



# The Domestic Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump

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## Introduction

Donald J. Trump’s decision to assume the presidency without separating from his businesses has undermined vital protections in our Constitution meant to ensure that the President does not put his personal interests above the interests of the nation and subvert our constitutional system. Among those critical protections is the Domestic Emoluments Clause, which bars the President from receiving benefits other than his compensation from the federal, state, or local governments.

When the Founders gathered to draft our Constitution, they were deeply concerned about corruption. Indeed, they believed that corruption and self-dealing posed an existential threat to the new national project. In response, they adopted two prohibitions on the receipt of “emoluments”—benefits, advantages, or profit—by officials of the federal government.

The Foreign Emoluments Clause, which bars federal officials from accepting benefits from foreign states without the consent of Congress,<sup>1</sup> was adopted to limit foreign powers from meddling in the nation’s affairs. But the Framers realized that the threat of corruption was not exclusively external. They foresaw the dangers likely to arise from jealousy and rivalry among the American states, which were each being asked to yield their sovereignty to a new and more powerful national government. The Founders’ hard-won victories against the armies and influence of King George III taught them to fear the corrupting influence of patronage and the co-mingling of profit and power in the same office. They worried that a powerful chief executive would be tempted to feather his own nest, and that elements within the state and federal governments would capitalize on that temptation by offering him rewards to curry favor—undermining the careful balance of power in the new Constitution.

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<sup>1</sup> U.S. Const. art. I, § 9, cl. 8; see Norman L. Eisen, Richard Painter, & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, Brookings Governance Studies (Dec. 16, 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_121616\\_emoluments-clause1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf).

To protect the nation’s highest office from temptations and divided loyalty of this sort, the Framers adopted the Domestic Emoluments Clause, which provides that the President “shall not receive” any emolument, other than his fixed compensation, from “the United States, or any of them.”<sup>2</sup>

That prohibition is as important today as ever. Were they permitted to do so, the states would have ample reason to bestow financial rewards on the President, who has great leverage over them through his influence on legislation, agency regulations, enforcement against particular industries, federal transfers, disaster declarations, administrative waivers, and more. The Domestic Emoluments Clause, however, “prohibit[s] individual states from greasing a president’s palm.”<sup>3</sup>

Public reports suggest that President Trump may already be receiving emoluments in violation of this Clause, and he almost certainly will receive such emoluments while President unless he divests from his businesses. His real-estate and entertainment empire was built on government subsidies and tax breaks—nearly a billion dollars in New York alone—which his businesses continue to receive and seek to expand.<sup>4</sup> And the federal government may be providing the President significant financial benefits through leases of, and expenditures at, his properties around the country.<sup>5</sup> Regulatory actions by the federal government may also benefit Trump’s businesses, and thus Trump himself, in countless ways.

In a recent Brookings white paper, several legal scholars took an in-depth look at the Foreign Emoluments Clause and the constitutional violations that result from President Trump’s continuing acceptance of benefits from foreign powers.<sup>6</sup> This white paper takes a similar look at the Domestic Emoluments Clause, discussing the text and history of the Clause, how it should be interpreted, and what it means in the context of President Trump’s vast business holdings.

Based on this examination, we conclude that President Trump is likely violating one of the Constitution’s most important provisions—a safeguard designed to prevent corruption and self-dealing in our highest office. And that should not be allowed to continue.

## **I. The Text and Original Meaning of the Domestic Emoluments Clause**

Article II, Section I, Clause 7 of the Constitution provides that each President must receive a fixed compensation, and it prohibits him from accepting anything beyond that

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<sup>2</sup> U.S. Const. art. II, § 1, cl. 7.

<sup>3</sup> Akhil Reed Amar, *America’s Constitution: A Biography* 182 (2005).

<sup>4</sup> Charles V. Bagli, *A Trump Empire Built on Inside Connections and \$885 Million in Tax Breaks*, N.Y. Times (Sept. 17, 2016), <https://mobile.nytimes.com/2016/09/18/nyregion/donald-trump-tax-breaks-real-estate.html>.

<sup>5</sup> See, e.g., Jim Zarroli, *Trump Tower’s Newest Tenants Likely to Be the Secret Service*, NPR (Dec. 14, 2016), <http://www.npr.org/2016/12/14/505555997/trump-towers-newest-tenants-likely-to-be-the-secret-service>.

<sup>6</sup> Eisen et al., *supra* note 1; see Laurence H. Tribe et al., *The Courts and the Foreign Emoluments Clause*, Casetext (Jan. 30, 2017), <https://casetext.com/posts/the-courts-and-the-foreign-emoluments-clause-1>.

compensation from the federal or state governments: “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.” To fully appreciate the significance of this ban on receiving “other Emolument[s],” it is helpful to understand the historical and political concerns that led to the Clause’s adoption.

When the Framers gathered in Philadelphia to draft our Constitution, they embarked on a bold experiment with uncertain prospects. The individual states represented by the delegates were independent and sovereign entities, joined together for limited purposes under the Articles of Confederation in a “league of friendship” with a weak central government and no chief executive.<sup>7</sup> The new arrangement that the Framers ultimately devised asked these states to yield sovereignty to a true national government—subordinating state and regional loyalties “in Order to form a more perfect Union.”<sup>8</sup> Yet jealousies among the states and fears of intrigue and collusion were pervasive.

Moreover, this new and powerful national government would, the Framers soon decided, include a single chief executive. Yet only recently had the states thrown off the yoke of a king who had sought “an absolute Tyranny” over them,<sup>9</sup> making the “temper of the people,” in the view of some delegates at Philadelphia, “adverse to the very semblance of Monarchy.”<sup>10</sup>

These concerns mingled with a deep fear of corruption among public officials. Born of their experience with Britain and their knowledge of history, the Framers were “obsessed with corruption.”<sup>11</sup> Indeed, their discussions “constantly compared the British government to the end of Rome—where a well-designed government was eventually internally corrupted and, therefore, self-destructed.”<sup>12</sup> The Framers understood that men are not angels, and they were acutely aware of the danger that the leaders of this new government would put their own pecuniary interests above those of the nation. George Mason crystalized these concerns by warning the delegates that “if we do not provide against corruption, our government will soon be at an end.”<sup>13</sup>

The Framers were especially worried that Congress or the states might exploit the President’s self-interest as a means of inducing him to favor their personal or provincial

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<sup>7</sup> Articles of Confederation of 1781, art. III; see *id.* art. II (“Each state retains its sovereignty, freedom, and independence . . .”).

<sup>8</sup> U.S. Const. pmb. l.

<sup>9</sup> The Declaration of Independence para. 2 (U.S. 1776).

<sup>10</sup> 1 *The Records of the Federal Convention of 1787*, at 88 (Max Farrand ed., 1911) [hereinafter “*Convention Records*”] (Randolph).

<sup>11</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 348 (2009).

<sup>12</sup> *Id.* at 350.

<sup>13</sup> 1 *Convention Records* 392.

concerns.<sup>14</sup> Alexander Hamilton observed that “a power over a man’s support is a power over his will,” and that if legislatures could alter the President’s financial circumstances, they could “tempt him by largesses” and thereby cause him “to surrender at discretion his judgment to their inclinations.”<sup>15</sup> History revealed many examples “of the intimidation or seduction of the Executive by the terrors or allurements of . . . pecuniary arrangements.”<sup>16</sup> Even in the American colonies, experience had shown how conniving legislatures could gain undue influence over the executive through financial rewards, and how the executive in turn could exploit his office to enrich himself.

In some colonies, for instance, governors lacked a fixed salary,<sup>17</sup> instead relying on myriad other sources of profit that accompanied their offices: bonuses, awards of pensions, grants of land, use of land and public labor for personal profit, sharing in taxes and fees, use of idle public funds as personal capital, tax exemptions, and “customary gifts” of merchandise or money from ships at port.<sup>18</sup> In colonies that operated as proprietorships, the situation was even starker: the “public revenue of the colony belonged to the private proprietor,” who often was the governor.<sup>19</sup> In both situations, governors “engaged in trade,” “accepted bribes,” and even “engaged in illicit activities . . . and supported piracy.”<sup>20</sup> Such rampant profiteering enabled legislatures to influence governors’ decisions by manipulating their financial rewards. It also enabled governors to hold legislatures hostage to their personal monetary demands.

