[ORAL ARGUMENT SCHEDULED FOR DECEMBER 9, 2019]
No. 19-5237

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Senator RICHARD BLUMENTHAL, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States of America,

Defendant-Appellant.

On Appeal from the U.S. District Court
for the District of Columbia
(Hon. Emmet G. Sullivan)

BRIEF FOR *AMICI CURIAE* CERTAIN LEGAL HISTORIANS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and *Amici*. All parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Briefs for Defendant-Appellant and Plaintiffs-Appellees.

B. Rulings Under Review. References to the rulings at issue appear in the Brief for Defendant-Appellant.

C. Related Cases. *Amici curiae* adopt the statement regarding related cases provided in the Brief for Plaintiffs-Appellees.

Dated: October 29, 2019

/s/ Erica C. Lai
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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. *Amici curiae* filed their notice of their intent to participate in this case on October 28, 2019.*

Pursuant to Circuit Rule 29(d), *amici curiae* certify that a separate brief is necessary to provide the perspective of legal historians with expertise in the history and purpose of the Foreign Emoluments Clause, and the historical meaning of the word "emolument" as it was used by the framers.

* Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel or person other than *amici* and their counsel authored any part of this brief, or contributed money intended to fund its preparation or submission.

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GLOSSARY

DEC	Domestic Emoluments Clause
DOJ	U.S. Department of Justice
FEC	Foreign Emoluments Clause

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in the Brief for Plaintiffs-Appellees and the accompanying Addendum.

INTEREST OF THE *AMICI CURIAE*

Amici curiae Professors Jed H. Shugerman, John Mikhail, Jack Rakove, Gautham Rao, and Simon Stern are legal historians who have deep expertise in the original meaning of the Foreign Emoluments Clause ("FEC"). This brief seeks to provide helpful information for the Court by (1) setting forth the history and purpose of the FEC, and (2) providing historical context concerning the definition of the word "emolument" as it was used by the framers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FEC states that "[n]o Person holding any Office of Profit or Trust under [the United States], shall, without the consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[1] The framers of the Constitution adopted the FEC to prevent corruption, conflicts of interest, undue foreign influence, and other threats to republican government, and they wrote the clause broadly to accomplish these purposes.

[1] U.S. Const. art. 1, § 9, cl. 8.

In its brief, the government contends that the FEC permits the president to receive payments from foreign states, and "prohibits only compensation accepted from a foreign government for services rendered by [U.S. officials] in either an official capacity or employment type relationship."[2] This brief explains why that view is mistaken. Part I surveys the history of the FEC, including the historical background, drafting history, and ratification history. Part II clarifies the original meaning of "emolument," based on a study of founding-era dictionaries, treatises, and other sources. Finally, Part III responds to the government's remaining historical arguments, explaining why they are weak and unconvincing.

ARGUMENT

I. HISTORY OF THE FOREIGN EMOLUMENTS CLAUSE

The framers adopted the FEC to advance core republican goals: to prevent corruption and conflicts of interest; to maintain public confidence in government; and to avoid foreign entanglements.[3] To achieve these purposes, the FEC uses sweeping language, prohibiting federal officials from accepting "any . . . emolument

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[2] DOJ Br. 39.

[3] *See* 3 Joseph Story, *Commentaries on the Constitution* 202 (1833); *accord* FEDERALIST No. 75 (Alexander) (specific concerns with the president having control over treaties and foreign relations unchecked by the Senate). The consensus among historians is that the fear of political corruption was a primary factor in the break with Great Britain and the drafting the U.S. Constitution. *See, e.g.,* Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975).

. . . of any kind whatever" from any foreign government.[4] Ample historical evidence demonstrates that the word "emolument" covered a broad range of things, including any profit, advantage, gain, or benefit derived from private commercial transactions. Its meaning was not reducible to a simple fee or salary.

a. Historical Background

In Anglo-American political thought, a concern with emoluments was closely tied to the pervasive fear of political corruption. In the mid-eighteenth century, this concern dominated Real Whig views of how the British Crown had corrupted Parliament's vaunted independence and legal supremacy after the Glorious Revolution of 1688.[5] English Whigs feared that the Crown could use an array of emoluments (e.g., offices, pensions, grants of income, and other benefits) to make Parliament docile and subservient. The American colonists also understood that these levers could be used to deprive them of self-government and fair competition.[6]

The founders were particularly animated by a famous example of the corrupt use of emoluments. In the secret Treaty of Dover of 1670, Louis XIV of France paid large sums of cash to Charles II (and provided a young French mistress) in order for Charles to convert to Catholicism and ally with France in an ill-fated war

[4] U.S. Const. art. 1, § 9, cl. 8.

[5] *See, e.g.,* Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967).

