

# THE FOREIGN EMOLUMENTS CLAUSE: TRACING THE FRAMERS’ FEARS ABOUT FOREIGN INFLUENCE OVER THE PRESIDENT

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*“Foreign influence is truly the Grecian horse to a republic. We cannot be too careful to exclude its influence.”*<sup>1</sup>

—Alexander Hamilton

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1. *Pacificus* No. 6 (July 1793), *reprinted in* 15 *THE PAPERS OF ALEXANDER HAMILTON, JUNE 1793?–JANUARY 1794*, at 100-06 (Harold C. Syrett ed., Columbia Univ. Press, 1969).

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## I. INTRODUCTION

Amid the 2016 presidential election that brought us President Trump, legal historians resuscitated a historically overlooked constitutional provision from obscurity: the Foreign Emoluments Clause. This Clause provides that “no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”<sup>2</sup> Historians posited that, if his business entanglements follow him into office, President Trump could be violating the Clause.<sup>3</sup> No sitting president has ever been found to be in violation of the Clause. Then again, the Oval Office has never seen the likes of Donald J. Trump, whose business schemes and proclivity toward indebtedness—ideal access points for foreign interests seeking to influence U.S. policy—were exactly the types of things the Framers sought to avoid in a sitting president.<sup>4</sup> Now, the historians’ earlier predictions have reverber-

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2. U.S. CONST. art. I, § 9, cl. 8.

3. See, e.g., Zeke J. Miller, *How Donald Trump Could Legally Make Himself Richer in Office*, TIME (Sept. 24, 2016), <http://time.com/4506757/donald-trump-ethics-conflict-business/> [<https://perma.cc/6GX4-7W5L>].

4. See Chris Isidore, *Everything You Want to Know About Donald Trump's Bankruptcies*, CNN MONEY (Aug. 31, 2015), <https://money.cnn.com/2015/08/31/news/companies/donald-trump-bankruptcy/> [<https://perma.cc/PKJ6-5RGE>] (listing Trump's four bankruptcy filings). According to the Attorney General, Special

ated into lawsuits and calls for impeachment.<sup>5</sup> At least two courts may soon answer the question whether President Trump's business dealings involving foreign officials, including foreign diplomats' visits to Trump hotels, violate the Clause.<sup>6</sup> Not only would the outcome provide some long overdue clarity in an important area of constitutional law, but it would also shed some light on just how deep the rabbit hole of Trump's foreign network goes.

This Note aims to demonstrate that delineating the parameters of the Foreign Emoluments Clause is especially critical today, as the values and ideals instilled in the Constitution are under threat by

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Counsel Robert Mueller's investigation found no evidence of a conspiracy or an "agreement—tacit or express—between the Trump Campaign and the Russian government on election interference." See Letter from William Barr, Att'y Gen., to Hon. Lindsey Graham, Hon. Jerrold Nadler, Hon. Dianne Feinstein, and Hon. Doug Collins, H. and S. Judiciary Comms. (Mar. 24, 2019). Unlike that offense, a Foreign Emoluments Clause violation is triggered upon a president's acceptance of an emolument or gift from a foreign government, without congressional consent. An investigation into Trump's inaugural committee and emoluments lawsuits brought against Trump are ongoing. See Letter from William Barr, Att'y Gen., to Hon. Lindsey Graham, Hon. Jerrold Nadler, Hon. Dianne Feinstein, and Hon. Doug Collins, H. and S. Judiciary Comms. (Mar. 24, 2019); Maggie Haberman and Ben Protess, *Trump Inaugural Committee Ordered to Hand Over Documents to Federal Investigators*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/us/politics/trump-inaugural-committee-subpoena.html>. Michael Cohen, President Trump's former lawyer, pleaded guilty to making false statements to Congress under oath about plans for a Trump Hotel Moscow. See Plea Agreement at 1-8, United States v. Cohen, No. 18 Civ. 602 (WHP) (S.D.N.Y. filed Nov. 29, 2018). The Donald J. Trump Foundation agreed to dissolve after New York Attorney General Barbara Underwood accused the so-called charity of illegally coordinating with the 2016 Trump campaign. See Shane Goldmacher, *Trump Foundation Will Dissolve, Accused of 'Shocking Pattern of Illegality'*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/nyregion/ny-ag-underwood-trump-foundation.html>.

5. See First Amended Complaint, *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17 Civ. 1154 (EGS)); Original Complaint, *District of Columbia v. Trump*, 315 F.Supp.3d 875 (D. Md. 2018) (No. 17 Civ. 1596 (PJM)); First Amended Complaint, *Citizens for Responsibility & Ethics in Washington ("CREW") v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458 (GBD)); Rashida Tlaib & John Bonifaz, *Now is the Time to Begin Impeachment Proceedings Against President Trump*, DETROIT FREE PRESS (Jan. 3, 2019), <https://www.freep.com/story/opinion/contributors/2019/01/03/donald-trump-impeachment/2463127002/> [https://perma.cc/YZR3-CWZF].

6. Judge Peter J. Messitte of the U.S. District Court for the District of Maryland and Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia have granted plaintiffs standing to sue in lawsuits against President Trump on the foreign emoluments issue. *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 72 (D.D.C. 2018); *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 878 (D. Md. 2018).

foreign forces seeking to compromise U.S. political processes and institutions. To that end, this Note presents both historical evidence of the Framers' anti-foreign influence motivation behind the Clause as well as modern considerations, like the secrecy around dealings between the Presidency and foreign nations. At the same time, the Clause faces substantial obstacles, many of which are not addressed in this Note. Among these excluded topics are the political question and standing doctrines and a silver bullet solution for enforcing the Clause in all applicable contexts. Additionally, this Note does not address the ongoing debate about the exact individuals who fall under the Clause. Because the presidency has been at the center of this dialogue, this Note focuses on why the Clause applies to the president. A few arguments are raised as to why the Clause applies to elected officials.<sup>7</sup>

The Foreign Emoluments Clause is the product of the Framers' salient concern that foreign influence could infiltrate the U.S. federal government.<sup>8</sup> President George Washington echoed this concern in his famous Farewell Address, warning that "foreign influence is one of the most baneful foes of republican government."<sup>9</sup> To preserve America's unprecedented form of republican government—the power of which derives, not from a monarch or the government itself, but from the people<sup>10</sup>—the Framers established constitutional limits on foreign intervention in U.S. affairs. The Framers' persistent admonitions against foreign interference arose from their belief that the American political system ought to be

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7. See *infra* Section III.A.

8. Cf. NORMAN L. EISEN, RICHARD PAINTER & LAURENCE H. TRIBE, *THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP* 6 (2016) (suggesting that the Foreign Emoluments Clause was motivated by the Framers' concern regarding foreign corruption); Amandeep S. Grewal, *The Purposes of the Foreign Emoluments Clause*, 59 S. TEX. L. R. 167, 169 (2018) (noting that "most agree that the Foreign Emoluments Clause addresses corruption concerns"); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 361 (2009) (stating that the Foreign Emoluments Clause was formulated to prevent foreign corruption); Joshua Matz & Lawrence H. Tribe, *President Trump Has No Defense Under the Foreign Emoluments Clause*, AM. CONST. SOC'Y: ACS BLOG, (Jan. 24, 2017), <https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Trump%20and%20the%20Emoluments%20Clause.pdf> [<https://perma.cc/K573-AJ74>] (characterizing the Foreign Emoluments Clause as a "broad anti-corruption rule").

9. George Washington, Farewell Address (Sept. 17, 1796), in *AMERICAN DEMOCRACY FROM WASHINGTON TO WILSON: ADDRESSES AND STATE PAPERS* 1, 18 (John H. Finley ed., 1925). It is common knowledge that Hamilton wrote President Washington's Farewell Address.

10. See U.S. CONST. pmb. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America.").

largely independent from other nations. Foreign influence in the form of payments, benefits, or advantages to U.S. officeholders can pose a danger to the United States because it can slowly and surreptitiously sow the seeds of authoritarian policies, jeopardizing individual freedoms and other democratic values upon which the Constitution was formed. It can expose the U.S. policy making process to interference from despotic regimes and corrupt federal government officials.

The problem of foreign influence is no less dangerous today than it was during the lifetime of the Framers. Consider the foreign interference of the 2016 U.S. election, in which Russia hacked the voter registration systems of approximately half of the states in the United States.<sup>11</sup> Since then, Russia has sought to ‘advance’ a range of domestic and foreign political views in the United States, including anti-immigration sentiment, stances on race relations, extremism, opposition to U.S. law enforcement agencies, and support for pro-Russian policies.<sup>12</sup> What if the Russian government, known for its grave human rights violations<sup>13</sup> and rigid control over news media,<sup>14</sup> were to channel its efforts to influence U.S. policy affairs by gaining access to or bribing U.S. federal officials? The potential ramifications of this interference speak to the types of dangers that the Foreign Emoluments Clause aims to prevent. By prohibiting

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11. See Mike Levine and Pierre Thomas, *Russian Hackers Targeted Nearly Half of States’ Voter Registration Systems, Successfully Infiltrated 4*, ABC News (Sept. 29, 2016), <https://abcnews.go.com/US/russian-hackers-targeted-half-states-voter-registration-systems/story?id=424358221> [<https://perma.cc/5QTA-TXET>]; see also Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html> (detailing Russian government efforts to impact the 2016 U.S. election, including “hacked emails, social media fraud, and suspected spies”).

12. See *Tracking Russian Influence Operations on Twitter*, HAMILTON 68 (last visited Feb. 19, 2018), <http://dashboard.securingdemocracy.org> [<https://perma.cc/5J2B-4DNF>]; Sheera Frenkel & Daisuke Wakabayashi, *After Florida School Shooting, Russia ‘Bot’ Army Pounced*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/technology/russian-bots-school-shooting.html?hp&action=click&pg-type=homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news> [<https://perma.cc/49E2-4DV9>].

13. E.g., Nick Cumming-Bruce, *Russia Committed ‘Grave’ Rights Abuses in Crimea*, U.N. SAYS, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/world/europe/russia-crimea-un.html> (citing evidence by United Nation investigators of “detentions, torture and abductions” by Russian police officers in Crimea).

14. See Alexey Kovalev, *In Putin’s Russia, the Hollowed-Out Media Mirrors the State*, GUARDIAN (Mar. 24, 2017), <https://www.theguardian.com/commentisfree/2017/mar/24/putin-russia-media-state-government-control> [<https://perma.cc/Y5H4-VNZF>].

