

President Trump Has No Defense Under the Foreign Emoluments Clause

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Introduction: Trump's Violation of the Emoluments Clause

Until recently, you probably didn't know (or care) what an "emolument" is. Many people, including many lawyers, had never heard that archaic term before. Those were the good old days. Now, thanks to President Donald J. Trump, the word "emolument" is all the rage. Need proof? Last week, it topped the charts on Merriam-Webster.com. As far as words go, that is a big deal.

This newfound popular interest reflects an emerging consensus that Trump is violating the Constitution's foreign emoluments clause. That clause bars 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" (absent congressional consent). As Trump's lawyers have acknowledged (and rightly so), the President holds an "Office of Profit or Trust" and is subject to this restriction.

The nature of Trump's violation is straightforward: Because of his ownership stake in the Trump Organization, Trump's private financial interests are intertwined with a business empire subject to many possible burdens and benefits abroad. None of Trump's "solutions" fixes this problem. As a result, in his dealings with foreign powers, Trump may be guided not only by the interests of the United States, but also by those of the business that bears his name—unless he totally stops caring about his money (we are not holding our breath). It is the purpose of the foreign emoluments clause to eliminate precisely this kind of blurred loyalty.

At stake here is more than the abstract principle that the President, above all other officials, must have only the interest of "We the People" at heart in his decisions. One can criticize the terrifying implications of Trump's "America First" slogan while still recognizing the concrete value of ensuring that nothing distracts the President from undivided devotion to the interests of the United States. Workers and consumers, for example, count on such loyalty whenever the President negotiates trade deals with foreign powers. Soldiers place their lives in the President's hands and trust that he will send them into danger only for the greater good of the Nation.

When the President orders his affairs such that foreign powers can seek influence through his private bank account, he betrays our collective trust. Now all Americans must worry that foreign emoluments extended to the President will translate into American jobs being shipped overseas or American consumers being stiffed. Our soldiers must worry that they may be deployed abroad because the President's personal attachment to (and private investment in) Trump-branded properties will result in otherwise-avoidable conflagrations.

An Inadequate Defense: The Morgan Lewis White Paper

Notwithstanding the clarity of these conflicts, Trump's lawyers at Morgan Lewis have recently sought to justify his obviously improper position. They do so by reading the foreign emoluments clause through a distorted lens that obscures its text, history and purpose.

The relevant section of their white paper opens with a flourish, citing Justice Scalia for the proposition that "the scope of any constitutional provision is determined by the original public meaning of the Constitution's text." Probably mistaken, but clear. After that, things get murkier.

The white paper's principal conclusion is that an "emolument" means only "a payment or other benefit *received as a consequence of discharging the duties of an office*" (emphasis added). In other words, the white paper's central postulate is that foreign government payments to the President pose no constitutional problem under the foreign emoluments clause unless they are payments *specifically* made in exchange for an official presidential action, like vetoing a bill the foreign government does not like or appointing a cabinet member that government favors. Only payments made for actions in "the performance of an office" are prohibited.

On this basis, the white paper concludes that "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."

Halfway through its defense of that point, however, the white paper abruptly changes tack, and starts arguing that "fair market value" transactions—like hotel rentals to foreign powers—cannot qualify as "emoluments." Even as they weave this argument through the rest of the memo, at no point do Trump's lawyers bother to define their key term, "fair market value."

Every single premise and every single conclusion of this analysis is wrong.

To start, there is a glaring (and widely-overlooked) inconsistency in the white paper's reasoning: the definition of "emolument" *cannot* include both an "official act" rule and a "fair market value" rule. That is because there is *no such thing* as "fair market value" for the official services of the President of the United States. As we explain in greater detail below, if a foreign power gives the President money or any other benefit "as a consequence of discharging the duties of [his] office," the concept of fair market value is wholly inapplicable. Rather, the applicable constitutional concept in that circumstance is "bribery" (and, in some circumstances, "treason").

Thus, in arguing that "fair market value" transactions do not qualify as emoluments, Trump's lawyers necessarily concede that the term "emolument" does (or might well) apply to action taken by Trump in his private rather than in his official capacity. At best, this is a mightily subtle argument in the alternative. At worst, it is deliberate obfuscation of a key point.