[6] *See* Jed H. Shugerman & Gautham Rao, *Emoluments, Zones of Interests, and Political Questions*, 45 Hastings Const. L.Q. 651, 657-663 (2018).

against Holland.[7] These events contributed to the Glorious Revolution of 1688, but the secret payments were not clearly revealed until 1771.[8] At the Federal Convention, Gouverneur Morris, a chief architect of the presidency, explicitly invoked this infamous episode during a debate over executive powers:

> Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay, without being able to guard agst. it by displacing him. One would think the King of England well secured agst. bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV.[9]

Although Morris did not use the word "emolument" here, this passage helps to explain why the framers adopted a constitutional prohibition on foreign emoluments. The same lesson was reinforced by Charles Cotesworth Pinckney, who cited the Treaty of Dover and "Charles II., who sold Dunkirk to Louis XIV" in the course of warning against undue foreign influence on the president.[10] Two early

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[7] Louis XIV also secretly paid James II in 1687 for similarly compromising allegiances. *See* George Clark, *The Later Stuarts, 1660-1714*, at 86-87, 130 (2d ed. 1956); Barry Coward, *The Stuart Age* 262-65, 267, 274-75 (1980).

[8] *See* J.P. Kenyon, *The History Men: The Historical Profession in England Since the Renaissance* 67-68 (Weidenfeld & Nicolson eds., 2d. ed. 1993).

[9] 2 *The Records of the Federal Convention of 1787*, at 68-69 (Max Farrand ed., 1911) [hereinafter Farrand].

[10] 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution in 1787*, at 264 (Jonathan Elliot ed., 1836) [hereinafter Elliot's

commentators on the Constitution, St. George Tucker[11] and William Rawle,[12] also emphasized the scandal of Louis XIV secretly paying Charles II as the background for the FEC. Justice Joseph Story cited these pages from Tucker and Rawle in his own *Commentaries on the Constitution* in 1833.[13] Justice Story explained that the FEC was adopted to protect against "foreign influence of every sort."[14]

Numerous founding-era documents reflect concern with the corrupting effect of emoluments. Article IV of the Articles of Confederation included language that would form the basis of the FEC: "nor shall any person holding any office of profit or trust under the United States or any [of] them, accept of any present, emolument, office, or title of any kind whatever, from any King, Prince or foreign State."[15] The drafters likely borrowed from the Dutch rule, adopted in 1651, prohibiting foreign ministers from taking "any presents, directly or indirectly, in any manner or way

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Debates].

[11] 1 St. George Tucker, *Blackstone's Commentaries with Notes of Reference to the Federal Constitution and the Constitution of Virginia* 295-96 (1803) ("In the reign of Charles the second of England, that prince, and almost all of his officers of state were either actual pensioners of the court of France, or supposed to be under its influence, directly or indirectly, from that cause.").

[12] William Rawle, *A View of the Constitution of the United States* 120 (1829) ("[I]t is now known that in England a profligate prince [Charles II] and many of his venal courtiers were bribed into measures injurious to the nation by the gold of Louis XIV.").

[13] 3 Story, *supra* note 3, at 216 n. 1.

[14] *Id*. at 216.

[15] 5 *Journals of the Continental Congress, 1774-1789*, at 675 (Worthington C. Ford et al. eds., 1904-37) [hereinafter JCC].

whatever."[16] The French practice of giving expensive diplomatic gifts was called *presents du roi* or *presents du congé*, highlighting the problem of "presents," which the framers later expanded to include emoluments.[17]

Two other foundational texts of 1776 also illustrate the link between a broad understanding of emoluments and core republican values. Article IV of the Virginia Declaration of Rights states "[t]hat no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."[18] Article V of the Pennsylvania Constitution similarly declares "[t]hat government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett of men, who are a part only of that community."[19] Later, New Hampshire's 1784 Constitution and Vermont's 1793 Constitution contained almost identical clauses.[20] All these state constitutions use the word "emolument" broadly to mean a benefit or advantage.

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[16] Zephyr Teachout, *Corruption in America: From Franklin's Snuffbox to Citizens United* (2014) (citing John Bassett Moore & Francis Wharton, *A Digest of International Law* 579 (1906)).

[17] *Id.* at 19.

[18] Va. Const. sec. 4 (1776).

[19] Pa. Const. art. 5 (1776).

[20] *See* N.H. Const. art. 10 (1784); Vt. Const. ch. 1, art. 7 (1793); *see generally Op. of the Justices (Mun. Tax Exemptions for Elec. Util. Pers. Prop.)*, 746 A.2d 981, 987 (N.H. 1999); *In re Op. of the Justices*, 190 A. 425 (N.H. 1937); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

Moreover, like the FEC itself, all of these provisions reflect fundamental republican commitments: that government is a public trust derived from the people; that the material benefits it provides public officials are to be regarded solely as compensation for public duties, not opportunities for personal enrichment; that hereditary power is anathema to good government; and that American officials must operate independently of undue foreign or domestic influences.

