

**THE EMOLUMENTS CLAUSE: ITS TEXT,
MEANING, AND APPLICATION
TO DONALD J. TRUMP**

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Introduction

Foreign interference in the American political system was among the gravest dangers feared by the Founders of our nation and the Framers of our Constitution. The United States was a new government, and one that was vulnerable to manipulation by the great and wealthy world powers (which then, as now, included Russia). One common tactic that foreign sovereigns, and their agents, used to influence our officials was to give them gifts, money, and other things of value. In response to this practice, and the self-evident threat it represents, the Framers included in the Constitution the Emoluments Clause of Article I, Section 9. It prohibits any “Person holding any Office of Profit or Trust under [the United States]” from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” Only explicit congressional consent validates such exchanges.

While much has changed since 1789, certain premises of politics and human nature have held steady. One of those truths is that private financial interests can subtly sway even the most virtuous leaders. As careful students of history, the Framers were painfully aware that entanglements between American officials and foreign powers could pose a creeping, insidious risk to the Republic. The Emoluments Clause was forged of their hard-won wisdom. It is no relic of a bygone era, but rather an expression of insight into the nature of the human condition and the prerequisites of self-governance.

Now in 2016, when there is overwhelming evidence that a foreign power has indeed meddled in our political system, adherence to the strict prohibition on foreign government presents and emoluments “of any kind whatever” is even more important for our national security and independence.

Never in American history has a president-elect presented more conflict of interest questions and foreign entanglements than Donald Trump. Given the vast and global scope of Trump’s business interests, many of which remain shrouded in secrecy, we cannot predict the full gamut of legal and constitutional challenges that lie ahead. But one violation, of constitutional magnitude, will run from the instant that Mr. Trump swears he 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.”¹ While holding office, Mr. Trump will receive—by virtue of his continued interest in the Trump Organization and his stake in hundreds of other entities—a steady stream of monetary and other benefits from foreign powers and their agents.

Applied to Mr. Trump’s diverse dealings, the text and purpose of the Emoluments Clause speak as one: this cannot be allowed.

¹ U.S. Constitution, Article II, § 1, cl. 8.

“The President Can’t Have a Conflict of Interest”

It is widely accepted that Mr. Trump’s presidency will present a variety of conflicts issues, many of them arising from his far-flung domestic and global business activities. Some will involve Mr. Trump personally, while others will involve his administration. Consider the following examples, drawn from the domestic sphere:

- Over ten cases challenging Trump labor practices are pending before the National Labor Relations Board—which has two vacancies, both to be filled by Trump.²
- The Internal Revenue Service is auditing Trump, who will soon pick its new chief.³
- The Trump International Hotel in Washington, DC is located in the Old Post Office and leased from the General Services Administration (GSA); once Trump takes office, he will be both landlord and tenant (an obvious conflict), and also will be in violation of the lease, which bars elected officials from sharing in any benefit.⁴
- Trump owes several hundred million dollars to banks, but is now responsible for selecting the next Treasury Secretary and may influence interest rate policy.⁵

Indeed, apart from these concrete instances, the possibility of skewed incentives will haunt literally *every* interaction between the federal government and any Trump-associated business. And given the sheer size of Mr. Trump’s empire, not to mention its track record of controversial conduct, that dynamic will play out in innumerable contexts.

At times, Mr. Trump has seemed unconcerned by this issue. For example, in a recent interview, he brushed all conflicts concerns aside, stating that “I can be president of the United States and run my business 100 percent, sign checks on my business.”⁶ Mr. Trump added, “The law is totally on my side, meaning, the president can’t have a conflict of interest.”⁷ These claims are fully consistent with Trump’s other statements treating presidential conflicts as matters ungoverned by law or ethical requirements.

To be sure, there are good reasons why the President must be trusted to carry on the vast majority of his dealings without fear of civil or criminal liability arising from actual or perceived conflicts of interest. Almost everything the President does will tend to advantage some and disadvantage others, and it would be entirely unworkable to regulate the President’s every move by reference to benefits that might accrue to selected individuals or groups. Moreover, by virtue of election through the democratic process and subjection to

² See Daniel Wiessner & Robert Iafolla, *The Trump Presidency Has Its First Big Conflict-Of-Interest Issue*, Reuters (Nov. 17, 2016).

³ See Katy O’Donnell & Bernie Becker, *Trump Gets to Pick His Own Auditor*, Politico (Nov. 23, 2016).

⁴ See Steven L. Schooner & Daniel I. Gordon, *GSA’s Trump Hotel Lease Debacle*, Government Executive (Nov. 28, 2016).

⁵ Eric Lipton & Susanne Craig, *Donald Trump’s Far-Flung Holdings Raise Potential for Conflicts of Interest*, N.Y. Times (Nov. 14, 2016).

⁶ The Editors, *Donald Trump’s New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016).

⁷ *Ibid.*

the continuing checks and balances of our democratic system, presidents are entitled to a presumption of good faith and public interestedness in most of their official conduct.

But that principle has limits—several of which are embodied in federal statutes that address nepotism, bribery, financial disclosures, acting as the agent of a foreign power, and receipt of gifts.⁸ One such limit, however, was deemed so fundamental to our republican form of government that the Framers wrote it into our basic charter.

The Text and Original Meaning of the Emoluments Clause

Article I, Section 9 of the Constitution provides as follows: “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” Generally referred to as the Emoluments Clause, this provision cannot be understood apart from the historical experiences and political principles that led the Framers to support it.

In 1651, the Dutch adopted a rule prohibiting their foreign ministers from accepting “any presents, directly or indirectly, in any manner or way whatever.”⁹ This rule marked a sharp departure from European diplomatic customs, in which gift-giving played a major role. Impressed by that example, Americans included a similar provision in the Articles of Confederation: “Nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign State.”¹⁰

It soon became clear that imposing this requirement on American ministers was far easier than persuading foreign sovereigns to respect it. The King of France, in particular, took great pride in bestowing valuable tokens of affection, such as jeweled snuff boxes, on favored diplomats. Torn between American law and European protocol, several American emissaries to the court of King Louis XVI were forced into tortured, no-win, and intensely public contortions. Most famously, King Louis bestowed on Benjamin Franklin a snuff box bearing a royal portrait surrounded by 408 diamonds “of a beautiful water”—inciting American anxiety that Franklin, a notorious Francophile, might be corrupted, and prompting Franklin to ask Congress for approval to keep the box (which was granted).¹¹

At the Constitutional Convention, the anti-emolument provision of the Articles of Confederation was initially excluded. However, it was restored without noted dissent at the request of Charles Pinkney, who “urged the necessity of preserving foreign Ministers &

⁸ See generally Jack Maskell, *Conflict of Interest and “Ethics” Provisions That May Apply to the President*, Congressional Research Service (Nov. 22, 2016).

