

## BUSINESS TRANSACTIONS AND PRESIDENT TRUMP'S "EMOLUMENTS" PROBLEM

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Recently, some have argued<sup>1</sup> that the term "emoluments," as used in the Constitution's Foreign Emoluments Clause<sup>2</sup> and Pres-

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\* Lecturer, Maynooth University Department of Law, Ireland. Roinn Dlí Ollscoil Mhá Nuad. I thank the student editors at the *Harvard Journal of Law & Public Policy* for their excellent editing, Professor Josh Blackman for his encouraging my developing the Washington-era precedents, and several other academics for reviewing drafts of this Essay. I note that an early version of this Essay was published on my group blog. See Seth Barrett Tillman, *Business Transactions for Value Are Not "Emoluments"*, NEW REFORM CLUB (Mar. 19, 2017, 3:15 AM), <http://reformclub.blogspot.com/2017/03/business-transactions-for-value-are-not.html> [<https://perma.cc/TEH6-4XGA>]. I have been asked to participate (in some fashion) in an amicus brief in *Citizens for Responsibility and Ethics in Wash. v. Trump*, Civ. A. No. 1:17-cv-00458-RA (S.D.N.Y. Jan. 23, 2017), 2017 WL 277603. No decision in regard to my participation has been made at this time.

1. See First Amended Complaint at 58, *Citizens for Responsibility and Ethics in Wash. ("CREW") v. Trump*, Civ. A. No. 1:17-cv-00458-RA (S.D.N.Y. Apr. 18, 2017), <https://perma.cc/UY2U-UZWS> (filed by, among others, Professors Richard W. Painter, Laurence H. Tribe, Erwin Chemerinsky, and Zephyr Teachout) ("Plaintiffs allege that . . . together, the phrases 'present' and 'Emolument . . . of any kind whatever' under the Foreign Emoluments Clause cover anything of value, including above- or below-market rates . . ." (emphasis added)); Norman L. Eisen, Richard Painter & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, GOVERNANCE STUDIES AT BROOKINGS 11 (Dec. 16, 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_121616\\_emoluments-clause1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf) [<https://perma.cc/U73U-QG9Z>] ("[T]he best reading of the Clause covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder."); Laurence H. Tribe et al., *The Courts and the Foreign Emoluments Clause*, CASETEXT (Jan. 31, 2017), <https://casetext.com/posts/the-courts-and-the-foreign-emoluments-clause-1> [<https://perma.cc/G2LX-BD5B>] ("[The Foreign Emoluments Clause] does apply to fair market value transactions . . ."); Joshua Matz & Laurence H. Tribe, *President Trump Has No Defense Under the Foreign Emoluments Clause*, ACS BLOG (Jan. 24, 2017), <https://perma.cc/R4TA-BMSY>; John Mikhail, *A Note on the Original Meaning of "Emolument"*, BALKINIZATION (Jan. 18, 2017, 1:15 PM), <https://perma.cc/VT6Y-XL25> ("[T]here is ample evidence that 'emolument' was often used at the founding in a much wider sense, one that went beyond the duties of an office and encompassed the fruits of ordinary market transactions."). But see *infra* notes 22 & 29 (collecting counter-authority).

idential Emoluments Clause,<sup>3</sup> reaches any pecuniary advantage, benefit, or profit arising in connection with business transactions for value.<sup>4</sup> There is good reason to doubt the correctness of this position. Why? The Presidential Emoluments Clause states:

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2. U.S. CONST. art. I, § 9, cl. 8 (“[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.”). There is some substantial debate in regard to whether the President and other elected federal and state officials fall under the scope of the Constitution’s *office . . . under the United States*-language. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE *Titles of Nobility and the Foreign Emoluments Clause* § 9.18 n.12 (5th ed. Supp. 2017); William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28, 2016), <http://conlaw.jotwell.com/constitutional-officers-a-very-close-reading> [<https://perma.cc/W9CH-TRK5>]; see also JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 7–8 (2011). Compare, e.g., Seth Barrett Tillman, Opening Statement, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. 399 (2012), and Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013), with Zephyr Teachout, Rebuttal, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012), and Zephyr Teachout, Closing Statement, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200 (2014). See generally REPORT FROM THE SELECT COMMITTEE ON OFFICES OR PLACES OF PROFIT UNDER THE CROWN (1941); Luke Beck, *When Is an Office or Public Trust ‘Under the Commonwealth’ for the Purposes of the Religious Tests Clause of the Australian Constitution?*, 41 MONASH U. L. REV. 17 (2015).

