would violate the Domestic Emoluments Clause. In my judgment, the plaintiffs gave the

¹³⁶ *Id.* at 905-06.

¹³⁷ *Id.* at 906-07.

right answer to this question, but supplied the wrong reason. Profits from U.S. Treasuries do not violate the DEC because, unlike the Foreign Emoluments Clause, the DEC is probably best construed to refer to emoluments received by the president *for his services as president*. The DEC reads: “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”¹³⁸ The last part of the clause can plausibly be read to include a tacit repetition of the phrase “for his services” after the word “receive.” In other words, the clause can be interpreted like this:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive [for his Services] within that Period any other Emolument from the United States, or any of them.¹³⁹

On this reading of the DEC, many of the examples that are often thought to be the most difficult cases for the plaintiffs to explain—including profits from U.S. Treasuries—are not difficult at all because they fall outside the scope of that clause. State pension benefits (Ronald Reagan), naval retirement benefits (JFK), and land purchases from the federal government at a public auction (George Washington) would also fall into this unproblematic class of cases. Even if one adopts a broad definition of the term “emolument,” none of these benefits was received by the president “for his services” as president. Thus, they are not covered by the DEC, on this interpretation of its proper scope.¹⁴⁰

President Trump’s most important new argument was jurisdictional. At the hearing, his lawyers claimed that Maryland and DC had no cause of action under the Constitution, nor any such authority granted by Congress. This argument seems questionable on historical grounds, especially in light of the early practice of the Supreme Court, which recognized jurisdiction in cases such as *Oswald v. New York*, *Chisholm v. Georgia*, *Hollingsworth v. Virginia*, and *Georgia v. Brailsford*. If the president

¹³⁸ See U.S. CONST. art. II, § 1, cl. 7.

¹³⁹ *Id.* (bracketed phrase added).

¹⁴⁰ To clarify, I should note that reasonable minds can differ on how to construe the DEC. Whether or not the reading I have offered here is the best overall construction of its ambiguous language, at a minimum it deserves to be brought to the court’s attention as a plausible alternative basis on which to address the alleged difficulties with a broad interpretation of the term “emolument.”

were correct that the Constitution provides neither a cause of action nor jurisdiction in *D.C. and Maryland v. Trump*, then cases like these presumably should have been dismissed on that basis. Yet that did not happen.

Many important founders were among the lawyers and judges who participated in these early cases, including two men—Edmund Randolph and James Wilson—who actually drafted the jurisdictional grants of Article III.¹⁴¹ Is it President Trump’s position that these founders did not understand the jurisdiction of U.S. courts? Does he think States can be sued in equity, but cannot bring suit in turn? Article III states: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . [and] to Controversies . . . between a State and Citizens of another State.”¹⁴² What rule of law prevents Maryland or D.C. from suing Donald J. Trump on this basis? The Fourth Circuit should have asked the president these and other questions that go to the heart of his bold assertions about jurisdiction and presidential immunity. Instead, the panel tossed his lawyers one softball after another.

A final observation about the March 19th hearing concerns the text of the FEC, which Judge Paul Niemeyer read aloud at the start of the hearing. Notably, Judge Niemeyer misquoted the FEC, omitting what for purposes of this lawsuit are its four most important words: “of any kind whatever . . .”¹⁴³ As I have emphasized, the FEC is virtually unique among constitutional clauses because it uses the word “any” four times. In effect, it says: Without Congress’s consent, no one holding *any* office of profit or trust under the United States shall accept *any* emolument of *any* kind whatever from *any* foreign government. The broad sweep of this prohibition cannot be ignored. It reflects the framers’ deliberate decision to draw a bright line around both the reality and the appearance of corruption, conflicts of interest and undue foreign influence, which only Congress is authorized to modify. In light of the historical evidence of how “emolument” was actually used at the founding, the ban on accepting “*any* . . . emolument . . . of *any* kind whatever” makes any serious original public meaning defense of the president’s interpretation of the FEC exceedingly difficult. Yet President Trump—who has made appointing originalist judges a centerpiece of his administration—was not asked any difficult questions about the original meaning of “emolument.” This kid-gloves treatment contrasts sharply with how the Fourth Circuit panel treated the lawyers for Maryland and D.C.