⁹ The leading accounts of the history of the Emoluments Clause, upon which we rely in this section are Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* (2014), Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009), and Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—And a Plan to Stop It* (2011).

¹⁰ Article 6, § 1.

¹¹ See Teachout, *Corruption in America*, at 1-5.

other officers of the U.S. independent of external influence.”¹² Perhaps as a reflection of Benjamin Franklin’s awkward experience, and consistent with Dutch practice, language was added allowing for the receipt of gifts if explicitly approved by Congress.

Historical evidence suggests that the Framers did not view the Emoluments Clause as exclusively, or even mainly, relevant to diplomats. Rather, at least some of them saw it as a broader anti-corruption measure.¹³ For example, speaking at the Virginia Ratifying Convention, Edmund Jennings Randolph described the Clause as applying to the President, and as affording grounds for impeachment in the event of a violation:

There is another provision against the danger mentioned by the honorable member, of the president receiving emoluments from foreign powers. If discovered he may be impeached. If he be not impeachable he may be displaced at the end of the four years . . . I consider, therefore, that he is restrained from receiving any present or emoluments whatever. It is impossible to guard better against corruption.¹⁴

Randolph took an expansive view of the Clause, generalizing from the experience of American diplomats to far-reaching purposes:

This restriction is provided to prevent corruptionAn accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.¹⁵

Thus, while the immediate basis for the Emoluments Clause was a rejection of European gift-giving habits pertaining to diplomacy, the Clause also demarcated and enforced a sweeping American rejection of European corruption and foreign influence.¹⁶

In this respect, the 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, colonists decried the King’s success at subverting limits on his own power. As Professor Gordon Wood has observed, “Throughout 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 the representatives in Parliament

¹² 2 Farrand, *The Records of the Federal Convention of 1787*, at 389.

¹³ See President Reagan’s Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 188 (1981) (discussing the background of the ratification of the Clause).

¹⁴ David Robertson, *Debates and other Proceedings of the Convention of Virginia* 345 (2d ed. 1805) (1788).

¹⁵ 3 Farrand, *The Records of the Federal Convention of 1787*, at 327.

¹⁶ See Teachout, *Corruption in America*, at 1-80.

in order to gain its treacherous ends.”¹⁷ 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.¹⁸ American observations of European politics—including its corrupt culture of gift-giving and back-scratching—only further accentuated their fear that foreign interests, deploying gifts and titles, would seek to cripple the new republic.¹⁹ 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.”²⁰ More than any other constitutional provision, the Emoluments Clause reflects the Framers’ determined effort to ensure that no federal officeholder in the United States ever 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.²¹ 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.²² 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.”²³ In other words, rather than worry only about *quid pro quo* bribery, the Framers recognized the subtle, varied, and even unthinking ways in which a federal officeholder’s judgment could be clouded by private concerns and improper dependencies. Their anxiety encompassed the gift-giving habits of corrupt European diplomats, but also reached even the most virtuous domestic officials.²⁴ And given the impossibility of effectively addressing this kind of corruption through bribery laws, or other statutes that criminalize particular transactions by reference to improper intent, the Framers decided

¹⁷ Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 33 (1969).

¹⁸ See Teachout, *Corruption in America*, at 37-40 (discussing scholarship by Gordon Wood, Bernard Bailyn, and J.G.A. Pocock).

¹⁹ Lessig, *Republic, Lost*, 18-19.

²⁰ Zephyr Teachout, *Trump’s Foreign Business Practices May Violate the Constitution*, Room for Debate, N.Y. Times (Nov. 17, 2016).

²¹ *Afroyim v. Rusk*, 387 U.S. 253, 259 n.13 (1967), citing *The Constitution of the United States of America, S. Doc. No. 39, 88th Cong., 1st Sess.*, at 77-78 (1964).

²² See *Afroyim v. Rusk*, 387 U.S. 278 (1967) (Harlan, J., dissenting).

²³ Teachout, *Corruption in America*, at 2.

²⁴ See Lessig, *Republic Lost*, 19.

instead to write a broad prophylactic rule into Article I.²⁵ 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.²⁶

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.²⁷

Ultimately, the theory of the Emoluments Clause—grounded in English history and the Framers’ experience—is that a federal officeholder who receives something of value from a foreign power can be imperceptibly induced to compromise what the Constitution insists be his exclusive loyalty: the best interest of the United States of America.²⁸ And rather than guard against such corruption by punishing it after-the-fact, the Framers concluded that the proper solution is to write a strict rule into the Constitution itself, thereby ensuring that shifting political imperatives and incentives never undo this vital safeguard of freedom.

The Proper Interpretation of the Emoluments Clause

This background, and centuries of experience and interpretation, helps to answer a number of important questions about the Emoluments Clause.

1. The Emoluments Clause Applies to the President

This is an easy question. As the Department of Justice Office of Legal Counsel (OLC) concluded when asked if the Emoluments Clause applied to President Obama’s receipt of the Nobel Peace Prize, “The President surely ‘hold[s] an[] Office of Profit or Trust.’”²⁹ That position, most recently reaffirmed by OLC in 2009, is consistent with

²⁵ The United States Supreme Court has recently addressed the difficulties of defining and applying bribery in the context of federal statutory law. *See McDonnell v. United States*, 579 U.S. ____ (2016).

²⁶ *See Teachout, Corruption in America*, at 4.

²⁷ *See Zephyr Teachout, Gifts, Offices, and Corruption*, 107 Nw. U. L. Rev. Colloquy 30, 36 (2012).