3. U.S. CONST. art. II, § 1, cl. 7.

4. Business transactions for value are not “presents,” as the former involve an exchange, but the latter do not. The Presidential Emoluments Clause does not extend to “presents,” but only to “emoluments.” *Id.* Likewise, neither the Presidential Emoluments Clause nor the Foreign Emoluments Clause extends to bribes, which is expressly dealt with by the Impeachment Clause. See U.S. CONST. art. II, § 4. Professors Teachout and Tribe have made this precise point. See, e.g., ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 28 (2014) (explaining that the Foreign Emoluments Clause “forbids presents—not bribes”); Matz & Tribe, *supra* note 1, at 2 (“[I]f a foreign power gives the President money or any other benefit ‘as a consequence of discharging the duties of [his] office’ . . . the applicable constitutional concept in that circumstance is ‘bribery’ (and, in some circumstances, ‘treason’).” (emphasis added)). Compare U.S. CONST. art. II, § 4 (extending scope of impeachment to “bribery” and “treason”), with U.S. CONST. art. II, § 1, cl. 7 (extending scope of Presidential Emoluments Clause *exclusively* to “emoluments,” but not to bribes or presents), and U.S. CONST. art. I, § 9, cl. 8 (extending scope of Foreign Emoluments Clause to “presents” and “emoluments,” but not to bribes). Allegations relating exclusively to bribery are simply not cognizable under either the Presidential Emoluments Clause or the Foreign Emoluments Clause.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period *any other Emolument from the United States*, or any of them.<sup>5</sup>

If the *emoluments-are-any-pecuniary-advantage* position were correct, if “emoluments” as used in the Constitution extended to any pecuniary advantage, then presidents are and would have been precluded from doing business with the United States government. However, George Washington, who had presided over the Philadelphia Convention,<sup>6</sup> did business with the Federal Government on more than one occasion while he was president. He purchased several lots of land in the new federal capital at public auction. One such set of purchases took place on or about September 18, 1793.<sup>7</sup>

The public auction was run by three commissioners: David Stuart, Daniel Carroll, and Thomas Johnson. Who were they? David Stuart was a member of the Virginia convention that ratified the Federal Constitution. Stuart was also a federal elector in the first federal election for President and Vice President of the United States.<sup>8</sup> Daniel Carroll was a member of the Federal Convention that drafted the Constitution and later a member of the First Congress.<sup>9</sup> Thomas Johnson was the first Governor of Maryland fol-

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

6. See *Washington, George (1732–1799)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000178> [https://perma.cc/ZS6Q-8J37] (last accessed May 10, 2017). Furthermore, Washington was a member of the Continental Congress and a member of the Virginia House of Burgesses. *Id.* See generally 5 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* (Philadelphia, C. P. Wayne 1807).

7. See *Certificate for Lots Purchased in the District of Columbia, 18 September 1793*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-14-02-0074> [https://perma.cc/V84N-MF3B] (last accessed May 13, 2017).

8. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 654 & 662 (Jonathan Elliot ed., Washington, 2d ed. 1836) (recording David Stuart’s votes in the Virginia convention on June 25 and 27, 1788); 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at xvi (Gordon DenBoer ed., 1986).

9. See *Carroll, Daniel (1730–1796)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000187> [https://perma.cc/9THS-HHW6] (last accessed Feb. 14, 2017). Carroll also signed the Articles of Confederation and was a member of the Continental Congress and the Maryland State Senate. *Id.* Because Carroll was a member of the House when

lowing independence, a member of the Maryland convention that ratified the Federal Constitution, and afterwards he served as a Justice of the Supreme Court of the United States.<sup>10</sup>

So among the four participants (Washington and the three commissioners) were: three members of the Continental Congress;<sup>11</sup> three members of pre-independence colonial legislatures or post-independence state legislatures;<sup>12</sup> two members of state conventions that ratified the Constitution; two members of the Federal Convention (including the Convention's president); a member of the First Congress; a Justice of the Supreme Court of the United States; a governor; a federal elector for President and Vice President; and, our first President. Collectively these four are, undoubtedly, an accomplished group. Are we really to believe that not only did all four officials willingly, openly, and notoriously participate in a conspiracy to aid and abet the President in violating the Constitution's Presidential Emoluments Clause, but that they also left—for themselves and their posterity—a complete and signed documentary trail of their wrongdoing?<sup>13</sup>

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first commissioned, Washington waited for his House term to end, and then issued a new commission, after which Carroll accepted the position. See CENTENNIAL HISTORY OF THE CITY OF WASHINGTON, D.C. 90, 129 (Dayton, United Brethren Publishing House 1892); *infra* note 20. This incident with Carroll is further substantial indication—as if any were needed—that President George Washington was a stickler for constitutional propriety.