¹⁴¹ See FEDERAL CONVENTION RECORDS, *supra* note 9, at 146–47 (Randolph); *id.* at 157, 172–73 (Wilson).

¹⁴² See U.S. CONST. art. III, § 2.

¹⁴³ See U.S. CONST. art. I, § 9, cl. 8.

In sum, the March 19th hearing was a poor showing of the Fourth Circuit's willingness to take seriously the text, structure, and history of the Constitution and to carefully assess the president's conduct on that basis. Instead, it appeared to be an illustration of the "cafeteria originalism" that often seems to guide some lawyers and judges who embrace public meaning originalism, founding-era dictionaries, and the like whenever it suits them, but who seem indifferent to the original Constitution on other occasions.

C. *Judge Sullivan's Decision*

In the most recent emoluments decision, announced on April 30, 2019, Judge Sullivan of the U.S. District Court for the District of Columbia also denied the president's motion to dismiss for failure to state a claim. In doing so, Judge Sullivan adopted a broad understanding of "emolument," in line with the definition embraced by Judge Messitte. Extending the impact of his prior decision that the congressional plaintiffs had standing to sue President Trump for violating the FEC, Judge Sullivan denied the president's motion to dismiss because he found that the president's definition of emolument "disregards the ordinary meaning of the term as set forth in the vast majority of Founding-era dictionaries; is inconsistent with the text, structure, historical interpretation, adoption, and purpose of the Clause; and is contrary to [historical] Executive Branch practice . . ." ¹⁴⁴ Judge Sullivan thus found that the plaintiffs had a cause of action to seek an injunction, a form of relief he determined to be constitutional.¹⁴⁵ His analysis of the definition of "emolument" was divided into five parts: (1) the ordinary meaning of "emolument"; (2) the text and structure of the FEC; (3) the history of the clause; (4) the purpose of the clause; and (5) executive branch practice. In what follows, I comment briefly on each of these parts of his opinion.

1. Ordinary Meaning

Judge Sullivan found the president's definition of the term "emolument" as "profit arising from an office or employ" to be less compelling than the plaintiffs' definition. He was persuaded that the Founding-era evidence "supports the [broader] meaning of the term advocated by plaintiffs and supported by the Legal Historians."¹⁴⁶ Because the evidence cited by the plaintiffs supported more than one

¹⁴⁴ Blumenthal v. Trump, 373 F. Supp. 3d 191 (D.C. Cir. Apr. 30, 2019), No. 17-1154, 2019 WL 1923398, at *2.

¹⁴⁵ *Id.* at *3.

¹⁴⁶ *Id.* at *14.

definition, however, Judge Sullivan considered the term to be somewhat ambiguous. Accordingly, he also examined “the surrounding text, structure, adoption, historical interpretation, and purpose of the Clause, as well as Executive Branch practice” to determine its meaning.¹⁴⁷

2. Text and Structure

Judge Sullivan held that “the text and structure of the [FEC], together with the other uses of the term in the Constitution, support the plaintiffs’ definition of ‘Emolument’ rather than that of the President.”¹⁴⁸ He found both the president’s argument that the Incompatibility Clause and the Domestic Emoluments Clause supports a narrow definition, and his argument that the plaintiffs’ definition of “emolument” would render the term redundant, to be unconvincing.¹⁴⁹ In this connection, Judge Sullivan reaffirmed Judge Messitte’s conclusion that “the President’s narrow definition ‘would seem to create its own concerning redundancies within the Constitution’”¹⁵⁰ by limiting the definition of “emolument” to bribery, which is dealt with elsewhere in Article II.¹⁵¹