²⁸ *See Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 18 (1994) (“Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty. That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government.”).

²⁹ David J. Barron, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 4 (2009).

established OLC precedent specifically addressing the applicability of the Emoluments Clause to the President, constituting the considered view of the Executive Branch.³⁰

Moreover, this is the only conclusion consistent with the text of the Constitution, which repeatedly refers to the President as holding an “Office.” For example, Article II, Section 1 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*.” In addition, the Presidential Oath Clause, and the Twelfth, Twenty-Second, and Twenty-Fifth Amendments, all refer to the President as occupying an “Office.” Reading the Constitution as a whole, it is hard to imagine why its references to “any Office of Profit or Trust” in the Emoluments Clause would *not* refer to the President, who is repeatedly described elsewhere in the Constitution as holding an “Office,” which, giving the terms their plain meaning, is unquestionably one of Profit or Trust or both.³¹

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,” since that same phrase appears five other times in the Constitution:

- Article I, 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 every federal office in the land, but could be President.
- Article I, Section 6 provides that “no Person holding any Office under the United States, shall be a Member of either” House of Congress. If the President did not hold an office “under the United States,” the President could also hold a seat in Congress, which has never happened.
- Article II, Section 1, governing the Electoral College, provides that “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.” It is hard to see why the Framers would ban Representatives, Senators, and every federal official *other* than the President from sitting in the Electoral College. (If anything, one might think the President *especially* should not be an Elector.)
- 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

³⁰ See, e.g., Norbert A. Schlei, *Memorandum for the Honorable McGeorge Bundy, Special Assistant to the President, Re: Proposal that the President Accept Honorary Irish Citizenship* (1963). While a number of other OLC opinions appear to have taken a narrower view of the Emoluments Clause, to our knowledge the only public OLC opinions directly addressing the application of the Emoluments Clause to the President conclude or assume that the Clause does apply.

³¹ See Saikrishna Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L. & Pub. Pol’y Sidebar 143 (2009).

the President did not hold an office “under the United States,” then he or she could constitutionally be subject to a religious test.

- Article XIV, Section 3 provides that, barring waiver from Congress, no person who swore an oath to support the Constitution, but then betrayed it during the Civil War, “shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State.” Again, it is quite impossible to see why the Constitution would forbid ex-Confederates from holding every office in the federal government *except for the Presidency*.

Reading the Constitution as a whole, it would require extraordinary legal and linguistic gymnastics to explain how the President is excluded from the Emoluments Clause.³² But even if the Constitution’s text and structure left any doubt, every other interpretive tool supports the conclusion that the Emoluments Clause applies to the President.

First, while we have precious little evidence of the Framers’ expectations, we do know that Edmund Randolph described this Clause at the Virginia Ratifying Convention as “another provision against the danger mentioned by the honorable member, of *the president* receiving emoluments from foreign powers.” Indeed, Randolph expressly stated that the President “may be impeached” for violating the Emoluments Clause. Given the importance of the question, one might have expected other attendees at the Virginia Ratifying Convention—including many leading lights of the Framing generation—to have corrected Randolph if his position were understood to be erroneous.

Second, centuries 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.³³ Thus, when Simon Bolivar presented President Andrew Jackson with a gold medal, Jackson asked Congress whether he could keep it—and Congress said no.³⁴ Similarly, Presidents John

³² It also has been suggested by one scholar that the Emoluments Clause did not cover elected, as opposed to appointed, federal office holders. See Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. C. 180 (2013). But this idiosyncratic suggestion is at best supported by ambiguous founding-era historical materials, rests upon a strained and counterintuitive textual analysis, and is flatly inconsistent with the recognized purpose of the Clause and the overwhelming thrust of modern (and historical) Executive Branch practice. See, e.g., Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. U. L. Rev. C. 30 (2012); Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 Nw. U. L. Rev. C. 200 (2013). Ultimately, only the most myopic and strained focus on the least plausible version of originalism to the exclusion of every other interpretive tool, coupled with a series of highly doubtful conclusions from the historical record, would support the conclusion that the President is not subject to the strictures of the Emoluments Clause. That approach must be rejected.

³³ There are two possible counter-instances from the 1790s, see Tillman, *The Original Public Meaning of the Foreign Emoluments Clause*, at 186-190, though those examples are ambiguous and cannot bear great weight in the ultimate constitutional analysis (of which original public understanding and early Executive Branch practice is but a single component), see Teachout, *Gifts*, at 41-42.

³⁴ See Message From The President Of The United States To The Two Houses Of Congress At The Commencement Of The First Session Of The Twenty-Third Congress 258–59 (Washington, Gales & Seaton

Tyler and Martin Van Buren both turned to Congress for approval when offered gifts by foreign leaders.³⁵ More recently, 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.³⁶ Their recognized purpose for doing so has been to avoid an array of conflicts, including with the Emoluments Clause.³⁷ Thus, while there is no Supreme Court precedent (and little political branch discourse) regarding the Clause, that reflects only a norm of ethical conduct by our Nation’s leaders, and the fact that no prior president has come anywhere close to Mr. Trump in the scale of possible violations.³⁸ In any event, considering this Nation’s history and experience, it can be concluded that—as in the separation of powers field—“[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions.”³⁹

Finally, the basic objectives of the Emoluments Clause cut decisively in favor of applying it to the President. Given that the Clause was “particularly directed against every kind of influence by foreign governments upon officers of the United States,”⁴⁰ 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. Familiar with the corruption of King Charles II of England by lavish pensions and promises from King Louis XIV, the Framers manifestly did not see national leaders as immune from foreign influence.⁴¹

These and other factors compellingly support the longstanding and near-unanimous consensus among lawyers and legal scholars that the Emoluments Clause applies in full to the President.

1833) (reproducing Jan. 22, 1834 letter from the Secretary of State to the President explaining the history of the Jackson medal and how it came into the possession of the State Department).

³⁵ Teachout, *Gifts*, at 42.

³⁶ Michael D. Shear & Eric Lipton, *Ethics Office Praises Donald Trump for a Move He Hasn’t Committed To*, N.Y. Times (Nov. 30, 2016). President Obama elected the equivalent, choosing to put his holdings in statutorily conflict-free investments.