10. See *Johnson, Thomas (1732–1819)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000175> [<https://perma.cc/4TAH-9EUJ>] (last accessed May 13, 2017). Johnson was also a member of the Continental Congress for Maryland, a state and territorial judge, and a member of the pre-independence colonial legislature as well as the post-independence state legislature. *Id.*

11. See *id.*; *Washington*, *supra* note 6; *Carroll*, *supra* note 9.

12. See *Washington*, *supra* note 6; *Carroll*, *supra* note 9; *Johnson*, *supra* note 10.

13. See, e.g., *Certificate for Lots Purchased in the District of Columbia, 18 September 1793*, *supra* note 7 (reproducing a certificate of purchase signed by Commissioners David Stuart and Daniel Carroll which stated: “At a Public Sale of Lots in the City of Washington, George Washington, President of the United States of America became purchaser of Lots No. twelve, No. thirteen & No. fourteen in Square No. six hundred & sixty seven . . .”). In addition to lots 12, 13, and 14, Washington also purchased lot 5, and he received a separate certificate confirming this additional purchase. See *id.*; see also Letter from President George Washington to the Commissioners (Mar. 14, 1794), in *The Writings of George Washington Relating to the National Capital*, 17 RECORDS OF THE COLUMBIA HIST. SOC'Y 3, 97 (1914) (indicating that Washington believed and intended that his purchases of public land were known to the public).

The *emoluments-are-any-pecuniary-advantage* position amounts to: (1) President Washington was at best grossly negligent, if not crooked; (2) Washington's allies openly supported obvious and profound constitutional lawlessness; and (3) Washington's political opponents were altogether and unaccountably silent—silent in Congress,<sup>14</sup> silent in newspapers, and silent even in their private correspondence. The *emoluments-are-any-pecuniary-advantage* position amounts to a naked assertion by twenty-first century legal academics<sup>15</sup> that they understand the Constitution's binding legal meaning better than those who drafted it, ratified it, and put it into effect during the Washington administration.

The alternative view is that linguistic and historical humility compel reasonable minds to recognize that much of the language within our more than two century-old Constitution is opaque. It follows that—in order for twenty-first century citizens to understand what the Constitution's opaque language meant when ratified (and what it continues to mean today) in regard to a specific (but otherwise obscure) legal term, namely, “emoluments”—reasonable persons must look to the actual conduct of the Framers, the Ratifiers, and the original practice of the three branches when they were squarely confronted with the need to determine the meaning of a particular legal term on concrete facts.<sup>16</sup>

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14. In 1793, during the Third Congress, the year President Washington made these land purchases at public auctions, there were some 13 anti-administration Senators and some 40 anti-administration Representatives. See BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/biosearch/biosearch.asp> [<https://perma.cc/N34W-PSGP>] (last accessed Feb. 14, 2017) (enter “Representative” or “Senator” for “Position:” and enter “1793” for “Year or Congress:”); see also Letter from President George Washington to Bushrod Washington (July 27, 1789), in 30 THE PAPERS OF GEORGE WASHINGTON 366, 366 (John C. Fitzpatrick ed., 1939) (“My political conduct . . . must be exceedingly circumspect and proof against just criticism, for the Eyes of Argus [the all-seeing, many-eyed giant of Greek mythology] are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relatives.”); Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL STUD. 95, 107–08 (2016) (“Washington both valued his reputation for probity and acted under the assumption that his conduct was closely monitored by political opponents and opportunists.”); *infra* note 17.

15. See *supra* note 1.

16. In regard to judicial dicta, Chief Justice Marshall explained the principle as follows:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those

It is incontrovertible that President George Washington, in a private capacity, engaged in business transactions for value with the Federal Government, notwithstanding that he received or intended to receive a pecuniary advantage. Given Washington's very public conduct, a modern interpreter should be reluctant to conclude that such advantages, benefits, and profits amount to a constitutionally proscribed "emolument."<sup>17</sup> Moreover, it stands to reason that if the benefits flow-

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expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821).