3. Adoption and Historical Interpretation

Judge Sullivan was persuaded “that the adoption of the [FEC] and its historical interpretation support plaintiffs’ definition rather than that of the President.”¹⁵² Citing our amicus brief, he noted that “there was little discussion of the [FEC] by the Framers because it was noncontroversial” at the founding.¹⁵³ The president’s historical claim that George Washington’s purchase of public land “potentially in violation of the [DEC]” supports a narrow definition of “emolument” did not persuade him in light of “the great weight of historical interpretation” pointing in a different direction.¹⁵⁴ Finally, Judge Sullivan dismissed the president’s argument with respect to the failed 1810 constitutional amendment, explaining that “the Court is not persuaded that the President’s reliance on a proposed constitutional amendment that never became law, and for which he is unable to cite any floor debates that would illuminate the

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *19.

¹⁴⁹ *Id.* at *20–21.

¹⁵⁰ *Blumenthal v. Trump*, 373 F. Supp. 3d 191 (D.C. Cir. Apr. 30, 2019), No. 17-1154, 2019 WL 1923398, at *21.

¹⁵¹ *Id.* at *21–22.

¹⁵² *Id.* at *25.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

intent of the amendment, should be accorded any weight in determining the meaning of ‘emolument.’”¹⁵⁵

4. Constitutional Purpose

Judge Sullivan took notice of the fact that the president “pays little attention to interpreting the meaning of ‘Emolument’ by reference to the purpose of the [FEC].”¹⁵⁶ In contrast, he found that the plaintiffs “cite contemporaneous documents to support their argument that the purpose of the Clause was ‘to exclude corruption and foreign influence,’ prompted by the need to guard against ‘the influence which foreign powers may attempt to exercise in our affairs.’”¹⁵⁷ Quoting an amicus brief by former Government Ethics Officers tasked with interpreting and implementing the FEC, Judge Sullivan observed that “the government applies a totality-of-the-circumstances approach to Emoluments Clause questions, with a bias in favor of breadth, and a keen eye to the anti-corruption purpose of the clause.”¹⁵⁸ Drawing together these and related points, Judge Sullivan concluded:

In view of the overwhelming evidence pointing to over two hundred years of understanding the scope of the [FEC] to be broad to achieve its purpose of guarding against even the possibility of “corruption and foreign influence,” the Court is persuaded that adopting plaintiffs’ broad definition of “Emolument” ensures that the Clause fulfills this purpose.¹⁵⁹

5. Executive Branch Practice

With the exception of President Trump, all modern presidents have complied with the FEC by either obtaining congressional approval or seeking advice from OLC before accepting potentially unconstitutional emoluments. Highlighting this fact, Judge Sullivan turned finally to historical practices within the Executive Branch. Examining these precedents, he found that “OLC opinions have consistently cited the broad purpose of the [FEC] and broad understanding of ‘Emolument’ advocated by the plaintiffs to guard against even the *potential* for improper

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Blumenthal v. Trump*, 373 F. Supp. 3d 191 (D.C. Cir. Apr. 30, 2019), No. 17-1154, 2019 WL 1923398, at *26.

¹⁵⁷ *Id.* at 27 (quoting Edmund Randolph and Tench Coxe).

¹⁵⁸ *Id.* at 27–28.

¹⁵⁹ *Id.* at *28.

foreign government influence.”¹⁶⁰ The same was true of Comptroller General Opinions, another traditional source of legal authority within the Executive Branch. According to Judge Sullivan, both sets of opinions undercut President Trump’s narrow interpretation of “emolument,” especially because the president “has not cited an OLC or Comptroller General opinion that supports his position.”¹⁶¹

VII. CONCLUSION

The decisions by Judge Messitte and Judge Sullivan are significant, but they are unlikely to be the last word on the constitutional meaning of “emolument.” Sooner or later, the Supreme Court of the United States probably will decide this question, along with the questions of standing raised by these lawsuits. Until then, one can only guess how the historic emoluments cases against the president will finally be resolved. Still, the historical evidence about the original meaning of this term that my colleagues and I have uncovered seems likely to contribute to this outcome and points in a clear direction.