Under the Articles of Confederation, neither the Continental Congress nor the state governments had anything resembling an institutional bureaucracy, so they necessarily relied on merchants and commissaries to obtain the goods and services needed to sustain the war effort. There were no mechanisms readily available to monitor these exchanges, and charges of corruption flowed freely. Merchants like Robert Morris, who played a critical role in importing military supplies while also serving as Superintendent of Finance, frequently blended their public and private ventures.[21] Morris's critics attacked his conflicts of interest, referring explicitly to his pursuit of personal "emoluments."[22] Partly as a result, an emoluments restriction was placed in the 1784 and 1788 Consular Conventions with France,[23] as well as the

[21] *See, e.g.*, E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790*, at 70-105 (1961).

[22] *See, e.g.*, *Boston Evening Post and the General Advertiser*, May 3, 1983, at front page (printing one such criticism by "Lucius" after the Newburgh controversy).

[23] *See* "Consular Convention between His Most Christian Majesty and the

1789 Act to Establish the Treasury Department.[24] In its brief below, DOJ asserted that "the history of the [FEC]'s adoption is devoid of any concern about an official's private commercial businesses."[25] The example of Robert Morris, the emoluments prohibitions adopted by American governments from 1776 to 1789, and the drafting and ratification history of the Constitution themselves, all undercut this claim.

b. The Constitutional Convention

The FEC was not controversial at the Federal Convention. Its first appearance came with the work of the Committee of Detail, which prohibited the United States from granting "any Title of Nobility."[26] On August 23, 1787, Charles Pinckney then moved to add that "No person holding any office of profit or trust under the U.S. shall without the consent of the Legislature, accept of any present, emolument, office or title of any kind whatever, from any King, Prince or foreign State."[27] As reported by James Madison, Pinckney urged "the necessity of preserving foreign

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Thirteen United States of North America," *in* 4 *The Diplomatic Correspondence of the American Revolution* 198-208, 199-200 (1829); "Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls between the United States and France," *in* 1 *The American Diplomatic Code, Embracing a Collection of Treaties and Conventions between the United States and Foreign Powers* 70-82 (Jonathan Eliot ed., 1834).

[24] *See* 1st Cong., Sess. 1, Stat. 65 (1789-1799).

[25] J.A. 234.

[26] 2 Farrand, *supra* note 9, at 169, 183.

[27] *Id.* at 389.

Ministers & other officers of the U.S. independent of external influence."[28] This rationale tracks the Dutch rule's focus on "foreign ministers,"[29] but Pinckney's proposal went further and closely tracked the language of the Articles of Confederation, covering any office of profit or trust under the United States. His motion was promptly approved unanimously.[30]

A narrow definition of "emolument" limited to payments for official services is inconsistent with the text chosen by the framers in 1787. The FEC seeks to prevent activities that have the potential to influence or corrupt the person who profits from them. That is why it prohibits presents, offices, and titles, as well as emoluments. Nothing in the historical record suggests that the ban on foreign presents extends only to gifts received for the performance of an official duty, or that foreign offices or titles would be legitimate if they were not connected to a federal office. Similarly, nothing in the text or context of the FEC suggests that it permits federal officials to accept foreign emoluments so long as they are not given for official services. Any such exception would open a major loophole for foreign states (and U.S. officials) to defeat the FEC's purposes.[31] It also would be in obvious

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[28] *Id.*

[29] Teachout, *Corruption in America*, *supra* note 16, at 27.

[30] 2 Farrand, *supra* note 9, at 389.

[31] On DOJ's reading, the FEC extends to (1) all gifts whatsoever, and (2) all offices and honorary titles whatsoever, but *only* (3) those payments relating to the performance of official duties. This interpretation leaves out a large swath of

tension with the FEC's text: "any . . . Emolument . . . of any kind *whatever*" is not limited to official services or salaries. Furthermore, as applied to the president, such a narrow reading would conflict with the duty of faithful execution of the laws, embodied in the Take Care Clause and Presidential Oath, a duty that from medieval times up to the founding signified an obligation to serve the public interest and to avoid self-dealing.[32]

c. The Ratification Debates

Once the Constitution was submitted to the state ratification conventions, the FEC was largely, though not wholly, neglected. The most significant exchange, involving two important framers—George Mason and Edmund Randolph—took place in the Virginia ratification convention on June 17, 1788, in conjunction with a debate over presidential elections. Randolph first explained the purposes of the FEC in terms of "greater security" in the context of war, diplomacy, and anti-corruption:

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

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arrangements that create opportunities for corruption and conflicts of interest.