17. See AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 309 (2012) ("Over the centuries, the constitutional understandings that crystallized during the Washington administration have enjoyed special authority on a wide range of issues . . ."); Martin S. Lederman, *If George Washington Did It, Does that Make It Constitutional?: History's Lessons for Wartime Military Tribunals*, 105 GEO. L.J. (forthcoming Aug. 2017) (manuscript at 11), [https://ssrn.com/abstract\\_id=2840948](https://ssrn.com/abstract_id=2840948) [<https://perma.cc/R6PN-LWWU>] ("Washington's example has long been a touchstone for constitutional understandings."); see also Tillman, *supra* note 14, at 105–08 ("Evidence arising in connection with the Washington administration is generally considered superior to that of later administrations. Why? First, Washington's administration was contemporaneous with the Constitution's ratification. Second, the President was a Framers and his cabinet (and administration) contained other prominent Framers and [R]atifiers. Indeed, between the President and his nine cabinet members (over the course of two terms), half of the group were either Framers or [R]atifiers or both. Third, the President saw himself above party or faction; indeed, active partisan federal electoral politics did not arise until after Washington announced that he would not run for a third term. Fourth, Washington both valued his reputation for probity and acted under the assumption that his conduct was closely monitored by political opponents and opportunists. Fifth, Washington understood that his personal and his administration's conduct were precedent-setting in regard not only to significant deeds, but even in regard to what might appear to be minor events and conduct." (footnotes omitted)); *supra* note 14.

Indeed, the attorneys for CREW, proponents of the *emoluments-are-any-pecuniary-advantage* position, see *supra* note 1, have relied on George Washington and Washington-era precedents in their own scholarly publications, see, e.g., Erwin Chemerinsky, *Civil Liberties and the War Terror*, 62 SMU L. REV. 3, 11 (2009) ("Going back to the days of George Washington, the United States government has always prided itself on humane treatment of detainees and prisoners of war. Even when the English army was treating American soldiers badly during the Revolutionary War, accounts of English soldiers indicate that George Washington

ing from business transactions for value (with the Federal Government) are not constitutionally proscribed “emoluments” for the purposes of the Presidential Emoluments Clause, then the benefits flowing from similar transactions for value with foreign states, foreign agencies or instrumentalities, or with foreign state owned or state controlled commercial entities<sup>18</sup> are

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ordered the American troops to use what we now regard as the basis of human rights.” (footnote omitted)); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 356 (2009) (discussing “George Washington’s . . . contribution to the Constitutional Convention”).

18. In regard to the Presidential Emoluments Clause, where the Federal Government or a state government engages in a business transaction with a private commercial entity owned (in whole or in significant part) or controlled (in whole or in significant part) by the President of the United States in his private capacity, but not with the President himself, it is not clear that such a transaction falls under the aegis of the Presidential Emoluments Clause. See U.S. CONST. art. II, § 1, cl. 7. Indeed, no court of the United States has had occasion to resolve this novel threshold question of pure law. This issue must be resolved in any litigation seeking to assert that the Presidential Emoluments Clause applies to such business transactions with commercial entities having substantial connections to the President. Likewise, there is no case law establishing that transactions between the President and a state or federal municipal entity or a municipal agency or instrumentality or municipal owned or controlled commercial entity fall under the aegis of the Presidential Emoluments Clause.

Much the same can be said in regard to the Foreign Emoluments Clause. There is no case law establishing that transactions between the President and a foreign municipal entity or a foreign state (or municipal) agency or instrumentality or a foreign state (or municipal) owned or controlled commercial entity fall under the aegis of the Foreign Emoluments Clause. This is a novel threshold question of pure law which must be resolved in any litigation seeking to assert that the Foreign Emoluments Clause applies to business transactions between a constitutionally proscribed federal officeholder, that is, an *officer . . . under the United States, id.* art. I, § 9, cl. 8, and a foreign municipal entity or a foreign state (or municipal) agency or instrumentality or a foreign state (or municipal) owned or controlled commercial entity. Similarly, where a foreign state engages in a business transaction with a private commercial entity owned or controlled in whole or in significant part by a constitutionally proscribed federal officeholder in his private capacity, but not with the officeholder, it is not clear that such a transaction falls under the aegis of the Foreign Emoluments Clause. Indeed, no court of the United States has had occasion to resolve this novel threshold question of pure law. This too must be resolved in any litigation seeking to assert that the Foreign Emoluments Clause applies to business transactions between private commercial entities owned or controlled by a constitutionally proscribed federal officeholder and a foreign state. Finally, where a transaction has a commercial entity on both sides, as opposed to an *actual* foreign state and an *actual* constitutionally proscribed federal officeholder, the policy concerns animating the Foreign Emoluments Clause must be much attenuated. See David B. Rivkin Jr. & Lee A. Casey, *Trump doesn't need a blind trust*, WASH. POST, Nov. 23, 2016, at A17; David B. Rivkin Jr. & Lee A.