³⁷ Lipton & Craig, *Donald Trump’s Far-Flung Holdings*.

³⁸ While it is likely that a careful student of history could discover various minimal, short-lived, or glancing violations of the Emoluments Clause by Presidents or other officeholders, the violations at issue here are orders of magnitude beyond anything that this Nation has previously witnessed in its highest official.

³⁹ *The Pocket Veto Case*, 279 U. S. 655, 689 (1929); accord *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819) (“[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.”).

⁴⁰ 24 Op. Att’y Gen. 116, 117 (1902).

⁴¹ Lessig, *Republic, Lost*, at 18-19.

2. *What Qualifies as an Emolument?*

The next question is, what qualifies as “any present, Emolument, Office, or Title, of any kind whatever”? 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.”⁴² The word also has an older meaning of “advantage, benefit, comfort.”⁴³ 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.”⁴⁴

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.”

While the phrasing may strike us as peculiar, everything about the Emoluments Clause militates in favor of giving the broadest possible construction to the payments it encompasses. For that reason, the Clause unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state.

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 specially 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

⁴² See President Reagan’s Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 188 (1981) (discussing the background of the ratification of the Clause).

⁴³ *Ibid.*

⁴⁴ James Madison, A Candid State of Parties, Nat’l Gazette, Sept. 22, 1792, *reprinted in* 14 James Madison, The Papers of James Madison 370 (Robert A. Rutland et al. eds., 1973).

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. Just imagine if the President, *while in office*, owned a company that made tens of millions of dollars, all as a result of profitable transactions with the Chinese government. Could it be said in that scenario that there is little risk of improper foreign influence? 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.

3. *What Qualifies as a “King, Prince, or foreign State”?*

A final question concerns the meaning of “King, Prince, or foreign State.” There is a substantial body of OLC precedent addressing this question, which usefully catalogues the factors relevant to determining whether an actor qualifies as a “foreign State”:

[T]he factors we have considered in conducting such an assessment include whether a foreign government has an active role in the management of the decisionmaking entity; whether a foreign government, as opposed to a private intermediary, makes the ultimate decision regarding the gift or emolument; and whether a foreign government is a substantial source of funding for the entity. No one of these factors has been dispositive. We have looked to them in combination to assess the status of the decisionmaking entity for purposes of the Clause, keeping in mind the underlying purpose that the Clause serves.⁴⁵

As then-Deputy Assistant Attorney General Samuel A. Alito, Jr. explained in 1986, “The answer to the Emoluments Clause question . . . must depend [on] whether the consultancy would raise the kind of concern (*viz.*, the potential for ‘corruption and foreign influence’) that motivated the Framers in enacting the constitutional prohibition.”⁴⁶ That is precisely the kind of commonsense approach that is important to understanding this Clause.

In all circumstances, however, it is settled that the Emoluments Clause reaches not only “foreign State[s],” but also their agents and instrumentalities.⁴⁷ Accordingly, and as is

⁴⁵ Memorandum Opinion for the Assistant General Counsel, Department of Commerce, from Daniel L. Kofofsky, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development, 34 Op. O.L.C. 1, 3 (2010) (citations omitted).

⁴⁶ *Ibid.* (quoting Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, Re: *Emoluments Clause Questions raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales* at 4-5 (May 23, 1986)).

⁴⁷ See *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 18 (1994).

most relevant here, OLC has determined that “corporations owned or controlled by a foreign government are presumptively foreign states under the Emoluments Clause.”⁴⁸

4. Conclusion

Careful review of the Emoluments Clause shows that the Clause unquestionably applies to the President of the United States; that it covers an exceptionally broad and diverse range of remunerative relationships (including fair market value transactions that confer profit on a federal officeholder); and that it reaches payments and emoluments from foreign states (including state-owned and state-controlled corporations).

Mr. Trump, As President-Elect, Appears To Be On a Direct Collision Course with the Emoluments Clause

Mr. Trump’s business holdings present significant problems under the Emoluments Clause. It is possible that many transactions between foreign states and the Trump empire would involve no actual impropriety, but it is a virtual certainty that many would create the risk of divided or blurred loyalties that the Clause was enacted to prohibit. And while in some instances the threat might be readily apparent, the majority of potential conflicts would be cloaked in secrecy, buried in technicalities, or impossible to prove definitively. That is true both because Mr. Trump has declined to make many of his business dealings transparent, and because any President often acts covertly and on the basis of extremely complicated motives. Disentangling any potential improper influence resulting from special treatment of Mr. Trump’s business holdings by foreign states would be extremely difficult, at best. The American people would be condemned to uncertainty and innuendo, and our political discourse would be rife with unresolved and unresolvable accusations of corruption. Indeed, that dynamic has already begun and shows no sign of abating.

This is *exactly* what the Emoluments Clause is meant to head off at the pass. Rather than deal with potential impropriety in a case-by-case manner, or with *ad hoc* managerial walls between the President and his private interests, the Constitution forbids the very circumstances that give rise to such concerns in the first place. By imposing clear limitations, the Clause avoids a situation in which the American people must try to read the President’s or a foreign leader’s mind, searching for hints of private favoritism toward foreign powers, or of foreign attempts to seduce the American President into compromising our national interest for his private profit.

These concerns may be exacerbated in Mr. Trump’s case. During his campaign and since his election, he has made numerous statements about his business interests that imply an identity of interest between Mr. Trump himself and Mr. Trump’s companies.⁴⁹ Perhaps

⁴⁸ David J. Barron, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 7 & n.6 (2009).

⁴⁹ For example, as both the Trump Organization and Trump Transition Websites noted, “In New York City and around the world, the Trump signature is synonymous with the most prestigious of addresses.” See Trump Organization, *Biography, Donald J. Trump*, <http://www.trump.com/biography/>; Great Again, *Meet the President Elect*, <https://greatagain.gov/meet-the-president-elect-a72c9d5067ce#.9jtxy55ou>. Mr. Trump also

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 businessman and politician.⁵⁰ 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.”⁵¹

The result is that we are moving toward “a world in which [Mr. Trump’s] stature as the U.S. president, the status of his private ventures across the globe and his relationships with foreign business partners and the leaders of their governments could all become intertwined.”⁵² Apart from the concrete complications that this development could create for U.S. foreign policy, it also raises grave concerns under the Emoluments Clause: the risks of improper dealing may be increased if foreign powers come to believe, even mistakenly, that offering benefits to Trump-associated businesses is important to maintaining good will with the President. At the very least, that perception could affect the conduct of foreign nations, resulting in many more situations that present the appearance of impropriety and fuel persistent doubts (at home and abroad) about the integrity of our political system.