[32] *See* Andrew Kent, Ethan J. Leib, & Jed H. Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019).

> I believe that if, at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.[33]

Two points in this passage deserve emphasis. First, Randolph used the word "emolument" in its broadest sense: All men have a "natural right" to receive emoluments "from anyone." The only limitation would be "the regulations of the community" (and not the appointment to a specific office). This sentence makes sense only if emoluments include profits from private market transactions. Second, Randolph highlights the appearance of corruption as a problem addressed by the FEC: The "supposed" corruption or perception thereof would have been enough to endanger the crucial French-American alliance during Revolution.

For his part, Mason was concerned that the president might seek to stay in office "for life" and worried that "the great powers of Europe" would have a deep interest in the selection and continuation of the president. "This very executive officer, may, by consent of Congress, receive a stated pension from European Potentates," Mason warned. It would also "be difficult to know, whether he receives emoluments from foreign powers or not." Moreover, presidential electors might also "be easily influenced" again by foreign emoluments.[34] In reply, Randolph

[33] 3 Elliot's Debates, *supra* note 10, at 465-66; 3 Farrand, *supra* note 9, at 327.

[34] 10 *Documentary History of the Ratification of the Constitution* 1365-66 (Merrill

argued that the requirement that electors be appointed separately in the states and vote on the same day "renders it unnecessary and impossible for foreign force or aid to interpose." But should the president be charged with "receiving emoluments from foreign powers," Randolph continued, the Constitution supplied remedies, including impeachment.[35] This exchange between Mason and Randolph—two Virginians who attended the Federal Convention—is certainly revealing, especially in referring to foreign intervention in presidential elections.

The ratification debates of 1787-88 are important for another reason. They demonstrate that the term "emolument"—a word which sounds archaic today, but which was common then—had an array of uses. The salary or fees one might earn from holding government office were common uses of the term, but they were hardly exhaustive. In general, "emolument" was synonymous with multiple forms of material benefit and enrichment that applied not only to individuals, but also to whole communities, classes, and regions. In the Virginia ratifying convention, for example, future U.S. Senator William Grayson invoked the economic advantages to be enjoyed by merchants residing at the national capital: "The whole commerce of the United States may be exclusively carried on by the merchants residing within the

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Jensen et al. eds., 1976-present) (U. Va. Rotunda Database) [hereinafter DHRC].

[35] *Id.* at 1367. The fact that Congress plays a role in these remedies does not mean that they trigger the political question doctrine. *See* Shugerman & Rao, *supra* note 6.

seat of Government . . . . How detrimental and injurious to the community, and how repugnant to the equal rights of mankind, such exclusive emoluments would be."[36] Likewise, James Madison described the benefits of American neutrality in a future European war in this manner: "We need not expect in case of such a war, that we should be suffered to participate of the profitable emoluments of the carrying trade, unless we were in a respectable situation."[37]

II. "EMOLUMENT" IN FOUNDING-ERA DICTIONARIES, TREATISES, AND OTHER SOURCES

In its brief, DOJ defines the word "emolument" as "profit arising from office or employ," arguing that this narrow "office-or-employment" meaning is grounded in contemporaneous dictionaries and intertextual analysis of the Constitution.[38] However, a substantial body of evidence from founding-era dictionaries, treatises, and other sources confirms that "emolument" had a broad meaning in the eighteenth century, which encompassed profits from ordinary business transactions.

a. The Government's Narrow Definition of "Emolument" is Inaccurate, Unrepresentative, and Misleading

First, the government's continued reliance on founding-era dictionaries is fundamentally flawed. A comprehensive study of English language dictionaries from 1604 to 1806 shows that *every* definition of "emolument" published during this

[36] 10 DHRC, *supra* note 34, at 1191.

[37] *Id*. at 1206.

[38] DOJ Br. 39-46.

period relies on one or more of the elements of the broad definition DOJ rejects in its brief: "profit," "advantage," "gain," or "benefit." Furthermore, over 92% of these dictionaries define "emolument" *exclusively* in these terms, with no reference to "office" or "employment." By contrast, DOJ's preferred definition—"profit arising from office or employ"—appears in less than 8% of these dictionaries. Even those outlier dictionaries always include "gain, or advantage" in their definitions, a fact obscured by DOJ's selective quotation of only one part of its favored definition from Barclay.[39]

Second, the idea that "emolument" was a legal term of art at the founding, with a sharply limited "office- and employment-specific" meaning, is also inconsistent with the historical record. The founding generation used the word "emolument" in a broad variety of contexts, including private commercial transactions. Moreover, none of the most significant common law dictionaries published from 1523 to 1792 even includes "emolument" in its list of defined terms. In fact, this term is only used in these legal dictionaries to define or explain other,