not constitutionally proscribed “emoluments” for the purposes of the Foreign Emoluments Clause or any other clause. Both the Presidential Emoluments Clause and the Foreign Emoluments Clause use precisely the same term: “emolument.”<sup>19</sup>

Indeed, from the perspective of modern, as opposed to eighteenth century, governance norms, President Washington’s business transactions posed a nonfrivolous risk of moral hazard, conflicts, and corruption. Unlike transactions struck between genuinely adverse profit-maximizing parties at arms-length, President Washington was speculating on land in public auctions—that is, *public auctions managed by commissioners whom he had personally appointed*.<sup>20</sup> As a result, Washington was on both sides of each and every one of these transactions;<sup>21</sup> yet, no one then, or

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Casey, *It’s unrealistic and unfair to make Trump use a blind trust*, WASH. POST (Nov. 22, 2016, 6:37 PM), [https://www.washingtonpost.com/opinions/its-unrealistic-and-unfair-to-make-trump-use-a-blind-trust/2016/11/22/a71aa1d4-b0c0-11e6-8616-52b15787add0\\_story.html?utm\\_term=.24e4566f09da](https://www.washingtonpost.com/opinions/its-unrealistic-and-unfair-to-make-trump-use-a-blind-trust/2016/11/22/a71aa1d4-b0c0-11e6-8616-52b15787add0_story.html?utm_term=.24e4566f09da) [https://perma.cc/R2DN-U2XK]. To put it another way, American law has a rich tradition recognizing the independent or separate legal personality of corporations and other commercial entities. See *infra* note 34 (discussing *Yeoman v. Commonwealth*, 983 S.W.2d 459 (Ky. 1998)).

19. See *supra* notes 2–3 and accompanying text. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“In deploying this technique [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1172 (2003) (“It is far better to use two different words in a sentence when we mean to convey two different meanings.”).

20. See Letter from George Washington, President of the United States of America, to All Who Shall See These Presents (Jan. 22, 1791), in *The Writings of George Washington Relating to the National Capital*, *supra* note 13, at 3 (appointing Johnson, Carroll, and Stuart commissioners); *supra* note 9 (describing Daniel Carroll’s appointment in further detail); see also An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, § 2, 1 Stat. 130, 130 (1790) (granting the President the power to appoint commissioners).

21. Oliver Evans held U.S. Patent #3: a patent for an automated grain milling system. This patent was issued by Executive Branch officers responsible to President Washington during his first term in office. Indeed, President Washington personally reviewed and signed the patent application. See *The Magnificent Millworks of Oliver Evans*, GEORGE WASHINGTON’S MOUNT VERNON, <http://www.mountvernon.org/the-estate-gardens/gristmill/oliver-evans> [https://perma.cc/PRK4-HCH6] (last accessed May 10, 2017). Subsequently, circa 1791, “Washington purchased a license under the patent” and then had the milling system installed in his Mount Vernon gristmill. *Overview of the Gristmill*, GEORGE WASHINGTON’S MOUNT VERNON,



since, has ever impugned the propriety of his conduct, much less the legal validity or constitutionality of his purchases.<sup>22</sup>

So what is an “emolument”? That question has been squarely addressed by the Supreme Court of the United States and state supreme courts.

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encyclopedia/article/overview-of-the-gristmill [https://perma.cc/FB6N-82L5] (last accessed May 13, 2017). Just like his land purchases, here too, President Washington was on both sides of the transaction at issue. This is another good example indicating that *modern* and *expansive* fiduciary governance standards have little or nothing to do with the *original* and *limited* legally binding meaning of the Constitution’s Presidential Emoluments Clause and Foreign Emoluments Clause. See, e.g., Martin H. Redish & Elana Nightingale Dawson, “Worse than the Disease”: *The Anti-Corruption Principle, Free Expression, and the Democratic Process*, 20 WM. & MARY BILL RTS. J. 1053, 1068 (2012) (explaining the “Framers’ limited prophylactic approach”); Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 510 (2001) (characterizing the Presidential Emoluments Clause and Foreign Emoluments Clause as “limited anticorruption provisions”); see also Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (“[D]irectors can neither appear on *both sides* of a transaction nor expect to derive any personal financial benefit from [a director-approved transaction] in the sense of self-dealing . . .” (emphasis added)), *overruled on other grounds sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000). See generally Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL’Y 1 (2001); Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 144 (Gary Lawson et al. eds., 2010); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004).