The Framers were familiar with this history, and their desire to prevent similar problems under the new federal government shaped key aspects of our constitutional structure. For instance, delegates to the Constitutional Convention “had little trust in the integrity of the state legislatures,”<sup>21</sup> and thus the delegates rejected a proposal that state legislatures select

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<sup>14</sup> Madison, for instance, helped defeat a proposal that would have enabled a majority of state legislatures to effect the President’s removal—arguing that “it would open a door for intrigues [against] him in States where his administration tho[ugh] just might be unpopular, and might tempt him to pay court to particular States whose leading parti[s]ans he might fear, or wish to engage as his parti[s]ans.” 1 *Convention Records* 86.

<sup>15</sup> *The Federalist No. 73*, at 439-40 (Clinton Rossiter ed., 1961).

<sup>16</sup> *Id.*

<sup>17</sup> Alvin Rabushka, *The Colonial Roots of American Taxation, 1607-1700*, Hoover Institution Pol. Rev. (Aug. 1, 2002), <http://www.hoover.org/research/colonial-roots-american-taxation-1607-1700> (explaining that the lack of “permanent sources of revenue” gave legislatures “greater control over their executives”). In Virginia, for example, the colonial legislature granted the governor “a permanent export duty of 2 [shillings] per hogshead of tobacco” to replace a prior practice of landgrants worked by company tenants for the governor’s benefit. See Alvin Rabushka, *Taxation in Colonial America* 241 (2008).

<sup>18</sup> See Rabushka, *Taxation in Colonial America*, *supra* note 17, at 13, 241-44, 248, 374, 384, 536 n.35, 606.

<sup>19</sup> Rabushka, *The Colonial Roots of American Taxation*, *supra* note 17. A colonial proprietor “was the landlord of his estate,” although unlike a feudal lord, he “could govern and tax only with the consent of his tenants.” Some proprietors served as governor while others appointed a governor to serve their interests. *Id.*

<sup>20</sup> Rabushka, *Taxation in Colonial America*, *supra* note 17, at 311.

<sup>21</sup> Teachout, *supra* note 11, at 357.

members of the House of Representatives because they worried that “[i]f the national legislature are appointed by the state legislatures, demagogues and corrupt members will creep in.”<sup>22</sup>

Fears of corruption, and of collusion between legislatures and the President, also prompted opposition to a proposal for Congress to select the President. As one delegate warned: “The Legislature & the candidates [would] bargain & play into one another’s hands. [V]otes would be given by the former under promises or expectations from the latter, of recompensing them by services to members of the Legislature or to their friends.”<sup>23</sup>

The Framers also instituted measures to prevent the President from being able to bribe members of Congress. Having seen firsthand how the British monarch used patronage to wield influence in Parliament,<sup>24</sup> the Framers ensured that the President could not similarly purchase the loyalty of members of Congress by appointing them to lucrative federal positions.<sup>25</sup>

Suspicion of presidential corruption rose to the fore when it was proposed that the President be given absolute veto power over legislation. Benjamin Franklin strenuously objected, explaining that he had “some experience” with such an arrangement in Pennsylvania. There, he said:

The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter. When the Indians were scalping the western people, and notice of it arrived, the concurrence of the Governor in the means of self-defence could not be got, till it was agreed that his Estate should be exempted from taxation[,] so that the people were to fight for the security of his property, whilst he was to bear no share of the burden. This was a mischievous sort of check.<sup>26</sup>

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<sup>22</sup> *Id.* (quoting Notes of Robert Yates (June 6, 1787), in 1 *Convention Records* 140).

<sup>23</sup> 1 *Convention Records* 80 (Gerry).

<sup>24</sup> See, e.g., Thomas Paine, *Common Sense*, in 1 *Writings of Thomas Paine* 74 (Moncure Daniel Conway ed., 1906) (“the crown . . . derives its whole consequence merely from being the giver of places and pensions”); 1 *Convention Records* 86 (Dickenson) (“In the British Govt. itself the weight of the Executive arises from the attachments which the Crown draws to itself, & not merely from the force of its prerogatives.”).

<sup>25</sup> See U.S. Const. art I, § 6, cl. 2 (prohibiting members of Congress from simultaneously “holding any Office under the United States” and from being appointed, during their period of service as legislators, “to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time”).

<sup>26</sup> 1 *Convention Records* 99.

Franklin “was afraid, if a negative should be given as proposed, that more power and money would be demanded, till at last eno[ugh] would be gotten to influence & bribe the Legislature into a comple[te] subjection to the will of the Executive.”<sup>27</sup> George Mason agreed: “The Executive may refuse its assent to necessary measures till new appointments shall be referred to him; and having by degrees engrossed all these into his own hands, the American Executive, like the British, will by bribery & influence, save himself the trouble & odium of exerting his negative afterwards.”<sup>28</sup> After this discussion, an absolute veto was rejected, in favor of allowing two-thirds of both houses of Congress to override the President.<sup>29</sup>

Not content with these precautions, the Framers further addressed the threat of presidential corruption in the Domestic Emoluments Clause. By stipulating that the President would receive a fixed compensation, “in which no increase or diminution” could be made during his term of office,<sup>30</sup> they prevented Congress from bribing the President or punishing him by manipulating his salary. This measure also sought to avert the flagrant extortion in which some colonial governors had engaged.

The Framers ultimately realized, however, that providing a fixed compensation was not enough: Congress and the states might instead give the President other lucrative benefits or rewards, besides a compensation increase, in order to bend him to their will. To prevent such corruption and guarantee a fully independent President, John Rutledge and Benjamin Franklin moved to supplement the presidential compensation provision by adding the following: “and he (the President) shall not receive . . . any other emolument from the U.S. or any of them.”<sup>31</sup> Franklin and Rutledge’s motion was swiftly approved by the Convention, and the Domestic Emoluments Clause became part of the new Constitution.<sup>32</sup>

Consistent with the broad goals of this Clause, and its central role in preserving the integrity of the new federal government, the Framers used the expansive term “emolument” to describe the rewards forbidden to the President. That term was understood at the time to mean any benefit, advantage, or profit.<sup>33</sup>

The Clause built upon the example of early state constitutions that similarly attempted to prevent corruption and self-dealing by the executive. The Pennsylvania Constitution of 1776, for instance, established a new separation between the finances of the governor and those of the state by requiring that “[a]ll fees, licence money, fines and forfeitures heretofore granted,

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 101.

<sup>29</sup> *See id.* at 103-04.

<sup>30</sup> *Id.* at 21; *see* U.S. Const. art. II, § 1, cl. 7.

<sup>31</sup> 2 *Convention Records* 626.

<sup>32</sup> *Id.*

<sup>33</sup> *See* Part II.A, *infra*.

or paid to the governor, or his deputies for the support of government, shall hereafter be paid into the public treasury[.]”<sup>34</sup> The influential Massachusetts Constitution of 1780 required a fixed governor’s compensation, so “that the governor should not be under the undue influence of any of the members of the [legislature] by a dependence on them for his support,” and so that “he should in all cases, act with freedom for the benefit of the public” and “not have his attention necessarily diverted from that object to his private concerns.”<sup>35</sup> And the Maryland Constitution of 1776, in a forerunner to both the Domestic and Foreign Emoluments Clauses, barred “any person in public trust” from receiving “any present from any foreign prince or state, or from the United States, or any of them, without the approbation of this State.”<sup>36</sup>

The Domestic Emoluments Clause, like these state precursors, limited the executive’s power to enrich himself through his office, while curtailing the ability of Congress and the states to seek advantage by way of the President’s personal financial interests. “Just as the executive should not be able to bribe individual legislators with double salaries or make-work jobs,” “legislators should not be able to bribe the executive with extra pay for extra pliancy.”<sup>37</sup>

The Clause also addressed an underlying concern that mixing power and profit in one office would encourage the worst sorts of candidates to seek the presidency, and induce even virtuous officeholders to abuse their positions for personal gain. As Franklin had exhorted the Convention, “there are two passions which have a powerful influence on the affairs of men. These are ambition and avarice; the love of power, and the love of money.”<sup>38</sup> When joined together, these impulses “have in many minds the most violent effects,” Franklin warned: “place before the eyes of such men a post of *honour* that shall at the same time be a place of *profit*, and they will move heaven and earth to obtain it.”<sup>39</sup> Moreover, the type of leaders “that will strive for this profitable pre-eminence” will “not be the wise and moderate, the lovers of peace and good order, the men fittest for the trust. It will be the bold and the violent, the men of strong passions and indefatigable activity in their selfish pursuits.”<sup>40</sup> By introducing a ban on presidential acceptance of emoluments from Congress and the states, Franklin sought to prevent the dangers of “making our posts of honor, places of profit.”<sup>41</sup>

When the proposed Constitution was submitted to the states for ratification, Hamilton lauded the value of the Domestic Emoluments Clause in the Federalist Papers, commending

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<sup>34</sup> Pa. Const. of 1776, § 33.