[39] *See* John Mikhail, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 Val. U. L. Rev. 631 (2019); John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries* 1523-1806 (June 30, 2017), https://ssrn.com/abstract=2995693; *see also* Appellees Br. 51-52 (explaining why even Barclay's supposedly narrower definition does not support the government's argument).

less familiar words and concepts. These findings reinforce the conclusion that "emolument" was not a term of art with a highly restricted meaning.[40]

Third, little or no evidence indicates that the two eighteenth-century dictionaries—Barclay (1774) and Trussler (1766)—on which DOJ has relied throughout this lawsuit for its "office- and employment-specific" definition of "emolument" were owned, possessed, or used by the founders, let alone had any impact on them, or on those who debated and ratified the Constitution. For example, neither of these sources is mentioned in the more than 178,000 searchable documents in the *Founders Online* database, which makes publicly available the papers of the six most prominent founders. Nor do they appear in other pertinent databases, such as *Journals of the Continental Congress*,[41] *Letters of Delegates to Congress*,[42] *Farrand's Records*,[43] *Elliot's Debates*,[44] or the *Documentary History of the Ratification of the Constitution*.[45] By contrast, all of the dictionaries that the

[40] *See* Mikhail, *Definition of "Emolument," supra* note 39.

[41] *See* JCC, *supra* note 15.

[42] *See Letters of Delegates to Congress 1774-1789* (Paul H. Smith et al. eds., 1976-2000).

[43] *See* Farrand, *supra* note 9.

[44] *See* Elliot's Debates, *supra* note 10.

[45] *See* DHRC, *supra* note 34.

founding generation did possess and use regularly define "emolument" in the broad manner favoring the plaintiffs: "profit," "advantage," "gain," or "benefit."[46]

b. "Emolument" Had a Broad Meaning in Eighteenth Century Legal and Economic Treatises

i. "Emolument" in Blackstone's *Commentaries*

In William Blackstone's *Commentaries on the Laws of England*—probably the best-known legal treatise when the Constitution was adopted—the word "emolument" occurs on sixteen occasions.[47] Although some of these contexts involve government officials, the majority of Blackstone's usages of "emolument" refer to benefits other than public salaries or perquisites.

For example, Blackstone uses "emolument" in the context of family inheritance, private employment, and private ownership of land. He refers to "the power and emoluments" of monastic orders; to "the rents and emoluments of the estate" managed by ecclesiastical corporations; and to the "pecuniary emoluments" which the law of bankruptcy assigns to debtors. Blackstone describes the

[46] *See, e.g.,* Samuel Johnson, *A Dictionary of the English Language* (1st ed. 1755) ("Profit; advantage"); Nathan Bailey, *A Universal Etymological Dictionary* (2d ed. 1724) ("Advantage, Profit"); Thomas Dyche & William Pardon, *A New General English Dictionary* (8th ed. 1754) ("Benefit, advantage, profit"); John Ash, *The New and Complete Dictionary of the English Language* (1st ed. 1775) ("An advantage, a profit"); John Entick, *The New Spelling Dictionary* (1st ed. 1772) ("Profit, advantage, benefit"). *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419 (2012) (identifying Johnson, Bailey, Dynche & Pardon, and Ash as "the most useful and authoritative" English dictionaries from 1750 to 1800).

[47] *See* Mikhail, *Emoluments and President Trump*, *supra* note 39.

advantages to third-party beneficiaries of a gift as "the emolument of third persons." He uses "emolument of the exchequer" to refer to an increase in the national treasury. Finally, in explaining the law of corporations, he characterizes "parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish" as among the "emoluments" vested in the church parson.[48]

A further illustration of Blackstone's broad understanding of emoluments can be found in the forms of "Conveyance by Lease and Release" that appear at the end of Book II of the *Commentaries*. In the first of these forms ("Lease, or Bargain and Sale, for a year"), Blackstone lists "emoluments" among the benefits that are transferred when conveying parcels of land. Blackstone uses the same language in his second form ("Deed of Release"). Both forms can also be found in his *Analysis of the Laws of England* (1756). In fact, many form books and other legal manuals of the period included similar templates. In Giles Jacob's *Law Dictionary* (1729), for instance, one finds a "Form of a Release and Conveyance of Lands" with similar language, in which "A.B." conveys to "C.D." a piece of property together with "all .

[48] *See* 2 William Blackstone, *Commentaries on the Laws of England* 18, 23, 50, 185, 318 (S. Stern ed., 2016) (1765) (third persons, private employment, inheritance, estates, and bankruptcy); 1 Blackstone, *Commentaries* 75, 247, 304 (D. Lemmings ed., 2016) (1765) (land, monastic orders, and corporations); 4 Blackstone, *Commentaries* 277 (R. Paley ed., 2016) (1769) (exchequer).

