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ARTICLE

TITLES OF NOBILITY, EMOLUMENTS, AND PRESIDENTIAL PRIVILEGES: APPLYING *FLAST* TO UNCONSTITUTIONAL GRANTS

Sarah E. Crooke[†]

ABSTRACT

As many Americans struggle to make ends meet and bear the added load of paying taxes, federal spending allows the President and former presidents to live in extravagance that sharply contrasts with the more plebian life many United States citizens live. One example of that spending is the costs associated with vacations taken by the first family, each of which can generate costs several times more than the average annual income. The President and his family also receive other privileges paid for by tax dollars that might exceed the constitutionally prescribed limitation on emoluments beyond a fixed compensation for the President. This article addresses the need and a means for addressing congressional spending associated with the office of the President under the constitutional limits on emoluments and its absolute prohibition against granting titles of nobility.

This article gives a brief history of the Framers' intent in crafting the prohibition against granting titles of nobility and the limits on emoluments. The Framers had experienced the dangers of aristocracy and nobility under British rule and saw them as destroyers of equality. Those dangers are gradually surfacing again as elected officials are treated like aristocracy and are given benefits paid for by tax dollars that are out of reach for the majority of citizens. This can lead to elected officials growing numb to the voice of the

[†] This article would not have been possible without the support of my family, my fellow law review members, and my professors. My husband, Will Crooke, and my three young children have made countless sacrifices that have allowed me to complete this article. I also thank the Law Review Board that trained me as a 2L, my peers who strove for excellence beside me and especially those who edited my article, and the 2Ls who spent hours cite checking my article. Your hard work and perspectives are all appreciated. I am grateful especially to Professor Tory Lucas, who has always stressed the importance of balancing benefits and burdens and critically considering the policy behind the Constitution, laws, and cases. I also would like to thank Professor Jeffrey Tuomala for his willingness to compare current constitutional jurisprudence with the standard set by his hero Chief Justice John Marshall, which has emboldened me to argue in this article a rarely discussed and largely unapplied early founding principle. Finally, I would like to thank my entire law school family. You encourage me on my life-long quest to pursue justice for those who are oppressed, voiceless, and hopeless.

people, which in turn destroys equality and a republican form of government. While presidents are not the only recipients of potentially unconstitutional emoluments and titles of nobility, the high profile and great power of the office of the President pose an especial risk for the degradation of equality. The theories of separation of powers and checks and balances rely on the principle that no branch of government may violate the Constitution. Federal courts have, however, predominantly avoided title of nobility questions and currently discourage suits on constitutional rights with rigorous requirements for standing.

Although each branch can take steps to prevent violations of the Emoluments and Titles of Nobility Clauses, such as the President refusing privileges that exceed the determined salary and Congress refusing to grant unconstitutional emoluments, the burden of determining if the Constitution has been violated often rests on the shoulders of the judicial branch. This Article argues that the *Flast v. Cohen* nexus test should apply to suits claiming violations of the Emoluments and Titles of Nobility Clauses and that taxpayer standing is appropriate in these cases when Congress violates its spending and taxing powers. This Article also proposes a framework for determining whether federal spending violates these clauses.

I. INTRODUCTION

A. *The People as Sovereign Rejected Tyranny*

Foundational to the Constitution and the United States is the understanding that the people are the sovereign.¹ The people ratified the Constitution and thereby delegated powers to specific offices, retaining all non-delegated powers for themselves and for the states.² Those who drafted and those who ratified the Constitution experienced the Revolutionary War and decided that they did not want royals and nobles. They created the office of President, specified its duties, and limited its powers. In seeking to create a strong union, they nonetheless sought to avoid the tyranny always at risk when power is retained in a select class of people.³ Among the restraints

1. "We the People of the United States . . . ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.

2. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

3. In the Federalist Papers, James Madison wrote about the dangers of concentrating power in a government:

designed to prevent tyranny are the Titles of Nobility and the Emoluments Clauses of the Constitution. Some current presidential privileges are at odds with these provisions and threaten the constitutional republic by destroying the principles of equality. There are many privileges the President enjoys, some based on sound policy reasons and others springing from unconstitutional emoluments and titles of nobility.

B. The Modern Threat

In their proclamation, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,”⁴ the Framers encapsulated their goal for a new nation, a nation where all would be treated equally and where rights came from citizenship, not from family background, wealth, or office. The Constitution further echoes these sentiments.⁵ Yet the President and former presidents continue to enjoy special privileges unnecessary for the performance of their offices⁶ yet burdensome to other citizens through taxes.⁷

Tyranny is not a long-faded threat; it is a current and insidious threat. The distinctions between the powers of the people, the powers of the states, and the powers of the federal government are disappearing, especially with the

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, [self-appointed], or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.

THE FEDERALIST NO. 47 (James Madison).

4. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5. The Constitution protects the rights of citizens and emphasizes equality. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” U.S. CONST. amend. XIV, § 1.

6. The Framers intended that emoluments be tied to the nature of the public service rendered, as demonstrated by the Virginia Declaration of Rights, adopted shortly before the Articles of Confederation. “That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.” VA. DECLARATION OF RIGHTS para. 4 (1776).

7. The Supreme Court of Alabama considered the expense of a privilege to others as one sign of a title of nobility. “To confer a title of nobility, is to nominate to an order of persons to whom privileges are granted at the expense of the rest of the people.” *Horst v. Moses*, 48 Ala. 129, 142 (1872).

broad, sweeping federal powers found to exist under the Commerce Clause.⁸ Freedoms that the Framers never dreamed would be touched by the federal government have disappeared under numerous laws and regulations controlling activities that might possibly affect interstate commerce. The creation of executive agencies, which are given power to legislate and enforce rules, also threatens freedom through the creation of a multitude of laws.⁹ From 1995 to 2016, at least 88,899 federal rules and regulations have been created, dwarfing the 4,312 federal laws that were passed by Congress during those years.¹⁰ The end result is a host of *mala prohibita* crimes, some of which are felonies, of which the general population has no practical notice. The Federal Register contains these laws, but the average person will not know how to find them or how to interpret them. Further, these regulations are too numerous for the average person to read them all.

The executive branch is charged with enforcing these laws and regulations. The danger of granting titles of nobility and unconstitutional emoluments to the President is the loss of the essential perception, if not the reality, of equality. Such grants, especially when against the spirit or letter of the Constitution, allow the President to believe himself above the law. He is no longer on equal footing with the people, no longer a servant of their will, and no longer a protector of rights. Instead of *lex rex, rex lex*.¹¹

The dangers posed by a President who believes himself or herself to be above the law and capable of acting without Congress are demonstrated by the actions of presidents and the acceptance among voters of “strong” presidents. George W. Bush declared “war” on terror¹² despite the People’s

8. See generally *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress could set quotas for wheat production and penalize a wheat grower for growing above that amount, even if he kept it solely for use on his farm); *United States v. Lopez*, 514 U.S. 549 (1995) *superseded by statute on other grounds* (Congress can regulate any *economic* activity that in the aggregate has a substantial effect on interstate commerce); *Gonzales v. Raich*, 545 U.S. 1 (2005) (although California allowed persons to grow and use marijuana for medicinal purposes, federal agents acting under the Federal Controlled Substances Act could seize the plants belonging to someone using them for medicinal purposes in accord with the California law because Congress was acting under the Commerce Clause and allowing seizure in these circumstances was part of a comprehensive regulator scheme).

9. When ignorance of the law is not an excuse, justice dictates that the law be knowable.

10. Clyde Wayne Crews, Jr., *How Many Rules and Regulations Do Federal Agencies Issue?*, FORBES (Aug. 15, 2017, 12:48 PM), <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue>.

11. Latin: the law is king, the king is law.

12. “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.” *Text of*

clear intent to give that right only to Congress.¹³ Presidents have also failed to refuse titles of nobility.¹⁴ Presidential candidates campaign on promises that are outside of the executive power. While a President may sign laws that cause these effects, it is outside of his enumerated powers to write and submit such laws. Another danger to equality and freedom is the increasing use of executive orders which are rarely subjected to judicial review.¹⁵ In recent history, presidents have increased their usage of executive orders to bypass partisan resistance in Congress or to make law where Congress has been silent,¹⁶ depriving the people of an active voice in legislation and even notice of such laws.¹⁷ Because executive orders are increasingly affecting the rights of ordinary citizens,¹⁸ the danger increases that the President will lose the essential perception of equality and impose tyrannical orders.

Yet some voters, awed by this larger-than-life (and larger-than-the-Constitution) image, appear to expect the President to fix problems that they themselves ought to fix through the legislature. The image of the President as powerful enough to single-handedly change the policy of the nation through executive orders, national emergency, or military action has made the office ripe for abuses. And this image is only confirmed when the President is kept by taxpayer dollars in luxury few could dream of and is not checked from violating the very Constitution he is charged with protecting.

It would, of course, be easiest to trust Congress and the President to uphold the Constitution, but the Framers through the Constitution designed the federal government so that the judicial branch could review whether

George Bush's Speech, THE GUARDIAN (Sept. 21, 2001), <https://www.theguardian.com/world/2001/sep/21/september11.usa13>.

13. "The Congress shall have Power . . ." "[t]o declare War." U.S. CONST. art. I, § 8, cls. 1, 11. While it could be argued that the power delegated to Congress was to declare war on nations and that the President's declaration was a mere phrase, a declaration of war on an idea, or something outside of the power granted to Congress, his subsequent actions and the rest of his speech indicated that he was declaring a literal war, and that war against an idea would extend to fighting many nations. *Text of George Bush's Speech*, *supra* note 12.

14. *See infra* note 22.

15. John C. Duncan, *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 337 (2010).

16. President Clinton used executive orders to govern when he and Congress failed to agree. *Id.* at 342. Presidents have also tried to make laws where there are none. *Id.* at 345.

17. *Id.* at 342.

18. *Id.* at 344. Some executive orders might actually grant titles of nobility by singling out certain individuals and granting them a greater pay than that of their offices or waiving mandatory retirement. *Id.* at 348. Executive orders are enforceable against private citizens. *See* Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2030-31 (2015).

actions and legislation are unconstitutional.¹⁹ Under the Constitution, Congress has the sole power to pay the debts of the United States, including spending for presidential privileges.²⁰ The President of the United States has a duty to preserve and protect the Constitution.²¹ The prohibition against titles of nobility and the limits on granting emoluments are the supreme laws of the land, and the President must therefore see that they are not violated.²² However, recent presidents have failed to execute the law with regard to receipt of their own privileges.²³ The People granted the Court the power of judicial review of Constitutional issues and depend on the Court to hold the other branches accountable.²⁴

19. The Constitution requires that the President “shall take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3. The Supreme Court has authority to review and declare legislation unconstitutional. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-79 (1803). The Court can also review certain actions of the President. *Id.* at 162, 165-66.

20. U.S. CONST. art. I, § 8, cl. 1.

21. The oath of office for the President required by the Constitution is “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” *Id.* art. II, § 1, cl. 8.