<sup>35</sup> Mass. Const. pt. II, ch. II, § 1, art. XIII.

<sup>36</sup> Md. Const. of 1776, art. XXXII.

<sup>37</sup> Amar, *supra* note 3, at 182.

<sup>38</sup> 1 *Convention Records* 82.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* Franklin initially opposed *any* compensation for the President on these grounds, a position that failed to garner support at the Convention.

<sup>41</sup> *Id.* at 83.

“the judicious attention which has been paid to this subject.”<sup>42</sup> Echoing the concerns expressed by Franklin and other delegates about collusion and corruption among officials, Hamilton explained: “The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations.”<sup>43</sup> These dangers, Hamilton assured, had been effectively guarded against, as Congress and the states would have no such leverage over the President:

They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act [establishing the President’s salary]. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.<sup>44</sup>

Participants in the state ratification conventions expressed similar views. In Pennsylvania, James Wilson touted the value of the Domestic Emoluments Clause in securing the President “from any dependence upon the legislature as to his salary.”<sup>45</sup> Under the Constitution, Wilson noted, the chief executive would be President “of the whole Union,” chosen “in such a manner that he may be justly styled *the man of the people*. Being elected by the different parts of the United States, he will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection.”<sup>46</sup> After ratification, as the First Congress established President George Washington’s salary, lawmakers were mindful of the importance of the Clause in maintaining the President’s independence, with one legislator calling the measure “one of the most salutary clauses in the constitution.”<sup>47</sup>

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<sup>42</sup> *The Federalist No. 73*, *supra* note 15, at 440.

<sup>43</sup> *Id.* at 439. Alluding to the disagreeable experiences that prompted adoption of the Clause, Hamilton continued: “examples would not be wanting, even in this country, of the intimidation or seduction of the Executive by the terrors or allurements of the pecuniary arrangements of the legislative body.” *Id.* at 440.

<sup>44</sup> *Id.*

<sup>45</sup> 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 446 (Jonathan Elliot ed., 1836).

<sup>46</sup> *Id.* at 448.

<sup>47</sup> 1 *Annals of Cong.* 659 (1789) (Joseph Gales ed., 1834) (Sedgwick). The First Congress insisted on paying Washington a salary despite his stated willingness to forgo any compensation, reflecting a consensus that “financial independence was a crucial barrier to corruption,” and therefore “an officer who impoverished himself by declining his wages endangered the public interest.” David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 192 (1995). The same Congress notably decided against providing Washington with separate funds beyond this salary to cover certain expenses, after lawmakers objected that doing so would violate the Domestic Emoluments Clause. See 1 *Annals of Cong.* 659 (1789) (Sedgwick) (“paying the expenses of enumerated articles, does not leave the President in the situation intended by the constitution, which was, that he should be independent of the Legislature, during his

Consistent with this history, executive branch and judicial precedent has recognized that the “basic purposes and principles” of the Domestic Emoluments Clause were “to prevent Congress or any of the states from attempting to influence the President through financial awards or penalties,”<sup>48</sup> as well as to “address[] the Framers’ concern that the President should not have the ability to convert his or her office for profit.”<sup>49</sup> As one court has noted: “it was the intent of the framers of the Constitution to prevent the Office of the President from being a position of both power and profit. While they recognized that they could not divest the office of power, they sought to prevent the corruption of the office by removing profit.”<sup>50</sup>

## II. The Proper Interpretation of the Domestic Emoluments Clause

### A. “Emolument” Covers Any Benefit, Advantage, or Profit, Including Those Arising from Commercial and Market Transactions

The word “emolument” was, until recently, unfamiliar to modern ears, having gradually fallen out of use over the past two centuries. But at the time of the Framing, it was a common term, understood to encompass any profit, advantage, or benefit that one might confer upon another.

Samuel Johnson’s ubiquitous *Dictionary of the English Language*, first published in 1755 and frequently reprinted over the decades that followed, defined “emolument” as “Profit; advantage.”<sup>51</sup> To illustrate the word’s usage, Johnson cited contemporary sentences such as this one: “Nothing gives greater satisfaction than the sense of having dispatched a great deal of business to public emolument.”<sup>52</sup> Consistent with this broad and general meaning, the *Oxford English Dictionary* cites eighteenth-century texts that defined the word to mean “[a]dvantage, benefit, comfort.”<sup>53</sup> *Merriam-Webster* likewise indicates that at one point the word meant simply “advantage.”<sup>54</sup>

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continuance in office”); *id.* at 660-61 (Livermore) (“The clause in the constitution is intended to tie down the Legislature, as well as the President; they shall make him no compliments while in office, he shall receive nothing but a fixed compensation for his services.”); *id.* at 661 (Page) (stating that funding such expenses “would be against the spirit of the constitution”).

<sup>48</sup> *President Reagan’s Ability to Receive Ret. Benefits from the State of Cal.*, 5 Op. O.L.C. 187, 189 (1981).

<sup>49</sup> *Griffin v. United States*, 935 F. Supp. 1, 3-4 (D.D.C. 1995).

<sup>50</sup> *Nixon v. Sampson*, 389 F. Supp. 107, 137 (D.D.C. 1975).

<sup>51</sup> Samuel Johnson, 1 *A Dictionary of the English Language* 686 (6th ed. 1785), <http://publicdomainreview.org/collections/samuel-johnsons-dictionary-of-the-english-language-1785/>.

<sup>52</sup> *Id.*

<sup>53</sup> *Emolument*, Oxford English Dictionary (2d. ed. 1989).

<sup>54</sup> *Emolument*, Merriam-Webster Online Dictionary, [https://www.merriam-webster.com/dictionary/emoluments?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriam-webster.com/dictionary/emoluments?utm_campaign=sd&utm_medium=serp&utm_source=jsonld) (last visited July 7, 2017).

The word appears to have originated during the English middle ages, as *Merriam Webster* explains, from a Latin noun meaning “profit” or “gain.” That word itself arose from an earlier Latin verb meaning “to grind.” These two Latin words were linked by a traditional practice in which farmers took their grain to a miller, who would take a portion of the grain milled in exchange for his troubles.<sup>55</sup>

Founding-era documents deployed the term in a broad array of contexts to refer to various types of benefits or advantages. For example, “emolument” was used to describe the benefits accruing to Britain through colonial exploitation,<sup>56</sup> the benefits of citizenship,<sup>57</sup> individualized government benefits,<sup>58</sup> and benefits from suspension of law for the private interest of any class of men.<sup>59</sup>

Notably, a number of Revolutionary-era documents used the word “emolument” to distinguish a citizen’s personal interests from the public good of colony or country. For instance, George Washington, Thomas Jefferson, and other Virginians who had formed an association to boycott British goods criticized merchants who ignored the boycott as having “preferred their own private *emolument*, by importing or selling articles prohibited by this association, to the destruction of the dearest rights of the people of this colony.”<sup>60</sup> To help enforce New York’s ban on business with British ships, General Washington issued a proclamation denouncing the “sundry base and wicked Persons” who preferred “their own, present private *Emolument* to their Country’s Weal.”<sup>61</sup> John Adams, under a pseudonym, wrote of a clergyman telling magistrates that they “were not distinguished from their brethren for their private *emolument*, but for the good of the people.”<sup>62</sup> Likewise, the 1776 Constitution of Pennsylvania opens with a declaration that “government is, or ought to be, instituted for the common benefit, protection

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<sup>55</sup> *Id.* (“By the year 1480 . . . Latin *emolumentum* had come to mean simply ‘profit’ or ‘gain’; it had become removed from its own Latin predecessor, the verb *molere*, meaning ‘to grind.’ The original connection between the noun and this verb was its reference to the profit or gain from grinding another’s grain.”).

<sup>56</sup> U.S. Continental Congress, *A Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms* (July 6, 1775), <https://www.loc.gov/resource/rbpe.14400700/?sp=1>.

<sup>57</sup> Alexander Hamilton, *The Farmer Refuted*, &c. (Feb. 23, 1775), <http://founders.archives.gov/documents/Hamilton/01-01-02-0057>.