These concerns have become more tangible over the past month, partly because Mr. Trump has made a practice of freely mixing the business of the United States of America and his private business interests. Consider just a few examples of that habit:

- While picking his Cabinet, Mr. Trump took a break to meet privately with developers from India doing business with the Trump Organization and, during that meeting, made several remarks about India’s current political leadership that were then released to media in both America and India.⁵³

regularly says “my” when referring to his company or its financials, and takes personal credit when referring to people pleased by their interactions with a Trump enterprise.

⁵⁰ Richard C. Paddock et al., *Potential Conflicts Around the Globe for Trump, the Businessman President*, N.Y. Times (Nov. 26, 2016) (describing worry that “in some countries those connections could compromise American efforts to criticize the corrupt intermingling of state power with vast business enterprises controlled by the political elite”); Rosalind S. Helderman & Tom Hamburger, *Trump’s Presidency, Overseas Business Deals and Relations with Foreign Governments Could All Become Intertwined*, Washington Post (Nov. 25, 2016) (quoting an American foreign affairs expert as saying, “[t]he gray areas Trump has between where his job as president ends and where his business interests begin, that’s normal in that part of the world [Georgia].”).

⁵¹ Paddock et al., *Potential Conflicts* (quoting Michael H. Fuchs, until recently the deputy assistant secretary at the Bureau of East Asian & Pacific Affairs).

⁵² Helderman & Hamburger, *Trump’s Presidency*.

⁵³ Ayesha Venkataraman et al., *Indian Business Partners Hope to Exploit Their Ties to Donald Trump*, N.Y. Times (Nov. 20, 2016); Kailash Babar, *Donald Trump Meets Indian Partners, Hails PM Modi’s Work*, Econ. Times (Nov. 17, 2016, 6:23 AM); Eric Lipton & Ellen Barry, *Donald Trump Meeting Suggests He Is Keeping Up His Business Ties*, N.Y. Times (Nov. 19, 2016).

- It has been reported that Mr. Trump's business partners in India are themselves connected to Indian politicians, resulting in an array of potential conflicts relating to development policy and permitting.⁵⁴
- By the same token, since his election, Mr. Trump has met in his office with developers and other business partners from the Philippines.⁵⁵
- On a recent call with Recep Tayyip Erdoğan, President of Turkey, Mr. Trump went out of his way to mention that he and his daughter (who also participated in the call) both admire Mehmet Ali Yalcindag, Mr. Trump's business associate in the Trump Towers in Istanbul.⁵⁶
- It has been reported that Mr. Trump opposes wind farms because he has decided that they ruin the view from his golf course in Aberdeen, Scotland. Recently, Mr. Trump openly lobbied Nigel Farage—a British political ally of his—to oppose wind farms in the United Kingdom, an issue that does not otherwise appear to be of relevance to American foreign policy.⁵⁷
- Even as Mr. Trump has delegated greater authority to his three children (Ivanka, Eric, and Donald Junior) in running the Trump Organization, he has continued to involve them in exceptionally important federal business.
 - Most troubling, Ivanka has participated in several meetings between Mr. Trump and foreign heads of state, including those from Turkey, Argentina, and Japan. Ivanka's presence at Mr. Trump's meeting with Prime Minister Shinzo Abe of Japan is especially striking, since Ivanka is currently in talks with Sanei International (whose largest shareholder is wholly owned by the Japanese government) to close a major and highly lucrative licensing deal.⁵⁸
 - It has also been reported that Donald Junior, who plays a major role in overseeing new project acquisition and development for the Trump Organization, had a role in interviewing candidates for the position of Secretary of the Department of the Interior, whose policies can have significant consequences for foreign companies.⁵⁹

⁵⁴ Paddock et al., *Potential Conflicts*.

⁵⁵ *Ibid.*

⁵⁶ Kurt Eichenwald, *How Donald Trump's Business Ties Are Already Jeopardizing U.S. Interests*, Newsweek (Dec. 13, 2016); Richard C. Paddock, Eric Lipton, Ellen Barry, Rod Nordland, Danny Hakim & Simon Romero, *Potential Conflicts Around the Globe for Trump, the Businessman President*, N.Y. Times, (Nov. 26, 2016).

⁵⁷ Danny Hakim & Eric Lipton, *With a Meeting, Trump Renewed a British Wind Farm Fight*, N.Y. Times (Nov. 21, 2016).

⁵⁸ Matt Flegenheimer et al., *Business Since Birth: Trump's Children and the Tangle That Awaits*, N.Y. Times (Dec. 4, 2016).

⁵⁹ Mark Hensch, *Trump's Son Involved in Interior Secretary Hunt*, The Hill (Dec. 14, 2016); Tal Kopan, *Trump's sons involved in interviewing, vetting Cabinet candidates*, CNN (Dec. 14, 2016)".

In addition, while serving as President-Elect, Mr. Trump has used that bully pulpit as a platform to attack those who have publicly criticized Trump-owned and Trump-branded businesses. For example, on December 15, 2016, less than 24 hours after Vanity Fair published an article describing Trump Grill in New York City as “the worst restaurant in America,” Mr. Trump attacked Vanity Fair and its editor on Twitter: “Has anyone looked at the really poor numbers of @VanityFair Magazine. Way down, big trouble, dead! Graydon Carter, no talent, will be out.”⁶⁰

For obvious reasons, conduct like this risks creating the appearance, both domestically and abroad, that Mr. Trump does not see a meaningful distinction between his public interests as President-Elect and his private interests as business tycoon. To the contrary, such conduct invites foreign states and their agents to treat the man, his office, and his business interests as one and the same, in both public and private dealings.