With respect to emoluments not involving payment for official acts, the white paper engages in another sleight of hand: it concludes that the only relevant dealings with foreign powers will be fair market value exchanges, like hotel room rentals, that do not permit favors or sweetheart

deals. As we and others have explained, however, that conclusion is dead wrong. There will be *no shortage* of commercial, regulatory, licensing and investigatory contexts in which foreign powers can (and will) give the Trump Organization special treatment in hopes of influencing the President. Trump's lawyers make no defense of such conduct under the foreign emoluments clause because there is no defense. Here, Trump's constitutional violations are clear as day.

But even limiting our attention to "fair market value" transactions, the white paper totally dodges important questions about what exchanges are permitted between the President and foreign powers. In general, fair market value is understood as the price at which an asset will trade between a willing buyer and a willing seller when all of its attributes are known equally to both. Under that definition, would Trump's lawyers say that "fair market value" is exceeded only if rooms at Trump Hotels are rented to foreign diplomats at higher rates than they would be rented to other customers? What about a scenario where rental prices remain the same for everyone but many rooms that would have gone unoccupied are booked by foreign powers seeking to influence Trump, thereby dramatically increasing the profitability of his hotels? And if Trump's new job does allow the business to raise prices at all Trump hotels—partly because foreign leaders are willing to pay more money, or rent more rooms, to curry favor with the President—is Trump allowed to reap the benefits of that spike in the "fair market value" of his business?

These questions are not hypothetical. Some diplomats have openly speculated that "spending money at Trump's hotel is an easy, friendly gesture to the new president." And perhaps coincidentally (but probably not), last week the cocktail prices at Trump's D.C. hotel increased from a range of \$16 to \$21 pre-election to a range of \$24 to \$100.

These are just a few issues that confront any effort to say that "fair market value" transactions are allowed under the foreign emoluments clause. Trump's lawyers address none of them.

In sum, the Morgan Lewis white paper never reconciles the inconsistency between its "official act" and "fair market value" definitions of "emolument," completely misses a large number of contexts where Trump's businesses will receive special treatment from foreign nations and fails to offer any definition of "fair market value" despite obvious ambiguities in that limitation.

Interpreting the Term "Emolument"

Regardless, the white paper is wrong on all accounts. The foreign emoluments clause *does not* apply only to foreign payments in exchange for official acts. And it *does* apply to fair market value transactions between the President's business and foreign governments. This conclusion is required by every applicable principle of constitutional interpretation.

- **Constitutional Purpose**

As then-Deputy Assistant Attorney General Samuel A. Alito, Jr. once noted, "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." This is a commonsense intuition: if we know what the Framing generation sought to achieve, we should seek to facilitate, not frustrate, that goal.

The white paper, however, does not even attempt to justify its reading of “emolument” by reference to constitutional purpose. Instead, it flatly deems irrelevant “subjective conceptions of the policies behind the Clause.” It is curious that professed originalists would so quickly dismiss considerable historical evidence about why this clause was written and ratified in the first place.

The wrongness of Trump’s position follows directly from the widely-understood purpose of the foreign emoluments clause. Reacting to their experience with devious monarchs—including the King of England, who had seduced Parliament with public and private favors of all kinds—the Framers added this provision to “preserv[e] foreign Ministers & other officers of the U.S. independent of external influence.” And they used the most sweeping language possible because they were painfully familiar with the manifold forms of corruption. They knew that only a broad, prophylactic rule would effectively ward against the many and unthinking ways in which an official’s loyalty could be clouded by improper financial dependencies on foreign powers.

Given this underlying purpose, an “official act” requirement makes no sense. Trump’s lawyers would allow unlimited foreign payments to the President, so long as the President is not engaged in the specific duties of his office when he gives foreign governments their money’s worth in services. But this myopic, single-transaction perspective misses the forest for the trees. Just imagine if the President owned a company that provided nearly all of his income and exclusively did business in Russia. Could it really be said that the President would act free of private financial motives in his otherwise-unrelated public dealings with Putin? Why would people who added this broad anti-corruption rule to the Constitution leave such a gaping hole in its shield against subversive foreign influence, especially after their encounters with wily European rulers?

