

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era—Separation of Powers/General

The Debate over Donald Trump's Business Arrangements (2017)

Donald Trump when campaigning for the presidency claimed that he was a successful business person whose business skills were uniquely suited to improve American economic life. His vast business empire, however, became a source of controversy after his election. Democrats and many Republicans insisted that he had to abandon entirely his business ventures in office to avoid various conflicts of interest. Trump insisted that milder measures were all that was appropriate. Constitutional debate centered around the Emoluments Clause of Article I, Section 9, which declares, "No Person holding any Office or Profit or Trust under [the United States], shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State." Trump when president-elect claimed that this clause did not apply to the president or to fair-market transactions. Democrats and many Republicans insisted that the president was bound by the Emoluments clause and that all economic transactions with foreign nations were covered.

The following excerpts from a Brookings Institute (generally considered a nonpartisan organization) report claiming that Trump's business arrangements violate the emoluments clause and a respond by Trump's lawyers. How does the Brookings Institute report interpret the Emoluments clause? What methods of constitutional interpretation do they use, and what conclusions do they reach? How does the Trump legal team interpret the same clause? Do they disagree on methods of interpretation, applications of that method, or both? The parties to the controversy dispute whether fair-value transactions are covered by the Emoluments Clause. What arguments do they make? Who has the better of the argument? What are the appropriate constitutional limits on presidential economic activity when in office?

Norman L. Eisen, Richard Painter, and Laurence H. Tribe, "The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump," December 16, 2016¹

...
[T]he [Emoluments] Clause responded to an underlying colonial indictment of the English political system. Even as they celebrated the wisdom and invoked the teachings of England's unwritten constitution, colonist decried the King's success at subverting limits on his own power. As Professor Gordon Wood has observed, "Through the eighteenth century the Crown had slyly avoided the blunt and clumsy instrument of prerogative, and instead had resorted to influencing the electoral process and representatives in Parliament in order to gain its treacherous ends." Having spent years scrupulously dissecting the King's use of gifts, offices, and other inducements to manipulate Parliament, early Americans were obsessed with the many species of corruption and figuring out how best to combat them. American observations of European politics—including its corrupt culture of gift-giving and back-

¹ Governance Studies at Brookings, https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf

scratching—only further accentuated their fear that foreign interests, deploying gifts and titles, would seek to cripple the new republic. In the 1790s, this was no hypothetical concern: foreign meddling could doom a young nation.

For that reason, as Professor Zephyr Teachout has explained, “Several provisions of the Constitution were designed assuming that foreign powers would actively try to gain influence.” More than any other constitutional provision, the Emoluments Clause reflects the Framers’ determined effort to ensure that no federal officeholder in the United States could be influenced by gifts of any kind from a foreign government. Indeed, the Clause was seen as so important that the Eleventh Congress considered, as a proposed Thirteenth Amendment, a provision stating that a person would lose his or her citizenship by accepting an office or emolument from a foreign power. The proposed amendment was, in a modified form, accepted by both Houses, and subsequently obtained the approval of all but one of the requisite number of States. The leading explanation for why this proposed amendment failed is that it was seen as unnecessary, given existing protections.

Implicit in the Emoluments Clause is a distinctive theory about the nature of political corruption and how to thwart it. To quote Professor Teachout, “Corruption, in the American tradition, does not just include blatant bribes and theft from the public till, but encompasses many situations where politicians and public institutions serve private interests at the public’s expense. This idea of corruption jealously guards the public morality of the interactions between representatives of government and private parties, foreign parties, or other politicians.” In other words, rather than worry only about *quid pro quo* bribery, the Framers recognized the subtle, varied, and even unthinkable ways in which a federal officeholder’s judgment could be clouded by private concerns and improper dependencies. . . . The Emoluments Clause thus operates categorically, governing transactions even when they would not necessarily lead to corruption, and establishing a clear baseline of unacceptable conduct.

This understanding is supported by the Framers’ grant of authority to Congress to validate exchanges covered by the Emoluments Clause. When Congress acts, it brings transparency and accountability to transactions that might otherwise remain buried, forcing federal officeholders to examine their judgments and opening the entire arrangement to probing scrutiny. Private and secretive transfers of wealth from foreign to federal officials are thereby reconfigured into regulated transactions and matters of vital public inquiry. Moreover, Congress itself must accept political responsibility for unleashing foreign money, with all its corrupting and corrosive influence, into the halls of federal power.