When the Constitution was written, “emolument” was a flexible term that generally meant “profit,” “gain,” “advantage,” or “benefit.” It was commonly used in ordinary English to refer to advantages or benefits of different types. Not only government salaries, but also payments on contracts, interest on loans, and profits from ordinary commercial transactions were all referred to as “emoluments.” So, too, was the rental income earned by churches, halls, and boarding houses.

Even though President Trump promised to remove himself from the day-to-day operations of The Trump Organization, he has refused to divest himself of ownership interests in this company. As a result, the president continues to earn profits and other advantages from commercial transactions with foreign governments. The Foreign Emoluments Clause forbids federal officials from receiving any emoluments of any kind whatever from foreign governments without the consent of Congress. Since the start of his presidency, Donald Trump has been doing just that.

Three lawsuits have been brought to stop these alleged constitutional violations. Judge Messitte’s decision in the *D.C. and Maryland* case denying the president’s motion to dismiss was a landmark opinion because it was the first time a federal judge decided on the constitutional meaning of “emolument.” Drawing upon our research, Judge Messitte wrote a thoughtful and well-reasoned opinion, which carefully considered all of the relevant arguments presented to him by the

¹⁶⁰ *Id.* at *32.

¹⁶¹ *Id.* at *33.

president, the Attorneys General of Maryland and the District of Columbia, and many independent experts. Significantly, Judge Messitte held that the type of commercial profits President Trump has been receiving from foreign and domestic governments are covered by the Emoluments Clauses. In his opinion, Judge Sullivan followed suit, likewise endorsing the broad interpretation of “emolument” advocated by the plaintiffs and reinforced by our amicus brief.

What are the worst-case and best-case scenarios for President Trump in these lawsuits? Ultimately, the worst-case scenario for the president is that one of these cases will effectively force him to choose between continued ownership of his businesses and his presidency. This might happen if, for example, a federal court orders the president to divest his ownership interests in his companies or stop doing business with foreign governments. Moreover, any Emoluments Clause violations established by these lawsuits also could conceivably factor into impeachment proceedings against the president, as some members of Congress have already called for. By contrast, the best-case scenario for President Trump would be if Judge Messitte’s decision gets overturned on appeal, the other lawsuits against the president eventually fail as well, and he never gets impeached or even censured for his alleged constitutional violations. In that case, several different types of plaintiffs and numerous other individuals would have tried to bring a halt to his allegedly illegal conduct, but the president would have ultimately prevailed against each of them.

How these cases get resolved will have an impact on future presidents and their private business activities, but what that impact is remains to be determined. President Trump is unique in the extent to which he has refused to play by the rules by which every other recent president has abided. All other modern presidents have willingly complied with the constitutional norms, federal laws, and established customs designed to prevent corruption, conflicts of interest, and undue foreign influence. By contrast, President Trump has brazenly flouted these norms, laws, and customs. No other individual has ever entered office intending to maintain such a vast business empire while also serving as President of the United States. It seems reasonable to assume—or at least to hope—that the United States will not face this problem again, either because the federal courts will eventually enforce the Constitution or because no one will ever again test its limits in this way. A more pessimistic take, however, would be that the genie is now out of the bottle. Particularly if President Trump manages to win these lawsuits, future presidents might similarly seek to profit off the presidency. In that case, the anti-corruption

668 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53

principles embedded in the Constitution will have been dramatically undermined – and, as a result, our country will be much worse off.