U.S. officeholders from accepting foreign gifts and emoluments, the Clause was designed to help mitigate the pernicious threat of foreign influence in the U.S. federal government, particularly from foreign government leaders whose political ideologies are antithetical to American democracy.

In the legal debate around the Foreign Emoluments Clause, two key questions remain contentious: (1) What is an emolument? (2) Does the Clause apply to the president? Legal precedent provides little insight into these questions. However, some progress has been made. On July 25, 2018, Judge Peter J. Messitte of the U.S. District Court for the District of Maryland permitted a lawsuit against President Trump to proceed, concluding that emolument “means any ‘profit,’ ‘gain,’ or ‘advantage’” and that the Clause applies to the President.<sup>15</sup> Conversely, Judge George B. Daniels of the U.S. District Court for the Southern District of New York dismissed two similar lawsuits against President Trump on standing grounds and thus did not address these questions.<sup>16</sup> It is crucial to resolve the debate surrounding the definition of “emolument” because this will help determine the scope of the Clause—whether it includes, and therefore prohibits, things like foreign bonds, favorable treatment from foreign governments, and commercial transactions involving foreign officials.

Several theories help illustrate why the courts have failed to address the contours of the Foreign Emoluments Clause. Some members of the legal community believe that the matter is a non-justiciable political question.<sup>17</sup> According to them, since the Constitution expressly grants Congress and no other political branch the power to override the foreign emoluments ban, the courts are precluded from addressing the matter.<sup>18</sup> In addition, plaintiffs face obstacles in satisfying certain elements of standing, such as injury and

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15. *District of Columbia v. Trump*, 315 F.Supp.3d 875, 878 (D. Md. 2018).

16. *CREW v. Trump*, 276 F.Supp.3d 174, 179-80 n.1 (S.D.N.Y. 2017) (stating the court’s decision does not “address whether the payments at issue would constitute an emolument”), *appeal docketed*, No. 18-474 (2d Cir. Feb. 16, 2018).

17. *E.g., id.* at 194. (“[T]his case involves a conflict between Congress and the President in which this Court should not interfere unless and until Congress has asserted its authority . . .”).

18. *E.g., id.* at 193 (“[T]he Foreign Emoluments Clause makes clear that Congress, and Congress alone, has the authority to consent to violations of that clause.”); *but see* *District of Columbia v. Trump*, 291 F.Supp.3d 725, 757 (D. Md. 2018) (“[I]n the absence of Congressional approval, this Court holds that it may review the actions of the President to determine if they comply with the [Foreign Emoluments Clause].”).

redressability.<sup>19</sup> Moreover, under a series of statutes, including the Foreign Gifts and Decorations Act,<sup>20</sup> Congress has provided advance consent for some types of gifts and emoluments—but not all—received by certain U.S. government employees from foreign governments.<sup>21</sup> Although the courts have danced around the meaning of emolument, other members of the legal community have tackled the issue head-on, including regarding whether the term should include benefits other than salary and compensation flowing from an office.<sup>22</sup>

Legal scholarship is not without its holes, however. In particular, the academic landscape has failed to give due attention to the Framers' deep concern about the presidency's unique susceptibility to foreign influence.<sup>23</sup> Singling the president out, Edmund Randolph stated at the Virginia Ratifying Convention that the Foreign Emoluments Clause is a key "provision against the danger of" the president receiving emoluments from foreign powers.<sup>24</sup> In cautioning that "foreign intrigues" may attempt to infiltrate the presidential election process, Hamilton stressed that "the executive should be independent for his continuance in office on all, but the people

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19. *E.g.*, *CREW*, 276 F.Supp.3d at 192 (S.D.N.Y. 2017) (declining to grant standing where the "time, money, and attention" a legal ethics group diverted to litigation strained their limited resources), *appeal docketed*, No. 18-474 (2d Cir. Feb. 16, 2018). For a discussion of justiciability issues associated with the lawsuits filed against President Trump, see generally Matthew I. Hall, *Who Has Standing to Sue the President Over Allegedly Unconstitutional Emoluments?*, 95 WASH. U. L. REV. 1 (2017).

20. 5 U.S.C. § 7342 (2011).

21. *E.g.*, *id.* § 7342 (c)(1)(A) (consenting to federal government employees' acceptance of foreign gifts of \$100 or less "received as a souvenir or mark of courtesy"); *id.* § 7342 (a)(5) (defining "minimal value" as \$100 or less).

22. *E.g.*, EISEN ET AL., *supra* note 8; Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639 (2017); Erik M. Jensen, *The Foreign Emoluments Clause*, 10 ELON L. REV. 73, 96 (2018); Robert G. Natelson, *The Original Meaning of 'Emoluments' in the Constitution*, 52 GA. L. REV. 1, 1 (2017); Teachout, *supra* note 9, at 361; John Mikhail, *The Definition of 'Emolument' in English Language and Legal Dictionaries, 1523-1806* (June 30, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2995693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693).

23. Some commentators even argue that the Foreign Emoluments Clause does not apply to the President. See *infra* Section III.A.; see also Seth Barrett Tillman, Colloquy, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. 180, 181-82 (2013) (arguing that the foreign emoluments ban does not apply to the President and other elected officials).

24. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, at 486 (Jonathan Elliot, 2d ed. 1827) [hereinafter THE CONVENTION AT PHILADELPHIA].

themselves.”<sup>25</sup> A violation of the Clause is among the abuses of public trust relating “chiefly to injuries done immediately to the society itself.”<sup>26</sup> Without a way out of the Foreign Emoluments Clause snafu we currently find ourselves in, any foreign intervention into U.S. policy decisions by way of President Trump’s business pursuits remains undetected. As a result, the U.S. public may be deprived of their constitutional recourse to the mounting number of potential violations of the Clause surrounding the Trump presidency.

This Note proceeds in three parts. The first part examines the textual meaning of the term “emolument” and the Framers’ foreign influence concern. In particular, the first part contributes additional support for a broad application of emolument by establishing that the Foreign Emoluments Clause is a prophylactic against foreign *influence*, a concept which is broader than foreign *corruption*.<sup>27</sup> The second part explains why and how the Clause applies to the president. To help fill in the current gap in the legal commentary around this argument, the second part establishes that the president is a special target of foreign influence. The final part suggests that President Trump’s refusal to take certain steps to separate himself from his global enterprise and failure to seek congressional approval for foreign business dealings have led to a proliferation of foreign emoluments violations.

## II.

### THE WIDE REACH OF THE FOREIGN EMOLUMENTS CLAUSE

This part demonstrates that the Framers anticipated a broad application of “emolument” in the Foreign Emoluments Clause. In so doing, it explores the usage of the term in the Constitution and Federalist Papers as well as the historical context in which the Framers were operating. Importantly, it introduces the foreign emoluments ban as a prophylactic against foreign influence. Relying on the findings from this part, this paper adopts the broad definition of a foreign emolument referring to any payment, benefit, or advantage from a foreign state, espoused by former Ambassador Norman L. Eisen, Professor Richard W. Painter, and Professor

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25. THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012).

26. THE FEDERALIST NO. 65, at 317 (Alexander Hamilton) (Terence Ball ed., 2012).

27. In the context of the Foreign Emoluments Clause, foreign corruption is a corollary of foreign influence. See *infra* Section II.B.

Laurence H. Tribe (hereinafter “Eisen-Painter-Tribe”), and is similar to the approach recently adopted by Judge Messitte.<sup>28</sup>

A. *Competing Originalist Interpretations of the Emoluments Clause*

In interpreting “emolument” under the Foreign Emoluments Clause, commentators have turned to various sources for guidance, ranging from recent federal agency decisions, the scant case law that exists, the Federalist Papers, to dictionary definitions. Scholars relying primarily on materials that postdate the Constitution, however, will likely be led astray in their research because the usage of the term has since fallen out of fashion. And even when the term has been used in modern times, its meaning has drastically changed since the signing of the Constitution. Another problem is the fact that many of the conclusions drawn from these sources, regardless of the time period, address “emolument” within the ambit of the Domestic Emoluments Clause<sup>29</sup> or the Ineligibility Emoluments Clause,<sup>30</sup> both of which serve different functions than that of the Foreign Emoluments Clause, and thus yield different meanings of the term.

1. Originalist and Purposive Interpretive Tools: Text, Structure & Founding Era Records

To avoid the aforementioned problems, this Note relies on sources that uncover the Framers’ understanding of the term “emolument” specifically as it relates to the Foreign Emoluments Clause—most notably, the Federalist Papers and records of the Constitutional Convention.<sup>31</sup> These sources will be examined

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28. See *District of Columbia v. Trump*, 315 F.Supp.3d 875, 891 (D. Md. 2018) (“The clear weight of the evidence shows that an ‘emolument’ was commonly understood by the founding generation to encompass any ‘profit,’ ‘gain,’ or ‘advance.’”). The prophylactic anti-foreign influence function of the Foreign Emoluments Clause is evidenced by the historical context at the time of the Founders. An obvious reason is that the Framers feared European countries might seek to invade the United States for its access to the vast lands and resources of the Americas; perhaps they perceived this threat as even greater following the American Revolutionary War. Cf. THE FEDERALIST NO. 59, at 291 (Alexander Hamilton) (Terence Ball ed., 2012) (observing that the United States “will probably be an encreasing object of jealousy to more than one nation of Europe.”). For the purposes of this Note, foreign influence refers to any access to the presidency by a foreign nation through emoluments and other means prohibited under the Foreign Emoluments Clause. See *infra* Section II.B.

29. U.S. CONST. art. II, § 1, cl. 7.

30. U.S. CONST. art. I, § 6, cl. 2.

31. The Federalist Papers provide one of the most valuable perspectives into the minds of the Framers at the time they crafted the Constitution, and thereby are

through a dual lens of original meaning and purposivism, an approach that most observers have taken up to guide their interpretation of emolument.<sup>32</sup> In applying the above framework, this part concludes that the definition of emolument under the Clause is wider in scope than its usage in the other constitutional emoluments provisions.