<sup>58</sup> Va. Declaration of Rights of 1776, §IV.

<sup>59</sup> John Adams, *The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts* (Oct. 28-31, 1779), <http://founders.archives.gov/documents/Adams/06-08-02-0161-0002>.

<sup>60</sup> *Virginia Nonimportation Resolutions* (June 22, 1770) (emphasis added), <http://founders.archives.gov/documents/Jefferson/01-01-02-0032>.

<sup>61</sup> *Proclamation on Intercourse with British Warships* (Apr. 29, 1776) (emphasis added), in 4 *The Papers of George Washington: Revolutionary War Series* 164-65 (Philander D. Chase et al. eds., 1991).

<sup>62</sup> Letter from Novanglus, IV to the Inhabitants of the Colony of Massachusetts-Bay (Feb. 13, 1775), <http://founders.archives.gov/documents/Adams/06-02-02-0072-0005>(emphasis added).

and security of the people, nation or community; and not for the particular *emolument* or advantage of any single man, family, or set of men, who are a part only of that community.”<sup>63</sup>

To be sure, the word “emolument” has often been associated with the benefits connected to holding an office.<sup>64</sup> In pre-modern England, a grant of office was akin to a property right, entitling the officeholder to enjoy its “emoluments.”<sup>65</sup> Some Founding-era documents therefore use “emolument” to refer to the benefits of office.<sup>66</sup> But as evident from the other sources above, the meaning of the word in 1787 was hardly limited to this particular association. Indeed, legal scholar John Mikhail has undertaken a “comprehensive study of how ‘emolument’ [was] defined in both English language dictionaries published from 1604 to 1806 and English legal dictionaries published from 1523 to 1792,” and concluded that the idea that the term “‘emolument’ was a legal term of art at the founding, with a sharply circumscribed ‘office-and-employment-specific’ meaning, is . . . inconsistent with the historical record.”<sup>67</sup> Further, as he explains in detail, “the founders used the word ‘emolument’ in wide variety of contexts, including private commercial transactions.”<sup>68</sup> This is not surprising: the word originated from a traditional exchange between millers and farmers—in which the miller would extract a portion of the grain processed with his assistance—that today could be characterized as a “fair-market-value transaction.”<sup>69</sup>

This broad usage, embracing ordinary market transactions, is evident in founding era floor-statements discussing “emoluments.” In debates over the Articles of Confederation, one delegate remarked, “The Indian Trade is of no essential service to any Colony. . . . The *Emoluments* of the Trade are not a Compensation for the Expençe of donations.”<sup>70</sup> And at the Virginia ratifying convention, James Madison asked, “if the carrying business be [eastern

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<sup>63</sup> Pa. Const. of 1776, art. 5 (emphasis added).

<sup>64</sup> Thus, the Oxford English Dictionary defines the contemporary meaning of “emolument” as “profit or gain arising from station, office, or employment: reward, remuneration, salary,” Oxford English Dictionary, *supra* note 53, and Merriam-Webster as “the returns arising from office or employment usually in the form of compensation or perquisites,” Merriam-Webster Online, *supra* note 54.

<sup>65</sup> See Douglas Stanley, *Prerogative in Private and Public Employment*, 20 McGill L.J. 394, 404 (1974).

<sup>66</sup> For example, *The Federalist No. 51* observes that “it is equally evident that the members of each department [of government] should be as little dependent as possible on those of the others for the *emoluments* annexed to their offices.” *The Federalist No. 51*, at 318 (James Madison) (Clinton Rossiter ed., 1961).

<sup>67</sup> John Mikhail, *The Definition of “Emolument” in English Language and Legal Dictionaries, 1523-1806*, at 7, 9 (July 11, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2995693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693).

<sup>68</sup> *Id.* at 9.

<sup>69</sup> See *supra* note 55; see also *infra* at 75 (discussing the argument made by President Trump’s personal attorneys that the Foreign Emoluments Clause does not regulate “fair-market-value transactions”).

<sup>70</sup> John Adams, *Notes of Debates on the Articles of Confederation, Continued* (July 26, 1776) (emphasis added), <http://founders.archives.gov/documents/Adams/01-02-02-0006-0008>.

states'] natural province, how can it be so much extended and advanced, as by . . . having the *emolument* of carrying [western states'] produce to market?"<sup>71</sup>

In sum, at the time of the Framing, the term "emolument" was understood to encompass a wide array of benefits. By using that term, the Framers broadly and absolutely prohibited the President from receiving any manner of benefit or advantage from the federal or state governments, apart from his fixed compensation. In so doing, the Framers not only blocked state and federal powers from seeking to corrupt the President, they also prohibited the President from using his office for personal enrichment.

## **B. The Clause Bars the President from Receiving a Wide Array of Benefits, Advantages, and Profits**

### ***Direct Financial Payments***

The Domestic Emoluments Clause prohibits the President from receiving any monetary payment from the federal or state governments, beyond the fixed presidential compensation.

The only exception to this prohibition that the executive branch has ever recognized involved a unique situation in which a state was legally obligated to pay the President a pension arising from his former state employment. Because the state lacked all discretionary control over that obligation, the Department of Justice concluded that the payment did not raise the anti-corruption concerns that motivated the adoption of the Clause.<sup>72</sup>

With only the narrowest of possible exceptions, therefore, any financial payments the President were to receive from federal or state governments, apart from the fixed presidential compensation, should be presumed to violate the Clause.

### ***Regulatory and Administrative Emoluments***

The Domestic Emoluments Clause may also prohibit federal or state regulatory actions that benefit the President.

As earlier discussed, the term "emolument" had a broad meaning when the Constitution was drafted, encompassing all manner of benefits and advantages, including those arising from changes to the law.<sup>73</sup> Exercises of sovereign government authority that benefit the President or

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<sup>71</sup> James Madison, *The Mississippi Question* (June 13, 1788) (emphasis added), <http://founders.archives.gov/documents/Madison/01-11-02-0080>.

<sup>72</sup> In 1981, the Justice Department's Office of Legal Counsel (OLC) concluded that President Reagan could accept his California pension because "he acquired a vested right 6 years before he became President, for which he no longer has to perform any services, and of which the State of California cannot deprive him." *President Reagan's Ability to Receive Ret. Benefits from the State of Cal.*, 5 Op. O.L.C. at 190. OLC viewed the California pension as a *sui generis* legal entitlement under California law, and therefore "neither a gift nor a part of the retiree's compensation." *Id.* at 191.

<sup>73</sup> See Part II.A, *supra*.

his businesses would seem to come within that broad definition.<sup>74</sup> After all, financial advantage can come not only from government payments but also from government decisions that increase one's profit from private commerce. Acknowledging this basic equivalence furthers the purpose of the Clause—keeping the President from exploiting his position to enrich himself or falling victim to the financial persuasion of other government officials and legislators.

### **Government Business**

The Domestic Emoluments Clause prohibits the award of government business to the President and to businesses owned by the President.

Under the Foreign Emoluments Clause, which similarly bars officials from receiving any “Emolument,” President Trump’s personal lawyers have argued that “fair-market-value” exchanges with foreign governments are permissible.<sup>75</sup> But they have never explained either what qualifies as a “fair-market-value” transaction, or why the profits from such transactions should be exempted from the Clause’s restrictions.<sup>76</sup> Notably, the Department of Justice’s Office of Legal Counsel has consistently interpreted the Foreign Emoluments Clause as encompassing market-rate payments for services rendered to foreign governments or their instrumentalities.<sup>77</sup>

Even if an arm’s length exchange for some objectively neutral “fair market value” price might be permissible—and there is good reason to think it generally is not<sup>78</sup>—governments as large purchasers often *negotiate* their exchanges. Thus, determining whether any government contract represents a “fair-market-value” price will generally be a subjective exercise in evaluating a negotiated arrangement. Because the negotiation of any deal creates an

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<sup>74</sup> Ron Fein & Brianne Gorod, *Lining Trump’s Pockets*, US News (Mar. 21, 2017), <https://www.usnews.com/opinion/articles/2017-03-21/president-donald-trump-has-also-got-a-domestic-emoluments-clause-problem>; see Mathew Stephenson, *When, if Ever, Does a Favorable Legal or Regulatory Decision Count as an “Emolument”?*, The Global Anticorruption Blog (Apr. 25, 2017), <https://globalanticorruptionblog.com/2017/04/25/when-if-ever-does-a-favorable-legal-or-regulatory-decision-count-as-an-emolument/> (explaining why at least some legal and regulatory decisions qualify as emoluments within the meaning of the constitutional proscription).