22. “This Constitution . . . shall be the supreme Law of the Land . . .” *Id.* art. VI, cl. 2.

23. Presidents have failed to grant Congress its opportunity to permit or deny emoluments and titles of nobility from other nations or groups. *See id.* art. I, § 9, cl. 8. President Obama received the Nobel Peace Prize in 2009 without submitting the matter to Congress. *See* Jeremy Pelofsky, *Nobel Award to Obama Required Lengthy U.S. Constitution Check*, REUTERS (Apr. 16, 2010), <http://blogs.reuters.com/talesfromthetrail/2010/04/16/nobel-award-to-obama-required-lengthy-u-s-constitution-check/> (the Justice Department sent a thirteen-page memo telling the President he did not need Congressional approval to accept the award, basing some of their reasoning on two former presidents receiving the award without Congressional approval.). Presidents Obama and George W. Bush both received the Collar of King Abdul Aziz Order of Merit from King Abdul in Saudi Arabia, arguably not just a valuable bejeweled emolument but also a title of nobility. Ronald D. Rotunda & Peter Pham, *Obama Barred Constitutionally from Accepting Nobel*, WASH. POST (Oct. 16, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101502277.html>. President Trump also received this honor upon his first international visit as President. *Trump Receives Saudi’s Highest Civilian Honor*, N.Y. POST (May 20, 2017, 9:10 AM), <https://nypost.com/2017/05/20/trump-receives-saudis-highest-civilian-honor/>. When the President receives an honor from others and consults only those within the executive branch as to whether it is prohibited by the Constitution, he has already been guilty of violating the express requirement that such decisions be made by Congress. U.S. CONST. art. I, § 9, cl. 8. Violation of the Foreign Emoluments Clause and the Domestic Emoluments Clause endanger the integrity of the Oval Office and can lead to improper influence over the President. *See generally* Ciara Torres-Spelliscy, *From a Mint on a Hotel Pillow to an Emolument*, 70 MERCER L. REV. (2019).

24. “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .” U.S. CONST. art. III, § 2, cl. 1.

II. THE FRAMERS' INTENT: FRAMING FOR FREEDOM

The prohibitions against titles of nobility and emoluments grew in the dreams of oppressed men and women as they suffered firsthand the dangers of tyranny. The colonists in North America suffered the abuses of tyranny under the rule of King George III.²⁵ Among those abuses was a sharp inequality between the people favored by the king and the others, the commoners.²⁶ Some of these inequalities took the form of titles of nobility and emoluments. Among the recipients of titles of nobility granted by the king were the officers sent to harass the colonist and “eat out their substance,”²⁷ the troops quartered among civilians at their expense,²⁸ and the British soldiers protected from murder charges by mock trials.²⁹ The king’s forces also enjoyed superior power over the civil government in the colonies.³⁰ This favoritism granted by the king as rewards or incentives did not merely benefit his favorites; it also harmed the colonists by subjecting them to multiplied tyranny. King George further granted emoluments to judges, paying or withholding their salaries not according to an amount consistent with their public service but rather dependent on his favor, presumably earned by doing his will and destroyed by daring to oppose him.³¹ The suffering they endured under these abuses forged in the generation of the Framers an iron will to resist tyranny and guard against the sparks from which it rose.

Following the Declaration of Independence, the people of the former colonies struggled to create their ideal government. Out of that uncertainty, the thirteen states adopted the Articles of Confederation in 1781.³² This early constitution contained a prohibition to prevent Congress and the states from granting “any title of nobility” and to prevent “any person holding any office of profit or trust” under either the United States or an individual state from accepting an emolument from any ruler or foreign state.³³ Prior to the

25. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

26. *Id.*

27. *Id.* para. 12.

28. *Id.* para. 16.

29. *Id.* para. 17.

30. *Id.* para. 14.

31. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

32. ARTICLES OF CONFEDERATION of 1781.

33. *Id.* art. VI, para. 1.

adoption of the Constitution, several states adopted similar language in their state constitutions.³⁴

III. TITLES OF NOBILITY: HISTORY AND CASES

In the midst of the controversy surrounding the Articles of Confederation and the Constitution, one topic escaped heated debate.³⁵ Alexander Hamilton wrote,

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.³⁶

Regrettably, escaping debate resulted in very little explicit discussion or definition of this “corner-stone of republican government.”³⁷ The purpose of the prohibition was to preserve a republican form of government, and Alexander Hamilton praised the prohibition not only as the very foundation of liberty and equality but as the only necessary prevention of tyranny.³⁸ The prohibition against titles of nobility survived the uncertainty of the change in government structure when the Framers abandoned the Articles of Confederation and adopted it with the rest of the Constitution. Article I, Section 9 states, “No Title of Nobility shall be granted by the United States”³⁹ Further, the Constitution prohibits the states from granting this undefined privilege: “No State shall . . . grant any Title of Nobility.”⁴⁰

34. See Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1385 (2006).

35. See *id.* at 1401-02.

36. THE FEDERALIST NO. 84 (Hamilton).

37. *Id.*

38. *Id.* Tyranny means

1. The severe deprivation of a natural right. 2. The accumulation of all powers—the legislative, executive, and judicial—in the same hands (whether few or many). • Sense 2 expresses the Madisonian view of tyranny, to be found in *The Federalist*, No. 47. 3. Arbitrary or despotic government; the severe and autocratic exercise of sovereign power, whether vested constitutionally in one ruler or usurped by that ruler by breaking down the division and distribution of governmental powers.

Tyranny, BLACK'S LAW DICTIONARY (10th ed. 2014).

39. U.S. CONST. art. I, § 9, cl. 8.

40. U.S. CONST. art. I, § 10, cl. 1.

Because the writers of the Constitution did not clearly define what constituted a title of nobility, this crucial constitutional protection must be evaluated both from historical context and philosophical grounds. Since the purpose of the Constitution was to preserve liberty and justice,⁴¹ the prohibition designed to most protect these should be interpreted broadly against government grants of privileges that would harm that equality.

The Framers were very concerned with avoiding hereditary privileges.⁴² This concern reflected that of the people, as embodied in the Virginia Declaration of Rights: “That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.”⁴³ Other states at the time adamantly rejected any hereditary offices.⁴⁴ A title of nobility could also be reflected in a noble family name, which, if abandoned by a citizen’s ancestors, could not be regranted by a state.⁴⁵

41. The preamble, which is the ultimate purpose statement for the Constitution (and by extension, all federal laws), states several goals which the Constitution seeks to harmoniously preserve:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl. The provisions protecting each of these goals should be interpreted to extend as fully as possible as long as they do not interfere with protecting other enumerated goals and rights. The balance between justice, public welfare, defense, and personal liberty creates a tension that allows the People to protect rights of individuals without harming the People.

42. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, [self-appointed], or elective, may justly be pronounced the very definition of tyranny.” THE FEDERALIST NO. 47 (James Madison).

43. VA. DECLARATION OF RIGHTS § 4 (1776).

44. The Massachusetts Constitution states,

No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

MASS. CONST. pt. I, art. VI (1780); *see also* PA. DECLARATION OF RIGHTS para. VII (1776).

45. A court rejected a man’s application to change a name from “Jama” to “von Jama” because his family had purportedly dropped the “von” and he wished to use it. *In re Jama*, 272

However, the prohibition of titles of nobility does not solely concern hereditary privileges.⁴⁶ In the early years of this nation, the Framers and following generations resisted special distinctions granted by Congress, including favoritism to businesses.⁴⁷ Rather than prohibiting just a hereditary nobility, the Framers appear to have intended to shrug off a functional nobility.⁴⁸ If the prohibition of titles of nobility extends beyond hereditary privileges, it is reasonable to conclude that it extends to honors that widen the gap between officials and the people.

The Supreme Court has been primarily silent on the prohibition against granting titles of nobility, choosing instead to decide cases with the question on other grounds. In *Mobile & Ohio R.R. Co.*, the Supreme Court held that a provision of the Constitution of Tennessee that required equality in taxation could not be applied to a charter that granted a perpetual tax exemption.⁴⁹ In a prior case, *Piqua State Bank v. Knoop*, the Court decided a similar case based on contract principles as well,⁵⁰ failing to address the Ohio Supreme Court's holding that the charter could not be honored because it granted a

N.Y. S.2d 677 (Civ. Ct. 1966). The court reasoned "von" is often a family title of nobility. *Id.* "It would be presumptuous if not unlawful for this court to take a position or do an act contrary to the spirit and intent, if not the letter, of our Federal Constitution." *Id.* at 678. See also *In re Thompson*, 369 N.Y.S.2d 278, 279 (Civ. Ct. 1975) (Because "Chief" was a title of authority and superiority, the court denied a man's application to change his name to "Chief Piankhi Akinbaloye"). But see *Societe Vinicole De Champagne v. Mumm*, 143 F.2d 240 (2d Cir. 1944) (a person is not necessarily required to drop a family surname such as "von" in order to be naturalized).

46. "The Legislature shall not grant any title of nobility or hereditary distinction, nor create any office the appointment to which shall be for a longer term than during good behavior." PA. CONST. art. I, § 24. Here, Pennsylvania distinguishes between titles of nobility and hereditary distinction. See also Larson, *supra* note 34, at 1402-04 (In prohibiting titles of nobility, the people hoped to allow equal access to education, safeguard equality, and discourage the desire for noble distinction.).

47. Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 MICH. L. REV. 245, 251-59 (1997).

48. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 654 (2014).

49. *Mobile & Ohio R.R. v. Tennessee*, 153 U.S. 486, 507 (1894). The charter granted that the railroad company's capital stock would be "forever exempt from taxation" and the property and buildings would be exempt for 25 years after completion and subject to taxes only when such taxation would not reduce dividends below 8%. *Id.* at 488 (internal quotations omitted). The Court accepted the defendant's concession that Tennessee could grant tax exemptions for full or partial tax immunity and did not discuss whether granting immunity from taxes by a charter violated the prohibition against granting titles of nobility. *Id.* at 500.

50. *Piqua State Bank v. Knoop*, 57 U.S. 369, 392 (1854).

title of nobility.⁵¹ While the Court clearly recognizes the prohibition exists, it has yet to base a ruling on it.⁵²

The prohibition against granting titles of nobility has been mentioned in concurring and dissenting opinions to support or protest rulings by the Supreme Court on different theories. In *Zobel v. Williams*, the Court found that distribution of money to citizens of Alaska based on how long they had resided in Alaska violated the Equal Protection Clause.⁵³ In his concurrence, Justice Brennan recognized that the prohibition against titles of nobility protects equality and overlaps in purpose with the Equal Protection Clause.⁵⁴ He noted, “The American aversion to aristocracy developed long before the *Fourteenth Amendment* and is, of course, reflected elsewhere in the Constitution” by the prohibition against granting titles of nobility.⁵⁵

In *Scott v. Sandford*, Justice Curtis dissented, arguing that allowing the federal government to determine which free persons born in the United States received the privilege of citizenship (as the majority supported) was inconsistent with the prohibition against granting titles of nobility.⁵⁶ In *Fullilove*, the Court considered whether an act requiring that contracts be awarded in a manner favoring minority owned businesses was constitutional.⁵⁷ Justice Stevens dissented, recognizing that the “historic aversion to titles of nobility” requires impartial government⁵⁸ and asserting that the act’s criteria failed to meet the specificity and universal requirements for reparations.⁵⁹ A more recent case questioned the constitutionality of an act of Congress limiting participation in a program to contractors who use

51. *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 603, 615 (1853).