The word “emolument” appears in the Federalist Papers a total of eleven times. Five of those times, it is employed in the context of officeholders engaged in corrupt or nefarious behavior or those who have fallen subject to foreign influence.<sup>33</sup> Six of those times, it refers to compensation or salary, most likely in relation to the Domestic Emoluments Clause and the Ineligibility Clause.<sup>34</sup> The diver-

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the ideal source for understanding the meaning of the Foreign Emoluments Clause. Referring to the Federalist Papers, Madison expressed that they contribute “the most authentic exposition of the text of the Federal Constitution, as understood by the Body which prepared and the authority which accepted it.” Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), *in* 9 THE WRITINGS OF JAMES MADISON 218, 219 (Gaillard Hunt ed., 1910).

32. *See, e.g.*, *District of Columbia v. Trump*, 315 F.Supp.3d 875, 881 (D. Md. 2018) (“Both sides embrace a blend of original meaning and purposive analysis.”); *but see* Grewal, *supra* note 8, at 178 (calling for textualism over purposivism in interpreting the Foreign Emoluments Clause).

33. THE FEDERALIST NO. 1, at 2 (Alexander Hamilton) (Terence Ball ed., 2012) (describing certain opponents of the Constitution as a “class of men” who “resist all changes which may hazard a diminution of the power, emolument and consequences of the offices”); THE FEDERALIST NO. 55, at 272 (James Madison) (Terence Ball ed., 2012) (discussing how the proposed number of House of Representatives does not increase the likelihood that the representatives would be corrupted by foreign gold or “[t]heir emoluments of office”); THE FEDERALIST NO. 59, at 290 (Alexander Hamilton) (Terence Ball ed., 2012) (“The scheme of separate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal.”); THE FEDERALIST NO. 65, at 319 (Alexander Hamilton) (stating that an official who has been impeached will lose the “esteem and confidence, and honours and emoluments of his country.”); THE FEDERALIST NO. 72, at 354 (Alexander Hamilton) (Terence Ball ed., 2012) (stating that prohibiting a President from running for office in consecutive terms could lead to improper behavior, such as embezzlement and lead an “avaricious man . . . looking forward to a time when he must at all events yield up the emoluments he enjoyed, would feel a propensity . . . to make the best use of the opportunity he enjoyed, while it lasted.”).

34. THE FEDERALIST NO. 36, at 166 (Alexander Hamilton) (Terence Ball ed., 2012) (discussing how the federal government will employ state tax commissioners by attaching them to “the Union by an accumulation of their emoluments”); THE FEDERALIST NO. 46, at 229 (James Madison) (Terence Ball ed., 2012) (explaining how the public’s attachment to state governments will lead to a “greater number of offices and emoluments” in the administration of them); THE FEDERALIST NO. 51, at 252 (James Madison) (Terence Ball ed., 2012) (“[M]embers of each department

gent treatment of emolument in the Federalist Papers suggests that the meaning of the term depends on the context in which it is used—notably, in relation to compensation, foreign influence, or corruption.

Similarly, a textual review of the three constitutional emoluments clauses reveals that “emolument” has a wider scope under the Foreign Emoluments Clause than it does under the other clauses. The Domestic Emoluments Clause, which was intended to prevent Congress and state governments from capturing the president through manipulating the president’s salary,<sup>35</sup> provides that “[t]he 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.”<sup>36</sup> The Ineligibility Clause, on the other hand, was designed in part to prevent the president from improperly influencing Members of Congress through patronage.<sup>37</sup> The Ineligibility Clause states that Members of Congress are prohibited from being “appointed 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; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”<sup>38</sup> Unlike the Foreign Emoluments Clause, the Domestic Emoluments Clause and the Ineligibility Clause focus primarily on salary and compensation requirements when referring to emoluments.

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should be as little dependent as possible on those of the others, for the emoluments annexed to their offices.”); THE FEDERALIST NO. 55, at 273 (James Madison) (Terence Ball ed., 2012) (“The members of the Congress are rendered ineligible to any civil offices that may be created or of which the emoluments may be increased, during the term of their election.”); THE FEDERALIST NO. 73, at 357 (Alexander Hamilton) (Terence Ball ed., 2012) (discussing how the Domestic Emoluments Clause prohibits the president from accepting “any other emolument, than that which may have been determined by the first act”); THE FEDERALIST NO. 77, at 373 (Alexander Hamilton) (Terence Ball ed., 2012) (comparing the power to set “honors and emoluments” with the Senate’s power to consent to the president’s appointments).

35. See THE FEDERALIST NO. 73, at 357 (Alexander Hamilton) (Terence Ball ed., 2012) (“The Legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will.”).

36. U.S. CONST. art. II, § 1, cl. 7.

37. See THE FEDERALIST NO. 55 (James Madison) (Terence Ball ed., 2012) (suggesting that the Ineligibility Clause would help prevent the President from “subduing the virtue of the Senate”).

38. U.S. CONST. art. I, § 6, cl. 2.

While many legal scholars have acknowledged that multiple definitions of “emolument” existed at the time of the Framers, they disagree on the term’s meaning in the Constitution. At the center of this debate is the *breadth* of “emolument.” In other words, how large is the umbrella of things that are considered an emolument under the Constitution? To date, commentators can be roughly grouped into two camps on the issue: a “broad emolument camp” and a “narrow emolument camp.”

## 2. The “Broad Emolument Camp”

The “broad emolument camp,” often associated with Eisen-Painter-Tribe, calls for a wide reading of “emolument,” the justification for which some have argued is to prevent even the appearance of foreign corruption.<sup>39</sup> Eisen-Painter-Tribe further conclude that emolument in the Foreign Emoluments Clause holds a broader meaning than the term as used in the other constitutional emoluments provisions.<sup>40</sup> They cite to the “of any kind whatever” language following “present, Emolument, Office, or Title” in the Clause.<sup>41</sup> This language, they argue, modifies emolument and the other items in the list, and thus emoluments are not restricted to those flowing from an office.<sup>42</sup> Under Eisen-Painter-Tribe’s approach, an officeholder’s profits from a fair market transaction constitute foreign emoluments regardless of whether the transaction involved an office-related exchange.<sup>43</sup> A corollary to this point is that a *quid pro quo* is not necessary to render a foreign emoluments violation.<sup>44</sup>

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39. See *infra* note 76; see also Jensen, *supra* note 22, at 124 (describing the function of the Foreign Emoluments Clause as “forbidding transfers from foreign governments to American officials that could call the loyalty of an official into question”).

40. EISEN ET AL., *supra* note 8, at 11; see, e.g., First Amended Complaint at 2, *supra* note 5 (stating that the Domestic Emoluments Clause is narrower than the Foreign Emoluments Clause).

41. EISEN ET AL., *supra* note 8, at 11.

42. *Id.*

43. See *id.* (concluding that a foreign emolument includes “any . . . benefit inconsistent with a purely fair market exchange in an arms-length transaction not specially tailored to benefit the holder of an Office under the United States”).

44. For a discussion on this issue as it applies to the president, see *infra* Section III.B. The U.S. District Court of Maryland has adopted a similar position. *District of Columbia v. Trump*, 315 F.Supp.3d 875, 893 (D. Md. 2018) (“There is, moreover, a substantial body of evidence suggesting that the founding generation used the word ‘emolument’ in a variety of contexts reaching well beyond payments tied to official duties.”).

### 3. The “Narrow Emolument Camp”

In the “narrow emolument camp” are Professor Amandeep S. Grewal and Professor Seth Barrett Tillman. Both suggest that a foreign “emolument” arises only out of circumstances under which an officeholder concurrently holds a U.S. Office and foreign government position or similar relationship.<sup>45</sup> They appear to diverge on the question whether the foreign government relationship must involve a legal mandate. In either case, arm’s length business exchanges—such as profits from foreign diplomats’ visits to Trump hotels—would not constitute “emoluments” and therefore would not be prohibited under the Foreign Emoluments Clause.

Grewal refers to foreign “emoluments” as compensation that an officeholder accepts “from providing services for a foreign government.”<sup>46</sup> Consequently, the Foreign Emoluments Clause would prohibit an officeholder from maintaining an employment services relationship with a foreign government while serving out their U.S. Office tenure. In a transaction involving goods, however, emoluments could not arise.<sup>47</sup> For an exchange in which payments do not reflect the market value of the goods or services, Grewal suggests excess payments may constitute prohibited gifts under the Clause or “impeachable bribes.”<sup>48</sup> In any case, Grewal’s approach poses certain logical inconsistencies. As Erik M. Jensen notes, it is unclear why the Clause should prohibit equal market value service arrangements and allow for equal market commercial good exchanges—both are “business transaction[s].”<sup>49</sup> If the Framers were concerned with “disguised payments”<sup>50</sup> because they could be bribes, for example, it would make more sense to treat the Clause as a *default rule* by which all gains officeholders receive from commercial transactions are presumed to be prohibited emoluments or gifts—regardless of whether they appear to be legitimate, fair market value transactions

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45. See Grewal, *supra* note 22, at 666 (defining emoluments as compensation for performing services that may be limited to those that “relate to the U.S. Officer’s position with the U.S. government” or “of any kind provided to a foreign government”); Motion for Leave to File Amicus Curiae Brief of Scholar Seth Barrett Tillman as Amicus Curiae in Support of the Defendant, Ex. Brief for Scholar Seth Barrett Tillman as Amicus Curiae in Support of the Defendants at 6, CREW, 276 F. Supp. 3d 174 (No. 17 Civ. 458) (arguing the Foreign Emoluments Clause prohibits “those *holding office . . . under the United States . . .* from taking emoluments associated with *foreign* government positions,” offices, and employments).

46. Grewal, *supra* note 22, at 644.

47. See *id.* at 683.

48. See *id.*

49. See Jensen, *supra* note 22, at 99.

50. See Grewal, *supra* note 22, at 642 n. 12.

on their face. The officeholder, when approaching Congress for permission to accept, has an opportunity to raise as a sort of affirmative defense the purported legitimacy of the transaction.<sup>51</sup> Along those lines, it is the role of Congress, rather than the officeholder, to determine the legitimacy of these transactions. This approach is consistent with the fact that the sole exemption for the ban on acceptance of gifts and emoluments enumerated under the Clause is where congressional consent has been secured.