And as things already stand, that risk is higher than it has ever been. By way of illustration, consider these examples of all the ways in which Mr. Trump’s global business empire creates the conditions for his ongoing violation of the Emoluments Clause to surface in obviously dubious transactions—transactions casting doubt on the ability and inclination of a President Trump to conduct himself with a singular focus on the Nation’s interests and of foreign leaders dealing with him to treat his motives as public-spirited:

- Mr. Trump has recently completed the Trump International Hotel, a major new project in Washington, D.C. and a new hot spot for foreign diplomats.
 - As a former Mexican ambassador to the United States has candidly remarked, “The temptation and the inclination will certainly be there. Some might think it’s the right way to engage, to be able to tell the next president, ‘Oh, I stayed at your hotel.’”⁶¹
 - Speaking on the Senate floor, Senator Ben Cardin noted, “One diplomat was recorded as saying ‘Why wouldn’t I stay at his hotel blocks from the White House, so I can tell the new president, ‘I love your new hotel!’ Isn’t it rude to come to his city and say, ‘I am staying at your competitor?’”⁶²
 - Indeed, with lots of public fanfare, the Kingdom of Bahrain already has decided to mark the seventeenth anniversary of King Hamad bin Isa Al Khalifa’s accession to the throne by hosting a reception at the Trump International Hotel.⁶³
- Since Mr. Trump’s election, long-delayed Trump projects have suddenly jump-started around the world, including in Argentina and Georgia. This

⁶⁰ Louis Nelson, *Trump: Vanity Fair is “dead”*, Politico (Dec. 15, 2016).

⁶¹ Jonathan O’Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel is Place to Be*, Washington Post (Nov. 18, 2016).

⁶² Statement of the Honorable Benjamin J. Cardin, *Emoluments Clause Resolution* (Nov. 29, 2016).

⁶³ Nolan D. McCaskill & Madeline Conway, *Bahrain to Host Event at Trump’s D.C. Hotel, Raising Ethical Concerns*, Politico (Nov. 29, 2016).

may be especially noteworthy in light of Mr. Trump's acknowledgment that he has raised business issues on calls with foreign officials.⁶⁴

- Mere weeks before Mr. Trump spoke by phone with the President of Taiwan, dramatically altering American foreign policy, a businesswoman claiming to be associated with Mr. Trump's conglomerate arrived in Taiwan and made inquiries about major new investments in luxury hotels.⁶⁵
- Shortly before the election, President Duterte of the Philippines named Jose E.B. Antonio, a business partner of Mr. Trump and founder of a company behind Trump Tower Manila, as a special envoy to the United States.⁶⁶
- After Mr. Trump spoke of banning Muslim immigrants, President Erdoğan of Turkey demanded that Mr. Trump's name be removed from Trump Towers in Istanbul; but that demand abruptly ceased after Mr. Trump defended President Erdoğan's brutal crackdown on Turkish dissidents.⁶⁷
 - Indeed, while running for President, Mr. Trump openly admitted during a radio interview that "I have a little conflict of interest because I have a major, major building in Istanbul."⁶⁸
- The Industrial and Commercial Bank of China—owned by the People's Republic of China—is the single largest tenant in Trump Tower. Its valuable lease will expire, and thus come up for re-negotiation, during Mr. Trump's presidency.⁶⁹
- Even as debates rage over American/Russian relations and Russian cyber-attacks on U.S. interests and even on the recent presidential election, it has been reported that Russian financiers play a significant (albeit concealed) role in Mr. Trump's organization.⁷⁰
- Mr. Trump's businesses owe hundreds of millions to Deutsche Bank, which is currently negotiating a multi-billion-dollar settlement with the U.S. Department of Justice, a settlement that will now be overseen by an Attorney General and many other appointees selected by and serving at the pleasure of Mr. Trump.⁷¹

⁶⁴ Helderman & Hamburger, *Trump's Presidency*.

⁶⁵ Nicola Smith, *Trump's Taiwan Phone Call Preceded by Hotel Development Inquiry*, *The Guardian* (Dec. 3, 2016).

⁶⁶ Iris Gonzales, *Trump Business Partner in Philippines Named Special Envoy to US*, *The Philippine Star* (Nov. 8, 2016).

⁶⁷ Paddock et al., *Potential Conflicts*.

⁶⁸ *Ibid.*

⁶⁹ Lipton & Craig, *Trump's Far-Flung Holdings*; Caleb Melby, Stephanie Baker & Ben Brody, *When Chinese Bank's Trump Lease Ends, Potential Conflict Begins*, *Bloomberg* (Nov. 28, 2016).

⁷⁰ Darren Samuelsohn, *Trump's Vast Web of Conflicts: A User's Guide*, *Politico* (Nov. 16, 2016).

⁷¹ *Ibid*; Jackie Northam, *Trump's Loans From Troubled German Bank Pose Conflict of Interest*, *NPR* (Dec. 1, 2016); Drew Harwell, *Trump's unusual conflict: Millions in debts to German bank now facing federal fines*, *Washington Post* (Sept. 30, 2016).

- Federal prosecutors in Brazil are in the middle of a sensitive (and now politically-freighted) criminal investigation into whether two pension funds that invested in the Trump Hotel in Rio de Janeiro were bribed to do so.⁷²
- In Ireland, Mr. Trump wants to build a wall that would protect a coastline near his Trump International Golf Links course. Environmentalists, however, worry about an endangered species: the *vertigo angustior* snail. This fight will go to a national planning board, which may now find itself enmeshed in treacherous international politics relating to Mr. Trump.⁷³

These examples are but the tip of an iceberg of unknowable dimension. They suggest the remarkably wide range of situations in which a foreign power could seek to confer a benefit on Mr. Trump through his private interests. Wholly apart from any actual *quid pro quo* arrangements or demonstrable bribes or payoffs, the Emoluments Clause will be violated whenever a foreign diplomat stays in a Trump hotel or hosts a reception in one; whenever foreign-owned banks offer loans to Mr. Trump's businesses or pay rent for office space in his buildings; whenever projects are jump-started or expedited or licensed or otherwise advantaged because Mr. Trump is associated with them; whenever foreign prosecutors and regulators treat a Trump entity favorably; and whenever the Trump Organization makes a profit on a business transaction with any foreign state or foreign-owned entity.