52. The prohibition is most often quoted due to its proximity to the prohibition against states impairing the obligation of contracts. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 502 (1987); *White v. Hart*, 80 U.S. 646, 652 (1871) (Georgia had no power to violate the Constitution by granting a title of nobility, impairing contracts, or other prohibited actions after rebellion but before restoration of representation.). In *Legal Tender Case (Juilliard v. Greenman)*, the Court mentioned the prohibition only in the context of actions forbidden to both states and Congress. *Legal Tender Case*, 110 U.S. 421, 447 (1884).

53. *Zobel v. Williams*, 457 U.S. 55, 57, 65 (1982).

54. *Id.* at 69 (Brennan, J., concurring). About the Equal Protection Clause, he stated, “[t]hat Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.” *Id.*

55. *Id.* at 69 n.3.

56. *Scott v. Sanford*, 60 U.S. 393, 577-78 (1857) (Curtis, J., dissenting) *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

57. *Fullilove v. Klutznick*, 448 U.S. 448, 453-54 (1980).

58. *Id.* at 533 (Stevens, J., dissenting).

59. *Id.* at 537.

the labor or products of “socially and economically disadvantaged” small businesses.⁶⁰ In his concurrence, Justice Scalia acknowledged that “[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole” but emphatically denied the existence of “either a creditor or debtor race.”⁶¹ Such a distinction, he reasoned, is prohibited by the Fourteenth and Fifteenth Amendments and the prohibition against granting titles of nobility.⁶²

In his dissent in *Downes*, Justice Harlan argued on the assumption that the Court recognized that the prohibition against granting titles of nobility or passing bills of attainder or ex post facto laws limited Congress’s power over United States territories.⁶³ Similarly, the Constitution bars Congress from imposing a “duty, impost or excise that is not uniform throughout the United States” on such territories.⁶⁴ This seems to indicate that the prohibition against granting titles of nobility is uniform among the states and territories.⁶⁵ Justice Stevens, in his dissent in *Mathews v. Lucas*, argued against a requirement that illegitimate children must show dependency in order to collect Social Security survivor’s benefits, stating that such a requirement is prejudicial and contrary to the prohibition against granting titles of nobility that also prohibits “attaching any badge of ignobility to a citizen at birth.”⁶⁶

Lower federal courts give little more guidance, so for purposes of understanding judicial approach to titles of nobility, it is instructive to turn to state courts. In *Horst v. Moses*, the Alabama Supreme Court held that the state could not “sell to a collection of persons” an exclusive right to hold lotteries.⁶⁷ The court reasoned:

60. *Adarand Constructors v. Peña*, 515 U.S. 200, 206-07 (1995) (quoting 15 U.S.C. § 637(d)(1) (2012)). The act lists certain races that are presumed to be so disadvantaged. *Id.*

61. *Id.* at 239 (Scalia, J., concurring).

62. *Id.* Justice Scalia further criticized such a notion of granting a race special privileges, stating, “To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here.” *Id.*

63. *Downes v. Bidwell*, 182 U.S. 244, 383-84 (1901) (Harlan, J., dissenting).

64. *Id.*

65. Congress passed a law governing relations over the Philippine Islands restricting its governance, including several constitutional restraints, one of which was a prohibition on granting titles of nobility. *Kepner v. United States*, 195 U.S. 100, 118 (1904). The Court declined to express an opinion as to whether the constitutional restrictions or protected rights would have extended without the legislation. *Id.* at 124-25.

66. *Mathews v. Lucas*, 427 U.S. 495, 520-21 n.3 (1976) (Stevens, J., dissenting).

67. *Horst v. Moses*, 48 Ala. 129, 141-42, 145 (1872).

Article I, section 32, of the State constitution declares that “no title of nobility, or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State.” *To confer a title of nobility, is to nominate to an order of persons to whom privileges are granted at the expense of the rest of the people.* It is not necessarily hereditary, and the objection to it arises more from the privileges supposed to be attached, than to the otherwise empty title or order. These components are forbidden separately in the terms [“]privilege,” “honor,” and “emolument,” as they are collectively in the term “title of nobility.” The prohibition is not affected by any consideration paid or rendered for the grant. *Its purpose is to preserve the equality of the citizens in respect to their public and private rights.*⁶⁸

One possible example of granting an unequal privilege is in determining what can and cannot be taxed. The Supreme Court of North Carolina ruled that the stocks of a foreign corporation could be taxed, reasoning, “In this country we have built our Constitution upon the foundation of ‘equal rights to all and special privileges to none.’ And as long as that is observed by lawmaking bodies and the courts our troubles will be but light.”⁶⁹ Based on these cases, it seems extending privileges to one or more persons in a class without extending the same privileges to others in that class grants a title of nobility.

The prohibition against granting a title of nobility cannot be overcome by granting privileges or denying them to large classes of persons. In his dissent in *Scott v. Sandford*, Justice Curtis argued that Congress cannot determine who can and cannot become a citizen of the United States based on race.⁷⁰ He hinted that the prohibition against granting titles of nobility does not allow Congress’s “creat[ing] an oligarchy, in whose hands would be concentrated the entire power of the Federal Government.”⁷¹ When the government classifies a group of people, based on race or ancestry, as having fewer rights

68. *Id.* at 142 (emphasis added).

69. *Brown v. Jackson*, 102 S.E. 739, 745 (N.C. 1920). *See also* *Makah Indian Tribe v. Clallam County*, 440 P.2d 442, 448 (Wash. 1968) (questioning whether a treaty that exempted the Makah Indians from personal property tax conferred a title of nobility but stating that the question was one over which the state court had no jurisdiction because it was a treaty).

70. *Scott v. Sanford*, 60 U.S. 393, 577-78 (1857) (Curtis, J., dissenting) *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

71. *Id.* at 578.

than another group, it violates the prohibition against granting titles of nobility.⁷²

In *Barker v. Crum*, the Kentucky legislature allowed counties to select at least one student who had passed an examination to attend the State University free of tuition, rent, and utility costs.⁷³ The court found this grant to be an unconstitutional granting of special privileges under Kentucky's Bill of Rights.⁷⁴ The court determined that the legislature could not modify its constitution by consistently violating it. Rather the court stated, "The statute which violates the constitution is never effective for any purpose; it cannot be made constitutional by repeated violations of that instrument."⁷⁵ Thus, a court cannot interpret constitutional provisions by giving deference to legislative acts that violate them, regardless of how long a violation has remained unchallenged.⁷⁶

Titles of nobility cannot be limited merely to granting a hereditary honor, such as earl or lord. From the beginning of the nation, a title of nobility was interpreted to include non-hereditary honors.⁷⁷ In 1783, after the adoption of

72. See *Eskra v. Morton*, 524 F.2d 9, 12-13 (7th Cir. 1975) (an illegitimate Native American child could not be discriminated against in the distribution of intestate property left by a relative of the child's mother). The court stated,

From its inception, the Federal Government has been directed to treat all its citizens as having been "created equal" in the eyes of the law. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Id. at 13 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). See also *Berry v. Sch. Dist.*, 467 F. Supp. 695, 713 (W. D. Mich. 1978). See also *In re Leva* 96 B.R. 723, 732-33 (Bankr. W.D. Tex. 1989) (A debtor's station in life was not a valid criterion to determine if specific articles of jewelry were necessary to retain his dignity.). "The perpetuation of social stratification is also, in this court's view, inconsistent with the public policy sought to be promoted by the exemption statutes of this state, and is fundamentally inconsistent with the history of this state and the circumstances which surrounded the creation of its original constitution." *Id.* at 732 (citing TEX. DECLARATION OF RIGHTS para. 8 (1836) ("[N]o title of nobility, hereditary privileges or honors, shall ever be granted or conferred in this Republic.")).

73. *Barker v. Crum*, 198 S.W. 211, 212 (Ky. 1917).

74. *Id.* at 213. "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services . . ." KY. CONST. § 3.

75. *Barker*, 198 S.W. at 215.

76. *Id.*

77. After George Washington was elected, Congress had a serious debate about how they should refer to him, with some persons in favor of titles such as "His Highness" or "His Excellency," which were rejected by others who saw such titles as threatening the republic by encouraging aristocracy. SOL BLOOM, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 373-76 (1941).

the Articles of Confederation but prior to the adoption of the Constitution and his first term in office as president, George Washington was offered a knighthood under the order of the Knights of Divine Providence.⁷⁸ George Washington sent this proposal to Congress, allowing them to decide the issue, and they determined that the proposal was not in keeping with the Articles of Confederation.⁷⁹ Upon Congress's answer, George Washington replied to Heintz, stating, "it appears to be incompatible with the principles of our national Constitution to admit the introduction of any kind of Nobility, Knighthood, or distinctions of a similar nature, amongst the Citizens of our republic"⁸⁰ Congress's response, echoed in George Washington's letter, revealed that the concerns surrounding titles of nobility extended beyond hereditary honors, and also beyond elected officials currently holding office.⁸¹ The intent was for equality among citizens without recognition of special titles or favors for any citizens.

IV. EMOLUMENTS: A VERY BRIEF OVERVIEW

Titles of nobility were not the only evil to liberty and equality the newly liberated states knew. Emoluments can overlap with titles of nobility when the recipient is an elected official. The Articles of Confederation sought to protect against the inequality that emoluments presented.⁸² The states also recognized and outlawed this threat of a conflict of interest.⁸³ An emolument is "[a]ny advantage, profit, or gain received as a result of one's employment or one's holding of office."⁸⁴ The Framers considered the dangers posed by emoluments above the salary for office so important that they prohibited

78. Letter from George Washington to Heintz (Jan. 21, 1784), <http://founders.archives.gov/documents/Washington/04-01-02-0047>.

79. Letter to George Washington from Thomas Mifflin (Jan. 9, 1784), <http://founders.archives.gov/documents/Washington/04-01-02-0017>.

80. Letter from George Washington to Heintz, *supra* note 78.

81. *See id.*

82. ARTICLES OF CONFEDERATION OF 1777, art. VI, para. 1.

83. *See* CONN. CONST. art. I, § 1 ("All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."); N.C. DECLARATION OF RIGHTS para. III (1776) ("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."); S.C. CONST. art. X (1776) ("[I]f a member of the general assembly or of the legislative council shall accept any place of emolument or any commission except in the militia, he shall vacate his seat, and there shall thereupon be a new election, but he shall not be disqualified from serving upon being reelected.").