Tillman's "emolument" interpretation, while covering salary and other forms of compensation, also extends to payments associated with a foreign "position" to which fixed services or duties are not necessarily attached.<sup>52</sup> Tillman's interpretation is not exactly broader than Grewal's, however. Tillman cabins the definition of emolument to payments that are fixed by law or regulations. As Tillman puts it, emoluments are "legal entitlements *mandated by public laws or regulations.*"<sup>53</sup> In the absence of a pre-determined set of services or duties, such as where a foreign employment or office is not concerned, a prohibited emolument would include a pension<sup>54</sup> or perhaps even an annuity or allowance, but only to the extent these payments are prescribed under law or regulations.

Although their "emoluments" constructions differ, Grewal and Tillman both cite as support specific language in the Supreme Court's *Hoyt* decision stating that "emoluments . . . embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of the office. . . ."<sup>55</sup> But *Hoyt* does not purport to define the entire universe of "emoluments." On its face, the cited language from *Hoyt* clearly refers only to a specific category of

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51. For example, the Foreign Corrupt Practices Act criminalizes bribes made to foreign officials, including those delivered through commercial transactions motivated by a corrupt intent, and permits defendants to prove as an affirmative defense that the payments were made to secure the performance of routine governmental action rather than official action. *See, e.g.*, Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(c) (2012). The foreign bribery offense under the Act requires evidence of a corrupt intent given the "corruptly" language in the statute. *See id.* § 78dd-1(c). As far as the Foreign Emoluments Clause is concerned, there is no intent requirement. This makes sense since the Clause is designed to make discoverable any foreign gifts, titles, and emoluments that may be hidden by a president or other officeholders.

52. *See* Brief for Scholar Seth Barrett Tillman, *supra* note 45, at 6.

53. Seth Barrett Tillman, Essay, *Business Transactions and President Trump's "Emoluments" Problem*, 40 HARV. J.L. & PUB. POL'Y 759, 771 (2017).

54. *See* Brief for Scholar Seth Barrett Tillman, *supra* note 45, at 9 (concluding that foreign emoluments can include "pensions and other perquisites").

55. *See* Grewal, *supra* note 22, at 643 n. 13 (citing *Hoyt v. United States*, 51 U.S. 109, 135 (1850)); Tillman, *supra* note 53, at 768 (same).

“emoluments”—“emoluments of an office.”<sup>56</sup> Recall that the Foreign Emoluments Clause refers to “any present, Emolument, Office, or Title, or any kind whatever . . . .” The Clause does not state “emoluments of an office” or “emoluments of employment.” Instead, it refers to “emoluments” in isolation.

#### 4. Other Originalist Legal Scholarship

Robert G. Natelson proposes four discrete emolument definitions based on sources providing insight into founding era-colloquim, including dictionaries, constitutional convention records, ratification debate records, and British and American government reform efforts.<sup>57</sup> In evaluating these four definitions, he argues that only two of the definitions can apply to the constitutional meaning of “emolument,” both of which refer only to those received for office-related purposes and so does not include profits from market transactions.<sup>58</sup> Unlike Eisen-Painter-Tribe, Natelson does not take a stance on whether the Foreign Emoluments Clause is wider in scope than the other constitutional emoluments provisions. In any case, Natelson’s evaluation of emolument is incomplete due in large part to the fact that he ignores the diverse purposes for which the constitutional emoluments provisions were crafted.<sup>59</sup> Regarding the “of any kind whatever” language unique to the Clause, Natelson argues that the constitutional language ought to be ignored “to avoid superfluous text and absurd results.”<sup>60</sup> His reasoning is that applying the “of any kind whatever” phrase might dissuade persons with foreign business dealings, such as Secretary of Finance for the Confederation Robert Morris (who was later imprisoned for his

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56. *Hoyt* refers to “emoluments of office” twice and “emoluments of the office” twice and repeatedly alludes to emoluments as interpreted under specific laws. See generally *Hoyt v. United States*, 51 U.S. 109 (1850).

57. See Natelson, *supra* note 22, at 9.

58. *Id.*

59. See *id.* at 8 (refusing to consider the values, including the anti-corruption concern, weighed by the Framers in formulating the constitutional emoluments provisions). Natelson criticizes Eisen-Painter-Tribe and Teachout for their reliance on the anti-corruption principle and for failing to address an article contending that multiple principles were balanced by the Framers in crafting one of the emoluments provisions. *Id.* It is easy to see why Eisen-Painter-Tribe and Teachout ignored this article—it examines the Ineligibility Clause and does not address the Foreign Emoluments Clause or the Domestic Emoluments Clause. See also John F. O’Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFTRA L. REV. 89 (1995) (presenting multiple principles behind the Ineligibility Clause).

60. Natelson, *supra* note 22, at 53.

debts),<sup>61</sup> from serving in public office.<sup>62</sup> However, Natelson fails to take into account the Framers' foreign influence concern driving the Clause, which helps show why officeholders' foreign business dealings are prohibited under the Clause.<sup>63</sup> Likewise, accepting that the Framers would include superfluous language in the Constitution—and such exceptional, emphatic language for that matter—would lead to even more “absurd results” than those suggested by Natelson. Suffice it to say, Natelson would be hard-pressed to convince the Supreme Court to ignore constitutional language, such as the “of any kind whatever” phrase, in interpreting the Constitution.<sup>64</sup>

James C. Phillips and Sara White (hereinafter “Phillips-White”) apply a “corpus linguistic” analytical framework to decipher the meaning of “emolument,” comprising historical materials originating from 1760-1799, including the Framers' correspondence, cases, legislative debates, books, and pamphlets.<sup>65</sup> They speculate that the term as used in the Domestic Emoluments Clause and Ineligibility Clause refers to a narrow, office-based emolument definition.<sup>66</sup> Rather than settling on a definition of emolument in the Foreign Emoluments Clause, Phillips-White state that further inquiry is needed to interpret whether the “of any kind whatever” language denotes a broader application of emolument in the provision.<sup>67</sup> The many phrases they found are often associated with the use of emolument include “private emoluments” and “pay and emolument(s).”<sup>68</sup> By limiting their search to the frequency of words surrounding “emolument” in historical documents, however, Phillips-White's approach lacks consideration of the Framers' broader commentary around the word “emolument,” such as its uses in the contexts of compensation, foreign influence, and corruption in the Federalist Papers discussed earlier in this section.

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61. See *infra* Section II.C.

62. Natelson, *supra* note 22, at 54.

63. See *infra* Section II.B.

64. In rejecting President Trump's argument that the “of any kind whatever” phrase is extraneous, Judge Messitte declared, “The more logical conclusion is one that Plaintiffs urge: The use of ‘any kind whatever’ was intended to ensure the broad meaning of the term ‘emolument.’” *District of Columbia v. Trump*, 315 F.Supp.3d 875, 888 (D. Md. 2018).

65. James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English, from 1760-1799*, 59 S. TEX. L. REV. 181 (2017).

66. *Id.* at 226.

67. See *id.* (“[I]t's unclear what impact ‘of any kind whatever’ has on determining the appropriate sense of *emoluments* in the Foreign Emoluments Clause.”).

68. *Id.* at 210.

Nevertheless, the “of any kind whatever” phrase, which is among the strongest language in the Constitution,<sup>69</sup> indicates that the broadest construction is most applicable to “present, Emolument, Office, or Title” under the Foreign Emoluments Clause. Comparatively, the fact that the Domestic Emoluments Clause and the Ineligibility Clause omit the “of any kind whatever” language suggests that “emolument” as used under these provisions primarily refers to compensation and salary. Given that the constitutional emoluments clauses serve separate functions, this Note adopts the position taken by Eisen-Painter-Tribe that “emolument” under the Foreign Emoluments Clause bears a definition that is wider and distinct from the other constitutional emoluments provisions.

*B. A Main Purpose of the Clause: Foreign Influence—a Notion Broader than Foreign Corruption*

Unlike the Domestic Emoluments Clause and the Ineligibility Clause, the Foreign Emoluments Clause is first and foremost the product of the Framers’ deep concern regarding foreign influence. This section aims to show that the Framers’ anti-foreign influence justification is the primary motivating force behind the Clause and that this motivation supports a broad interpretation of a foreign emolument. In doing so, it explores the origins of the foreign influence concern as it relates to the Clause and distinguishes foreign influence from the notion of foreign corruption.

1. Unearthing the Framers’ Concern with Foreign Influence

To be sure, the Constitution as a whole is concerned with foreign influence. In a letter to Noah Webster dated September 15, 1787, Thomas Fitzsimons, a delegate to the Constitutional Convention, stated that without the Constitution, “we shall become a prey to foreign influence and domestic violence.”<sup>70</sup> However, the origin of the Foreign Emoluments Clause, the debates surrounding its inclusion in the Constitution, and the structure of it altogether indicate that the Framers envisioned the Clause as a special antidote

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69. *Cf.* U.S. CONST. art. I, § 8, cl. 17 (stating that Congress shall have power “[t]o exercise exclusive Legislation in all Cases *whatsoever*”) (emphasis added).

70. SUPPLEMENT TO MAX FARRAND’S RECORDS OF THE FEDERAL CONVENTION OF 1787, at 273 (James H. Huston & Leonard Rapport eds., 1987); *see also* STEPHEN HOLMES, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 206 (Michael Rosenfeld & András Sajó eds., 2012) (stating that in late eighteenth century America, “the greatest threat of bribery came from ‘foreign gold’ or ‘the desire in foreign powers to gain an improper ascendant in our councils’”) (quoting THE FEDERALIST NO. 68).

to foreign influence. On this point, Edmund Randolph stated at the Constitutional Convention, “[I]t 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.”<sup>71</sup> Thus, the Clause is necessarily a sweeping prophylactic tool designed to prevent foreign influence.

Representing a sharp break from European customs regarding acceptance of foreign gifts, the Foreign Emoluments Clause finds its roots dating back to a 1651 Dutch rule.<sup>72</sup> Under the Dutch policy, foreign ministers were barred from receiving “any presents, directly or indirectly, in any manner or way whatever.”<sup>73</sup> Drawing from the Dutch policy, the Articles of Confederation included a provision providing, “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.”<sup>74</sup> Initially, the first draft of the Constitution omitted the foreign emoluments ban. However, Charles Pinkney proposed the inclusion of the Foreign Emoluments Clause in the Constitution, “urg[ing] the necessity of preserving foreign Ministers and other officers of the U.S. independent of external influence.”<sup>75</sup> Upon this request, delegates at the Constitutional Convention unanimously adopted the Clause.<sup>76</sup> During the Virginia Ratifying Convention, Edmund Randolph described as one event that prompted the foreign emoluments ban former Ambassador Benjamin Franklin’s acceptance of a gift from King Louis XVI consisting of an opulent diamond-covered snuffbox displaying the King’s portrait.<sup>77</sup>

Under the Foreign Emoluments Clause, any U.S. officeholder who wishes to accept a gift or emolument must obtain congressional approval. The motivation for this requirement is two-fold: first, it provides U.S. officeholders with an excuse to decline gifts or emoluments from foreign governments without affronting them; and second, it draws public attention to foreign governments’ ef-

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71. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (Max Farrand ed., 1911).