22. One sincerely wonders if CREW’s attorneys can come forward with even *one* historian—living or dead—who will support their views: (1) that the term “emolument,” as used in the Constitution, extends to business transactions for value; and (2) that President Washington violated the Constitution in engaging in such transactions with the Federal Government’s Executive Branch. See Lawrence A. Peskin, *Can Donald Trump Profit from Businesses with Connections to Foreign Governments Once He’s President?*, HISTORY NEWS NETWORK (Dec. 18, 2016), <http://historynewsnetwork.org/article/164660> [https://perma.cc/K5NN-78UP] (explaining that “any broad interpretation of the [Foreign] [E]moluments [C]lause to prohibit doing *business* with foreign governments or their representatives would appear to contradict the intent of the founders as demonstrated by their actions” (emphasis added)); *supra* notes 1, 7, 13, 20–21 and accompanying text. Indeed, no one has yet asserted the broad interpretation of “emoluments” in a formal—prior, current, or forthcoming—academic publication. For recent authority affirming the traditional, narrow view of emoluments, see Andy S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2902391> [https://perma.cc/63B9-ET8X]; Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. (forthcoming Oct. 2017), <https://ssrn.com/abstract=2911871> [https://perma.cc/U5B4-8VKF].

*Supreme Court Case Law*

In *Hoyt v. United States*,<sup>23</sup> Justice Nelson, for a unanimous Supreme Court, explained:

These terms [“fees” and “commissions”] denote a compensation for a particular kind of service to be performed by the officer, and are distinguishable from each other . . . they are also distinguishable from the term emoluments, that [term] being more comprehensive, and embracing every species of compensation or pecuniary profit *derived from a discharge of the duties of the office*.<sup>24</sup>

The *Hoyt* Court’s definition of emolument is not “obscure;”<sup>25</sup> indeed, the *Hoyt* Court’s definition has been cited approvingly

23. 51 U.S. (10 How.) 109 (1850).

24. *Id.* at 135 (emphasis added). *Hoyt* expounded on how “emolument” was used in a 1799 act of Congress, and in a subsequent 1802 act amending the 1799 act. See An Act to Establish the Compensations of the Officers Employed in the Collection of the Duties on Imports and Tonnage, and for Other Purposes, ch. 23, § 2, 1 Stat. 704, 706–08 (1799), amended by An Act to Amend “An Act to Establish the Compensations of the Officers Employed in the Collection of the Duties on Imports and Tonnage; and for Other Purposes”, ch. 37, § 3, 2 Stat. 172, 172–73 (1802). Indeed, early congressional statutes expressly distinguished “emoluments” associated with government office from “carry[ing] on the business of trade or commerce.” See, e.g., An Act to establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789) (“[N]o person appointed to any office instituted by this [A]ct, shall directly or indirectly be concerned or interested in *carrying on the business of trade or commerce* . . . or take or apply to his own use, any *emolument* or gain for negotiating or transacting any business in the said department . . .” (emphasis added)). It is also noteworthy that the Treasury Act does not extend to the President or to any other elected positions.

25. Professor Tribe and his co-authors have, on more than one occasion, described *Hoyt* as an “obscure Supreme Court decision from 1850.” Tribe et al., *supra* note 1 (denominating *Hoyt* as an “obscure Supreme Court decision from 1850,” but failing to discuss, quote, cite, or even expressly name this counter-authority); see Matz & Tribe, *supra* note 1, at 5 (again, denominating *Hoyt* as an “obscure Supreme Court decision from 1850,” but failing to discuss, quote, cite, or even expressly name this counter-authority). But see Laurence Tribe, *Civil Liberties after 9/11: A Response to David Cole*, BOS. REV. FORUM (Dec. 1, 2002), <http://bostonreview.net/forum/civil-liberties-after-911/laurence-tribe-liberty-all> [<https://perma.cc/YNL8-AJPM>] (discussing *Railway Express Agency v. New York*, 336 U.S. 106 (1949), notwithstanding expressly identifying *Railway Express* as an “obscure case”). Obscure or not, Professor Tribe and his co-authors make no substantial effort to explain how *Hoyt*, a unanimous decision of the Supreme Court of the United States, fails to conclusively settle the issue at hand, particularly with regard to the Presidential Emoluments Clause. See David E. Weisberg, *The Foreign Emoluments Clause: Will President Trump be in Violation by Virtue of Taking the Oath?* 7 n.11 (Jan. 20, 2017) (unpublished manuscript),

by the Executive Branch<sup>26</sup> and Legislative Branch.<sup>27</sup> It follows that President Washington may very well have derived pecuniary advantages, benefits, and profits from his business transactions with the Federal Government, but the benefits flowing from those business transactions were not “derived from [his] discharg[ing] the duties of [his] office.”<sup>28</sup> Hence, no constitutionally proscribed “emoluments” were involved. It seems this is the consensus position.<sup>29</sup>