...

... [T]he text of the Constitution . . . repeatedly refers to the President as holding an “Office.” For example, Article II, Section I provides that the President “shall hold his *office* during the term of four years.” It further provides that no person except a “natural born citizen . . . shall be eligible to the *office* of President,” and addresses what occurs in the event of “the removal of the President from *office*.” . . .

Nor can there be any cavil that the Office of the President is “under the United States.” This phrase is used repeatedly in the Constitution to separate *federal* from *state* officeholders, and the President is plainly a *federal* officeholder. Indeed, bizarre consequences would follow if the President were *not* viewed as holding an office “under the United States.” . . .

- Article 1 Section 7 provides that any official who has been impeached and removed from office is disqualified from holding any “Office of Honor, Trust or Profit under the United States.” If the President did not hold an office “under the United States, a disgraced former official would be forbidden from ever federal office in the land, but could be President.”

...

- Article VI, Section 3 provides that no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” If the President did not hold an office “under the United States,” then he or she could constitutionally be subject to a religious test.

...

... [C]enturies of Executive Branch interpretation and practice reveal a largely consistent understanding on the part of presidents that this Clause does apply—and a history of legislative agreement with that position, as manifested in action by Congress to approve or disapprove questionable transactions between presidents and foreign powers. Thus, when Simon Bolivar presented President Andrew Jackson with a gold medal, Jackson asked Congress whether he could keep it—and Congress said no. . . . More recent, as the *New York Times* reported on the basis of careful study, “Every president in the past four decades has taken personal holdings he had before being elected and put them in a blind trust in which the assets were controlled by an independent party” or the equivalent. Their recognized purpose for doing so has been to avoid an array of conflicts, including with the Emoluments Clause. . . .

Finally, the basic objectives of the Emoluments Clause cut decisively in favor of applying it to the President. Given the Clause was “particularly directed against every kind of influence by foreign governments upon officers of the United States,” it is inconceivable that its references to “any Office of Profit or Trust under [the United States]” would *not* encompass the President. If there is any federal officeholder that a foreign power might seek to influence—and the corruption of whom would imperil the Republic—surely it is the President. It would be surreal to conclude that the Framers forbade a local federal tax collector from receiving any payment from the King of France, but allowed the President to hold a title in the French Court and receive a substantial monthly retainer. . . .

... The word “Emolument” is not self-defining—though the Clause, by referring to “any kind whatever,” instructs that it be given a broad construction. As OLC has concluded, and as the Oxford English Dictionary teaches, the word “emolument” is defined as “profit or gain arising from station, office, or employment: reward, remuneration, salary.” The word also has an older meaning of “advantage, benefit, comfort.” Around the time of Ratification, “emolument” was often used as a catch-all for many species of improper remuneration; thus, when James Madison criticized Alexander Hamilton, he warned that Hamilton sought to conduct government through “the pageantry of rank, the influence of money and emoluments, and the terror of military force.”

The Emoluments Clause is thus doubly broad. First it picks out words that, in the 1790s, were understood to encompass any conferral of a benefit or advantage, whether through money, objects, titles, offices, or economically valuable waivers or relaxations of otherwise applicable requirements. And then, over and above the breadth of its categories, it instructs that the Clause reaches any such transaction “of any kind whatever.”

... Just as plainly, the Emoluments Clause covers any transaction between a federal officeholder and a foreign state in which the foreign state offers a “sweetheart deal” or any other benefit inconsistent with a purely fair market exchange in an arms-length transaction not specifically tailored to benefit the holder of an Office under the United States.

Finally, while there is not yet a firm consensus on this point, the best reading of the Clause covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder. To start, the text supports this conclusion; since emoluments are properly defined as including “profit” from any employment, as well as “salary,” it is clear that even remuneration fairly earned in commerce can qualify. That view is bolstered by the Clause’s reference to “offices,” which indicates that the Framers sought to prohibit even reasonable money-for-services arrangements between officeholders and foreign states, which would result in profit to the officeholder. Indeed, it would be absurd to imagine that an otherwise forbidden emolument in the form of a foreign government’s payment to the American President could be cured if the President were to give that foreign government its money’s worth (or more) in services advancing that government’s interests, which might well be contrary to our own. And it must not be forgotten that every recognized *purpose* of the Emoluments Clause would be fully implicated by a federal officeholder whose (entirely legitimate) business interests depend in any

respect on profits earned from foreign states. . . . Certainly the Framers, who had seen the King co-opt Parliament through the strategic deployment of financial incentives, would have abhorred a president with loyalties divided by business dealings with foreign kings.