<sup>75</sup> Sheri Dillon et al., Morgan Lewis & Bokus LLP, *White Paper: Conflicts of Interest and the President, Background for President-Elect Trump’s January 11, 2017 Press Conference 4* (Jan. 11, 2017), <https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf>.

<sup>76</sup> See Tribe et al., *supra* note 1.

<sup>77</sup> See *Applicability of the Emoluments Clause to Non-Gov’t Members of the American Conference of the United States (ACUS)*, 17 Op. O.L.C. 114 (1993) [hereinafter “ACUS”]; *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Comm’n*, 10 Op. O.L.C. 96, 96 (1986); Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, *Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, Re: Emoluments Clause Questions Raised by NASA Scientist’s Proposed Consulting Arrangement with the Univ. of New S. Wales*, at 2-3 (May 23, 1986); *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 156 (1982).

<sup>78</sup> See, e.g., Eisen et al., *supra* note 1, at 11.

opportunity to award financial benefits to President Trump, such deals cannot be permitted under the Domestic Emoluments Clause.

While the mere continuation of business relationships on existing terms may present less opportunity for influence or self-dealing than a new arrangement, such preexisting relationships still result in the President receiving benefits, advantages, and profits beyond his fixed compensation from the federal or state governments. Under the broad prophylactic rule imposed by the Clause, which is meant to eliminate even the possibility of corruption, such relationships may also be prohibited.

### ***Special or “Discriminative” Tax Treatment***

The Domestic Emoluments Clause limits the power of Congress and the states to engage in special or “discriminative” tax treatment that benefits the President, including the President’s business enterprises.

While little interpretive history exists regarding how the Clause applies to taxation of the President,<sup>79</sup> useful insight can be found in precedent on judicial compensation, which the Constitution also regulates.<sup>80</sup> In that context, the Supreme Court has held that discriminatory tax treatment is unconstitutional regardless of the legislature’s motives in adopting it.<sup>81</sup> This logic applies even more strongly to the President under the Domestic Emoluments Clause, given that Clause’s important role in maintaining balance among the states and eliminating concerns that any particular state might try to curry favor with the President.

Moreover, also in the context of judicial compensation, the Supreme Court has concluded that a tax law that results in special “discriminative” tax treatment need not apply *solely* to judges to be unconstitutional. The Court thus held unconstitutional a law that required judges and certain other high-ranking government officials to pay a new Social Security tax that 94 percent of government employees could avoid.<sup>82</sup> Because “*nearly every* then-current federal employee, but not federal judges” were eligible for an exemption, the Court held that the tax burden was discriminatory and therefore impermissible.<sup>83</sup>

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<sup>79</sup> In the nineteenth century, the Clause was viewed as prohibiting *any* taxation of the President’s income during his term, Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 Case W. Res. L. Rev. 966, 979-81 (2006), but the Department of Justice subsequently took the view that the President’s income is subject to general taxation when not “discriminative,” see *Income Tax -- Salaries of President and Fed. Judges*, 31 U.S. Op. Att’y Gen. 475 (1919).

<sup>80</sup> Congress may not decrease the salary of any federal judge, although there is no restriction on salary increases. See U.S. Const. art. III, § 1.

<sup>81</sup> *United States v. Hatter*, 532 U.S. 557, 577 (2001).

<sup>82</sup> See *id.* at 571.

<sup>83</sup> *Id.* at 559 (emphasis added). Although this case involved a law that discriminated *against* the relevant public officials, there is no reason its holding should not apply in the case of laws that impermissibly *benefit* such officials.

Thus, where a change in tax treatment benefits the President, it may be unconstitutional, even though others may also be affected. That interpretation prevents the use of tax policy to indirectly accomplish a constitutionally forbidden end—supplying the President with emoluments beyond his fixed compensation.

### **C. The Clause Bars Receipt of Emoluments from Municipalities and from Government Instrumentalities**

The Domestic Emoluments Clause provides that a sitting President may not receive emoluments beyond his fixed compensation “from the United States, or any of them.” By its express terms, therefore, the Clause prohibits the acceptance of emoluments both from the federal government (“the United States”) and from the states (“or any of them”).<sup>84</sup> It also applies to cities, counties, and other local municipal bodies, as well as federal and state instrumentalities.

#### ***Cities, Counties, and Other Local Municipal Bodies***

“Since colonial times, a distinct feature of our Nation’s system of governance has been the conferral of political power upon public and municipal corporations for the management of matters of local concern.”<sup>85</sup> These units of local government are part of their respective state governments, however, not separate from them. As the Supreme Court has long recognized, “a municipality is merely a political subdivision of the State from which its authority derives.”<sup>86</sup> And these “[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.’ They are instead ‘subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.’”<sup>87</sup> Thus, American law has never regarded cities or other municipal bodies as autonomous entities independent of their respective states.

As a result, when the federal Constitution places limits on what the states may lawfully do, these limits apply to municipalities in the same way that they apply to the states. The Supreme Court has thus held that numerous provisions of the Constitution apply to

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<sup>84</sup> See, e.g., *President Reagan’s Ability To Receive Ret. Benefits from the State of Cal.*, 5 Op. O.L.C. at 187-92.

<sup>85</sup> *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

<sup>86</sup> *United Bldg. & Const. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 214-15 (1984) (quoting *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923)).

<sup>87</sup> *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 362 (2009) (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964)); see *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (“This Court has often recognized that political subdivisions such as cities and counties are created by the State ‘as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them.’” (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)); *Laramie Cty. Comm’rs v. Albany Cty. Comm’rs*, 92 U.S. 307, 308 (1875) (“[Counties, cities, and towns] have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.”).

municipalities just as they apply to the states, including the Supremacy Clause,<sup>88</sup> the Contract Clause,<sup>89</sup> the Commerce Clause,<sup>90</sup> the Takings Clause,<sup>91</sup> the First Amendment,<sup>92</sup> the Second Amendment,<sup>93</sup> and the Due Process,<sup>94</sup> Equal Protection,<sup>95</sup> and Privileges and Immunities Clauses of the Fourteenth Amendment.<sup>96</sup> As noted in one of these decisions, “what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State.”<sup>97</sup>

Notably, municipalities are bound by the constitutional limits imposed on the states even when the text of the relevant provision explicitly refers only to a “State” or the “States.”<sup>98</sup>

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<sup>88</sup> *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (“It is, finally, axiomatic that ‘for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.’” (quoting *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985))); see *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 626 (1973) (holding city ordinance regulating air traffic invalid under the Supremacy Clause).

<sup>89</sup> See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 673 (1978) (citing *Bd. of Comm’rs v. Aspinwall*, 65 U.S. 376 (1861), as “the first of many cases upholding the power of federal courts to enforce the Contract Clause against municipalities” (footnote omitted)); *id.* at 681 (noting that the nineteenth-century Court “vigorously enforced the Contract Clause against municipalities”).

<sup>90</sup> *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) (“The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce[.]” (emphasis added) (quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986))); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353, 361 (1992) (“[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.” (emphasis added)).

<sup>91</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005) (applying Takings Clause to property condemnation by city).

<sup>92</sup> *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (“It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment.”); see *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980) (invalidating municipal ordinance under the First Amendment); *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610 (1976) (same); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (same).

<sup>93</sup> See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (invalidating municipal ordinance under the Second Amendment).

<sup>94</sup> See, e.g., *City of Los Angeles v. David*, 538 U.S. 715 (2003); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983).

<sup>95</sup> *Avery v. Midland Cty.*, 390 U.S. 474, 479-80 (1968) (“The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.”).

<sup>96</sup> *United Bldg. & Const. Trades Council*, 465 U.S. at 214-15.

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., U.S. Const. art. I, § 10, cl. 1 (providing that “No State” shall pass a law impairing the obligation of contracts); *id.* art. VI, cl. 2 (providing that federal law is supreme, notwithstanding anything contrary in the laws of “any State”); *id.* amend. XIV, § 1 (providing that “No State” shall abridge the privileges or immunities of U.S. citizens); *id.* (prohibiting “any State” from denying equal protection or due process of law); see also *supra* notes 88, 89, & 94-96 (listing Supreme Court decisions in which these clauses have been held applicable to municipalities).