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

extra emoluments three times in the Constitution.⁸⁵ Article II states, “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.”⁸⁶ The Supreme Court has defined emoluments as “embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office.”⁸⁷ As compensation is not just monetary, certain of the privileges discussed below might be emoluments.

V. PRESIDENTIAL PRIVILEGES

A. *Housing and Transportation: Necessities and Extravagancies*

Ever since John Adams, each president has used a provided home during his presidency that is now called the White House.⁸⁸ The White House has been through a few renovations and now has 132 rooms, 35 bathrooms, and 28 fireplaces.⁸⁹ Providing a fixed place where the President lives is wise policy as it eases transitions between presidents, enables more effective security, and provides stability in the political process. However, the extravagance of the dwelling, especially in its current condition, is such that it deserves its past moniker: the “President’s Palace.”⁹⁰ Since Franklin Roosevelt’s term as President, presidents have also had a second home, Camp David, which serves a secondary purpose of hosting foreign dignitaries.⁹¹ This country resort in Maryland has various amenities attractions, including an indoor basketball court, a pool, and hiking trails.⁹²

In addition to prime housing arrangements, presidents enjoy traveling largely at taxpayer expense. Presidential travel has become more practical, more secure, and much more expensive. Since President John F. Kennedy,

85. See U.S. CONST. art. I, § 6, cl. 2; *id.* §9, cl. 8; *id.* art. II, § 1, cl. 7.

86. U.S. CONST. art. II, § 1, cl. 7.

87. *Hoyt v. United States*, 51 U.S. 109, 135 (1850).

88. *The White House Building*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/the-white-house/> (last visited Mar. 27, 2019).

89. *Id.*

90. *Id.*

91. *Camp David*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/camp-david/> (last visited Mar. 27, 2019).

92. Ben Brimelow, *Take a Tour of Camp David, Where Presidents Host World Leaders and Escape Washington*, BUS. INSIDER (Feb. 12, 2018, 3:36 PM), <https://www.businessinsider.com/camp-david-photos-tour-president-2018-2>.

presidents have flown in jets specifically designed for presidential use.⁹³ Today, there are two Boeing airplanes which are custom designed for presidential use.⁹⁴ These planes are not only equipped with accommodations for his staff, advisors, and dignitaries,⁹⁵ but also include videoconferencing capabilities, an emergency room, two kitchen galleys, and a presidential suite.⁹⁶ The President also has an impressive helicopter, Marine One, at his service both in the United States and abroad.⁹⁷ Marine One is two-hundred square feet, holds up to fourteen passengers, and is outfitted with antimissile defense technology and ballistic armor.⁹⁸ When the President is traveling on the ground, he uses “The Beast,” any of several highly modified Cadillac presidential limousines that feature five-inch-thick, bullet-proof glass windows, eight-inch-thick doors, and communication devices sufficient for video conferencing with the Situation Room in the White House.⁹⁹ The Beast also has Kevlar-reinforced tires, can emit tear gas, gets 3.7 miles to the gallon, and costs \$1.6 million.¹⁰⁰

The cost of presidential transportation is enormous. Six new presidential helicopters are being developed at a cost of \$1.24 billion,¹⁰¹ and two new jets

93. *Airforce One*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/air-force-one/> (last visited Mar. 27, 2019).

94. *Id.*

95. *Id.*

96. Jordyn Phelps, *Air Force One: 10 Perks of Flying Like the President*, ABC NEWS (May 4, 2015, 3:13 PM), <https://abcnews.go.com/Politics/air-force-10-perks-flying-president/story?id=30746181>.

97. Amanda Macias, *There Is No Other Helicopter in the World Like Marine One*, BUS. INSIDER (Dec. 19, 2016, 12:05 PM), <https://www.businessinsider.com/marine-one-2016-12>.

98. *Id.* Upon disembarking, the President is always saluted by a marine, regardless of where Marine One lands. *Id.* Whenever the President flies in Marine One, at least one other identical helicopter flies as a decoy, in addition to rest of the fleet. *Id.*

99. Christopher Woody, *The President's One-of-a-Kind Limo Is in Asia with Trump—Here's What Makes 'the Beast' Different*, BUS. INSIDER (Nov. 6, 2017, 12:05 PM), <https://www.businessinsider.com/presidents-one-of-a-kind-limo-the-beast-with-trump-in-asia-2017-11>.

100. *Id.* See also Tom Murray, *The Extravagant Cars of 5 World Leaders—Worth a Combined 19 Million*, BUS. INSIDER (June 13, 2018, 11:19 AM), <https://www.businessinsider.com/the-extravagant-cars-of-5-world-leaders-worth-a-combined-19-million-2018-6>.

101. Amanda Macias, *Marine One Upgrade: The Next Presidential Helicopter Fleet Is Getting Closer to Its Debut*, CNBC (Apr. 11, 2018, 10:44 AM), <https://www.cnbc.com/2018/04/10/marine-one-upgrade-next-presidential-helicopter-fleet-getting-closer-to-debut.html>. Negotiations for an additional 17 helicopters to form the remainder of the fleet are expected to conclude some time in 2018. *Id.* Replacing aged aircraft might reduce maintenance costs while upgrading technology.

for presidential use are being developed for use by 2024 at a cost of \$3.9 billion.¹⁰² The cost of transportation also includes accompanying vehicles, helicopters, and jets, fuel, security (road closures, etc.) and crew members.¹⁰³ A thirty-member crew serves aboard Air Force One,¹⁰⁴ and a multitude of mechanics, engineers, and coordinators plan the President's travel.¹⁰⁵

B. *Extra Perks: Living Large on the Taxpayers' Dime*

1. Vacations

One distinction between aristocrats and the lower class is that of costly vacations. If presidential vacations placed no burdens on the citizens of the United States, their extravagance would likely not provoke constitutional questions. When they are granted as a privilege by Congress using tax dollars, however, they fall within the prohibition against granting titles of nobility. While the President and his family generally pay their portion of airfare and their personal vacation expenses, the taxpayers are left holding the bill for the travel and accommodation expenses of secret service members and the

102. Secretary of the Air Force Public Affairs, *Air Force Formalizes Air Force One Replacement Deal with Contract to Boeing*, U.S. AIR FORCE (July 19, 2018), <https://www.af.mil/News/Article-Display/Article/1579091/air-force-formalizes-air-force-one-replacement-deal-with-contract-to-boeing/>.

103. There is always at least one decoy when the President travels by helicopter or limousine. See Macias, *supra* note 97; Woody, *supra* note 99. The convoy for the Beast can be up to forty-five cars, and sometimes the convoy accompanies the President on overseas and domestic trips. See Woody, *supra* note 99; William Kelly, *Mar-a-Lago Helipad Ready but Marine One Not Used for Trump's Arrival*, PALM BEACH POST (Mar. 18, 2017), <https://www.palmbeachpost.com/news/local/landing-pad-completed-for-marine-one-mar-lago/KAhATPvxpG4wJhEZv0qozM/>. Additionally, the helicopter fleet can and has been disassembled and loaded into a military cargo plane to accompany the President during foreign travel. See Macias, *supra* note 101. Operational costs for Air Force One per hour is \$142,380. *Judicial Watch Releases First Set of Numbers on President Trump Travel: Air Force One Costs for Two Trips: \$1,281,420*, JUD. WATCH (May 4, 2017), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-releases-first-set-numbers-president-trump-travel-air-force-one-costs-two-trips-1281420/>. Seven jets travel with the President when he flies. Cynthia McFadden et al., *Protecting the President: Secret Weapons and a Hefty Price Tag*, NBC NEWS (Jan. 20, 2017, 7:25 PM), <https://www.nbcnews.com/news/us-news/protecting-president-secret-weapons-hefty-price-tag-n691306>.

104. *VC-25-Air Force One*, U.S. AIR FORCE (July 1, 2003), <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104588/vc-25-air-force-one/>.

105. For example, more than 1,100 personnel comprise the 89th Airlift Wing, which serves the President and White House in flight arrangements. See *89th Airlift Wing*, JOINT BASE ANDREWS (Feb. 26, 2013), <https://www.jba.af.mil/About-Us/Fact-Sheets/Display/Article/336383/89th-airlift-wing/>.

accompanying White House staff.¹⁰⁶ Although transportation and lodging expenses for staff and secret service members comprise a lion's share of taxpayer expenses, when a President or his family travels for pleasure, several other expenses arise, including car rentals, cell phone charges, printers, and overtime pay.¹⁰⁷

Presidential vacations are not a new phenomenon, but the costs associated with vacations has risen over the years. Taxpayers paid more than \$250,000 for a two-week presidential vacation to his home in 1981, which was one of several vacations during that President's term in office.¹⁰⁸ It cost about \$750,000 to initially alter that home to make it secure enough for the President's stay.¹⁰⁹ Recent vacations have cost far more.

A seventeen-day Christmas vacation in Hawaii in 2013 cost taxpayers \$91,751.78 in car rentals, \$224,974.05 in accommodations for Secret Service members, and \$7,781,361.30 in flight expenses.¹¹⁰ In August 2014, the first

106. Chip Marsden, *Who Pays for the Expenses of the US President?*, POCKET SENSE, <https://pocketsense.com/pays-expenses-president-11741.html> (last updated Nov. 21, 2018).

107. *Trump Administration Air Travel Costs \$3.58 Million*, JUD. WATCH (July 14, 2017), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-trump-administration-air-travel-costs-3-58-million/>. The first lady's trip to China in March of 2014, cost taxpayers:

- \$288,662.07 in hotels
- \$72,701.14 in car rentals
- \$5,020.52 in cell phone charges
- \$4,282.65 in rental reproduction equipment
- \$393.52 in printers and toners
- \$1,010.63 in cell phone rentals
- \$199.17 in supplies
- \$11,266.38 in overtime/per diem pay
- \$1,265.13 in miscellaneous services by another government agency
- \$5,130.50 in Air/Rail

in Secret Service expenses, not counting the Airforce flight costs. *Id.* Congress does set a cap for Secret Service pay, and the President can cause the Secret Service to exceed that cap, leaving Congress with the dilemma that either they do not spend taxpayer money on these privileges, or they leave Secret Service members uncompensated for their overtime. Heidi M. Przybyla, *How Trump could ease the burden he's putting on the Secret Service*, USA TODAY (Aug. 23, 2017, 7:49 PM) <https://www.usatoday.com/story/news/politics/2017/08/23/how-trump-could-ease-burden-stressed-out-secret-service/593514001/>.

108. *Costs Are Put at \$250,000 for a Reagan Trip to Coast*, N. Y. TIMES (Dec. 25, 1981), <http://www.nytimes.com/1981/12/25/us/costs-are-put-at-250000-for-a-reagan-trip-to-coast.html>.