. . Easements, Profits, Commodities, Advantages, Emoluments, and Hereditaments whatsoever."[49]

When Americans bought and sold property during the founding era, they frequently referred to emoluments in their deeds and conveyances. For example, on January 5, 1787, Francis Lewis, a prominent New Yorker who signed the Declaration of Independence and Articles of Confederation, placed a notice in *The New-York Packet* announcing the sale of land at a public auction, together with "all buildings, ways, paths, profits, commodities, advantages, emoluments and hereditaments whatsoever . . . ." Lewis's advertisement ran throughout the spring and summer of 1787. As with Blackstone's form contracts, the emoluments to which he referred were not government salaries, but rather private benefits that ran with the land.[50]

ii. "Emolument" in Pufendorf's Law of Nature and Nations, and Smith's Wealth of Nations

With the possible exception of Hugo Grotius, no early modern writer on the law of nations was more influential than Samuel Pufendorf. The founders were familiar with Pufendorf's treatise and often quoted Basil Kennet's English

[49] *See* Mikhail, *Emoluments and President Trump*, *supra* note 39.

[50] *Id*.

translation.[51] In Kennet's translation, the word "emolument" occurs twice, both referring to private market transactions.[52] Likewise, many of the founders were well-acquainted with Adam Smith and his influential economic theories.[53] The word "emolument" also occurs twice in *The Wealth of Nations*. Once again, both instances involve private market transactions (monopolistic profits and bank interest).[54]

In sum, treatise writers like Blackstone, Pufendorf, and Smith did not use "emolument" in the restricted fashion advocated by DOJ in its brief. In their usage, "emolument" was not a rigid term of art, but rather a flexible word used to refer to a wide range of profits and benefits.

c. The Founders' Usage of "Emolument"

A search for the word "emolument" in various databases produces countless examples of the founders using that term broadly to mean profits, benefits, or advantages, including statements by Hamilton, Madison, Washington, Adams,

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[51] *See* Bernard Schwartz, *Thomas Jefferson and* Bolling v. Bolling*: Law and the Legal Profession in Pre-Revolutionary America* 417-18 (1997); 2 *The Papers of John Adams* 288-307 (R. Taylor ed., 1977); 1 *Collected Works of James Wilson* 478-79 (K.L. Hall & M.D. Hall eds., 2007) [hereinafter *Wilson Works*]; 15 *The Papers of Alexander Hamilton*, 65-69 (H.C. Syrett ed., 1969).

[52] Samuel Pufendorf, *On the Law of Nature and Nations* 259-60, 271 (Basil Kennet trans., 3d ed. 1717) (1672).

[53] *See* 23 *The Papers of Benjamin Franklin* 241-43 (1983) (W. B. Willcox ed., 1983); 6 *The Papers of James Madison* 62-115 (W. T. Hutchinson & W. M. E. Rachal eds., 1969); David Lefer, *The Founding Conservatives* 245-246 (2013); 1 *Wilson Works*, *supra* note 51, at 60-79, 73-74.

[54] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 26, 208 (Robert Maynard Hutchins ed., 1952) (1776).

Jefferson, Jay, and others—more examples than could possibly be cited in this brief. Here are some illustrations:

In response to the notorious Townshend Acts, American colonists formed nonimportation associations, which pledged not to purchase British goods until their grievances were met. In 1770, one such group in Virginia retaliated against local merchants who refused to join the boycott. Denouncing these holdouts, George Washington, Thomas Jefferson, and other prominent Virginians vowed to "avoid purchasing any commodity . . . from any importer or seller of British merchandise or European goods, whom we may know or believe . . . to have preferred their own private *emolument*, by importing or selling articles prohibited by this association."[55]

In the summer of 1786, James Madison and James Monroe invited Jefferson to join them in a purchase of land in upstate New York. The terms of Madison's proposal called for Jefferson to borrow "four or five thousand louis" (*i.e.*, French coins) "on the obligation of Monroe and myself, with your suretyship to be laid out by Monroe and myself for our triple *emolument*: an interest not exceeding six per cent to be paid annually and the principal within a term not less than eight or ten years."[56]

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[55] 10 *The Papers of Thomas Jefferson* 43-48 (J. Boyd ed., 1950) (emphasis added).

[56] *Id.* at 229-36.