APPENDIXES

Appendix 1: Citations to *The Federalist* in the Trump White Paper on Presidential Conflicts of Interest

No.	Author	Relevant Text (emphasis added)
1	Hamilton	"Among the most formidable of the obstacles which the new constitution will have to encounter, may readily be distinguished the obvious interest of a certain class of men in every state to resist all changes which may hazard a diminution of the power, <i>emolument</i> , and consequence of the offices they hold under the State establishments"
36	Hamilton	"If such a spirit should infest the councils of the union, the most certain road to the accomplishment of its aim would be to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their <i>emoluments</i> ."
46	Madison	"Many considerations . . . seem to place it beyond doubt, that the first and most natural attachment of the people will be to the governments of their respective states. Into the administration of these, a greater number of individuals will expect to rise. From the gift of these, a greater number of offices and <i>emoluments</i> will flow."
51	Madison	"It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the <i>emoluments</i> annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other, would be merely nominal."
65	Hamilton	"[T]he punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and <i>emoluments</i> of his country, he will still be liable to prosecution and punishment in the ordinary course of law."

73	Hamilton	“The legislature, with a discretionary power over the salary and <i>emoluments</i> of the [C]hief [M]agistrate, could render him as obsequious to their will, as they might think proper to make him. . . . It is not easy, therefore, to commend too highly the judicious attention which has been paid to this subject in the proposed Constitution. It is there provided, that ‘the [P]resident of the United States shall at stated times receive for his service a compensation, <i>which shall neither be increased nor diminished during the period for which he shall have been elected</i> , and he shall <i>not receive within that period any other emolument</i> from the United States, or any of them.’ It is impossible to imagine any provision which would have been more eligible than this. . . . Neither the [U]nion, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act.”
----	----------	---

Appendix 2: Additional Uses of “Emolument” in *The Federalist*

No.	Author	Relevant Text (emphasis added)
55	Madison	“Is the danger apprehended from [the president or the senate]? Their <i>emoluments</i> of office, it is to be presumed, will not, and without a previous corruption of the House of Representatives cannot, more than suffice for very different purposes; their private fortunes, as they must all be American citizens, cannot possibly be sources of danger. . . . The members of the congress are rendered ineligible to any civil offices that may be created, or of which the <i>emoluments</i> may be increased, during the term of their election.”
59	Hamilton	“The scheme of separate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all such influential characters in the State administrations, as are capable of preferring their own <i>emolument</i> and advancement to the public weal.”
72	Hamilton	“An avaricious man, who might happen to fill the office, looking forward to a time when he must at all events yield up the <i>emoluments</i> he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of the opportunity he enjoyed while it lasted, and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory; though the same man probably, with a different prospect before him, might content himself with the regular perquisites of his station, and might even be unwilling to risk the consequences of an abuse of his opportunities.”
76	Hamilton	“The Constitution has provided some important guards against the danger of executive influence upon the legislative body: it declares that ‘no senator or representative shall during the time for which he was elected, be appointed to any civil office under the United States, which shall have been created, or the <i>emoluments</i> whereof shall have been increased, during such time; and no person, holding any office under the United States, shall be

		a member of either house during his continuance in office.”
77	Hamilton	“How could the Senate confer a benefit upon the President by the manner of employing their right of negative upon his nominations? If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct; I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The power which can originate the disposition of honors and <i>emoluments</i> , is more likely to attract than to be attracted by the power which can merely obstruct their course.”
84	Hamilton	“The most considerable of the remaining objections is that the plan of the convention contains no bill of rights. . . . To [this] I answer, that the Constitution proposed by the convention contains . . . a number of such provisions. Independent of those which relate to the structure of the government, we find the following: . . . ‘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, <i>emolument</i> , office, or title of any kind whatever, from any king, prince, or foreign state.’”

Appendix 3: “Emolument” in Blackstone’s Commentaries

Book I (Of the Rights of Persons) (emphasis added)

1. Introduction (“Of the Study, Nature, and Extent of the Laws of England”), Section IV (“Of the Countries Subject to the Laws of England”)

“[T]he isle of Man is a distinct territory from England, and is not governed by our laws. . . . But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue . . . authority was given to the treasury by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 39, whereby the whole island and all its dependencies so granted as aforesaid, (except the landed property of the Atholl family, their manorial rights and *emoluments*, and the patronage of the bishopric and other ecclesiastical benefices,) are unalienably vested in the crown. . . .”