Indeed, it would have been naïve—and self-defeating—to valorize any supposed distinction between the President’s “office” and the man himself. While Trump’s lawyers may draw that line, you can rest assured that foreign powers will not. When they confer benefits on the Trump Organization and brag about it publicly (or in private meetings with Trump or his children), they will do so in an effort to sway Trump in his *official* capacity, and thus to push U.S. policy toward their interests. In that real sense, foreign powers will confer valuable benefits on Trump the man with the goal of influencing how Trump the president discharges the duties of that office. The impossibility of proving that unsavory intent and effect on a case-by-case basis is why the Constitution prevents the very conditions of possibility for such corruption.

Ultimately, the white paper’s reading of “emolument” reduces that word to little more than a prohibition on quid-pro-quo bribery: foreign governments cannot pay the President or confer other benefits on him in exchange for official Presidential actions. Yet all available evidence shows that the original purpose of the foreign emoluments clause extended well beyond covering mere bribery (which, as we describe below, is already addressed *elsewhere* in the Constitution).

Indeed, limiting “emolument” to payment for official acts would unquestionably *defeat* the major objective of the clause. This point is demonstrated by the Supreme Court’s decision last Term in *McDonnell v. United States*. There, the Court let Governor Bob McDonnell off the hook for some very sketchy dealings—and sharply restricted what qualifies as an “official act” in federal bribery law—because it worried about the implications of giving prosecutors free reign to target

“pay for play” bribery schemes. As *McDonnell* showed, it is exceptionally difficult in practice to delineate and enforce bribery laws, and their “official act” requirements, in contexts involving high-level political actors. That is especially true given how complex and secretive the relevant transactions often are, and how difficult it can be to prove the parties’ true intentions.

The Framers instead chose a wiser course. Rather than target quid-pro-quo bribery in the foreign emoluments clause—a rule that could fast become mired in technicalities and difficulties of proof—they preemptively barred *all* foreign financial entanglements that could imperil the President’s integrity and subvert his judgment. And that shield against corruption simply would not work if limited exclusively to payments given in exchange for “official acts.”

Nor would an exception for “fair market value” transactions, however defined, make sense. Consider this hypothetical: You own a business kept afloat by fair market value transactions with Johnny. You know that you and your children would lose everything if Johnny stopped buying your services. If Jane hired you to represent her in negotiations with Johnny and asked you to take Johnny for everything he is worth, do you really think you could faithfully represent Jane’s interests? Could you sit across the table from Johnny, who holds your bank account and financial fortune in his hands, and completely remove yourself from any private interests while negotiating on Jane’s behalf? If you think you can, you are made of tougher stuff than we are.

The point here is simple: Trump’s business (and thus Trump himself) *profit* from fair market value transactions. That is why his business enters into them. And all of the concerns about improper financial dependence that underlie the clause apply with full force to federal officials whose livelihoods are based on commercial dealings with foreign actors.

- **Original Public Meaning**

Trump’s lawyers do not even pretend to explain how their reading of the foreign emoluments clause achieves that provision’s purpose. Instead, hiding behind some Scalia citations, they assert that they prevail under the only *true* method of interpretation: original public meaning.

But even as an originalist matter, their conclusions just do not stand up. Frankly, the white paper reflects poorly-done, result-oriented originalism. It takes more than a handful of old citations to construct persuasive originalist arguments, and by that standard the white paper falls short.

John Mikhail has nicely captured one part of the problem: rather than rely on sources from the 1780s and 1790s, the white paper “relies on three Attorney General opinions from 1819, 1831, and 1854; one failed constitutional amendment from 1810; one obscure Supreme Court decision from 1850 and a handful of more recent comptroller general and OLC opinions, primarily from the 1960s, 1970s, and 1980s.” Indeed, as Mikhail observes, the white paper’s only 18th century source for its interpretation of “emolument” is *The Federalist* (which, by the way, also has plenty of uses of “emolument” cutting the other way). For lawyers who deem 1787 the decisive moment in legal time, Trump’s team is embarrassingly short on period-appropriate sources.