72. EISEN ET AL., *supra* note 8, at 4.

73. Teachout, *supra* note 8, at 341.

74. EISEN ET AL., *supra* note 8, at 4.

75. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 389.

76. *Id.*

77. See THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 465.

forts to influence U.S. officeholders.<sup>78</sup> By granting Congress significant supervisory authority under the Clause, the Framers established Congress as the bulwark against the various forms—“foreign gold,”<sup>79</sup> gifts, titles, or other means—through which foreign governments may seek to curry favor with U.S. officials.

Considering the events and discussions that precede the adoption of the Foreign Emoluments Clause in the Constitution as well as the Clause’s structural features, it is fair to conclude that the drafters understood the Clause as directed towards preventing foreign influence. What follows is an elaboration of the foreign influence concern and how its significance in understanding the meaning of the Clause has become lost in today’s legal discourse, which has by and large been dominated by the anti-corruption principle.

## 2. The Foreign Influence Concern Supports a Broad Reading of the Clause

Legal scholars, notably including Eisen-Painter-Tribe and Professor Zephyr Teachout, have concluded that given the Framers’ prevalent corruption concern, “emolument” must be interpreted broadly.<sup>80</sup> Under the Eisen-Painter-Tribe and Teachout approach, foreign emoluments—regardless of whether they flow from a U.S. office—are prohibited unless approved by Congress. Yet, Eisen-Painter-Tribe and Teachout focus primarily on the “anti-corruption principle.”<sup>81</sup> But this draws the Foreign Emolument Clause too narrowly. As this section explains, the Framers envisioned the Clause as a limit not only on corruption, but also on activities outside the scope of corruption.

The distinction between foreign influence and foreign corruption is important. Whereas foreign *corruption* is a type of foreign

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78. See PAUL BREST ET AL., *Note: The Emoluments Clauses, in PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (6th ed. Supp. 2017).

79. James Madison refers to payments from foreign governments as “foreign gold.” THE FEDERALIST NO. 55, at 272 (James Madison) (Terence Ball ed., 2012).

80. EISEN ET AL., *supra* note 8, at 2; Teachout, *supra* note 8, at 361. As noted earlier, Eisen-Painter-Tribe contend that “emolument” refers to any payment, benefit, or advantage—the definition which this Note adopts for reasons discussed at various points throughout. EISEN ET AL., *supra* note 8, at 11. Mikhail arrives at a similar definition but does so by surveying dictionary definitions of emolument since the formation of the Constitution. Mikhail, *supra* note 22.

81. EISEN ET AL., *supra* note 8, at 2; Teachout, *supra* note 8, at 361; *see also* District of Columbia v. Trump, 315 F.Supp.3d 875, 897 (D. Md. 2018) (characterizing the Framers’ concerns about undue foreign influence and corruption as “anti-corruption concerns”).

*influence*, the Framers' emphasis on the broader notion of foreign *influence* accords credence to a wide application of the Foreign Emoluments Clause. In the context of the Clause, foreign influence broadly refers to any access to U.S. officials by a foreign government through emoluments and other forms prohibited under the Clause. Granted, this Note agrees with most of the points Eisen-Painter-Tribe and Teachout make about the anti-corruption principle. For the purposes of the Clause, however, the foreign influence concern should be understood under its own "anti-foreign influence principle" instead of relegated to the "anti-corruption principle." These two concepts are further explained and distinguished from one another throughout this section.

As for the application of the anti-corruption principle to the Foreign Emoluments Clause, Teachout explains that the Clause derives from the Framers' deep concern that U.S. officeholders could betray their allegiance to the country by foreigners' attempts to "buy influence or access."<sup>82</sup> Her key concern is corruption in the form of betrayal whereby foreign influence is taken as one among other vehicles to betrayal.<sup>83</sup> Teachout arrives at this conclusion based on the historical context of the Constitutional Convention.<sup>84</sup> Because Teachout's analysis is through the anti-corruption framework, however, she overlooks the Framers' broader, separate concern about foreign influence. In other words, Teachout presupposes that, to the Framers, preventing foreign influence was merely a means to an end—the "end" being the thwarting of corruption.<sup>85</sup> Preventing foreign influence is not taken as a wholly singular concern nor an end itself.

Drawing from Teachout's work on the anti-corruption principle, Lessig distinguishes the modern-day understanding of corruption, which he describes as the "abuse of public office for private gain," from the Framers' broader framing of corruption.<sup>86</sup> Namely, Lessig explains that the Framers' sense of corruption, while it includes the modern day meaning of the term, refers to "improper dependence," where a U.S. officeholder or branch of government is dependent on something other than "the people."<sup>87</sup> Under this

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82. Teachout, *supra* note 8, at 362.

83. See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 54-55 (2014) (implying that dependence on a foreign sponsor is a kind of structural relationship that leads to corruption).

84. Teachout, *supra* note 8, at 361-62.

85. TEACHOUT, *supra* note 83.

86. Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV. 1, 6 (2014).

87. *Id.* at 7.

broader characterization of corruption, improper dependence would include a president who takes action to further a foreign nation's agenda over that of the United States. Lessig's theory is similar to Teachout's anti-corruption principle in that it would seem to raise questions about the corrupt purpose behind the gain and the impact it can have on the recipient. Practically speaking, the anti-corruption principle does in some respects share the Framers' anti-foreign influence goal of preserving the American republican form of government and maintaining the United States' autonomy in its political process, free from foreign intervention. However, private gains that are undue, improper, or illegal seem to be at the heart of the foreign corruption concern.<sup>88</sup> Beyond such gains, the anti-foreign influence principle goes further in that it is also concerned with things foreign nations confer for the purpose of garnering goodwill or providing a reward or compensation—the types of gains that might lead U.S. officeholders to develop even mere “attachments” to foreign governments.<sup>89</sup> Any form of conferral on the part of foreign governments is covered under the foreign influence concern. Accordingly, it is unnecessary to inquire into purpose and effect whenever the Clause is invoked. Whether the motive behind the gain is corrupt or whether it can have a tendency to corrupt a U.S. official are beside the point.

Interpreting the Foreign Emoluments Clause to apply across a broad range of things referred to as foreign emoluments—regardless of the motive behind the giving and the ensuing consequences—is most consistent with the Framers' fears of the often secretive and creeping nature of foreign influence. Warning that the United States “will probably be an encreasing object of jealousy

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88. TEACHOUT, *supra* note 83, at 20 (stressing that the foreign emoluments ban grew out of the Framers' concern that extravagant foreign gifts could lead a U.S. officeholder to put their own personal gain above American interests); *see also id.* at 17 (distinguishing presents that are corrupt from those given out of generosity).

89. While Teachout suggests that campaign donations motivated by gratification or expression are not corrupt, she does not address whether the same logic applies to foreign emoluments. *See id.* at 222 (stating campaign donations are not corrupt if they are made “out of allegiance, expression, or personal affection, but not in order to shape the exercise of power”). On the topic of a British king's authority to bestow offices, Teachout concedes that Hamilton identified a difference between influence and corruption, but ultimately rejects his view. *See id.* at 50 (dismissing Hamilton's belief that the British king's granting of offices to develop attachments constitutes mere influence rather than corruption). Being quick to assume that Hamilton's position was an outlier, Teachout avoids parsing out Hamilton's reasoning behind the distinction and how it might apply where there is an acceptance of foreign emoluments.

to more than one nation of Europe” and “that enterprises to subvert it will sometimes originate in the intrigues of foreign powers,” Hamilton emphasized that the preservation of the United States ought “to be committed to the guardianship of any but those, whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust.”<sup>90</sup> In *Pacificus*, Hamilton forcefully describes the consequences of opening the door to foreign attachments:

[T]he people of this country . . . [must] be upon our guard against *foreign attachments* . . . [which] will have a natural tendency to lead us aside from our own true interest, and to make us the dupes of foreign influence. They introduce a principle of action, which in its effects . . . is *anti-national*. Foreign influence is truly the Grecian Horse of a republic. We cannot be too careful to exclude its entrance. Nor ought we to imagine, that it can only make its approaches in the gross form of direct bribery. It is then most dangerous, when it comes under the patronage of our passions, under the auspices of national prejudice and partiality.<sup>91</sup>

To be sure, the Framers identified some benefits of foreign influence in American foreign policy, especially from allies. As Madison noted, “in doubtful cases, particularly where the national councils may be warped by some strong passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed.”<sup>92</sup> Nevertheless, foreign emoluments and gifts are particularly dangerous vehicles for foreign influence and are thus prohibited.<sup>93</sup>

For these reasons, the scope of the Foreign Emoluments Clause was drawn with an eye towards foreign influence more generally, not just foreign corruption. Under this anti-foreign influence

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90. THE FEDERALIST NO. 59, at 291 (Alexander Hamilton) (Terence Ball ed., 2012).

91. *Pacificus* No. 6, *supra* note 1, at 100-06.

92. THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012). This is consistent with the Framers’ emphasis throughout the Federalist Papers that the longevity and future success of the United States is in part dependent on its “respectability abroad.” *See, e.g.*, THE FEDERALIST NO. 30, at 140 (Alexander Hamilton) (Terence Ball ed., 2012) (commenting on how the federal government must collect revenue from the public and obtain loans from other nations to pay for the administration of the federal government) (emphasis added).

93. For an exploration of the foreign influence problem involving foreign emoluments in the context of land speculation and indebtedness, *see infra* Section II.C.

rationale, the foreign emoluments ban is designed to block foreign access in the form of payment, benefit, or advantage, which in turn helps to minimize such access from the outset of the U.S. policy process. To bring color to the anti-foreign influence principle, the next section presents one source of foreign influence that drew the Framers' attention: foreign nations' attempts to exploit U.S. officials' debts accrued from purchasing American land.