2. Chapter VII (“Of the King’s Prerogative”)

“Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. . . . The law therefore ascribes to the king, in his high political character, not only large powers and *emoluments*, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature. . . .”

3. Chapter VIII (“Of the King’s Revenue”)

“On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter-office. And, about that time, the outline of the present more extended and regular plan seems to have been conceived by Mr. Edmond Prideaux, who was appointed attorney-general to the commonwealth after the murder of King Charles. He was chairman of a committee in 1642 for considering what rates should be set upon inland letters; and afterwards appointed postmaster by an ordinance of both the houses, in the execution of which office he first established a *weekly* conveyance of letters into *all* parts of the nation; thereby saving to the public the charge of maintaining postmasters to the amount of 7000*l. per annum*. And, his own *emoluments* being probably

674 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53

very considerable, the common council of London endeavoured to erect another post-office in opposition to his; till checked by a resolution of the house of commons, declaring that the office of postmaster is and ought to be in the sole power and disposal of the parliament."

4. Chapter XI ("Of the Clergy")

"A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their own power and *emoluments*."

5. Chapter XVIII ("Of Corporations")

"At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same *emoluments* should ever afterwards continue as a recompense for the same care."

Book II (Of the Rights of Things) (emphasis added)

6. Chapter III, #1 ("Of Incorporeal Hereditaments")

"To make a good and sufficient *modus*, the following rules must be observed. 1. It must be *certain* and *invariable*, for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same from its first original to the present time. 2. The thing given in lieu of tithes must be beneficial to the *parson*, and not for the *emolument* of third persons only; thus a *modus* to repair the *church* in lieu of tithes is not good, because that is an advantage to the parish only. . . ."

7. Chapter III, #2 ("Of Incorporeal Hereditaments")

"Offices, which are a right to exercise a public or private employment, and to take the fees and *emoluments* thereunto belonging, are also

incorporeal hereditaments; whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. . . .”

8. Chapter V (“Of the Ancient English Tenures”)

“Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. . . . The heir, on the death of his ancestor, if of full age, was plundered of the first *emoluments* arising from his inheritance, by way of *relief* and *primer seisin*; and if under age, of the whole of his estate during infancy.”

9. Chapter XVIII (“Of Title by Forfeiture”)

“Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the land remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents and *emoluments* of the estate.”

10. Chapter XXI (“Of Alienation by Matter of Record”)

“The design for which these contrivances were set on foot was certainly laudable; the unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject . . . by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term-time, and enrolled in some court of record. . . . And if, in so national a concern, the *emoluments* of the officers concerned in passing recoveries are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrolment.”

11. Chapter XXXI (“Of Title by Bankruptcy”)

“But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well

as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigour of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary *emoluments*, upon condition they surrender up their whole estate to be divided among their creditors."

12. Appendix No. II ("Modern Conveyance by Lease and Release"), Sect. 1 ("Lease or Bargain and Sale, For a Year")

"[T]his Indenture . . . witnesseth, that . . . [A.B. and C.] . . . have . . . bargained, [and] sold, . . . unto [D.E. and F.G.] . . . the capital messuage called Dale Hall, . . . and all those their lands . . . called or known by the name of Wilson's farm . . . together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, water-courses, fishings, privileges, profits, easements, commodities, advantages, *emoluments*, hereditaments, and appurtenances whatsoever to the said capital messuage and farm. . . ."

13. Appendix No. II ("Modern Conveyance by Lease and Release"), Sect. 2 ("Deed of Release")

"[T]his Indenture . . . witnesseth, that . . . [A.B. and C.] have . . . granted, bargained, [and] sold, . . . unto [D.E. and F.G.] . . . the capital messuage called Dale Hall, . . . and all those their lands . . . called or known by the name of Wilson's farm . . . together with all and singular . . . advantages, *emoluments*, hereditaments, and appurtenances whatsoever to the said capital messuage and farm. . . ."