109. *Id.*

110. *Secret Service Expenses for Obama's 2013 Hawaii Christmas Vacation Cost Taxpayers \$316,698.03, Taxpayers Paid over \$8 Million for 17-Day Vacation*, JUD. WATCH (Dec. 29, 2015), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-secret-service->

family went on a two-week vacation to Martha's Vineyard.¹¹¹ The accommodations for the Secret Service cost taxpayers \$946,435.¹¹² Transportation costs for this vacation were \$400,666.30.¹¹³ During a December 2014–January 2015 Christmas vacation, taxpayers funded accommodations for the Secret Service including at least “\$39,575.95 at Paradise Luxury Rentals; \$34,827.57 at The Kahala; and \$209,218.25 at Cabana Girl LLC.”¹¹⁴ Flight costs for the vacation to Hawaii were \$3,672,798.¹¹⁵ Over the course of the eight years of presidency, the current known total of travel expenses for personal travel for the Obama family was at least \$114,691,322.17.¹¹⁶ The current President has visited properties he owns for over 220 of the days he has been in office, costing taxpayers millions of dollars in transportation costs.¹¹⁷

expenses-for-obamas-2013-hawaii-christmas-vacation-cost-taxpayers-316698-03-taxpayers-paid-over-8-million-for-17-day-vacation/.

111. *Secret Service Hotel Bills for Obama Family's 2014 August Vacation in Martha's Vineyard, Christmas Vacation in Honolulu Cost Taxpayers \$1,243,057*, JUD. WATCH (Feb. 03, 2016), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-secret-service-hotel-bills-for-obama-familys-2014-august-vacation-in-marthas-vineyard-christmas-vacation-in-honolulu-cost-taxpayers-1243057/>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Judicial Watch Sues Secret Service Presidential Travel Expenses Records*, JUD. WATCH (Sept. 21, 2018), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-sues-secret-service-presidential-travel-expense-records/>.

117. As of February 7, 2019, President Trump had visited his properties 222 days of his presidency, including his hotels in Washington D.C. and Hawaii, as well as his golf courses in New Jersey, Virginia, and Florida. Karen Yourish & Troy Griigs, *Tracking the President's Visits to Trump Properties*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/interactive/2017/04/05/us/politics/tracking-trumps-visits-to-his-branded-properties.html>. The actual costs associated with these travels are unknown, as the Secret Service is not forthcoming with the costs of these travel expenses, but the known total exceeds double digit millions. *Judicial Watch Sues Secret Service Presidential Travel Expenses*, *supra* note 116. Judicial Watch was successful in obtaining records showing that operating costs for flying to Mar-a-Lago on Airforce One were \$142,380 per hour between March 17-19, 2017. *Trump Administration Air Travel Costs \$3.58 Million*, JUD. WATCH (JULY. 14, 2017), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-trump-administration-air-travel-costs-3-58-million/>. Travel costs to Mar-a-Lago involve costs other than just air travel. Philip Bump, *Trump's Spent Far More Going to Mar-a-Lago Alone Than the Mueller Probe Has Cost*, WASH. POST (June 1, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/01/trumps-spent-far-more-going-to-mar-a-lago-alone-than-the-mueller-probe-has-cost/?noredirect=on&utm_term=.064359504a14.

Not all first family vacations involve the President himself. Vacations for the first family also cost taxpayers a fortune as well. Transportation for the first lady's vacation ski-trip in Aspen, Colorado, in 2014, cost taxpayers \$34,962.30.¹¹⁸ In 2017, three of the President's adult children took a vacation to Aspen, Colorado, resulting in transportation and housing costs for accompanying Secret Service members.¹¹⁹

2. Pensions

In common with many other federal elected officials¹²⁰ and federal employees, the President receives certain special retirement benefits after he leaves office. The living former presidents each receive an annual pension of around \$200,000.¹²¹ Former presidents have also received additional funding for travel, rental expenses, postage, printing, and equipment.¹²² Other benefits to former presidents include an office anywhere in the United States

118. *Judicial Watch Obtains Records Revealing \$937,487.94 in Security Expenses for Obamas' 2013 Vacations to Honolulu and Aspen*, JUD. WATCH (Oct. 07, 2014), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-obtains-records-revealing-937487-94-security-expenses-obamas-2013-vacations-honolulu-aspen/>. For comparison, the 2014 Census found that the median family household income was estimated to be \$68,426. U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014 (Sept. 2015).

119. *Judicial Watch Sues Pentagon, Secret Service for Records of Costs for Presidential and VIP Travel*, JUD. WATCH (May 8, 2017), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-sues-pentagon-secret-service-records-costs-presidential-vip-travel/>.

120. Congressional benefits range from pensions payable by a certain age upon five or more years of elected service to increased contribution limits for Thrift Savings Plans. See generally KATELIN P. ISAACS, CONG. RES. SERV., RL 30631, RETIREMENT BENEFITS FOR MEMBERS OF CONGRESS 4, 6 (2017).

121. 3 U.S.C. § 102 note (2017) ("Former Presidents: Allowance; Selection, Compensation, and Status of Office Staff; Office Space; Widow's Allowance, Termination; 'Former President' Defined"); WENDY GINSBERG & DANIEL J. RICHARDSON, CONG. RES. SERV., FORMER PRESIDENTS: PENSIONS, OFFICE ALLOWANCES, AND OTHER FEDERAL BENEFITS 5 (2016); Alicia Adamczyk, *Here's How Much Money Obama and Biden Will Get from Their Pensions*, MONEY (Jan. 20, 2017), <http://time.com/money/4640736/barack-obama-joe-biden-pension/>.

122. 3 U.S.C. § 102 note (2017) ("Former Presidents: Allowance; Selection, Compensation, and Status of Office Staff; Office Space; Widow's Allowance, Termination; 'Former President' Defined"); STEPHANIE SMITH, CONG. RES. SERV., 98-249, FORMER PRESIDENTS: FEDERAL PENSION AND RETIREMENT BENEFITS 4 (2008).

and staff, a state funeral, and medical care at reduced costs.¹²³ A former President may also request more money for various expenses.¹²⁴

These benefits continue long after service has ended and allow a former President to live well above the average citizen's means for the rest of his life, at the expense of those with whom he is supposed to be equal. Although some past presidents prior to the granting of the presidential pension struggled financially after leaving office,¹²⁵ modern former presidents have enjoyed lucrative book publishing deals¹²⁶ and speaking engagements¹²⁷ that dispel any fear of poverty.

3. Other Benefits

The President is granted a yearly a salary of \$400,000 and an expense allowance for discharging official duties (\$50,000) and can also receive an allowance for travel to be used at the President's discretion (up to

123. 3 U.S.C. § 102 note (2017) ("Former Presidents: Allowance; Selection, Compensation, and Status of Office Staff; Office Space; Widow's Allowance, Termination; 'Former President' Defined"); SMITH, *supra* note 122; Bob Fredericks, *Obama's the Most Expensive Ex-President for Taxpayers*, N.Y. POST (Sept. 1, 2017, 12:46 PM), <https://nypost.com/2017/09/01/obamas-the-most-expensive-ex-president-for-taxpayers/> (taxpayers pay between \$115,000 to \$536,000 per year for each former President's office space).

124. For example, George W. Bush received an additional \$1,098,000 in 2015. See Adamczyk, *supra* note 121.

125. Jeff Jacoby, *Harry Truman's Obsolete Integrity*, N.Y. TIMES (Mar. 2, 2007), <http://www.nytimes.com/2007/03/02/opinion/02iht-edjacoby.4775315.html>.

126. Jim Milliot & Rachel Deahl, *The Obamas' Book Deals Spark \$65 Million Mystery*, PUBLISHERS WKLY. (Mar. 3, 2017), <https://www.publishersweekly.com/pw/by-topic/industry-news/book-deals/article/72949-the-obamas-book-deals-spark-65-million-mystery.html> (Penguin Random House agreed to pay \$65 Million for two books, one written by Barack Obama and one by Michelle Obama). While this was a record-breaking deal, several former presidents and their families have signed lucrative deals as well. See Kathleen Elkins, *Bill Clinton Says He Left the White House \$16 Million in Debt*, CNBC (June 5, 2018; 8:00 A.M.), <https://www.cnbc.com/2018/06/04/the-clintons-erased-16-million-in-debt-and-accumulated-45-million.html> (Bill Clinton received a \$10 million advance on MY LIFE). Former presidents and first family members are not always forthcoming with their book deals, but they can be estimated to be in the million-dollar range. See e.g., Hillary Lewis, *So How Much DID Laura Bush Get Paid for That Book*, BUS. INSIDER, (Jan. 6, 2009) <https://www.businessinsider.com/2009/1/so-how-much-did-laura-bush-get-paid-for-that-book>.

127. Jacoby, *supra* note 125 (After leaving office, Ronald Reagan was given \$2 million to deliver speeches in Japan, George H. W. Bush charged \$80,000 to \$100,000 per speech, and Bill Clinton had, by 2007, already made \$40 million on speeches.).

\$100,000).¹²⁸ Presidents can also receive up to \$100,000 to redecorate the White House when they move in.¹²⁹

Federally-paid staff keep the White House running smoothly, benefitting the first family. The staff includes cooks, maids, and a plumber who all add to the quality of life for the first family, although the first family pays for the services rendered for private parties.¹³⁰ The White House staff includes butlers, valets, and groundskeepers, and consists of about a hundred full-time and over twice as many part-time staff members.¹³¹ These staff members do serve the nation because they maintain the White House, a building of historical importance and practical necessity. Their service, although benefitting the President, can be thought of as largely for the citizens of the United States. Though more personalized than those serving as custodians, federally-salaried secretaries also serve the public by handling correspondence, which, if the President had to handle on his own, would monopolize his time, leaving his more important duties undone. Because much of their work aides the office instead of granting special personal services, the funding for these staff members is likely not an emolument, but rather a practical necessity because of the nature of the office.¹³²

C. *Business*

It is possible that a president may indirectly gain business revenue at the expense of taxpayers for his private business(es). For example, if a president owned a premier company for drone technology that had a contract with the military and then ordered multiple drone strikes requiring that technology, a violation of the emoluments clause would be one of many ethical and constitutional concerns.¹³³ For example if a President owns a hotel, the use of

128. 3 U.S.C. §§ 102-03 (2019).

129. Myelle Lansat, *17 Financial Perks of Being the President of the United States*, BUS. INSIDER (July 17, 2018, 7:26 AM), <https://www.businessinsider.com/financial-perks-president-of-the-united-states-2018-7>.

130. *Id.*

131. Abby Jackson, *There Are over 300 Staffers Trump Doesn't Choose When He Enters the White House—and They're the Ones He'll See Every Day*, BUS. INSIDER (Jan. 19, 2017, 2:15 PM), <https://www.businessinsider.com/trump-permanent-white-house-staff-2017-1>.