George Washington often used the word "emolument" in private commercial contexts.[57] Likewise, in his argument in *Hite v. Fairfax*, John Marshall described a property title dispute in these terms: "Again, the words are 'and where upon such grants, quit-rents have been reserved[,]' [p]lainly referring the word *such* to those grants, from the terms of which some advantages, profits and *emoluments* arose to the crown."[58]

Finally, the Continental Congress,[59] the U.S. Supreme Court,[60] and state supreme courts[61] of the Early Republic also frequently used unqualified references

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[57] *See, e.g.*, Letter from Washington to Colonel Josias Carvil Hall (Apr. 3, 1778), (U. Va. Rotunda Database [hereinafter Rotunda]); Letter from Washington to William Livingston (Apr. 11, 1778) (Rotunda); Letter from Washington to John Price Posey (Aug. 7, 1782), *in The Papers of George Washington* 181-82 (Edward G. Lengel ed., U. Va. Press, 2010); Letter from Washington to Elias Boudinot (June 17, 1783), *in Founders Online,* National Archives, http://founders.archives.gov/ documents/Washington/ 99-01-02-11469; Letter from Washington to Friedrich von Poellnitz (Mar. 23, 1790) (Rotunda); Letter from Washington to Samuel Vaughn (Aug. 25, 1791) (Rotunda); Letter from Washington to James McHenry (July 7, 1797) (Rotunda).

[58] *Hite v. Fairfax* 8 Va. (4 Call) 42, 76 (1786) (emphasis added); *see also* Letter from John Marshall to Carey and Lea, *in* 12 *The Papers of John Marshall* 209 (Charles F. Hobson ed., 2006) (referring to "emolument" in the context of a private business transaction).

[59] *See, e.g.,* Address to the People of Great Britain (Oct. 21, 1774), *in* 1 JCC 84 ("You restrained our trade in every way that could conduce to your emolument."); Declaration of Causes and Necessity for Taking Up Arms (July 6, 1775), *in* 2 JCC 144 ("These devoted colonies were judged to be in such a state, as to present . . . all the emoluments of a statuteable plunder."); Olive Branch Petition (July 8, 1775), *in* 2 JCC, *supra* note 15, at 159 ("your loyal colonists . . . doubted not but that they should be permitted . . . to share in the

to "emoluments" in the context of market transactions, profits, and general benefits. In contrast, when the founders wanted to refer to the narrower office-based definition that DOJ proposes, they often used the phrase "emoluments of office" or similar language. Madison did so, for example, in Federalist No. 55.[62] Likewise, Washington, Jefferson, Adams, Jay, Federal Farmer, and the U.S. Congress also employed this type of qualified language to refer to office-based emoluments.[63]

III. THE GOVERNMENT'S OTHER HISTORICAL ARGUMENTS

The remaining historical arguments in the government's brief are weak and unconvincing. The government first argues that a broad meaning of "emolument"

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blessings of peace, and the emoluments of victory and conquest.").

[60] *See Himely v. Rose*, 9 U.S. (5 Cranch) 313, 318-19 (1809) (Johnson, J.); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 688 (1819) (Story, J.).

[61] *Ellis v. Marshall*, 2 Mass. 269, 276 (1807); *Yancey v. Hopkins*, 15 Va. (1 Munf.) 419, 422 (1810); *President of Portland Bank v. Apthorp*, 12 Mass. 252, 255 (1815).

[62] FEDERALIST No. 55 (Madison); *cf.* 1 Farrand, *supra* note 9, at 386 (noting that Madison moved to add "or the emoluments thereof" after "to such offices only as should be established").

[63] *See, e.g.*, An Act Further to Establish the Compensation of Officers of the Customs (May 7, 1822), 17th Cong., Sess. 1, Stat. 693; An Act Respecting the Compensation of the Collectors Therein Mentioned (Mar. 8, 1817), 14th Cong., Sess. 2, Stat. 368; Letter from Washington to Joseph Jones (Dec. 14, 1782) (Rotunda); Letter from Washington to Benjamin Lincoln (Oct. 2, 1782) (Rotunda); Letter from Thomas Jefferson to Washington (Sept. 9, 1792) (Rotunda); Federal Farmer, *An Additional Number of Letters to the Republican, New York, Letter IX*, (Jan. 4, 1788) (Rotunda); Letter from John Jay to Samuel Shaw (Jan. 30, 1786) (Rotunda).

would produce a surplusage or redundancy because it would include presents, but that argument fails for at least two reasons. First, the terms "presents" and "emoluments" have some overlap, but they do not overlap completely, and the words also have different connotations. Second, the ultimate origin of the FEC lies with the Dutch bar on "presents," which the Americans broadened by adding the term "emoluments," without deleting the earlier wording. As legal texts evolve, historical layers sometimes resist the logic of interpretive canons.