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<https://ssrn.com/abstract=2888201> [<https://perma.cc/Q5GK-8TCU>] (quoting an email from Professor Tribe stating that the Constitution’s *emoluments*-language has a “broader” scope in the Foreign Emoluments Clause than in the Presidential Emoluments Clause); *see also* Tribe et al., *supra* note 1 (putting forward “a broader definition” for “emoluments” in the Foreign Emoluments Clause specifically because that clause—unlike the Presidential Emoluments Clause—uses “any present, Emolument, Office, or Title, of any kind whatever”-language); Matz & Tribe, *supra* note 1, at 7 (same).

26. *See, e.g.*, Memorandum from Samuel A. Alito, Jr., Dep’y Asst. Att’y Gen., Office of Legal Counsel, for H. Gerald Staub, Office of the Chief Counsel, Nat’l Aeronautics & Space Admin., Re: Emoluments Clause Questions Raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales, 1986 WL 1239553, at \*1 n.4 (1986).

27. *See, e.g.*, Memorandum from Milton J. Socolar, on behalf of the Comptroller Gen. of the U.S., to Sen. George J. Mitchell, B-207467, 1983 WL 27823, at \*2 (1983). The Supreme Court has identified the Comptroller General with the Legislative Branch. *See* *Bowsher v. Synar*, 478 U.S. 714, 727–34 (1986).

28. *Hout*, 51 U.S. (10 How.) at 135. The Ineligibility Clause also uses the term “emoluments.” U.S. CONST. art. I, § 6, cl. 2 (“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 [i]ncreased during such time . . .”). “Emoluments” here seems structurally tied to compensation provided for by Congress, as opposed to other compensation supplied by external entities. *See* *United States v. Hartwell*, 73 U.S. 385, 393 (1867) (“An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.”); *see also* *Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev*, AIR 1992 SC 1959, ¶ 7 (India) (explaining that in determining whether a position is an office under the government of India, the court examines, among other factors, if the post is “paid out of the revenues of [the] Government of India”), <https://indiankanoon.org/doc/1633748> [<https://perma.cc/AJV8-QXCD>]. *See generally* Robert French, Chief Justice of the High Court of Australia, Seventh Annual St. Thomas More Forum Lecture: Public Office and Public Trust 3 (June 22, 2011), <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun11.pdf> [<https://perma.cc/FU6G-24EZ>].

29. *See* Grewal, *supra* note 22; Natelson, *supra* note 22; Eugene Kontorovich, *Did George Washington Take ‘Emoluments’?*, WALL ST. J. (Apr. 13, 2017), <https://www.wsj.com/articles/did-george-washington-take-emoluments->

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In 1975, the Supreme Court of New Mexico explained that the term emolument “does not refer to the fixed salary alone that is attached to the office, but includes such fees and compensation as the incumbent of the office is *by law entitled to receive*.”<sup>30</sup> This is also the view of judicial authority from other state supreme courts, including, for example, the Supreme Court of Washington<sup>31</sup> and the Supreme Court of Minnesota,<sup>32</sup> of state executive branch officers,<sup>33</sup> and of persuasive domestic<sup>34</sup> and foreign<sup>35</sup> scholarly authority. Again, an “emolument”

1492123033; Ronald D. Rotunda, *Everything, Anything, Is an Emolument*, VERDICT (Jan. 30, 2017), <https://verdict.justia.com/2017/01/30/everything-anything-emolument> [<https://perma.cc/5J8F-4EYX>]; Rivkin & Casey, *Trump doesn't need a blind trust*, *supra* note 18; Rivkin & Casey, *It's unrealistic and unfair to make Trump use a blind trust*, *supra* note 18; Sheri Dillon et al., Morgan, Lewis & Bockius LLP White Paper, Conflicts of Interest and the President (Jan. 11, 2017), <https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf> [<https://perma.cc/B8BU-X4U3>] (supporting a narrow meaning for “emoluments”); Peskin, *supra* note 22. *But see supra* note 1 (collecting counter-authority).

30. *State ex rel. Anaya v. McBride*, 539 P.2d 1006, 1012 (N.M. 1975) (emphasis added) (citing 63 AM. JUR. 2D *Public Officers and Employees* § 71 (1972)).