As the Court has observed: “The term ‘State’ is not self-limiting since political subdivisions are merely subordinate components of the whole.”<sup>99</sup>

The obligation of municipal governments to follow the same limits as their respective states, moreover, is not limited to constitutional provisions that safeguard individual liberties against government infringement. Municipalities, just like the states, must also abide by the structural provisions of the Constitution that establish the organization of the federal government, its relationship to the states, and how the states may interact with one another.<sup>100</sup> The reason for this is evident: just as it would vitiate the Constitution’s protection of individual liberties if a municipality could do what the state itself may not do, so too would it disturb the Constitution’s careful allocation of powers among the state and federal governments.<sup>101</sup> In either situation, therefore, “the restraints imposed by the Constitution on the States” may not “be circumvented by local bodies to whom the State delegates authority.”<sup>102</sup>

That principle is important because the structural provisions of the Constitution, which establish our nation’s system of federalism and separation of powers, ultimately “protect the individual as well,” by “secur[ing] to citizens the liberties that derive from the diffusion of sovereign power.”<sup>103</sup> The Domestic Emoluments Clause offers an especially clear example of how structural safeguards can promote individual liberty: By furnishing the President with a fixed compensation that can be neither diminished nor supplemented during his tenure, the Framers sought to eliminate every “pecuniary inducement” that could compromise “the independence intended for him by the Constitution.”<sup>104</sup> In doing so, they promoted “the vigor

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<sup>99</sup> *Wis. Pub. Intervenor*, 501 U.S. at 612 (1991); see *id.* at 607-08 (holding that a statutory authorization referring only to “State[s]” cannot be read as implicitly excluding municipalities because “political subdivisions” are “components of” the states); see also *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-40 (2002) (employing similar reasoning).

<sup>100</sup> See *supra* notes 88, 92.

<sup>101</sup> The Commerce Clause, for example, prohibits states from discriminating against products originating in other states, the “central rationale” being that laws “whose object is local economic protectionism” will “excite those jealousies and retaliatory measures the Constitution was designed to prevent.” *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). And because those problems would arise whether such a law were enacted by a state or by one of its municipalities, the Clause governs “state or municipal” laws equally. *Id.* Likewise, given the need to make federal measures “the supreme Law of the Land,” U.S. Const. art. VI, cl. 2, “the constitutionality of local ordinances is analyzed in the same way as that of statewide laws” under the Supremacy Clause. *Wis. Pub. Intervenor*, 501 U.S. at 605 (quotation marks omitted).

<sup>102</sup> *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 n.5 (1967).

<sup>103</sup> *Bond v. United States*, 564 U.S. 211, 221-22 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

<sup>104</sup> *The Federalist No. 73*, *supra* note 15, at 440.

of the executive authority” to ensure that the President would serve as an effective check against abuses and harmful policies that may originate elsewhere in government.<sup>105</sup>

Applying the Domestic Emoluments Clause equally to states and their municipalities is consistent not only with the purposes of the Clause and judicial precedent on similar constitutional limits, but also with longstanding executive branch practice under the Foreign Emoluments Clause.<sup>106</sup> The anticorruption logic of this executive branch precedent applies with equal force in the domestic context: no city, county, or other state subdivision can be permitted to confer benefits or advantages on the President that enrich him beyond his federal compensation. Otherwise, domestic government officials could use “financial awards or penalties” to exert undue sway over the President.<sup>107</sup>

### ***Government Instrumentalities***

The Domestic Emoluments Clause also applies to federal, state, and local instrumentalities—that is, entities owned or controlled by those bodies of government. Precedent on the Foreign Emoluments Clause illustrates why.

OLC has unequivocally concluded that commercial entities and other instrumentalities owned or controlled by foreign governments or their subdivisions must be treated as “foreign states” under the Foreign Emoluments Clause.<sup>108</sup> As OLC has explained, “nothing in the text of the Emoluments Clause limits its application solely to foreign governments acting *as sovereigns*,”<sup>109</sup> and foreign states cannot be permitted to use commercial entities or other instrumentalities to evade the prohibitions of the Clause.<sup>110</sup> Thus, OLC has determined that

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<sup>105</sup> *Id.* at 439. Indeed, the Clause was one of several measures intended to sustain “the personal firmness of the executive magistrate, in the employment of his constitutional powers.” *The Federalist No. 71*, at 429-30 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>106</sup> OLC has construed that Clause as reaching “any political governing entity within [a] foreign state.” *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Dev.*, 34 Op. O.L.C. 1, 2 n.3 (Oct. 6, 2010) (citation omitted). GAO has taken the same view, opining that “[f]oreign governmental influence can just as readily occur whether a [federal officer] is employed by local government within a foreign country or by the national government of the country.” *In re Major James D. Dunn*, B-251084, 1993 WL 426335, at \*3 (Comp. Gen. Oct. 12, 1993).

<sup>107</sup> *President Reagan’s Ability to Receive Ret. Benefits from the State of Cal.*, 5 Op. O.L.C. at 189.

<sup>108</sup> *ACUS*, 17 Op. O.L.C. at 121 (“we think that, in general, business corporations owned or controlled by foreign governments will fall within the Clause.”).

<sup>109</sup> *Id.* at 120-21, 122 (“[T]he Emoluments Clause should be interpreted to guard against the risk that occupants of Federal office will be paid by corporations that are, or are susceptible of becoming, agents of foreign States,” and therefore “[a]ny emoluments from a foreign State, whether dispensed through its political or diplomatic arms or through other agencies, are forbidden to Federal office-holders (unless Congress consents).”).

<sup>110</sup> See *Applicability of Emoluments Clause to Employment of Gov’t Emps. by Foreign Pub. Univs.*, 18 Op. O.L.C. 13, 19 (1994); see *id.* (“foreign governmental entities, including public universities, are presumptively instrumentalities of foreign states under the Emoluments Clause, even if they do not engage specifically in political, military, or diplomatic functions”).

public universities,<sup>111</sup> corporations owned or controlled by a foreign government,<sup>112</sup> and government contractors acting merely as a conduit for government funds<sup>113</sup> all presumptively qualify as “foreign states” under the Clause.

For similar reasons, officials should not be able to use entities that are created, funded, or controlled by the federal or state governments to confer benefits on the President that would be unconstitutional if conferred directly by those governments. For example, a state-chartered development corporation—for which a state provides funding, plays a management role, and has influence over decision-making—could not employ the President as a compensated advisor. Any other result would render the Domestic Emoluments Clause easily evaded.

#### **D. The Domestic Emoluments Clause May Prohibit Emoluments to the President’s Immediate Family**

By its terms, the Domestic Emoluments Clause bars the President from receiving emoluments beyond his fixed compensation. This prohibition may also prohibit the President from receiving emoluments constructively, through persons such as his immediate family members.

If gifts to the President could simply be routed to those with whom the President necessarily shares interests, like a spouse or legal representative, the Clause could be easily circumvented. As discussed earlier, however, the Framers wanted to ensure that the President would have “no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.”<sup>114</sup> Allowing workarounds would be at odds with the Clause’s strong anti-corruption purpose.<sup>115</sup>

Here once again, this approach is consistent with how the Foreign Emoluments Clause has been interpreted. In the Foreign Gifts and Decorations Act, Congress has offered blanket

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<sup>111</sup> *See id.* at 17 n.6.

<sup>112</sup> *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); *ACUS*, 17 Op. O.L.C. at 120; *see In re Harnett*, 65 Comp. Gen. 382, B-220860 (Mar. 10, 1986) (discussing *To Brenningstall*, 53 Comp. Gen. 753, B- 178538 (Apr. 9, 1974)).

<sup>113</sup> *ACUS*, 17 Op. O.L.C. at 118; *see Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. at 158 (Nuclear Regulatory Commission employee’s consulting arrangement with domestic consulting firm violates the Foreign Emoluments Clause where “retention of the NRC employee by the consulting firm appears to be the principal reason for selection of the consulting firm by the Mexican government.”).

<sup>114</sup> *The Federalist No. 73*, *supra* note 15, at 440.

<sup>115</sup> Federal law prohibiting external compensation to top federal officials defines *receipt* of compensation to include compensation that, “with the employee’s knowledge and acquiescence,” is “paid to his parent, sibling, spouse, child or dependent relative.” 5 C.F.R. § 2636.303(c). Although these general ethics rules are inapplicable to the President, they reflect the executive branch’s view that where payments are prohibited to avoid potential corruption, it is necessary to prohibit workarounds as well.

consent for federal employees to accept certain gifts from foreign governments, while making clear that receiving other gifts remains unlawful; significantly, this latter prohibition extends to spouses and dependents.<sup>116</sup> This approach is also consistent with the longstanding practice of providing no federal salary (a potential “other emolument”) to the President’s spouse, despite the extensive duties of a modern “First Spouse.”