...

Mr. Trump's business holdings present significant problems under the Emoluments Clause. . . . During his campaign and since his election, he has made numerous statements about his business interests that imply an identify of interest between Mr. Trump and Mr. Trump's companies. Perhaps as a result, some foreign leaders—particularly those from nations where politicians often intermingle politics and personal business—have reached out to Mr. Trump through his business contacts rather than through diplomatic channels, seeking to curry favor with Mr. Trump as both business man and politician. As one former federal official has explained, "The working assumption on behalf of all these foreign government officials will be that there is an advantage to doing business with the Trump organization. They will think it will ingratiate themselves with the Trump administration.

...

The bottom line is simple: Mr. Trump stands to benefit personally, in innumerable and largely hidden ways, from decisions made every day by foreign governments and their agents. Especially given Mr. Trump's strong personal attachment to his business, it is easy to imagine situations in which he is affected—whether subtly or overtly—by perceptions of whether foreign nations have dealt fairly with the company that he built and still owns. In those circumstances, feelings of gratitude, affection, frustration, and anger inevitably bleed out in complex and hard-to-discern ways, muddling motives in respects that elude conscious awareness or public accountability. Foreign states, attuned to that basic truth of human psychology, will no doubt tread carefully around Mr. Trump's private interests—seeking to avoid his wrath and induce his favor. The Emoluments Clause was put in place to avoid precisely that blending of public and private interest.

...

The most fundamental difficulty for [the proposal to turn ownership of the Trump business empire over to his children and business associates] is that the Emoluments Clause is concerned with *ownership*, not *management*. If Mr. Trump retains an ownership interest in the Trump Organization, then his personal bottom line is necessarily affected by *everything* that the business does, whether or not the decisions of that business are directed by, or even known to, Mr. Trump personally. For purposes of the Emoluments Clause, it would be totally irrelevant that someone else may be calling the day-to-day shots, since everyone (including Mr. Trump) would know that the matter in which foreign powers interacted with the Trump Organization invariably affected Mr. Trump's worth. . . .

...

... [E]ven if Mr. Trump divested himself of all ownership interests, turning both control *and* ownership of the Trump Organization over to his children, the Emoluments Clause violation would persist. While there is little authority addressing the question whether the Clause covers payments and emoluments given to an immediate family member of a federal officeholder, the better view is that it does. . . . The Framers were familiar with the peril that could arise from lavishing benefits on the prince to win gratitude and loyalty from the King. And the underlying purpose of the Clause strongly favors covering immediate family of a federal officeholder, lest formalism and paper walls eviscerate the Framers' design. . . .

... [T]h only true solution is for Mr. Trump and his children to divest themselves of all ownership interests in the Trump business empire. That divestment process must be run by an independent third party, who can then turn the resulting assets over to a true blind trust. . . .

In the event that Mr. Trump chooses a course of action that places him in continued violation of the Emoluments Clause, there are several possible remedies.

First, given that Mr. Trump would arrive in office as a walking, talking violation of the Emoluments Clause of the Constitution, the Electoral College would be justified in concluding that he is unqualified for the Office of the Presidency. For that reason, among others, individual electors must be considered free to decline to cast votes for Mr. Trump.

Second, if Mr. Trump enters office in what would obviously constitute a knowing and indeed intentional violation of the Emoluments Clause and then declines to cure that violation during his tenure, Congress would be well within its rights to impeach him for engaging in “high crimes and misdemeanors.” This would not require any evidence of provable bribes or other specific malfeasance, since the whole aim and theory of the Emoluments Clause is that the President (among others) is not lawfully permitted to order his private dealings with foreign powers such that they are vulnerable to systemic, invidious, undetectable corruption.” . . .

...

Morgan Lewis, “Conflicts of Interest and the President,” January 11, 2017²

From President Washington to Vice President Rockefeller to President-Elect Trump, many of this Nation’s leaders have been extraordinarily successful businessmen. Neither the Constitution nor federal law prohibits the President or Vice-President from owning or operating businesses independent of their official duties, as a careful textual and historical analysis shows.