C. *Foreign Influence in Early America: Bankruptcy and Real Estate Speculation*

One illustration of the foreign influence problem that has generally been neglected in the Foreign Emoluments Clause debate concerns foreign emoluments in the form of debt forgiveness in founding-era America. Indeed, the widespread problems of indebtedness and bankruptcy arising from land speculation at this time provide insight into the Framers' belief that emoluments, including officer holders' private business interests,<sup>94</sup> could serve as channels of foreign influence. During this period, wide stretches of American lands, particularly in the Western region, were recognized as significant sources of profit.<sup>95</sup> Many Americans, ranging from political elites to small farmers, obtained loans to purchase real estate.<sup>96</sup> Famous land speculators from this period include former Supreme Court Justice James Wilson and American Revolution financier Robert Morris, who were eventually imprisoned for their debts. According to Madison, the land speculation engaged in by many Americans rendered them "more in debt" than the land was worth.<sup>97</sup>

No doubt, real estate speculation by itself was not widely seen as corrupt. In fact, many Founders, including George Washington, made their fortune from such dealings.<sup>98</sup> Rather, land speculators who suffered from *serious indebtedness* were likely targets of foreign influence, given that foreign governments might attempt to pay off their debts in exchange for access to U.S. affairs. For example, in the 1820s the Holland Land Company, a real estate investment

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94. See *infra* Section II.C.

95. See Edward L. Glaeser, *A Nation of Gamblers: Real Estate Speculation and American History*, 103 AM. ECON. REV. 1, 2 (2013).

96. *Id.*

97. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 123.

98. E.g., A. M. SAKOLSKI, THE GREAT AMERICAN LAND BUBBLE: THE AMAZING STORY OF LAND-GRABBING, SPECULATIONS, AND BOOMS FROM COLONIAL DAYS TO THE PRESENT TIME 5 (William N. Parker ed., 1966) (noting that Washington "was one of the most active land speculators of colonial times").

company owned by a group of Dutch bankers, including Rutger Jan Schimmelpenninck, a prominent Dutch political figure who at one point led the authoritarian regime replacing the Dutch Republic,<sup>99</sup> received wide criticism from New Yorkers for gaining too much influence in the state.<sup>100</sup> A New York attorney complained to Governor DeWitt Clinton that “eighty to one hundred thousand people were subject to the will of the Hollanders for their prosperity.”<sup>101</sup> Following public outcry, New York trusts purchased much of the New Yorkers’ debts, thereby dismantling Holland Land Company’s network of control in New York.<sup>102</sup> Adding to the risk of foreign interference through leveraging the indebtedness of Americans, real estate dealings were often transacted in secret, without any paper trails.<sup>103</sup> Thus, if U.S. government officials secured payments from foreign actors to pay off their debts, such payments often went undiscovered by the public.

A prime example is Aaron Burr, whose presidential candidacy Hamilton opposed, in part because Hamilton believed him to be vulnerable to foreign bribes given his enormous debts. In response to Burr’s campaign for president, Hamilton expressed that “no circumstance . . . has given me so much pain as the idea that Mr. Burr might be elevated to the Presidency.”<sup>104</sup> He believed that Burr was too ambitious and egocentric to serve the interests of an autonomous, maturing America.<sup>105</sup> Hamilton predicted that Burr’s thirst for power would not be quenched by becoming president. Instead, Burr would look towards alliances with foreign nations and steer America away from its course of independence.<sup>106</sup>

Referring to Burr’s desperate financial situation, Hamilton confided in a letter that Burr was “bankrupt beyond redemption except by the plunder of his country” and labeled him as “the *Cat-*

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99. See MICHAEL BROERS ET AL., *THE NAPOLEONIC EMPIRE AND THE NEW EUROPEAN POLITICAL CULTURE* 103 (Michael Broers et al. eds., 2012).

100. See SAKOLSKI, *supra* note 98, at 83.

101. See *id.*

102. See *id.* at 83-86.

103. See *id.* at v (indicating that land speculation “has been conducted largely in secret and without enduring records”).

104. Letter from Alexander Hamilton to Oliver Wolcott, Jr. (Dec. 1800), in 25 *THE PAPERS OF ALEXANDER HAMILTON, JULY 1800?–APRIL 1802*, at 286 (Harold C. Syrett ed., Columbia Univ. Press, 1977).

105. See *id.* at 287 (“His ambition will not be content with those objects which virtuous men of either party will allot to it.”).

106. *Cf. id.* (“What would you think of [Burr] having seconded the positions that it was the interest of [the United States] to allow the belligerent [foreign] powers to bring in and sell their prizes and build and equip ships in our ports?”).

*aline* of America,”<sup>107</sup> a comparison to a first-century Roman senator who attempted to overthrow the Roman Republic. In another letter, Hamilton expressed that Burr was “without doubt insolvent for a large *deficit*” and the “fair emoluments of any station, under our government, will not equal his expences in that station.”<sup>108</sup> Because Burr’s government wages were insufficient to satisfy his debts, Hamilton reasoned, Burr was likely to seek debt relief by striking a “*bargain* and *sale* with some foreign power.”<sup>109</sup> More specifically, Hamilton suspected Burr of “having *corruptly* served the views of the Holland Company” during Burr’s tenure at the New York Assembly.<sup>110</sup>

Hamilton’s uncompromising suspicion was later vindicated. Burr had been bribed by the Holland Land Company.<sup>111</sup> In fact, Burr was partly responsible for the Holland Land Company’s ability to expand their land holdings in New York.<sup>112</sup> While serving on the New York Assembly, Burr became indebted to the Holland Land Company for failing to make payments on lands he purchased from it.<sup>113</sup> He then successfully pushed through legislation granting aliens, including the Dutch, the right to possess New York land.<sup>114</sup> In exchange, the Holland Land Company agreed to cancel Burr’s debt and paid him \$5,500,<sup>115</sup> a hefty sum at the time.

Decades after Burr served as vice president, a letter written by a British foreign minister publicly surfaced indicating that he had been secretly brokering a plan with the then-Vice President Burr under which Burr would assist the British government with separating the U.S. western territories from the rest of the Union.<sup>116</sup> In 1807, Burr was arrested for treason on allegations that he plotted to annex Louisiana and other territory for the formation of a nation

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107. *Id.* at 257.

108. Letter from Alexander Hamilton to John Rutledge, Jr. (Jan. 4, 1801), in 25 THE PAPERS OF ALEXANDER HAMILTON, JULY 1800?–?APRIL 1802, at 296 (Harold C. Syrett ed., Columbia Univ. Press 1977).

109. *Id.*

110. *Id.* at 295.

111. SAKOLSKI, *supra* note 98, at 80.

112. *Id.* at 79.

113. *Id.*

114. *Id.*

115. *Id.* at 80.

116. Letter from Anthony Merry to Lord Harrowby (Aug. 6, 1804), in HENRY ADAMS, 2 HISTORY OF THE UNITED STATES OF AMERICA 395 (Charles Scribner’s Sons 1909) (1889).

independent of the United States.<sup>117</sup> He was later acquitted given the lack of evidence required to prove that his conduct amounted to an “overt act.”<sup>118</sup> Perhaps Hamilton detected parallels between the “avaricious” or “ambitious” public servant he wrote about in *Federalist No. 75*, who might be convinced by a foreign power to betray the United States,<sup>119</sup> and Burr, whom Hamilton would later regularly mark as a man controlled by his pursuit of power and wealth.<sup>120</sup>

Unfortunately for Hamilton and the people of early America, the benefits of today’s Information Age filled with 24/7 news coverage and almost boundless electronic storage were not available to cast light on the prohibited foreign emoluments that Burr most likely received while in office. Letters revealing his land speculation activities were curiously destroyed by a confidant to whom he bequeathed them—certain letters depicting speculative money schemes, patronage, and influence were not.<sup>121</sup> If the swathes of Burr’s speculative business ventures were made public before his departure from office, lawmakers could have put a stop to any foreign influence funneled through Burr when he was serving out his federal tenure at a time during which preventing foreign influence from sabotaging American democratic institutions could matter the most.

*D. A Foreign Emolument is Any Payment, Benefit, or Advantage from a Foreign Government*

Because the Foreign Emoluments Clause is a prophylactic against foreign influence, only a definition of “emolument” referring to any payment, benefit, or advantage can stand. Under this definition, the Clause prohibits U.S. officials from accepting anything of value—whether pecuniary or nonpecuniary. For example, an elected official’s acceptance of campaign opposition research on the official’s electoral rival from a foreign government, without con-

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117. See *Aaron Burr Arrested for Treason*, This Day in History, HISTORY.COM (Feb. 9, 2010), <http://www.history.com/this-day-in-history/aaron-burr-arrested-for-treason> [<https://perma.cc/D3DT-RSHR>].

118. *Id.*

119. THE FEDERALIST NO. 75, at 365-66 (Alexander Hamilton) (Terence Ball ed., 2012).

120. See Letter from Alexander Hamilton to Oliver Wolcott, *supra* note 104, at 257 (claiming that Burr was capable of instigating war in furtherance of “power” and “wealth”); Letter from Alexander Hamilton to John Rutledge, *supra* note 108, at 294 (accusing Burr of having as his ultimate aim “stable power and Wealth”).

121. See Gordon S. Wood, *The Real Treason of Aaron Burr*, 143 PROC. AM. PHIL. SOC’Y 280, 282-83 (1999).

gressional approval, would constitute a foreign emoluments violation. Indeed, support for this approach derives from the language in the constitutional provision itself. The fact that “emolument” is separate from “present” in the text shows that the former encompasses more than merely foreign government gifts. Moreover, the “of any kind whatever” language following “present, Emolument, Office, or Title”<sup>122</sup> is evidence that emolument is further designed as a catch-all. The inclusion of the sweeping “of any kind whatever” language likely reflects the Framers’ understanding that foreign governments’ influence could manifest in many different forms.<sup>123</sup> On balance, a broad interpretation of “emolument” defined as any payment, benefit, or advantage is the most natural consequence of the Framers’ foreign influence concern and a textual analysis of the provision.

### III. THE FOREIGN EMOLUMENTS CLAUSE APPLIES TO THE PRESIDENT

This part addresses the argument that the Foreign Emoluments Clause applies to the president. A survey of the Framers’ anti-foreign influence considerations underpinning the structural design, powers, and attributes of the presidency reveals that the Clause directly contemplates the president vis-à-vis other U.S. offices. This part then argues that an expansive definition of a foreign emolument that reaches any payment, benefit, or advantage from a foreign government is in line with the Clause’s anti-foreign influence function, which helps tether the president’s loyalty to the American public.