A more comprehensive view of the historical record shows that the word “emoluments” appears to have been used in many different senses. Sure, sometimes it was used in relation to the

benefits associated with discharging the duties of an office. But in many, many other instances, it was used to encompass a broad universe of benefits or payments, including in unmistakably private contexts. Mikhail has listed numerous examples of such usage (*e.g.*, The Farmer Refuted (1775), the Virginia Declaration of Rights (1776) and the Constitution of Pennsylvania (1776)).

This view is also supported by founding era floor-statements that refer to “emoluments” plainly unrelated to official duties. For instance:

“The Indian trade is of no essential service to any Colony. . . . The **emoluments** of the trade are not a compensation for the expense of donations.”

“[I]f the carrying business be [eastern states’] natural province, how can it be so much extended and advanced as by . . . having the **emolument** of carrying [western states’] produce to market?”

Or consider this speech by Edmund Randolph at the Virginia Ratifying Convention, regarding the foreign emoluments clause:

This restriction is provided to prevent corruption. All men have a natural inherent right of receiving **emoluments** from any one, unless they be restrained by the regulations of the community . . .

It is difficult to see why Randolph would think “all men” have a natural right to receive “benefit[s] received as a consequence of discharging an office.” Rather, he is clearly referring to economic transactions in the private sphere (presumably including fair market value exchanges).

This usage accords with Founding-era dictionaries. For example:

- Samuel Johnson’s *A Dictionary of the English Language* (1785) defined “emolument” merely as: “Profit; advantage.”
- The *Oxford English Dictionary* lists two definitions dating to the Founding: “1. Profit or gain arising from station, office, or employment 2. Advantage, benefit, comfort.”
- *Webster’s Second* (1828) provided two definitions: “1. The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office, as salary, fees and perquisites. 2. Profit; advantage; gains in general.”

All of these definitions encompass far more than compensation for services rendered as a federal official, and would have included financial benefits from services rendered to foreign powers in a private capacity. What is more, they would all encompass fair market value exchanges.

Judge Leventhal once warned that investigation of legislative history can become an exercise in “looking over a crowd and picking out your friends.” Well, that is exactly what originalism has

become in the hands of Trump’s lawyers. Except most of the “friends” they pick out are not even from the right century.

In our view, the weight of the available evidence demonstrates beyond reasonable debate that the term “emolument” was understood by ordinary lawyers and those laymen who had a view of the matter in late 18th century America to cover a broad array of financial benefits unconnected to official governmental acts. That same evidence offers no indication at all of a “fair market value” exception to the term. At absolute minimum, it is clear that “emolument” was not a well-defined term of art in the late-18th century, and that it was often used in a manner wholly inconsistent with the limitations constructed *post hoc* by Trump’s legal team.

- **Constitutional Text**

To the extent original public meaning is indeterminate, or shows that there were numerous meanings of “emolument” in the 1780s, the Constitution’s text helps to resolve the resulting interpretive question. It tells us, in no uncertain terms, to prefer a *broader* definition, by stating that federal officials are forbidden “*any* present, Emolument, Office, or Title, *of any kind whatever*” The Framers, who were familiar with the meaning of the words they used, deliberately included interpretive guidance *twice* instructing us to favor broad over narrow views of “emolument[s].”

Contra Trump’s lawyers, this understanding of “emolument” does not render the term “present” redundant (though some redundancy is hardly a vice in a provision with such sweeping purpose). Whereas “present” captured unreciprocated, possibly unsolicited gifts, “emolument” often was used in reference to benefits resulting from some kind of exchange—whether involving private or official services, and including fair market value commercial transactions. To be sure, it is also true that “emolument” was sometimes used in a manner approximating “present” or divorced from any exchange, but that overlap simply demonstrates the Framers’ desire to capture *all manner* of financial relationships with foreign powers. It is just perverse to artificially narrow “emolument” to avoid a hint of redundancy with “present,” as the white paper does.

If anything, it is the Trump interpretation that risks redundancy. Article II, Section 4 of the Constitution provides that “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” Given that the Framers addressed bribery and deemed it an impeachable offense in Article II, there would have been little reason to limit Article I’s definition of “emolument” *only* to bribery. Yet Trump’s lawyers would read “emolument” to mean virtually the same thing as bribery: offering something of value to influence official action.