Generally speaking, federal conflict-of-interest laws prohibit “officers” or “employees” of the United States from taking positions against the country’s interest, maintaining outside employment, receiving an outside salary for official duties, or taking official acts that affect their personal financial interests.

But these laws have historically not applied to the President or Vice President. As then-Assistant Attorney General Antonin Scalia observed in an Office of Legal Counsel memorandum, the term “officer” typically includes neither the President nor Vice President. And since 1989, Congress has approved this tradition by expressly excluding the President and Vice-President—along with Members of Congress and federal judges—from most conflict-of-interest laws. The Office of Government Ethics has recently reaffirmed that these conflict-of-interest laws do not apply to the President.”

Though Congress has long exempted the President and Vice President from federal conflict-of-interest laws, consistent with a tradition extended back to the Founding, many of these public servants have nevertheless sought to provide extra assurances that their undivided commitment is to the good of the country. For example, Presidents Johnson and Carter voluntarily stepped away from their broadcasting stations and peanut farms.

Today, President-Elect Trump wishes to announce his own plans to transfer management of his business and to voluntarily limit those businesses’ ability to engage in transactions that could pose any conflict-of-interest concerns.

President-Elect Trump will relinquish management of his investment and business assets for the duration of his Presidency. To accomplish this, all of President-Elect Trump’s investment and business assets . . . have been or will be conveyed to a Trust, which will be managed for the duration of his Presidency by his sons, Don and Eric, and a Trump executive, Allen Weisselberg. . . . To implement this transfer, President-Elect Trump will resign from all official positions he holds with The Trump Organization entities.

Further, to ensure that The Trump Organization continues to operate in accordance with the highest ethical standards, President-Elect Trump is appointing an Ethics Advisor to the management

² <https://www.scribd.com/document/336319649/MLB-White-Paper-Trump>

team. Under the terms of the Trust agreement, written approval of the Ethics Advisor is required for all actions, deals, and transactions that could potentially raise ethics or conflict-of-interest concerns. . . .

. . .

[T]he Trust Agreement prohibits—without exception—new foreign deals during the duration of President-Elect Trump’s Presidency. . . .

[N]ew domestic deals will go through a rigorous vetting process. At a minimum, new deals shall require: (i) the unanimous vote of approval of the Trustees, and(ii) written confirmation from the Ethics Advisor that the proposed transaction is both substantively and procedural an arm’s-length transaction, that involves an appropriate counterparty, and that it does not raise potential conflicts of interest or similar ethics issues. . . .

. . .

To further reinforce the President-Elect’s separation from The Trump Organization, the Trust Agreement will sharply limit the information that the President-Elect receives regarding the Trust’s assets. Reports transmitted to the President-Elect will only reflect the profit or loss of the Company as a whole.

Some commentators have claimed that the Constitution prevents the President-Elect from owning interests in businesses that serve foreign customers. In particular, they object to the Trump International Hotel in Washington, D.C.

On assuming office, the President-Elect will be bound by—and will scrupulously abide by—his obligations under the Constitution. That includes the obligations created by the constitutional provision that these commentators highlight, the Foreign Emoluments Clause. That provision prohibits an individual holding an “Office of Profit or Trust” under the United States from “accept[ing]” a “present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State, without congressional approval. But these commentators are wrong to suggest that business in the ordinary course at any of the Trump International Hotels, or at any of the President-Elect’s businesses, risks violating this obligation.

The scope of any constitutional provision is determined by the original public meaning of the Constitution’s text. Here that text, understood through historical evidence, establishes that foreign governments’ business at a Trump International Hotel or similar enterprises is not a “present, Emolument, Office or Title.” So long foreign governments pay fair-market-value prices, their business is not a “present” because they are receiving fair value as a part of the exchange. It clearly is not an “Office” or “Title” from that government. These commentators therefore must rest their argument on the final category of prohibited benefit: “Emolument.”

As shown below, an emolument was widely understood at the framing of the Constitution to mean any compensation or privilege associated with an *office*—then, as today, an “emolument” in legal usage was a payment or other benefit received as a consequence of discharging the duties of an *office*. Emoluments did not encompass all payments of any kind from any source, and would not have included revenues from providing standard hotel services to guests, as these services do not amount to the performance of an office, and therefore do not occur as a consequence of discharging the duties of an office.