#### A. *The President as a Target of Foreign Influence*

Notwithstanding the growing legal literature supporting a broad application of emolument, the lack of investigation into the anti-foreign influence spirit threading the Foreign Emoluments Clause and the presidency is surprising. This section begins with

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122. *See supra* Section II.A.

123. *Cf.* ST. GEORGE TUCKER, 3 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 386 (1803) (suggesting that the Foreign Emoluments Clause is a response to how “[c]orruption is too subtle a poison to be approached, without injury”); WASHINGTON, *supra* note 9, at 17 (“As avenues to foreign influence in innumerable ways,” passionate attachments to nations other than the United States “are particularly alarming to the truly enlightened and independent patriot.”).

the argument that, given the Framers' concern that the president is a special target of foreign influence, the exclusion of the president from the Clause is mistaken. Next, it fleshes out the anti-foreign influence goal that the Clause shares with three types of constitutional limitations on presidential power: (1) congressional oversight of Executive activity operating in secrecy and dispatch, (2) exclusion of monarchical attributes from the presidency, and (3) presidential election procedures and eligibility requirements.

The Framers stressed that, among the political branches, the president is an especially prominent object of foreign influence given the nature of the president as a key leader in foreign affairs.<sup>124</sup> In discussing the potential for corruption or improper behavior on the part of a president, Hamilton warned that “a man raised from the station of a private citizen to the rank of chief magistrate . . . might sometimes be under temptations to *sacrifice his duty to his interest*,” “[a]n avaricious man might be tempted to *betray the interests of the state to the acquisition of wealth*,” and “[a]n ambitious man might *make his own aggrandizement, by the aid of a foreign power*, the price of his treachery to his constituents.”<sup>125</sup> Given this heightened risk of foreign influence with the office of the presidency, the president is in many ways a focal point of the Foreign Emoluments Clause.

A view widely accepted among the legal community is that the Foreign Emoluments Clause applies to the president because the presidency is an “Office of Profit or Trust.”<sup>126</sup> Tillman, an outspoken critic of this view, takes the position that the Clause applies only to “holders of appointed federal statutory offices” and thus does not concern the president.<sup>127</sup> His main reasoning is that “[o]ffice . . . under the United States” translates into appointed or statutory offices.<sup>128</sup> However, Tillman places too much weight on one document: a list Hamilton provided to the Senate of “every person holding any civil office or employment under the United States, (except the judges) . . . .”<sup>129</sup> Because this list comprised federal appointed or statutory offices, and did not include elected officeholders, Tillman argues that appointed or statutory offices are the

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124. See *District of Columbia v. Trump*, 315 F.Supp.3d 875, 900 (D. Md. 2018) (submitting that the Framers' concern over potential foreign influence over the president led to adoption of the Foreign Emoluments Clause).

125. THE FEDERALIST NO. 75, at 365 (Alexander Hamilton) (Terence Ball ed., 2012) (emphasis added).

126. *E.g.*, EISEN ET AL., *supra* note 8, at 7-10; Teachout, *supra* note 8, at 361-66.

127. Tillman, *supra* note 24, at 181.

128. *Id.* at 185.

129. *Id.* at 186.

only ones to which the Clause applies.<sup>130</sup> As Teachout explains, however, Hamilton may have omitted the list of salaries of certain elected officeholders, such as the president and vice president, because their salaries may have been general knowledge at the time and thus unnecessary to include.<sup>131</sup> But Tillman also cites cases where President Washington accepted certain gifts from foreign nations and did not seek congressional approval for them.<sup>132</sup> Yet, he received these gifts when the federal government was in its infancy and still gaining its footing.<sup>133</sup> And this point is further overshadowed by the longstanding presidential practice of seeking congressional approval for foreign gifts following the Washington Presidency.<sup>134</sup> Lastly, Tillman rejects the notion that the Framers' corruption concern was a primary motivation for the creation of the Clause on the basis that other constitutional principles, such as separation of powers, could have been weighed more heavily.<sup>135</sup>

If the motivation of the Foreign Emoluments Clause is predicated on some concern regarding only appointed officials' acceptance of foreign gifts, as Tillman would argue, then surely some evidence of this narrow concern would exist. It is telling that Tillman's exact response as to why the Framers would exempt federal elected officeholders from the Clause is simply: "I do not know."<sup>136</sup> Historical evidence, on the other hand, points to the Framers' re-

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130. *Id.* at 187.

131. Zephyr Teachout, *Colloquy, Gifts, Offices, and Corruption*, 107 Nw. U. L. REV 30, 41 (2012).

132. Tillman, *supra* note 23, at 188-89.

133. *Cf.* TUCKER, *supra* note 123, at 386-87 (stating that the Foreign Emoluments Clause has "said to have been overlooked" and expressing hope that "all future ministers" will refuse presents from foreign governments to "ensure a proper respect to this clause of the constitution").

134. See Richard Tofel, *Emoluments Clause: Could Overturning 185 Years of Precedent Let Trump off the Hook?*, PROPUBLICA (Dec. 13, 2016), <https://www.propublica.org/article/emoluments-clause-overturning-185-years-of-precedent-let-trump-off-the-hook> [<https://perma.cc/4R7U-ZJU2>] (enumerating instances where presidents sought congressional approval prior to accepting foreign gifts or emoluments). *Cf.* *District of Columbia v. Trump*, 315 F.Supp.3d 875, 883 (D. Md. 2018) ("The Court finds executive branch precedent and practice overwhelmingly consistent" with a broad interpretation of emolument.); *but see* Teachout, *supra* note 131, at 38-39 (acknowledging that Thomas Jefferson initially took affirmative steps to satisfy the Foreign Emoluments Clause, but eventually accepted foreign gifts without congressional approval).

135. Tillman, *supra* note 23, at 183.

136. *Id.* at 203; *but see* Grewal, *supra* note 22, at 646 (offering as an explanation for limiting the Foreign Emoluments Clause to appointed officials a potential expectation that appointed officials were subject to improper foreign influences given visits abroad and that the president would remain at home).

peated mistrust that foreign bribery could turn U.S. officials, particularly the president and other elected officials. Moreover, foreign interference would undermine the United States' autonomy in foreign policy. Foreign influence and corruption concerns are perhaps the strongest evidence of the Framers' intent behind the Clause.

#### 1. The President's Role in Foreign Affairs: Secrecy and Dispatch

Given the president's unique, significant leadership role in foreign affairs, the Foreign Emoluments Clause serves as an important prophylactic measure to guard against foreign influence in the Executive Branch. Although the president shares certain foreign affairs powers with other branches of government—for example, the president's power to make treaties is shared with the Senate—the Framers contemplated that the president's work in foreign affairs would sometimes operate in ways distinct from that of the other branches of government, including sometimes in “secrecy” and “dispatch.”<sup>137</sup> The Framers expressed that secrecy and dispatch were crucial to certain aspects of the president's foreign affairs involvement because, without these characteristics, important transactions with foreign nations might be excessively delayed or forestalled altogether.<sup>138</sup>

Even where secrecy and dispatch of the president are necessary, however, the Framers anticipated some level of congressional participation in foreign transactions. Hamilton pointed out that, although the president is the “most fit agent” in foreign negotiations, “the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them” and that it “would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration.”<sup>139</sup> The chief advantages for the Senate's involvement in foreign affairs matters include “talents, information, integrity, and deliberate investigations.”<sup>140</sup> Given that the Framers envisioned a significant role for the Senate in foreign affairs matters to guard against foreign intervention, where the president is acting alone in foreign affairs, further congressional supervision is appropriate, if not necessary. The Foreign Emoluments Clause is a constitutional device conferred to Congress em-

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137. See THE FEDERALIST NO. 64, at 315 (John Jay) (Terence Ball ed., 2012).

138. See *id.*

139. THE FEDERALIST NO. 75, at 365 (Alexander Hamilton) (Terence Ball ed., 2012).

140. THE FEDERALIST NO. 64, at 315 (John Jay) (Terence Ball ed., 2012).

powering it to supervise the president, so as to ensure that the president is faithfully discharging their duty to the American public—rather than promoting a foreign nation’s agenda.

## 2. Distinguishing the President from a Monarch

General comparisons that the Framers make between republics and monarchies also demonstrate that the Foreign Emoluments Clause is designed as a limitation on emoluments that may induce the president and other officeholders to take actions that might adversely affect American interests and institutions. “One of the weak sides of republics,” Hamilton wrote, “is that they afford too easy an inlet to foreign corruption.”<sup>141</sup> For a hereditary monarchy, Hamilton stated, “it is not easy for a foreign power to give him an equivalent for what he would sacrifice by treachery to the State.”<sup>142</sup> Hamilton further explained that elected officials of “stations of great pre-eminence and power, may find compensations for betraying [the U.S. public’s] trust . . . .”<sup>143</sup> Similarly, Madison observed that, unlike a monarch who inherits their title, the president lacks a “permanent stake in the public interest which [would] place him out of the reach of foreign corruption.”<sup>144</sup> Because the president is particularly in a position of “great pre-eminence and power,” the risk of foreign emoluments tempting the president away from American interests is higher than that of the other branches of government.

Interestingly, the fact that the ban against titles of nobility is located in the same clause as the foreign emoluments prohibition<sup>145</sup> also sheds light on the relationship between the Foreign Emoluments Clause and the presidency. Like the foreign emoluments prohibition, the titles of nobility ban symbolizes the United States’ radical retreat from European customs. At the time of the Constitutional Convention, some opponents to the Constitution feared that the president was a sort of monarch. One reason for the

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141. THE FEDERALIST NO. 22, at 103 (Alexander Hamilton) (Terence Ball ed., 2012).

142. *Id.*

143. *Id.*

144. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 138.