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.

History teaches that leaders with divided interests cannot faithfully serve those who elected them, a lesson the Framers deemed so important that they hardwired safeguards reflecting its truths into our basic charter. Mr. Trump does not stand above the laws of history and human nature, or the requirements of the Constitution. He must not be permitted to violate the Emoluments Clause.

Solutions Thus Far Proposed (and Tweeted) By Trump Are Inadequate

Since Election Day, Mr. Trump has issued a series of statements describing in vague terms how he might address his multifarious conflicts of interest. Many of these statements

⁷² Paddock et al., *Potential Conflicts*.

⁷³ Paddock et al., *Potential Conflicts*.

have taken the form of Tweets, because 140-character missives are apparently the new normal for carrying out governmental and constitutional business.⁷⁴ Although Mr. Trump at one point announced his intention to address the matter of his business conflicts on December 15, 2016, he has since indicated that it will take until January 2017 to reveal his plans.⁷⁵ Accordingly, at this point it is possible only to guess at the outlines of what Mr. Trump has in mind. As far as we can tell, based on his Tweets and statements in interviews, Mr. Trump intends to retain his ownership interest in the Trump Organization, while turning operational control over to his children.⁷⁶ That would be inadequate.⁷⁷

The most fundamental difficulty for this proposal 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 manner in which foreign powers interacted with the Trump Organization invariably affected Mr. Trump's worth. No promise that, after leaving office, he might donate any net increase in his wealth to the United States Treasury—a promise he has of course never made but that some have fantasized—would be practical or enforceable. And even if Mr. Trump were removed from management, many goings-on of the Trump Organization would still be known to him, either because they are public or because of his extensive familial and social ties to that world.

Nor could a supposedly “blind trust” involving control of Mr. Trump's assets by his children (who would run the Trump Organization) suffice. As Senator Cardin has explained:

A true blind trust, including ones established by past Presidents, is an arrangement where the official has no control over, will receive no communications about, and will have no knowledge of the identity of the specific assets held in the trust, and the trust's manager operates independently of the owner. The arrangement described by Mr. Trump and his lawyers is not independent: Mr. Trump is well aware of the specific assets held and he can receive communications about and take actions to affect the value of such assets. And the

⁷⁴ Louis Nelson, *Obama Ethics Office Congratulates Trump in Bizarre Mini-Tweetstorm*, Politico (Nov. 30, 2016).

⁷⁵ Jason Slotkin, *President-Elect Trump Postpones Business Conflicts Announcement*, NPR (Dec. 12, 2016).

⁷⁶ Louis Nelson & Darren Samuelsohn, *Trump's Vow to Leave Business Raises More Questions*, Politico (Nov. 30, 2016). On November 30, 2016, Mr. Trump tweeted, “Hence, legal documents are being crafted which take me completely out of business operations. The Presidency is a far more important task!”

⁷⁷ For the reasons set forth *infra*, and many others, so would be any proposal premised on the Trump Organization not making any new deals while Mr. Trump is President. See Michael D. Shear & Eric Lipton, *Donald Trump Says His Company Will Do ‘No New Deals’ During His Term*, N.Y. Times (Dec. 12, 2016) (“Even if Mr. Trump and his children stop making new deals, the Trump Organization already has a large basket of investments and branding deals that present apparent conflicts of interest around the world.”).

idea that President-elect Trump's children are or will be truly "independent managers" is not credible.⁷⁸

The ultimate difficulty is that a "blind trust" of this sort does not address the fundamental reasons why the Emoluments Clause was written into the Constitution. Mr. Trump would still know that his interests and those of the Trump Organization are closely intertwined; he would still know what the Trump Organization is doing and how conduct by foreign states and their agents is affecting it (and him); he would still have continuing incentive and opportunity to use the power of the Presidency to influence the Trump Organization and, potentially, the conduct of its officers, directors, regulators, and competitors; and both the American public and international community would know all these facts.

Particularly in light of how the Trump family conducts its business operations, ran the campaign, and has handled the presidential transition, the idea that a dividing line of any kind could be drawn (and maintained) between Mr. Trump and his children is absurd. Indeed, shortly after Election Day, Eric Trump indirectly put his finger on the problem with turning control over to Mr. Trump's children: "We'll be in New York and we'll take care of the business. I think we're going to have a lot of fun doing it. *And we're going to make him very proud.*" (emphasis added).⁷⁹ This remark presumed (and quite reasonably so) that Mr. Trump will pay careful attention to his children and the company that he dedicated his life to nurturing, finding joy in their successes and sadness in their failures. Their allies may find favor in his eyes; their enemies may attract his wrath. In these respects, not only would Mr. Trump remain aware of his own strong financial interest in the Trump Organization, but he would also remain deeply invested in it by virtue of his children—whose reputations, personal well-being, livelihoods, and professional success would all be tied to the business. It is virtually inconceivable that, throughout his tenure, Mr. Trump could avoid discussing with his own children any matters relating to his policies and their business ventures, or that he could avoid noticing and caring about their interactions with foreign nations. As Professor Erik M. Jensen has pointedly observed, "What are called 'blind trusts' are often like the 'blind' beggars in *The Hunchback of Notre Dame*. With the Trump family in charge, I don't see how anyone can even pretend blindness."⁸⁰

Thus, under the text and purpose of the Emoluments Clause, a "blind trust" in which Mr. Trump's children manage his assets and run the business is wholly deficient. Payments made (and benefits conferred) by foreign states and their agents would still qualify as "any present, Emolument, Office, or Title, of any kind whatever." And all of the concerns about blurred loyalties animating the Clause would remain fully implicated. Blindness in this context works only if neither side can reasonably conclude that the seemingly opaque "wall" is actually a one-way mirror that the other side can see through.

In addition, it is our considered judgment that even if Mr. Trump divested himself of all ownership interests, turning both control *and* ownership of the Trump Organization over

⁷⁸ Statement of the Honorable Benjamin J. Cardin, *Emoluments Clause Resolution* (Nov. 29, 2016).

⁷⁹ Lipton & Craig, *Trump's Far-Flung Holdings*.