Thus, not only does Trump’s reading create redundancy between emolument and bribery, but it also raises a further question: why would the Framers provide explicitly that such transactions are *allowed* for purposes of the foreign emoluments clause, so long as Congress consents? Under what circumstances would they have imagined that Congress might consent to payments by a foreign power to the President made with the intent of receiving his official services? Given that they elsewhere made such conduct impeachable, this seems awfully improbable.

We must address one last point in the white paper. Retreating from the 18th century, Trump’s lawyers refer to the Titles of Nobility Amendment, a proposed amendment from 1810 that barred all United States citizens and not just federal officials from “accept[ing] and retain[ing] any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power.” They assert that if “emolument” had the broadest possible meaning, this un-enacted amendment would have outlawed all foreign trade—and surely the public didn’t intend that absurd result. This is a fair point. On the other hand, the text of the proposed amendment is also a serious problem for the white paper. After all, if an “emolument” is truly a benefit associated with the duties of an office, in what respect would it even have been *possible* for non-officer “citizen[s] of the United States” to receive foreign “emolument[s]”?

Truth be told, it is difficult to draw *any* inferences from the never-enacted Titles of Nobility Amendment. As scholars have remarked in exasperation, we have virtually no information available to us about contemporaneous debates or understandings of this text. The prudent course is to avoid placing any significant weight on this historical oddity.

- **Executive Branch Precedent and Practice**

Finally, when presented with legal questions relating to the political branches on which there is little judicial precedent, it is common to consider Executive interpretation and custom. Here, Trump’s position cannot be squared with several opinions of the Department of Justice’s influential Office of Legal Counsel (OLC), or with well-reasoned modern presidential practice.

For instance, in 1982, OLC concluded that the foreign emoluments clause barred a U.S. Nuclear Regulatory Commission employee from receiving foreign payment for reviewing the design of a Mexican nuclear power plant—even though he would have done that work in his leave time, rather than in any kind of official capacity, and even though there is no indication that he would have received something other than fair payment. Apparently the definition of “emoluments” that seems so obvious to Trump’s lawyers never even occurred to OLC.

To take another example, in 1993, OLC considered income received by law firm partners who served as advisors on the Administrative Conference of the United States. While none of these lawyers represented or had any dealings with foreign governments, their law firms had foreign government clients, and some portion of their partnership distribution thus consisted of (fair market value) income from foreign powers. OLC found that these distributions qualified as forbidden foreign “emoluments,” even though no member of the Administrative Conference personally rendered any services to foreign clients, let alone services in an official capacity.

Trump’s legal team dodges these examples, asserting that “the factual circumstances giving rise to [OLC] opinions finding Foreign Emoluments Clause violations are different from those here.” Of course, the circumstances are different. Trump is as unique a “circumstance” as have ever occurred in American conflict of interest law. But the principle underlying these opinions is clear, consistent and applicable. As a former Attorney General once observed, the foreign emoluments clause is “directed against *every* kind of influence by foreign governments upon officers of the United States” (emphasis added).

Presidential practice is consistent with the logic of these opinions. As the *New York Times* has reported, “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. Rather than look for loopholes related to their supposed “private” business dealings, or the fair market value of their services, president after president conformed his conduct to the requirements of the Constitution (which also happen to be good policy).

From an avowedly living constitutionalist perspective, we would contend that this presidential practice over the past half-century—informed by post-Nixon developments in American legal and constitutional norms—reflects an appropriately heightened sensitivity to the appearance and reality of improper financial influence in politics. That development, in turn, has become part of our tradition and should help give meaning to even our oldest anti-corruption provisions.

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To sum things up: Despite a glossy veneer of originalism, the cramped definition of “emoluments” advanced by Trump’s legal team does not pass muster under *any* theory of interpretation. Considerations of constitutional text, history, practice and purpose all strongly support the conclusion that “emolument” refers to any benefit—rather than only to benefits received specifically in consequence of discharging the responsibilities of an office, or benefits not constituting “fair market value” for services rendered.

Accordingly, the white paper is triply deficient. It fails to reckon with most of Trump’s constitutional violation. It leaves key terms undefined in ways that invite corruption. And it rests upon a view of “emoluments” that does not withstand scrutiny.

If that is really the best defense of Trump’s extreme position, then all it proves is the clarity of Trump’s constitutional violation.