132. The Framers would likely agree that employing persons on the federal pay role to serve the President by performing duties that are in the scope of his public services is in keeping with the Emoluments Clause. *See, e.g.*, N.C. DECLARATION OF RIGHTS para. III (1776) (“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.”).

133. The President would thereby gain financially by requiring the military, at the expense of taxpayers, to buy and use technology to his profit. He would gain from his position as

the hotel for vacations,¹³⁴ meetings with dignitaries, and first-family living arrangements could result in an unconstitutional emolument from the United States when the United States picks up the tab for secret service members or other federal employees.¹³⁵ Nor does having those properties held in trust solve the issue if any of the expenditures the government pays would increase the value of that trust.

Commander in Chief something beyond the fixed payment the Constitution requires. “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.” U.S. CONST. art. II, § 1, cl. 7.

134. Secret Service and White House staff accompany the President everywhere he goes, and when their lodging is charged at the normal rate, the President’s business will profit. If a President stays at his own resort, the Secret Service must pay lodging expenses to that resort. See Heidi M. Przybyla, *How Trump Could Ease the Burden He’s Putting on the Secret Service*, USA TODAY (Aug. 23, 2017, 7:49 PM), <https://www.usatoday.com/story/news/politics/2017/08/23/how-trump-could-ease-burden-stressed-out-secret-service/593514001/>.

135. The President took seven weekend trips to Mar-a-Lago in the first five months of his Presidency, which corresponded with a \$7.5 million increase in revenue from the Mar-a-Lago golf estate. See David Hoi, *Mar-a-Lago, the Florida Resort Where Trump Has Spent 25 Days Since Taking Office, Sees Huge Boost in Revenue*, BUS. INSIDER (June 16, 2017, 7:35 PM), <http://www.businessinsider.com/how-much-does-trump-make-on-maralago-financial-disclosure-2017-2017-6>. Mar-a-Lago brought in “\$37.2 million in ‘resort-related revenue’” from January 2016 to April 15, 2017 for his golf club estate. *Id.* The resort doubled its annual membership fee shortly before his inauguration. *Id.* Mar-a-Lago made \$29.8 million in 2015. *Id.* Another source of possible revenue (and free security) from the Secret Service’s accommodation was occasioned by First Lady Melania Trump’s and Baron Trump’s stay in the Trump Tower, which lasted from the inauguration until June 11, 2017. See Travis M. Andrews, *So Long, Trump Tower. First Lady Melania Trump and Son Barron Move into White House.*, WASH. POST (June 11, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/11/so-long-trump-tower-first-lady-melania-trump-son-barron-move-into-white-house/?utm_term=.9e8611365eff. It is unclear whether accommodations used were owned by Trump or by lien holders or to whom the benefit renting fees ultimately accrues. See Ford Fessenden & Iaryna Mykhyalyshyn, *What Donald J. Trump Owns and Owes*, N.Y. TIMES (Aug. 20, 2016), <https://www.nytimes.com/interactive/2016/08/20/us/elections/donald-trump-owns-and-owes-debt-properties.html> (\$100,000,000 was owed on Trump Tower); see also Julia Glum, *The Government Is Paying \$2.4 Million to Rent Space in New York City’s Trump Tower*, NEWSWEEK (July 19, 2017, 10:58 AM) <http://www.newsweek.com/government-paying-trump-tower-presidential-protection-638852> (the \$130,000 per month that the government is paying for an outpost of the White House Military Office is for an office in Trump Tower that President Trump purportedly does not own). Nor is the Trump Tower the first location near a President’s residence where a military outpost was set up, as similar arrangements were made in Chicago for President Obama and Texas for President George W. Bush. *Id.*

D. Heirs of the President: First Family Perks

1. First Lady Staff

Not all White House staff serves the President directly on behalf of the nation. Edith Roosevelt became the first of many first ladies to have a salaried federal employee as a secretary.¹³⁶ Exactly how many federal employees serve any given first lady is difficult to determine as many who serve the President in a secretarial manner also serve the first lady.¹³⁷ The first lady is not an elected official, and her staff, or her use of her husband's staff, might cross the line into a grant of a title of nobility. If we consider the first lady and the President as a family unit and that any benefit she is granted necessarily benefits the President by providing a service he would otherwise be expected to pay, that benefit would constitute an emolument with regard to the President and could be unconstitutional.

2. Secret Service Protection

One privilege the first family enjoys is Secret Service protection. The Secret Service is required to protect the President and Vice President of the United States.¹³⁸ The Secret Service is authorized to protect the immediate family of the President, the immediate family of the President-elect, major presidential candidates (and their spouses within 120 days of the election), former presidents and their spouses for life (unless the spouse remarries), and the children of former presidents until they turn sixteen.¹³⁹

Secret service protection of the President and President's family in general while he is in office would likely survive a constitutional inquiry into whether it is an emolument beyond the compensation constitutionally allowed by Article II because it is necessary for national security. The ability of a President to function if his immediate family members were killed or taken hostage would be severely compromised, and there is likely no other feasible alternative to protecting the first family other than providing Secret Service protection. A foreign or domestic enemy holding a former President's family member hostage does not present the danger of a distracted and distraught executive; however, because a former President might know classified and top-secret information key to the defenses of the United States, enemies

136. Carl Anthony, *The White House Staff of First Ladies*, NAT'L FIRST LADIES' LIBR. BLOG (Aug. 24, 2016), <http://www.firstladies.org/blog/the-white-house-staff-of-first-ladies/>.

137. *Id.*

138. *Who Does the Secret Service Protect?*, SECRET SERV., <https://www.secretservice.gov/protection/> (last visited Mar. 28, 2019). Any other individual may decline Secret Service protection. *Id.*

139. 18 U.S.C. § 3056(a) (2018).

could extract such information if they held a former President or one of his family members.

Although protection for the President's family is most likely necessary for a compelling government purpose, the President and his family still should not use this benefit in ways that demonstrate inequality between the first family and other citizens. In addition to vacation travel, Secret Service protection for business travel by adult children of the President unnecessarily burdens taxpayers.¹⁴⁰ Security during these business trips by adult children of the President greatly benefit the President's children while conferring little or no value on the general population or the nation.¹⁴¹

VI. CHECKING CORRUPTION: WHAT IS AND WHAT SHOULD BE THE ROLE OF THE COURTS

Each branch of the federal government is charged with protecting and obeying the Constitution.¹⁴² However, when it comes to enforcing

140. In early 2017, Eric Trump took four overseas business-related trips, for two of which he was joined by Donald Trump Jr. See Jackie Northam, *These Days, Business Travel by Trump's Sons Is Costly and Complicated*, NPR (Mar. 6, 2017, 4:47 AM), <https://www.npr.org/sections/parallels/2017/03/06/518367429/these-days-business-travel-by-trumps-sons-is-costly-and-complicated>. Eric traveled to Uruguay to check on the progress of a Trump building and to the Dominican Republic to find out if a project should be revived. *Id.* Both sons attended opening ceremonies for Trump projects in Dubai and Vancouver. *Id.* An estimate for hotel bills for the Secret Service entourage associated with the Uruguay trip alone is \$97,830. See Amy Brittain & Drew Harwell, *Eric Trump's Business Trip to Uruguay Cost Taxpayers \$97,830 in Hotel Bills*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/business/economy/eric-trumps-trip-to-uruguay-cost-taxpayers-97830-in-hotel-bills/2017/02/03/ababd64e-e95c-11e6-bf6f-301b6b443624_story.html?utm_term=.8679e0b7bbc2. This figure does not include the additional transportation costs for the secret service. *Id.* The Trump family is not the only first family to use the secret service for overseas business trips. Jeb Bush traveled to Nigeria in 1989, shortly after his father George H. W. Bush was elected. *Id.*

141. Adult children of the President can appoint proxies for business dealings. Rather than promoting the interest of the United States, attendance at foreign business events by relatives of the President could be sparking local interest in doing business with someone who has the ear of the President, encouraging a perception if not a reality of foreign influence. The first family, not the taxpayers, should carry the costs of any security they might need or desire for international business trips because granting such protection by the Secret Service for business affairs is not required for carrying out the duties of the office of the President.

142. Congress's legislative powers are carefully restrained by the Constitution, which requires certain legislative procedures, enumerates specific powers of legislation, and prohibits certain types of laws. See U.S. CONST. art. I. The President has a specific oath and the responsibility of executing the Constitution. U.S. CONST. art. II, § 1, cl. 8, § 2. The Supreme Court decides cases arising under the Constitution, federal law, and treaties, by the

prohibitions on grants of titles of nobility and emoluments, the three branches have been less than zealous. While it is simplest for Congress and federal courts to expect the executive branch to police itself when it comes to emoluments and titles of nobility, the President's unique office and power makes this office the most susceptible to abuse. Therefore, the other branches must check improper grants. The Framers foresaw abuse by government and created a framework where such abuse could be checked. They structured government into three branches, each accountable to the others, and divided powers among them.¹⁴³ This structure is and ought to be the first line of defense against unconstitutional emoluments and titles of nobility. The burden on the courts is to evaluate the constitutionality of laws and actions whenever such a case or controversy is brought before it.

A. *Standing in the Way of Standing*

Because violation of the Constitution, here the prohibition against granting (or receiving) titles of nobility, is not a discretionary or political question, the courts should evaluate arising cases solely under the Constitution's cases and controversies standard.¹⁴⁴ Could a court even decide a titles of nobility question? In *Cohens v. Virginia*, the Court briefly responded to the defendant's argument that the Constitution could be violated without giving the Supreme Court jurisdiction, as in a hypothetical instance of a state granting a title of nobility.¹⁴⁵ The Court stated that it was possible that such a violation would be outside of the Court's jurisdiction, but that jurisdiction would exist if there was a "case in law or equity."¹⁴⁶ If jurisdiction would have existed in the case of a state granting a title of nobility

Constitution. U.S. CONST. art. III, § 2, cl. 1. Further, senators, representatives, executive officers and judicial officers of the United States are "bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, cl. 3.

143. James Madison, in his major role of writing the Constitution, knew the dangers of allowing a single man to make, execute, and judge the laws, whether about a nation, a subject matter, or himself. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 249 (James Madison). He therefore structured the government in a manner that encouraged checks and balances that allowed the other two branches to prevent abuse of power in one branch. See generally U.S. CONST.

144. The federal courts cannot evaluate how the executive performs discretionary duties, but when an injury results from a failure to perform a duty required by law, the courts may hear such a case. *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 170 (1803).

145. *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404-05 (1821).

146. *Id.* at 405.

if there was a case in law or equity, it would also exist if the federal government granted a title of nobility as long as there was a case in law or equity.