“The Constitution’s text shows that the word had this more limited meaning. Apart from the Foreign Emoluments Clause, the term emolument appears twice more in the Constitution, and both times refers to compensation associated with an office. First, the Incompatibility Clause bars congressmen from assuming “any civil Office . . . the Emoluments whereof shall have been increased during” the congressman’s tenure. Second, the Compensation Clause, which guarantees the President’s compensation during his term of office, prohibits him from “receiv[ing] within that Period any other Emolument from the United States, or any of them.”

Although the Supreme Court has never interpreted the scope of the Foreign Emoluments Clause, it long ago understood “emolument” this way in another context. The Court explained that “the term *emoluments* . . . embrac[es] every species of compensation or pecuniary profit discharged from a discharge of the duties of [an] office.” *Hoyt v. United States* (1850). Other legal experts early in the Nation’s history used the word the same way, including Alexander Hamilton and James Madison in *The Federalist papers* and Attorneys General in numerous formal opinions.

Supporting this understanding is parallel language in the nearly adopted Titles of Nobility Amendment to the Constitution. In 1810, Congress voted by overwhelming margins to extend the Foreign Emoluments Clause to all citizens, not just federal officials. The proposed amendment would have prohibited private citizens’ acceptance of “any present, pension, office, or emolument, of any kind whatever, from any Emperor, King, Prince, or foreign Power,” stripping violators of their citizenship and barring them from state or federal office. The amendment came without two states of ratification. . . .

Yet there is no evidence anyone at the time thought the proposed amendment restricted citizens’ ability to engage in commerce with foreign nations, their governments, their representatives, or their instrumentalities. That suggests that the public did not understand the prohibition on accepting foreign emoluments to prohibit commerce with foreign states or their representatives through fair-market-value transactions. Given the importance of foreign trade in the Nation’s early decades, the absence of any indication that the proposed amendment would have had this effect further supports understanding “emolument” not to encompass fair-market-value transactions—consistent with the term’s other uses in the Constitution, its common legal use at the Founding, and the Supreme Court’s explanation of the term.

There are further problems with understanding “emoluments” to include any kind of benefit an individual might receive. For one thing, it would have been redundant to list “present” and “Emolument” in the Clause separately, because any present would already qualify as a benefit. For another thing, it would lead to absurd results. For example, if the Constitution’s Article II prohibition on the President receiving “any other Emolument from the United States, or any of them” refers to *any* benefit, including fair-market-value transactions, then the President violates the Constitution by purchasing Treasury bonds or receiving interest on a retirement account from federal or States bonds. That cannot be correct.

Commentators who argue for a more expansive understanding of the Clause tend to focus not on the Constitution’s original public meaning, but on more subjective conceptions of the policies behind the Clause. Moreover, while non-judicial opinions provided to guide members of the Executive Branch have suggested that the Clause has a broad scope, none of the published opinions has gone so far as to classify fair-market transactions as emoluments. And the factual circumstances giving rise to opinions finding Foreign Emoluments Clause violations are different from those here.

Other opinions fully accord with the Constitution’s original public meaning and are incompatible with the notion that the Constitution prohibits the President-Elect’s businesses from renting hotel rooms to foreign governments at fair-value rates. One opinion, for example, declined to view a pension as an emolument because it was neither a gift nor a salary. Another reached a similar conclusion about civil damages paid to a victim of Nazi persecution because they were “not paid as profit, gain, compensation, perquisite, or advantage flowing to him as an incident to possession of an office, or as compensation for services rendered.” Still another acknowledged that emoluments were “profit[s] arising from office or employment” and generally required services for a foreign government amounting to accepting an office from a foreign state.

In short, the Constitution does not forbid fair-market-value transactions with foreign officials. To put to rest any concerns, however, the President-Elect is announcing he will donate all profits from foreign governments’ patronage of his hotels and similar businesses during his presidential term to the U.S. Treasury. Historically, when federal officers received a gift or emolument from a foreign state, they surrendered possession of it to the federal government, though they were permitted to retain amounts

necessary to offset their business expenses. Although the Constitution does not require the President-Elect to do the same for profits from his businesses' fair-market-value transactions, he wants to eliminate any distractions by going beyond what the Constitution requires.