### III. President Trump Appears Likely To Violate the Domestic Emoluments Clause—and May Already Be Violating It

As shown above, the Domestic Emoluments Clause broadly prohibits the federal government, state governments, local governments, and their instrumentalities from giving any benefits to the President, monetary or otherwise, beyond the fixed presidential compensation. In light of President Trump’s refusal to divest from his extensive business interests, it appears likely that he is, or soon will be, violating the Clause in numerous ways. We here discuss only some of the many examples of payments and other benefits that may run afoul of the Clause.

- **Tax Breaks and Incentives** — Trump’s business empire was built on more than \$885 million in tax breaks,<sup>117</sup> and at least one major tax abatement continues to accrue millions of dollars in value for Trump and his businesses.<sup>118</sup> This sort of award to the President’s businesses of discretionary or competitive tax benefits may run afoul of the Clause.

Related, President Trump is currently suing the District of Columbia, seeking a dramatically lower valuation of his new D.C. hotel on federal property.<sup>119</sup> He has also sued the Palm Beach County Property Appraiser and the Florida Department of Revenue to contest the valuation of Trump National Golf Club in Jupiter, Florida.<sup>120</sup> While the President may have his day in court, discretionary actions by local governments to grant tax relief may run afoul of the Clause.

Finally, President Trump is pursuing a multi-stage application process for a \$32 million historic preservation tax credit for the D.C. hotel, which will require approval by the

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<sup>116</sup> 5 U.S.C. § 7342(a)(1)(G).

<sup>117</sup> Bagli, *supra* note 4.

<sup>118</sup> *See id.*

<sup>119</sup> Nick Penzenstadler, *Trump Refiles Lawsuit to Lower Taxes on D.C. Hotel*, USA Today (Nov. 17, 2016), <http://www.usatoday.com/story/news/2016/11/17/trump-refiles-lawsuit-lower-taxes-dc-hotel/94033840/>.

<sup>120</sup> Jeff Ostrowski, *EXCLUSIVE: Donald Trump Sues Over Taxable Value of Jupiter Golf Club*, Palm Beach Post (July 13, 2017), <http://www.mypalmbeachpost.com/news/exclusive-donald-trump-sues-over-taxable-value-jupiter-golf-club/LhGqsVNiBirUNR6JOAbUol/>.

National Park Service (NPS).<sup>121</sup> If this federal agency were to award the President a multimillion dollar tax benefit, that benefit may also run afoul of the Clause.

- **GSA Lease** — To operate his D.C. hotel, President Trump currently holds the lease on a piece of federal property on Pennsylvania Avenue, the Old Post Office. That lease prohibits an elected official from being “admitted to any share or part of this Lease, or to any benefit that may arise therefrom,” but the GSA has indicated that the lease remains valid.<sup>122</sup> By so interpreting the lease, GSA has conferred a significant benefit on the President that may run afoul of the Clause.<sup>123</sup>
- **New Government Leases** — Following the President’s election, the Secret Service was in talks to lease space in Trump Tower.<sup>124</sup> More recently, the Washington Post reported that the “[t]he State Department spent more than \$15,000 to book 19 rooms at the new Trump hotel in Vancouver when members of President Trump’s family headlined the grand opening of the tower in late February.”<sup>125</sup> Payment of rent to Trump-owned businesses by federal agencies may run afoul of the Clause.<sup>126</sup>
- **Renegotiation of Old Government Leases** — As just noted, a Trump business holds the lease for the Old Post Office in Washington, D.C. A Trump business also leases land from New York State for a hotel in New York City.<sup>127</sup> Any renegotiation or renewal of these arrangements may run afoul of the Clause.

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<sup>121</sup> Eric Levitz, *Trump Won the Presidency, Then Approval on a Tax Subsidy for His Hotel*, N.Y. Mag. (Nov. 30, 2016), <http://nymag.com/daily/intelligencer/2016/11/trump-won-the-presidency-then-a-tax-subsidy-for-his-hotel.html>.

<sup>122</sup> Jackie Northam & Marilyn Geewax, *GSA Says Trump D.C. Hotel Lease Is Valid, Despite Ban on Elected Officials*, NPR (Mar. 23, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/23/521283505/gsa-says-trump-d-c-hotel-lease-is-valid-despite-ban-on-elected-officials>.

<sup>123</sup> Brianne J. Gorod, *GSA, Trump International Hotel, and the Constitution*, Take Care (Mar. 24, 2017), <https://takecareblog.com/blog/gsa-trump-international-hotel-and-the-constitution>.

<sup>124</sup> Julia Marsh, *Trump Tower Security May Take Over 2 Floors — and Cost Millions*, N.Y. Post (Nov. 24, 2016), <http://nypost.com/2016/11/24/trump-tower-security-may-take-over-2-floors-and-cost-millions/>.

<sup>125</sup> Amy Brittain, *State Department Spent More Than \$15,000 for Rooms at New Trump Hotel in Vancouver*, Wash. Post (July 12, 2017), [https://www.washingtonpost.com/politics/state-department-spent-more-than-15000-for-rooms-at-new-trump-hotel-in-vancouver/2017/07/12/5eba5d0c-61bf-11e7-84a1-a26b75ad39fe\\_story.html?utm\\_term=.d9c7a0c2b245](https://www.washingtonpost.com/politics/state-department-spent-more-than-15000-for-rooms-at-new-trump-hotel-in-vancouver/2017/07/12/5eba5d0c-61bf-11e7-84a1-a26b75ad39fe_story.html?utm_term=.d9c7a0c2b245).

<sup>126</sup> Although at one point reports suggested that the Department of Defense might also lease space in Trump Tower, a more recent report indicates that it is now planning to lease a privately-owned unit. See Mark Hosenball & Phil Stewart, *Pentagon To Lease Privately Owned Trump Tower Apartment for Nuclear ‘Football’: Letter*, Reuters (May 5, 2017), <http://www.reuters.com/article/us-usa-pentagon-trumptower-idUSKBN1812B5>.

<sup>127</sup> See Bagli, *supra* note 4.

- **Government Contracts** — The extent of federal, state, and local business transacted by the Trump Organization is not known, but some reporting has identified existing arrangements. For example, Trump hotels advertise government rates,<sup>128</sup> Trump affiliates have received federal contracts,<sup>129</sup> and Trump operates several public concessions from New York City, including Wollman Rink in New York’s Central Park and a golf course in the Bronx.<sup>130</sup> New and existing relationships like these may run afoul of the Clause.
- **Government Grants** — Trump has a record of seeking government grants to support his development projects.<sup>131</sup> The award of additional funds under any existing grants, as well as the award of new government grants, may run afoul of the Clause.
- **Subsidies from the Department of Housing and Urban Development** — President Trump reportedly holds a share in a complex of 46 low-income apartment towers spread over 140 acres in Brooklyn, New York, which receives substantial subsidies from the Department of Housing and Urban Development (HUD).<sup>132</sup> In 2020, HUD will renegotiate the terms of the arrangement. HUD previously blocked the owners from selling the property to benefit from Brooklyn’s real estate boom; any future sale will likely require approval not only by HUD but also by New York City officials. Either renegotiation of the subsidies or government approval to sell the property may run afoul of the Clause.
- **Discretionary Tax Adjustments** — Any discretionary relief from tax authorities involving President Trump and his businesses may run afoul of the Clause.

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<sup>128</sup> Ben Walsh, *President Trump’s Federal Employees Wouldn’t Be Able To Stay at Most Trump Hotels*, Huffington Post (July 1, 2016), [http://www.huffingtonpost.com/entry/trump-hotels-fire-safety\\_us\\_57752ed5e4b0bd4b0b13b378](http://www.huffingtonpost.com/entry/trump-hotels-fire-safety_us_57752ed5e4b0bd4b0b13b378) (“[E]mployees at the Trump National Doral, Las Vegas and Soho locations said they *do* accept government rates.”).