31. *See, e.g., State ex rel. Todd v. Reeves*, 82 P.2d 173, 176 (Wash. 1938) (Blake, J., dissenting) (citing *Hoyt*, 51 U.S. (10 How.) 109); *State ex rel. McAulay v. Reeves*, 81 P.2d 860, 863 (Wash. 1938) (Blake, J., dissenting).

32. *See, e.g., State ex rel. Benson v. Schmah*, 145 N.W. 794, 795 (Minn. 1914).

33. *See, e.g., Memorandum from Wayne Stenehjem, Att’y Gen., to Gov. John Hoeven*, 2005 N.D. Op. Att’y. Gen. No. 2005-L-15, 2005 WL 1129466, at \*2 n.3 (2005).

34. *See, e.g., 63C AM. JUR. 2D Public Officers and Employees* § 272 n.5 (2017); *see also id.* & n.13 (discussing *Yeoman v. Commonwealth*, 983 S.W.2d 459 (Ky. 1998), and characterizing *Yeoman*’s holding as: “A foundation’s grant of money to a state to fund a health care program does not constitute payment of salaries of governmental officials by a private party.”). *See generally Construction and application of constitutional or statutory provision that member of Congress or state legislature shall not, during term for which he is elected, be appointed or elected to any civil office which shall have been created or the emoluments of which shall have been increased during the term for which he was elected*, 118 A.L.R. 182 (1939).

35. *See, e.g., FREDERICO B. MORENO, PHILIPPINE LAW DICTIONARY* 311 (2007) (defining “emolument” as “[f]ees, fixed salary, and compensation which the incumbent of an office is by law entitled to receive because he holds such office”); Richard Krever, *Taming Complexity in Australian Income Tax*, 25 SYDNEY L. REV. 467, 474 (2003) (“[A]n English court [may] find that a particular type of payment was not an emolument from office as required by UK income tax law . . .”); *cf. Income and Corporation Taxes Act, 1988*, pt. V, ch. IV, c. 1, § 192(1) (U.K.), <https://perma.cc/77C8-6FMR> (defining “foreign emoluments” as extending to emoluments associated with foreign “offices” and “employments”).

extends to what an officeholder is “by law entitled to receive.” No one is legally entitled to a “present.” So a mere present cannot fall under the aegis of the Presidential Emoluments Clause, which uses only *emoluments*-language. Bribes are illegal; by contrast, emoluments are legal entitlements. It follows that the two categories are mutually exclusive. Thus a plaintiff alleging a bribe cannot seek relief under the Presidential Emoluments Clause (using only *emoluments*-language) or the Foreign Emoluments Clause (using *emoluments*-language and *presents*-language). Finally, business transactions for value are *voluntary* and *private*; emoluments, by contrast, are legal entitlements *mandated* by *public* laws or regulations. The terms of business transactions are *negotiated* (or, at least, potentially negotiable); by contrast, emoluments are *fixed* by law. Even applying the most free-form<sup>36</sup> living constitutionalism,<sup>37</sup> there is simply no principled way to squeeze or translate<sup>38</sup> business transactions for value into the language of “emoluments,” nor is that plain result changed by recharacterizing a business transaction for value as a present or bribe.

For the reasons elaborated above, it is fair to conclude that business transactions for value are not encompassed by the term “emolument” as used in the Constitution.<sup>39</sup>

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36. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). Compare First Amended Complaint, *CREW v. Trump*, *supra* note 1, at 58 (filed by Laurence H. Tribe et al.) (“Plaintiffs allege that . . . together, the phrases ‘present’ and ‘Emolument . . . of any kind whatever’ under the Foreign Emoluments Clause cover *anything* of value, including above- or below-market rates . . .” (emphasis added)), with LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 14 & n.23 (1991) (quoting Justice Joseph Story as stating: “How easily men satisfy themselves that the Constitution is exactly what they wish it to be.”).

37. See Tribe et al., *supra* note 1 (advocating a “living constitutional[ism]” methodology); Matz & Tribe, *supra* note 1, at 9 (same).

38. Cf. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125.

39. Indeed, given the definition for “emoluments” adopted by the Supreme Court in *Hoyt* and used by state courts, a federal officer’s application for and receipt of a regulatory, licensing, or other foreign government granted benefits, do not convert such benefits into constitutionally proscribed “emoluments.” If a foreign government granted benefit is given in a *quid pro quo* exchange for official action by a federal officer, such a transaction is an obvious bribe, not a constitutionally forbidden “emolument.” See *supra* note 4.