In *Marbury v. Madison*, Chief Justice Marshall quoted Blackstone, upholding a common law maxim that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”¹⁴⁷ However, at some point, the United States adopted a rule that a private individual could not bring a lawsuit on a public right, only on a private one.¹⁴⁸ “An individual who demonstrated the violation of a private right, however, did not have to demonstrate that the violation had resulted in some other factual harm: the violation alone entitled the plaintiff to relief.”¹⁴⁹ In *Fairchild v. Hughes*, the Supreme Court held that the plaintiff could not sue for a declaration that the Nineteenth Amendment was unconstitutional because he was suing as a private citizen on a public right.¹⁵⁰

Rather than focusing on whether a right has been infringed upon, the modern trend is to require three elements for standing: (1) “the plaintiff must have suffered an ‘injury in fact’” (defined as “an invasion of a legally protected interest which is” both “concrete and particularized” and “actual or imminent,” (2) “there must be a causal connection between the injury and the conduct complained of,” and (3) “it must be ‘likely’ . . . that the injury will be ‘redressed by a favorable decision.’”¹⁵¹ The injury in fact requirement was originally created to broaden standing,¹⁵² although it has since been used to limit standing. When a harm is abstract, indefinite, and widely shared, such as when plaintiffs seek to enforce a law, the Supreme Court is likely to find

147. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

148. F. Andrew Hessick, *Standing, Injury in Fact, & Private Rights*, 93 CORNELL L. REV. 275, 279 (2008).

149. *Id.*

150. *Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922). The Court acknowledged a public right for citizens, stating, “Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted.” *Id.* at 129. However, the court denied an action to determine constitutionality before the passage of an amendment or statute by one asserting only a public right, stating, “Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid.” *Id.* at 129-30.

151. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

152. See Hessick, *supra* note 148, at 301. Hessick argues that injury in fact was only lately adopted as a requirement for standing and should be abandoned. *Id.* at 299-307.

the plaintiff lacks standing.¹⁵³ In *Lujan*, the Court stated that “ignoring the concrete injury requirement . . . would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch”¹⁵⁴ The Court continued, “Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”¹⁵⁵

However, the Supreme Court has recognized that a statute can grant standing to sue on what might otherwise be considered unenforceable public rights. One such statute is 42 U.S.C. § 1983, which allows lawsuits on a broad range of Constitutional and other rights against persons acting “under the color” of state law to unlawfully deprive the plaintiff of such rights.¹⁵⁶ The United States Supreme Court has recognized actions for violations of private rights conferred by the Constitution, including violations of due process, establishment of religion by government, restrictions on free speech, and violations of the Equal Protection Clause.¹⁵⁷ The Supreme Court also found that Massachusetts had standing to sue the EPA for its denial of a rulemaking petition because Congress had authorized that type of challenge by statute.¹⁵⁸ The Court followed the reasoning of *Lujan*, that when Congress, by statute, grants “a procedural right to protect [a litigant’s] concrete interests,” the litigant “can assert that right without meeting all the normal standards for

153. *FEC v. Akins*, 524 U.S. 11, 23-24 (1998). *But cf.* *United States v. SCRAP*, 412 U.S. 669, 688 (1973) (“To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.”).

154. *Lujan*, 504 U.S. at 576.

155. *Id.* There is, however, little comfort in the idea that the branch charged with being a check on abuse of legislative and executive power will ignore such abuse if all experience it equally. Such a construction tells these branches they can harm citizens and fleece their rights as long as all are fleeced equally.

156. 42 U.S.C. § 1983 states in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

157. *See Hessick, supra* note 148, at 288.

158. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

redressability and immediacy.”¹⁵⁹ Although the injury was gradual,¹⁶⁰ the desired regulation would have little effect,¹⁶¹ and the remedy would not relieve the entire injury,¹⁶² the Court found that Massachusetts had standing. It appears, then, that denying or granting standing with regards to redressability and immediacy is a prudential, rather than constitutional, decision made by the Court.

“Generalizations about standing to sue are largely worthless as such.”¹⁶³ The Constitution limits jurisdiction of the Supreme Court to cases and controversies,¹⁶⁴ but many additional impediments result from “judicially self-imposed limits,” which include the doctrine of the zone of protected interests, a hesitation to adjudicate general grievances that, in the Court’s judgment, are better decided by the other branches, and restrictions on third party lawsuits.¹⁶⁵

B. *Expanding Taxpayer Standing under Flast*

Taxpayer standing was found in *Flast v. Cohen*.¹⁶⁶ In *Flast*, the Supreme Court found an exception to its imposed barrier against taxpayer standing to challenge acts of Congress.¹⁶⁷ The Court fashioned a new two-part test for

159. *Id.* at 517-18 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (internal quotation marks omitted)).

160. Plaintiffs asserted global sea levels had risen between ten and twenty centimeters during the twentieth century. *Id.* at 522.

161. The legislation could not have affected much more than 6% of the global carbon dioxide emissions. *Id.* at 524.

162. *Id.* at 525.

163. *Ass’n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 151 (1970).

164. U.S. CONST. art. III, § 2, cl. 1.

165. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

166. *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968). *But see* *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011) (finding taxpayers in Arizona lacked standing to challenge Arizona’s school tuition organization tax credit). “Absent special circumstances, however, standing cannot be based on a plaintiff’s mere status as a taxpayer. This Court has rejected the general proposition that [a taxpayer] has a ‘continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution.’” *Id.* at 134 (citing *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2007) (plurality opinion)). *Cf.* *United States v. Richardson*, 418 U.S. 166, 174-75 (1974) (finding that taxpayer status standing requires a logical nexus between taxpayer status and the injury alleged and is not enough for a claim that Congress did not require the Executive Branch to release a sufficiently detailed report of CIA expenditures).

167. *Flast*, 392 U.S. at 85.

taxpayer standing, which they applied especially to this plaintiff's standing in a claim of a violation of the Establishment Clause.¹⁶⁸

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.¹⁶⁹

The Court applied this test narrowly to the Establishment Clause, determining that the Establishment Clause specifically limited the taxing and spending power.¹⁷⁰

The Court left undetermined whether there are other specific limitations on the spending power that would grant taxpayer standing, deferring this question to future challenges.¹⁷¹ Although the Court has not yet found another violation of constitutional limitations on the taxing and spending power, it did not rule out the possibility.¹⁷² The Court stated that:

whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those

168. *Id.* at 102-03.

169. *Id.*

170. *Id.* at 105.

171. *Id.*

172. *Id.* at 105-06.

constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review.¹⁷³

If this nexus were to be present, the case and controversy requirement would be satisfied because the litigated issues would be sufficiently specific and the parties would argue them vigorously.¹⁷⁴

Unless the federal courts apply *Flast* and find taxpayer standing for violations of the Emoluments and Titles of Nobility Clauses, most claims are unlikely to succeed under other standing theories.¹⁷⁵ However, because the prohibition against granting titles of nobility and against extra emoluments are in the Constitution and are express limits on Congress's taxing and spending powers,¹⁷⁶ the Court ought to allow taxpayer standing for such

173. *Flast*, 392 U.S. at 105-06.

174. *Id.* at 106.

175. See *Allen v. Wright*, 468 U.S. 737, 753-55 (1984) (finding that neither a claim to enforce the law against a government nor "a claim of stigmatic injury . . . suffered by all members of a racial group" caused by Governmental discrimination is sufficient to establish injury). The Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Id.* at 754. A federal district court held that standing to challenge the President's violations of the Emoluments Clauses could not be founded on unfair competition claims and that their injuries did not fall within the zone of injuries the Emoluments Clauses sought to prevent. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 184 (S.D.N.Y. 2017). That court did hold the question of foreign emoluments as within the jurisdiction of Congress and stated the case was not "ripe for judicial review." *Id.* at 193-94. Conversely, District Court Judge Messitte ruled that Maryland and the District of Columbia could sue President Trump on injuries to "quasi-sovereign, proprietary, and *parens patrie* interests" for Emoluments Clause violations. *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 750 (D. Md. 2018). Judge Messitte found that the question of foreign emoluments was not solely within Congress's power and found that it was not a political question and was capable of review. *Id.* at 756-57.

176. Congress is prohibited from granting a title of nobility. "No Title of Nobility shall be granted by the United States . . ." U.S. CONST. art. I, § 9, cl. 8. The President's salary, fixed for his term and paid by Congress, is the only emolument Congress may grant him: all other emoluments are expressly forbidden. U.S. CONST. art. II, § 1, cl. 7 ("[H]e shall not receive within that Period any other Emolument from the United States . . .").

violations.¹⁷⁷ If Congress is using taxpayer funds to violate the specific constitutional prohibitions against granting titles of nobility and extra emoluments, and Congress is using taxpayer funds to do so, it is taxing and spending in violation of the Taxing and Spending Clause.

Because *Flast* has never been overruled, it is clear that taxpayers have standing to bring lawsuits seeking injunctions against federal spending when that spending violates limitations placed on the taxing and spending power. Taxpayer standing can then be expanded to include any case that fits the *Flast* nexus, including those where a taxpayer sues to enjoin the use of taxpayer funds to grant emoluments or titles of nobility prohibited by the Constitution.

Because violation of the Constitution, here the prohibition against granting (or receiving) titles of nobility, is not a discretionary or political question, the courts should evaluate it solely under the constitutional cases and controversies standard.¹⁷⁸ The danger of requiring special injury to confer standing in complaints against violation of the Constitution is that Congress and the President could ignore and violate the Constitution, making it meaningless where it will not be enforced by the courts.¹⁷⁹

The courts now are loath to resolve abstract or generalized grievance;¹⁸⁰ however, that has not always been the case throughout U.S. history.¹⁸¹ When Congress violates the Constitution by granting titles of nobility and excessive emoluments, and when an evil as great as tyranny is harbored with each violation, the Court may be the only hope for checking the tide.¹⁸² Part of the function of the courts is to protect minorities from losing their rights at the

177. Professor Evan Zoldan argues that in the case of special legislation granting financial benefit to one class of persons, a taxpayer could have standing. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 692 (2014).

178. The federal courts cannot evaluate how the executive performs discretionary duties, but when an injury results from a failure to perform a duty required by law, the courts may hear such a case. *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 170 (1803).

179. Jeremy Patrick, *A Polemic Against the Standing Requirement in Constitutional Cases*, 41 CAP. U.L. REV. 603, 617-18 (2013).

180. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

181. Both English and U.S. courts did allow lawsuits from individuals whose primary injury was the violation of law, whether any other injury to themselves was alleged. See Patrick, *supra* note 179, at 621-24.

182. See *Flast v. Cohen*, 392 U.S. 83, 109-10 (1968) (Douglas, J., concurring) (“We have a written Constitution; and it is full of ‘thou shalt nots’ directed at Congress and the President as well as at the courts. And the role of the federal courts is . . . to protect the individual against prohibited conduct by the other two branches of the Federal Government.”); *Id.* at 111 (“With the growing complexities of government [the judiciary] is often the one and only place where effective relief can be obtained.”).

behest of the majority. If the courts wait for concrete, factual injury to a person which exceeds injury to citizens in common, it will likely wait too long and be unable to redress actual harm. In *Flast*, the Supreme Court found taxpayer standing for violations of the Establishment Clause because the Framers so adamantly warned of the evils attending government establishment of religion.¹⁸³ The Declaration of Independence, the Articles of Confederation, and the Federalist Papers all warn of the evils of granting titles of nobility or allowing extra privileges or money exceeding a salary for service for elected officials.¹⁸⁴ In *Flast*, the Court found “[t]he Establishment Clause was designed as a specific bulwark against . . . potential abuses of governmental power”¹⁸⁵ and the same is true of the prohibition against granting titles of nobility and emoluments in preventing tyranny, inequality, and oppression. Spending in violation of express prohibitions on spending can be enjoined, as under *Flast*.