Book IV (Of Public Wrongs) (emphasis added)

14. Chapter IV ("Of Offences Against God and Religion")

"If, through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it, unless their tenets and practice are such as threaten ruin or disturbance

to the state. He is bound indeed to protect the established church; and, if this can be better effected by admitting none but its genuine members to offices of trust and *emolument*, he is certainly at liberty so to do: the disposal of offices being matter of favour and discretion."

15. Chapter XVII ("Of Offences Against Private Property")

"Besides this general act, a multitude of others, since the revolution, (when paper-credit was first established,) have inflicted capital punishment on the forging, altering, or uttering as true when forged, of any bank bills or notes, or other securities; . . . [and] also on the personating . . . any seaman or other person entitled to wages or other *naval emoluments*. . . ."

16. Chapter XXXIII ("Of the Rise, Progress, and Gradual Improvements of the Laws of England")

"In the reign of king Henry the Seventh, his ministers (not to say the king himself) were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was that of amassing treasure in the king's coffers by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. . . . A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed, because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign introductive of a new law or modifying the old but what either directly or obliquely tended to the *emolument* of the exchequer."

Appendix 4: Definitions of “Emolument” in English Language Dictionaries, 1604-1806

	Author	Title	1st ed.	Image	Definition
1	Cawdrey, Robert	<i>A Table Alphabeticall</i>	1604	4th ed. 1617	“Profit or gaine”
2	Bullokar, John	<i>The English Expositor</i>	1616	12th ed. 1719	“Profit, gain, Advantage”
3	Cockeram, Henry	<i>The English Dictionarie</i>	1623	1st ed. 1623	“Profit, gaine”
4	Blount, Thomas	<i>Glossographia</i>	1656	2d ed. 1661	“Profit gotten by labor and cost”
5	Philips, Edward	<i>The New World of Words</i>	1658	7th ed. 1720	“Profit got by Labour and Cost; Benefit, Advantage”
6	Coles, Elisha	<i>A Dictionary</i>	1676	2d ed. 1679	“Profit”
7	Kersey, John	<i>A New English Dictionary</i>	1702	2d ed. 1713	“Gain properly by grist, profit got by labour and cost”
8	Cocker, Edward	<i>English Dictionary</i>	1704	3d ed. 1724	“Profit, Gain, Advantage”
9	[anon]	<i>Glossographia Anglicana Nova</i>	1707	1st ed. 1707	“Advantage, Profit”
10	Bailey, Nathan	<i>A Universal Etymological English Dictionary</i>	1721	2d ed. 1724	“Advantage, Profit”
11	Bailey, Nathan	<i>Dictionarium Britannicum</i>	1730	1st. ed. 1730	“Profit gotten by labour and cost”
12	Manlove, James	<i>New Dictionary</i>	1735	2d ed. 1741	“Advantage, Profit”
13	Defoe, B.N.	<i>A Compleat English Dictionary</i>	1735	1st ed. 1735	“Advantage, Profit”
14	Dyche, Thomas & Pardon, William	<i>A New General English Dictionary</i>	1735	8th ed. 1754	“Benefit, advantage, profit”