⁸⁰ Jonathan H. Adler, *The Emoluments Clause—Is Donald Trump Violating Its Letter Or Spirit?*, Wash. Post, Volokh Conspiracy (Nov. 21, 2016) (quoting Erik M. Jensen).

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, at least in circumstances remotely like these. 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.⁸¹ To be sure, there may well be many circumstances—*e.g.*, divorce, separation, alienation—where this reading of the Clause would become inapposite. But given the extraordinary degree to which Mr. Trump has mingled his own affairs with those of his immediately family, and his business dealings with his personal and political undertakings, Mr. Trump presents a paradigm case for application of the Clause to “any present, Emolument, Office, or Title, of any kind whatever” made to his children in the course of managing the Trump Organization.

Commentators have proposed a dizzying array of possible solutions to Mr. Trump's oncoming Emoluments Clause violation.⁸² But the 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. Even if, as some experts believe, there is nothing that Mr. Trump could do to avoid the significant tax consequences of divesting, fidelity to the Constitution, and to American foreign policy and national security interests, manifestly overcomes all such loss to Mr. Trump or his immediate family (who will remain extremely wealthy, in all events). Ultimately, having run for President and prevailed in Electoral College votes, Mr. Trump must make sacrifices in exchange for the awesome powers and responsibilities he will now inherit. That is the design of the Constitution, to which Mr. Trump is always subject.

Remedies for Emolument Clause Violations

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.⁸³

⁸¹ Just imagine if an officeholder's spouse and children received large payments on a regular basis from Russia, constituting a much larger share of the family's income than the officeholder's salary; in that circumstance, divided loyalty appears virtually inevitable.

⁸² See, *e.g.*, Darren Samuelsohn & Isaac Arnsdorf, *How Trump Can Keep His Company*, Politico (Nov. 30, 2016); Stephen Bainbridge, *Dealing with Trump's Conflicts of Interest*, ProfessorBainbridge.com (Nov. 30, 2016); Editorial, *The Trump Family Political Business*, Wall St. J. (Nov. 17, 2016).

⁸³ We are aware of the debate over so-called “faithless electors,” a term that in our view is a misnomer and fails to account for the role of the Electoral College in our constitutional system. We do not address that debate here, other than to note that strong arguments have been made for the proposition that electors are free to vote their conscience without fear of legal sanctions. See, *e.g.*, David Pozen, *Why G.O.P. Electoral College members Can Vote Against Trump*, N.Y. Times (Dec. 15, 2016).

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. So long as Mr. Trump persists in doing so, Congress would have a plainly valid basis under the Constitution for concluding he cannot serve in office—both as a matter of first principles and given evidence that at least one prominent leader in the ratification process saw violations of this Clause as grounds for impeachment.

Third, Congress—invoking its powers and responsibilities under the Necessary & Proper Clause, the “Consent of Congress” language in the Emoluments Clause, and various Article I provisions relating to commerce, foreign affairs, and national security—might pass legislation imposing restrictions on continued presidential involvement in or ownership of businesses and assets that may receive foreign payments or emoluments. Indeed, on December 15, 2016, five Democratic Senators unveiled a bill that would require Mr. Trump to divest assets that risk of a conflict of interest—and to place the proceeds in a truly blind trust (among other ethics measures).⁸⁴ Such legislation is plainly constitutional, and represents a proper and praiseworthy exercise of Congress’s oversight function.

At a future point, and to the extent consistent with Article III standing limits (described below), Congress might also create a private cause of action explicitly allowing injured parties, including business competitors of Trump-associated entities, to file Emoluments Clause suits against the President in his personal capacity for declaratory and injunctive relief (*e.g.*, disgorgement of the constitutionally problematic assets).

Finally, private parties could file suit against Mr. Trump, relying on decisions — written by Supreme Court Justices from across the ideological spectrum—standing for the basic proposition that even someone who might gain nothing concrete from winning a judgment that ends an allegedly unlawful benefit to a competitor has Article III standing simply because such a judgment would end the injury of being put at an improper comparative disadvantage vis-à-vis the recipient of that benefit.⁸⁵

⁸⁴ Elana Schor, *Senate Dems Seek Divestment Blind Trust for Trump’s Assets*, Politico (Dec. 15, 2016).

⁸⁵ See, *e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (Thomas, J.) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep’t of Bus. Regulation of Florida*, 496 U.S. 18 (1990) (Brennan, J.). The political question doctrine would pose no barrier to judicial consideration of private suits alleging violations of the Emoluments Clause. To be sure, no court would sit in judgment on Congress’s decision whether or not (and how) to impeach the President for violating the Emoluments Clause. See *Nixon v. United States*, 506 U.S. 224 (1993). But the legal question whether the President is subject to, and has complied with, the Emoluments Clause is most certainly amenable to manageable judicial standards, and there is no indication that this issue is committed by the Constitution

Conclusion

The Emoluments Clause, until recently not much discussed because its constraints have been taken for granted, constitutes a clear barrier to the intermingling of business and governmental interests that Donald J. Trump proposes to build into his conduct of the Presidency. That is a conclusion without partisan or ideological inflection; it would apply with equal force to any person or party occupying this position of public trust.

It is plain that a President Trump would be subject to removal from office for the intentional abuse of power that this manifestly unconstitutional intermingling of private and public concerns would entail. When this guillotine might fall is a matter of political more than legal calculation, and is thus beyond the scope of our analysis. Likewise, just how the ongoing prospect of such an ignominious end to a Trump presidency would embolden his political adversaries at home and abroad, and undermine his legitimacy in the eyes of the American public and global community, is impossible to predict. So too, we cannot anticipate how the omnipresent prospect of such a disgraceful end would distort the dynamics of a President Trump's ability to serve the domestic and national security interests of the nation. But that this looming constitutional shadow over his time in office would grievously disserve the people of the United States is beyond doubt.

exclusively to the political branches. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012). While Congress is authorized to *grant* consent to otherwise forbidden transactions, it does not follow that, when Congress *withholds* consent and the President nonetheless accepts foreign payments and emoluments, the Judiciary is forbidden from hearing the issue. That is the teaching of, among other precedents, centuries of decisions striking down state actions that Congress could have, but did not, authorize under the Commerce Clause.