The government points out that three early presidents (Washington, Jefferson, and Madison) maintained active plantations while in office, and at least some of them "exported their goods to other nations."[64] It speculates that these activities *might* have included commercial transactions with foreign governments, but it provides no evidence that any such transactions occurred.

The government also argues that because George Washington purchased several lots of public land from the federal government in 1793, the plaintiffs' broad definition of "emolument" must be mistaken. Even if one accepts that these lots were publicly owned (a premise rejected by the plaintiffs), this conclusion does not follow. Unlike the FEC, the Domestic Emoluments Clause ("DEC") does not use sweeping language ("of any kind whatever"), and it can be construed to refer to

[64] DOJ Br. 43.

emoluments the President receives "for his services" as President,[65] as DOJ itself maintains in its brief. On its own reading of the DEC, then, Washington's land purchases fall outside the scope of that clause. The same analysis can be applied to the "U.S. Treasury Bonds and various other state and municipal securities" to which DOJ refers in its brief. Because any profits from these securities would not be received by the president "for his services" as president, they are not covered by the DEC, on this interpretation of its scope. The precise definition of "emolument" is immaterial to this analysis. On any definition, the outcome would be the same.

Finally, the government argues that "emolument" must have a narrow meaning because of a failed constitutional amendment in 1810 that provided:

> If any citizen of the United States shall . . . without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.[66]

The government argues that a broad definition of emoluments in this context would be "inconceivable."[67] We do not think that word means what they think it means. In 1810, Americans *conceived* precisely of this problem. The historical context clarifies why. On a war footing during the Napoleonic Wars and rising

[65] Mikhail, *Emoluments and President Trump*, *supra* note 39.

[66] DOJ Br. 45.

[67] *Id.* 32.

conflict with England, Americans on both sides of the French/British divide worried that European powers were financing American newspapers as partisan propaganda outlets, thus creating "a partisan press financially beholden to and funded by European powers."[68] Like the FEC itself, the 1810 proposal only applied to foreign governments; thus, a broad meaning of "emolument" would have served as a barrier to subsidizing this type of foreign state propaganda. Furthermore, strict prohibitions on foreign commerce were not uncommon during this era. In 1774, for example, the the First Continental Congress famously committed the American people to a nearly complete trade boycott against the British.[69] Likewise, in 1794,[70] between 1798 and 1800,[71] and between 1806 and 1815,[72] Congress repeatedly imposed embargoes and restricted private commerce and intercourse with foreign powers. For example, during the Quasi-War with France, the 1799 Logan Act criminalized "any

[68] Gideon Hart, *The "Original" Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment*, 94 *Marq. L. Rev*. 311, 344 n. 177-78 (2010) (colorful quotations from newspapers in 1809-1811 making these allegations).

[69] 1 JCC, *supra* note 15, at 75-81 (outlining a comprehensive "non-importation, non-consumption, and non-exportation agreement" on behalf of the delegates and their constituents). Among other founders, these "Articles of Agreement" were signed by John and Samuel Adams, Samuel Chase, John Dickinson, John Jay, Patrick Henry, Caesar Rodney, John and Edward Rutledge, Roger Sherman, and George Washington.

[70] 1 Stat. 400-01 (1794).

[71] 1 Stat. 565 (1798); 1 Stat. 611 (1798); 1 Stat. 613 (1799).

[72] 2 Stat. 379 (1806); 2 Stat. 451 (1807); 2 Stat. 473 (1808); 2 Stat. 506 (1809); 2 Stat. 528 (1809); 2 Stat. 605 (1810); 2 Stat. 700 (1812); 2 Stat. 778 (1812); 3 Stat. 88 (1813); 3 Stat. 123 (1814); 3 Stat. 195 (1815).

correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States."[73] In sum, Congress was not troubled by overly broad restrictions on foreign entanglements during this period, when the United States was relatively weak and vulnerable.

CONCLUSION

English language dictionaries published from 1604 to 1806, the influential writings of Blackstone, Pufendorf, and Smith, and contemporary usage by the founders all confirm a broad definition of the word "emolument": as "profit," "advantage," "gain," or "benefit." More significantly, the history of the FEC, beginning with its European background through the Articles of Convention, the Philadelphia Convention, and the ratifying debates, clearly demonstrates that it was meant to serve as a broad and robust protection against corruption, conflicts of interest, and foreign entanglements, and to defend republican values. The founders feared that foreign governments would use financial pressure and incentives to influence and corrupt American officials, or to create the appearance of corruption. Only a broad interpretation of the Foreign Emoluments Clause can guard against such improper influence and be true to the founders' republican purposes.

[73] 1 Stat. 613 (1799).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,481 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: October 29, 2019

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 25(d) and Circuit Rule 25, that on October 29, 2019, the foregoing was electronically filed with the Clerk of the Court, using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

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