15	Martin, Benjamin	<i>Lingua Britannica Reformata</i>	1749	1st ed. 1749	"Profit, benefit, or advantage"
16	[anon]	<i>A Pocket Dictionary</i>	1753	2d ed. 1758	"Benefit, advantage"
17	Wesley, John	<i>The Complete English Dictionary</i>	1753	3d ed. 1777	"Profit, advantage"
18	Johnson, Samuel	<i>A Dictionary of the English Language</i>	1755	7th ed. 1783	"Profit; advantage"
19	Scott, Joseph	<i>A New Etymological Dictionary</i>	1755	1st ed. 1755	"Profit"
20	Buchanan, James	<i>Lingue Britannicae Vera Pronunciatio</i>	1757	1st ed. 1757	"Benefit or advantage"
21	Rider, William	<i>A New Universl English Dictionary</i>	1759	1st ed. 1759	"Profit arising from an office or employ, gain, or advantage"
22	Bellamy, Daniel	<i>New Complete English Dictionary</i>	1760	2d ed. 1764	"Profit, advantage, benefit"
23	Fenning, Daniel	<i>The Royal English Dictionary</i>	1761	5th ed. 1775	"Profit arising from an office or employ; gain, or advantage"
24	Donaldson, Alexander	<i>A Universal Dictionary of the English Language</i>	1763	1st ed. 1763	"Profit; advantage; gain"
25	Allen, Francis	<i>A Complete English Dictionary</i>	1765	1st ed. 1765	"Profit; gain, or advantage"
26	Entick, John	<i>The New Spelling Dictionary</i>	1765	new ed. 1780	"Profit, advantage, benefit"
27	Barlow, Frederick	<i>The Complete English Dictionary</i>	1772	1st ed. 1772	"Profit, gain, or advantage"
28	Kenrick, William	<i>A New Dictionary of the English Language</i>	1773	1st ed. 1773	"Profit; advantage"

680 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 53]

29	Fisher, Anne	<i>An Accurate New Spelling Dictionary</i>	1773	6th ed. 1788	"Advantage, profit, benefit"
30	Barclay, James	<i>A Complete and Universal English Dictionary</i>	1774	1st ed. 1774	"Profit arising from an office or employ; gain or advantage"
31	Ash, John	<i>The New and Complete Dictionary of the English Language</i>	1775	1st ed. 1775	"An advantage, a profit"
32	Perry, William	<i>The Royal Standard English Dictionary</i>	1775	1st ed. 1775	"Advantage, profit"
33	Walker, John	<i>A Critical Pronouncing Dictionary</i>	1775	1st ed. 1791	"Profit, advantage"
34	Sheridan, Thomas	<i>A Complete Dictionary of the English Language</i>	1780	3d ed. 1790	"Profit, advantage"
35	Lemon, George	<i>English Etymology</i>	1783	1st ed. 1783	"used to signify any advantage, or gain"
36	Scott, William	<i>Spelling, Pronouncing, Explanatory Dictionary</i>	1786	new ed. 1810	"Profit, advantage, benefit"
37	Jones, Stephen	<i>A General Pronouncing and Explanatory Dictionary</i>	1798	new ed. 1812	"Profit, advantage"
38	Browne, Thomas	<i>The Union Dictionary</i>	1800	4th ed. 1822	"Profit, advantage"
39	Fulton, George & Knight, George	<i>A Dictionary of the English Language</i>	1802	3d ed. 1823	"Profit; advantage"
40	Webster, Noah	<i>A Compendious Dictionary of the English Language</i>	1806	1st ed. 1806	"Profit, gain, advantage, benefit"

Appendix 5: "Emolument" in Common Law Dictionaries, 1523–1792

Author	Title	1st ed.	Image	Definition
Rastell, John	<i>Exposiciones terminorum legum anglorum</i>	1523	1st ed. 1523	no definition
Cowell, John	<i>The Interpreter</i>	1607	1st ed. 1607	no definition
Leigh, Edward	<i>A Philologicall Commentary</i>	1652	2d ed. 1658	no definition
Sheppard, William	<i>An Epitome of All the Common & Statute Laws of This Nation Now in Force</i>	1656	1st ed. 1656	no definition
Spelman, Henry	<i>Glossarium archaiologicum</i>	1664	1st ed. 1664	no definition
Blount, Thomas	<i>Nomo-Lexicon</i>	1670	2d ed. 1691	no definition
Jacob, Giles	<i>A New Law Dictionary</i>	1729	1st ed. 1729	no definition
Cunningham, Timothy	<i>A New and Complete Law-Dictionary</i>	1764	1st ed. 1764	no definition
Kelham, Robert	<i>A Dictionary of the Norman</i>	1779	1st ed. 1779	no definition
Burn, Richard	<i>A New Law Dictionary</i>	1792	1st ed. 1792	no definition