<sup>129</sup> See *Recipient Profile: Trump Palace Condominium*, USAspending.gov, <https://www.usaspending.gov/transparency/Pages/RecipientProfile.aspx?DUNSNumber=783051154> (last visited July 7, 2017), and *Recipient Profile: Trump Taj Mahal Associates, LLC*, USAspending.gov, <https://www.usaspending.gov/transparency/Pages/RecipientProfile.aspx?DUNSNumber=197139140&FiscalYear=2016> (last visited July 7, 2017).

<sup>130</sup> Janet Babin, *Is Donald Trump Saving NYC Millions, or Making Millions Off Taxpayers?* WNYC News (Oct. 19, 2016), <http://www.wnyc.org/story/donald-trump-saving-nyc-millions-or-making-millions-taxpayers/>.

<sup>131</sup> Bagli, *supra* note 4.

<sup>132</sup> Rosalind S. Helderman, Drew Harwell, & Tom Hamburger, *Airplanes, Golf Courses, Trademarks and More: Trump’s Government Will Oversee His Businesses*, Wash. Post (Jan. 15, 2017), [https://www.washingtonpost.com/politics/trumps-administration-will-regulate-trumps-businesses-raising-prospect-of-conflicts/2017/01/15/a2f7e53c-d913-11e6-9a36-1d296534b31e\\_story.html?utm\\_term=.df1b54e88520](https://www.washingtonpost.com/politics/trumps-administration-will-regulate-trumps-businesses-raising-prospect-of-conflicts/2017/01/15/a2f7e53c-d913-11e6-9a36-1d296534b31e_story.html?utm_term=.df1b54e88520).

- **Benefits from Local Governments in Connection with New Hotels** — Downtown developments necessarily tie up developers in lengthy, careful negotiations with city political leaders over government approvals, variances, partnerships, and incentives. Indeed, a major domestic development expansion by the Trump Organization would place local and state political leaders in direct competition to secure and reward the President’s new business ventures. Notwithstanding this, and notwithstanding the President-elect’s promise that “[n]o new deals will be done during my term in office,”<sup>133</sup> Trump Hotels is currently moving toward a major domestic expansion, potentially tripling its domestic locations.<sup>134</sup> As of February 2017, Trump’s hotel management company had identified a prospective location for a new hotel in Dallas, Texas.<sup>135</sup> Benefits conferred by local governments in connection with this expansion may run afoul of the Clause.
- **Tax Incentives for The Apprentice** — President Trump remains the executive producer of NBC’s *The Apprentice* and has used his position to promote the show.<sup>136</sup> Local and state governments often provide inducements and sweeteners to draw film and television productions to their sites. If *The Apprentice* receives such incentives, that may run afoul of the Clause.
- **Trademarks** — President Trump’s brands hold more than 100 trademark registrations, some of which will be up for renewal during his term in office; in addition, Trump has pending applications for at least eight new registrations.<sup>137</sup> The grant of a government license to exclusive rights, such as a trademark registration, may run afoul of the Clause.
- **Visas for Foreign Workers** — Since 2013, Trump’s businesses have sought visas for 500 foreign workers from the Department of Homeland Security.<sup>138</sup> The grant of valuable visas, which are in limited supply, may run afoul of the Clause.

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<sup>133</sup> Donald J. Trump (@realDonaldTrump), Twitter (Dec. 12, 2016, 8:32 PM), <https://twitter.com/realDonaldTrump/status/808529888630239232>.

<sup>134</sup> Sam Thielman, *Trump Hotels To Triple US Properties in Defiance of ‘No New Deals’ Pledge*, *The Guardian* (Jan. 25, 2017), <https://www.theguardian.com/us-news/2017/jan/25/trump-hotels-ceo-no-new-deals>.

<sup>135</sup> Candace Carlisle, *Trump Hotels’ Newest Concept to Plant Stake Near Dallas City Hall*, *Dall. Bus. J.* (Feb. 1, 2017), <http://www.bizjournals.com/dallas/news/2017/02/01/exclusive-trump-hotels-newest-concept-to-plant.html>.

<sup>136</sup> Rebecca Savransky, *Trump Opens National Prayer Breakfast with Talk About TV Ratings*, *The Hill* (Feb. 2, 2017), <http://thehill.com/homenews/administration/317510-trump-opens-national-prayer-breakfast-with-talk-about-tv-ratings>.

<sup>137</sup> Helderman et al., *supra* note 134.

<sup>138</sup> *Id.*

## IV. Potential Consequences of Trump's Failure To Divest

Because President Trump has chosen to retain ownership interests in his businesses, he enjoys a portion of any financial benefits they receive. Thus, as discussed above, to the extent those businesses receive benefits, financial or otherwise, from federal, state, or local government agencies or their instrumentalities, the President likely is running afoul of the Domestic Emoluments Clause. There are a number of possible remedies.

First, any number of parties could file suit against President Trump for his violations of the Domestic Emoluments Clause. For example, cities and states may sue to enjoin their peers from offering sweeteners to the President's businesses on the ground that the Clause was adopted partly to prevent states from winning the President's favor through financial incentives. In addition, competitor enterprises could challenge the validity of the award of incentives, subsidies, tax breaks, or other government benefits to Trump entities. Indeed, two suits are currently pending in federal district court that allege President Trump has violated the Domestic Emoluments Clause—one brought in the Southern District of New York by the nonprofit Citizens for Responsibility and Ethics in Washington and competitors to Trump businesses, and a separate one brought in the District of Maryland by the State of Maryland and the District of Columbia.

Second, and related, competing bidders, neighbors, city residents, and local officials could lodge legal or administrative challenges against the hundreds of business entities affiliated with the President, objecting to the government's initiation or continuance of business relationships with these Trump-affiliated entities, on the ground that government deals with these entities are presumptively unconstitutional.

Third, as Fordham law professor Jed Shugerman has argued, "attorneys general in states with a Trump corporation . . . can bring a quo warranto proceeding to access information about whether the entities are conduits for illegal emoluments, to enjoin those activities, to force President Trump to divest, and/or to dissolve those entities."<sup>139</sup> As Shugerman further explains, "corporations are a creature of state law, not federal law, and state attorneys general have a special role in making sure that corporations adhere to federal and state law."<sup>140</sup>

Fourth, if Congress deemed it appropriate, it could impeach the President for engaging in "High crimes and Misdemeanors."<sup>141</sup> By including the Impeachment Clause in the Constitution, the Framers empowered Congress to remove from office those federal officials who engaged in the "abuse or violation of some public trust."<sup>142</sup> The Domestic Emoluments

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<sup>139</sup> Jed Shugerman, *State Attorneys General Can Enforce the Emoluments Clause with Quo Warranto vs. Trump's Hotels*, Shugerblog (Feb. 9, 2017), <https://shugerblog.com/2017/02/09/state-attorneys-general-can-enforce-the-emoluments-clause-with-quo-warranto-vs-trumps-hotels/>.

<sup>140</sup> *Id.*

<sup>141</sup> U.S. Const. art. II, § 4.

<sup>142</sup> *The Federalist No. 65*, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Clause flatly prohibits any receipt of “Emolument[s]” by the President and provides no exceptions to this stark rule. Congress could reasonably conclude that a President who is engaged in a clear and continuing violation of the Constitution has committed a “High crime[]” or “Misdemeanor[]” and cannot serve in office.<sup>143</sup>

## Conclusion

Until recently, the Domestic Emoluments Clause garnered little attention, the result of past presidents’ commitment to ensuring they were beyond reproach. But the Clause is critical to the constitutional structure agreed to by the states at ratification. The Founders were deeply troubled by the possibility that federal or state officials would compromise the President’s independence and gain his loyalty by giving him financial benefits, and they worried that the President might use the powers of his office to enrich himself to the detriment of individual states or the nation as a whole. They thus adopted a broad and absolute prohibition on the President receiving “Emolument[s],” beyond his fixed compensation, from the federal or state governments.

By maintaining ownership of his businesses while serving as the nation’s chief executive, President Trump is likely violating this important provision of the Constitution. Until that constitutional violation is addressed, President Trump will do great damage to the rule of law and to the American people, who deserve to know with absolute certainty that when the President acts, he acts for their sake alone.

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<sup>143</sup> Cf. David Robertson, *Debates and other Proceedings of the Convention of Virginia* 345 (2d ed. 1805) (1788), <https://archive.org/details/debatesotherproc00virg> (at Virginia Ratifying Convention, Governor Edmund Jennings Randolph explained that the President would be subject to impeachment if it were discovered that he was “receiving emoluments from foreign powers”).