Violations of the Constitution are not political questions from which federal courts can hide.¹⁸⁶ Even violations of the Constitution that cause minute injury are serious.¹⁸⁷ Even when honoring the Constitution would result in great inconvenience, it is incumbent upon the courts to decide cases in accordance with the Constitution. Justice Bronson expressed this view with eloquence:

It is highly probable that inconveniences will result from following the constitution as it is written. . . . It is not for us, but for those who made the instrument to supply its defects. If the legislature or

183. *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968).

184. *See supra* Part II.

185. *Flast*, 392 U.S. at 104.

186. “The judicial power of the United States is extended to all cases arising under the constitution.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). Chief Justice Marshall stated, “an act of the legislature, repugnant to the constitution, is void.” *Id.* at 177. Federal courts, therefore, have the duty to decide between injured citizens and any branch of the Federal Government that violates the Constitution. *See also Flast*, 392 U.S. at 111 (1968) (Douglas, J., concurring) (“[W]here wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.”).

187. *See Flast*, 392 U.S. at 108 (1968) (Douglas, J., concurring) (“It therefore does not do to talk about taxpayers’ interest as ‘infinitesimal.’ The restraint on ‘liberty’ may be fleeting and passing and still violate a fundamental constitutional guarantee.”). Justice Douglas’s dissent also argued that citizens should have standing to sue about the Incompatibility Clause and other such clauses. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 233-34 (1974) (Douglas, J., dissenting) (“What the Framers did in each case was to set up constitutional fences barring certain affiliations, certain kinds of appropriations. Their judgment was that the potential for evil was so great that no appropriations of that character should be made.”).

the courts may take that office upon themselves; or if under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the government. Written constitutions will be worse than useless.

... [T]he success of free institutions depends on a rigid adherence to the fundamental law There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. . . . If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them.¹⁸⁸

VII. PROPOSED FRAMEWORK

Because of the dearth of cases regarding titles of nobility and emoluments granted by government, I suggest the following framework. To avoid taxation and spending that violates the Emoluments or Titles of Nobility Clauses, government spending must pass the following tests: (1) a grant by a government to any particular person, office, or organization must be in consideration of performance of a service, merit, or contract;¹⁸⁹ (2) no grant may be based on a pretext by exceeding the value of the contract or a legislatively determined salary; (3) no pecuniary benefit shall extend to an office holder beyond the time an office is held; (4) no grant may be made without consideration of those similarly situated, and no parameters may be

188. *Oakley v. Aspinwall*, 3 N.Y. 547, 568-569 (1850) (Bronson, J., dissenting).

189. This framework would allow merit-based awards to military members, such as the Purple Heart or other awards for outstanding accomplishments. It would also allow research grants, student loans, and educational grants if contract based. This framework also allows patents and copyrights, as they are merit based, but does not allow singling out an organization for special treatment.

developed to purposely exclude other candidates;¹⁹⁰ (5) no grant to an elected official shall exceed the legislatively determined one-sum salary; and (6) a grant may be made based on a person's present or past official status if the failure to do so would jeopardize national security or if necessary for the performance of official duties.¹⁹¹ With this framework, the court should use strict scrutiny, upholding the action only if it is necessary to accomplish a compelling government objective.¹⁹²

Grants to persons made only in consideration of performance of a service, merit, or contract safeguard against congressional granting of special favors to anyone outside of government, requiring that there be more than a mere hypothetical spending for "general welfare" which can mask special privileges given to supporters or large corporations.¹⁹³ As applied to elected persons or

190. The dangers of drawing classifying lines are reflected in the darkest chapters of our history. The Court and Congress defined a class of persons that could not become citizens. See *Scott v. Sanford*, 60 U.S. 393, 416-23 (1857) *superseded by constitutional amendment* U.S. CONST. amend XIV. "[T]he naturalization law, which was passed at the second session of the first Congress, March 26, 1790, . . . confines the right of becoming citizens 'to aliens being free white persons.'" *Id.* at 419. The Court then recognized that persons who were citizens under an alien government could be naturalized in the United States but excluded African-Americans because the court determined that their race and history of being considered inferior beings (according to the court) did not allow them to ever become citizens. *Id.* at 410, 419-20.

191. The prior five steps in the analysis restrict granting privileges, but this final step recognizes that the needs of the nation sometimes require an exception. Certain privileges may be necessary for the actual execution of official duties, and these would be in consideration for public service. The privilege of absolute or qualified immunity for actions or speech in the course of executing official duties "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959) (plurality). Also, Secret Service protection of the President as he performs the duties of his office would fit in this exception. However, allowing the President to take vacations that require taxpayers to provide millions in travel and accommodations expenses for secret service members does not fall within a privilege necessary for the execution of the office or necessary for national security, as much less expensive alternatives exist.

192. See Richard Delgado, *Inequality "from the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 117 (1984). Richard Delgado proposed that the court apply a strict scrutiny test finding the act unconstitutional unless the government "cannot achieve its objective by means less offensive" to the prohibition against granting titles of nobility. *Id.* Richard Delgado also proposed a framework, which would work if applied to many violations but would likely prove to be too subjective as applied to federal grants to federal officers. See *id.* at 115. One of his frameworks' indicia that there has been a grant of a title of nobility is the grant would cause others to perceive the grantee as "special or superior." *Id.* at 117.

193. U.S. CONST. Art. I, § 8, cl. 1.

their offices, this requirement encourages strict accountability for federal money and guards against the potential that the legislature increases its own members' benefits or those of other branches in an attempt to pass spending bills or curry favor for other legislation. The second part of the framework allows distinguishing between pretext and actual value in a grant. Federal salaries ought to be adjusted according to the needs of the office, and, therefore, extra allowances can be built into the one-sum salary without adding extra allowances. This restriction embraces the Framers' desire for transparency, accountability, and equality in government.¹⁹⁴

Equality demands that elected officials not receive pecuniary benefits beyond their time in office because to grant an elected official a continuing personal benefit beyond the time in office is contrary to the principle behind the prohibition of titles of nobility. Just as no one in the United States may be born entitled to special treatment by the United States government or by a state government, to allow a person to serve in office and then reward that person with money beyond the length of the term of office stinks of the very aristocracy the Framers fought so hard to eliminate. This is reflected in the absence of presidential pensions before 1958.¹⁹⁵ Even the impoverished early presidents did not ask for a pension, considering it too much like the tyranny they devoted their lives to end and prevent.¹⁹⁶

In a further safeguard against granting titles of nobility or unconstitutional emoluments, grants of economic or other privileges, even when made under contract, for merit, or for service in office, should not be made in a way that fails to consider others similarly situated. This also applies to more general spending for general welfare, such as disaster relief¹⁹⁷ as well as to spending for specific persons, offices, or organizations. Similarly situated must be determined by applicable factors, which allows some greater flexibility in this otherwise rigid framework.

The importance of a one-sum salary is the need for accountability and transparency in elected office.¹⁹⁸ To state a salary for an office to the public is

194. See *supra* Parts II, III.

195. Jonathan Zimmerman, *Why Should We Pay Our Ex-Presidents?*, CHICAGO TRIB. (Nov. 2010) <https://www.chicagotribune.com/opinion/ct-xpm-2010-11-12-ct-oped-1112-pension-20101112-story.html>.

196. *Id.*

197. To aid Floridians after a devastating hurricane and not to aid Puerto Ricans if damaged in the same hurricane and if requiring similar resources would confer special benefits on Florida and a title of nobility that is no less offensive to equality than had it been conferred on a single person.

198. One-sum salary is implied for the President in the Constitution. U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a *Compensation*, which

misleading if there are a multitude of other benefits that voters would have to discover through extensive research and careful analysis. The Constitution requires that Congress shall publish “a regular Statement and Account of the Receipts and Expenditures of all public Money.”¹⁹⁹ The purpose behind this constitutional duty, if not its actual modern effect, is to provide citizens with an accounting of how tax funds are spent. To disguise benefits under many different names is to defeat the spirit of the Constitution which requires that the sovereign, the People, know what elected officials receive. The issue of compensation and emoluments for the President was so important that it was included in the United States Constitution and ratified by the states.

Finally, because the needs of the nation can outweigh the need for mechanical adherence to form, an exception to the previous requirements is necessary where strict adherence could endanger national security or where services are necessary to the actual performance of the office. Secret Service protection, as discussed above, can give a benefit to the President outside of constitutional emoluments, but the benefit to him is arising out of the greater benefit to the nation. Similarly, running an office requires attention to a myriad of duties that are both important and time consuming. The national interest is likely better served by hiring staff at federal expense rather than by granting the President a salary sufficient to pay for him to select and employ secretaries and housekeeping staff.

The framework, as applied to the President, would allow spending which directly aids the President in carrying out his duties under the Constitution because it is a grant to the nation. Anything that is to be enjoyed by the President or the first family that does not directly aid the President in carrying out his duties is a grant to them, and therefore is either a title of nobility or an emolument. An application of this framework might result in striking down laws and traditions that have existed decades or even centuries; however, it is clear that a history of toleration does not make a practice constitutional.²⁰⁰

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.”) (emphasis added).

199. U.S. CONST. art. I, § 9, cl. 7.

200. “The statute which violates the Constitution is never effective for any purpose; it cannot be made constitutional by repeated violations of that instrument.” *Barker v. Crum*, 198 S.W. 211, 215 (Ky. 1917). See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“[A]n act of the legislature, repugnant to the constitution, is void.”).

VIII. CONCLUSION

It is essential that all three branches honor the safeguards the Framers set in place, and—should one or two be unwilling—the third ought to do all in its constitutional power to require the other two to abide by the Constitution. Sometimes the courts are the last resort for freedom, and as such, they should safeguard the Constitution. While it is outside of their power to proactively declare that a violation is occurring, it is within their duty to redress injuries brought before them. It is necessary that they allow standing where abuse by the federal government undermines the Constitution. When such cases arise, it is necessary for the court to speak clearly and to grant what relief is within its power. Titles of nobility and emoluments are not political questions from which the courts can hide; rather, they are safeguards that protect the people from tyranny. They are constitutional questions upon which rest equality. Only in the level plain of equality can liberty survive. The erosion of equality in the highly visible office of the President cannot but contribute to the destruction of liberty and this nation. Taxpayer standing should therefore be granted for titles of nobility and emoluments questions that involve congressional spending.