145. U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall . . . accept of any present, Emolument.”).

titles of nobility ban was to further distinguish the United States from a monarchy, which certain Founders saw as corrupt.<sup>146</sup>

In comparing the U.S. president to the king of Great Britain, Hamilton noted that, unlike the president, the king “can confer titles of nobility at pleasure.”<sup>147</sup> In addition, he pointed out that the president “can confer no privileges whatever,” whereas the king can make naturalized citizens of immigrants and nobles of commoners and establish corporations “with all the rights incident to corporate bodies.”<sup>148</sup> These specific references to the president in the context of the titles of nobility ban indicate that the Foreign Emoluments Clause, which contains exclusively the titles of nobility ban and the foreign emoluments prohibition, could on the whole be a result of the Framers’ anxieties that the presidency is more predisposed to certain types of abuse than the other branches of government. In other words, because both the ban against titles of nobility and the foreign emoluments prohibition appear in the same clause, the strong limits on presidential authority in the former imply a similar restriction in the latter.

Treason and bribery addressed in a separate constitutional provision<sup>149</sup> also appear to bring vigor to the Foreign Emoluments Clause and further justifies its application to the president. To quell concerns that the president would resemble a monarch, Hamilton stressed that the president could be convicted of “treason, bribery, or other high crimes.”<sup>150</sup> Describing the boundaries of treason, Hamilton stated that treason is “levying war upon the United States, and adhering to their enemies, giving them aid and comfort.”<sup>151</sup> Given the president generally has more exposure to foreign leaders than, say, Members of Congress, the president is uniquely situated to providing such “aid and comfort” or engaging in bribery. What if there is an acceptance of emoluments that would seem to set in motion the “giving aid and comfort” to foreign enemies? Acceptance of emoluments would probably not rise to the level of treason

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146. See, e.g., THOMAS PAINE, OF THE OLD AND NEW SYSTEMS OF GOVERNMENT (1791), reprinted in 2 THE WRITINGS OF THOMAS PAINE, 1779-1792, 413, 416 (Moncure Daniel Conway ed., New York, G.P. Putnam’s Sons 1894) (characterizing monarchs where “one is a tyrant, another an idiot, a third insane, and some all three together”).

147. THE FEDERALIST NO. 69, at 339 (Alexander Hamilton) (Terence Ball ed., 2012).

148. *Id.* at 340.

149. U.S. CONST. art. III, § 3.

150. THE FEDERALIST NO. 69, at 335 (Alexander Hamilton) (Terence Ball ed., 2012).

151. *Id.* at 338.

or bribery across all cases, however.<sup>152</sup> To illustrate, a president may have inadvertently accepted an emolument and, upon discovering that it should have been presented to Congress, immediately returns the emolument to the foreign giver and reports the mistake to Congress. A violation has occurred but, taken in isolation, the conduct here does not depict a pattern of behavior indicating the president is a foreign agent. But a persuasive argument can be made that the Framers believed that, at least in the most concerning cases, violations of the foreign emoluments ban should be accorded equal punishment to treason or bribery.<sup>153</sup> Perhaps the acceptance of an emolument (or emoluments over a substantial period of time) can be so grave or improper such that it naturally gives rise to suspicion that treasonous conduct or bribery is afoot. Accordingly, a kinship between the foreign emoluments ban and treason clause, especially with respect to the presidency, can be seen.

### 3. Election Processes, Eligibility Requirements & Voting Rules

Another manifestation of the foreign influence problem with respect to the president relates to the U.S. election system. One motivation for the election processes for the presidency and Senate was an assurance that treaties and other matters in foreign affairs would be managed by individuals “most distinguished by their abilities and virtue.”<sup>154</sup> Put differently, the electoral processes were de-

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152. Madison makes clear that the definition of treason under the Constitution is to be construed narrowly and describes the risk that impassioned factions that might otherwise abuse the offense by convicting opponents for their political views. *See* THE FEDERALIST NO. 43, at 210 (James Madison) (Terence Ball ed., 2012).

153. Placing a serious violation of the foreign emoluments ban on equal footing with treason and bribery certainly has significant repercussions for the type of punishment required when such a violation occurs. Treason can certainly serve as grounds for impeachment. *See* THE FEDERALIST NO. 69, at 335 (Alexander Hamilton) (Terence Ball ed., 2012) (“The President . . . would be liable to be impeached, tried, and upon conviction of treason . . . removed from office.”). In the same vein, a strong argument can be made that at least serious violations of the ban rising to the level of treason or bribery are impeachable. *See* THE FEDERALIST NO. 66, at 326 (Alexander Hamilton) (Terence Ball ed., 2012) (positing that impeachment might be applicable to circumstances in which the president has acted without integrity in negotiations with foreign governments or Senators have acted as “mercenary instruments of foreign corruption”). At any rate, whether a violation of the foreign emoluments ban can make a case for impeachment against the president is beyond the scope of this Note.

154. *See* THE FEDERALIST NO. 64, at 313 (John Jay) (Terence Ball ed., 2012); *see also* THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 489 (stating that without safeguards in the presidential election process, European countries may seek

signed to inhibit foreign government agents disguised as candidates from gaining electoral support and to eliminate certain perverse incentives, such as bribery, that would attract dishonest and corrupt candidates.

More specifically, the creation of the electoral college<sup>155</sup> was a key response to the foreign influence concern. Referring to the electoral college, Hamilton affirmed, “Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue and corruption,” all of which he stated are most likely to stem from the “desire of foreign powers to gain improper ascendant in our councils.”<sup>156</sup> Hamilton continued, “How could they better gratify this, than by raising a creature of their own to the chief magistracy of the union?”<sup>157</sup> At the Constitutional Convention, Pierce Butler also emphasized that the presidential election process would be targeted by foreign powers, warning that “the two great evils to be avoided” in selecting the executive were “cabal at home” and “influence from abroad.”<sup>158</sup> Thus, both the transient nature of the electoral college and the ineligibility of officeholders for the delegate positions were designed to make it prohibitively costly for foreign nations to infiltrate the Executive Branch.<sup>159</sup>

Much like the election processes, the Framers sought to limit foreign influence by establishing a citizenship requirement for presidential candidates and age requirements for candidates for the president and other elected offices.<sup>160</sup> Because the president is more accessible to foreign influence than other officials, the Framers set the age limit higher for presidential candidates than candidates for the Senate and House of Representatives. Madison

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to gain influence through the process and that if there is nothing to prevent the president’s “corruption but his virtue, which is but precarious, we have not sufficient security”).

155. U.S. CONST. art. II, § 1 (“[The President shall] be elected, as follows . . . Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives.”).

156. THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012).

157. *Id.*

158. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 112.

159. See THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012) (explaining that the transient and detached nature of the electoral college will help prevent the “business of corruption”).

160. U.S. CONST. art. II, § 1, cl. 5 (listing qualifications for President); U.S. CONST. art. I, § 2, cl. 2 (listing qualifications for House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (listing qualifications for Senate).

reasoned that those engaged “immediately in transactions with foreign nations” should be “thoroughly weaned from the prepossessions and habits incident to foreign birth and education.”<sup>161</sup> Otherwise, Madison anticipated, the American public’s “hasty admission” of foreign-born immigrants “might create a channel for foreign influence on the national councils.”<sup>162</sup> To address this concern, the most stringent qualifications are imposed on candidates running for offices with significant foreign affairs policy exposure. Given the president serves as commander-in-chief, receives ambassadors, appoints diplomats, and makes treaties, the president holds more responsibilities in foreign affairs than any other political branch. For this reason, presidential candidates are subject to a natural-born citizenship requirement, whereas candidates running for congressional seats are not. In addition, the age of presidential eligibility is thirty-five years old or older. Comparing the two chambers of Congress, the treaty-making power bestowed upon the Senate gives it higher authority in foreign affairs as compared to the House of Representatives. Reflecting this disparity, age qualifications for Senate candidates are higher than those imposed on House candidates: Senate candidates must be 30 years or older and House candidates need only be 25 years or older.

The anti-foreign influence motivations behind the structure of congressional voting rules in the Constitution also bring color to the Foreign Emoluments Clause and its application to U.S. officeholders who are special prey of such influence, such as the president. Passage of a bill requires a simple majority vote of the House and Senate, unless the president vetoes the bill, in which case passage requires a two-thirds vote.<sup>163</sup> Hamilton provided two reasons why the two-thirds vote, rather than the simple majority vote, would expose the process to heightened foreign influence. First, the greater delay in securing a two-thirds vote in support of a bill could

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161. THE FEDERALIST NO. 62, at 300 (James Madison) (Terence Ball ed., 2012).

162. *Id.* Operating within the anti-corruption framework, Teachout does not go far enough in uncovering the Framers’ anti-foreign influence justifications for the citizenship and age requirements. On the citizenship requirement, Teachout focuses on foreigners seeking U.S. office in their individual capacities rather than as foreign government agents and argues that the main concern was that foreigners “exploited the system and did not truly belong to or intend to respond to the residents.” See TEACHOUT, *supra* note 83, at 75-76. On the age requirements, Teachout describes them as limitations on “the power of family dynasties.” *Id.* at 76.

163. U.S. CONST. art. I, § 7.

present sufficient time for foreign powers to invade the process.<sup>164</sup> Second, under the simple majority system, the steep expense that foreign governments might be required to incur in order to bribe or coax a number of lawmakers short of a simple majority serves as a financial disincentive. Under the two-thirds system, on the other hand, it would be cheaper for these foreign governments because fewer resources are needed to sway the reduced number of lawmakers that it could take to move the vote in their favor.<sup>165</sup> Applying this rationale, because the president is an individual, foreign governments seeking influence in U.S. affairs have further motivation to funnel their efforts through the presidency, since doing so is less time-consuming and costly as compared with paying off the requisite number of Senators and U.S. Representatives.

*B. Prohibiting Extra-Office Emoluments to Ensure the President's Loyalty*

At the outset, the Foreign Emoluments Clause aims to secure the president's loyalty to U.S. interests by prohibiting the president from holding any private interests that might lead them to advance foreign nations' interests at the expense of the United States. At the Virginia Ratifying Convention, James Monroe warned that if the president and their advisers "can escape punishment with so much facility, what a delightful prospect must it be for a foreign nation, which may be desirous of gaining territorial or commercial advantages over us, to practice on them!"<sup>166</sup> Perhaps to dispel doubts such as Monroe's, John Jay explained, "having no private interest distinct from that of the nation," the president and Senate "will be under no temptations to neglect the latter."<sup>167</sup> Indeed, the ban on foreign emoluments appears to be among the "most effectual precautions" in the Constitution designed to keep U.S. officeholders "virtuous, whilst they continue to hold their public trust."<sup>168</sup> This

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164. THE FEDERALIST NO. 22, at 102 (Alexander Hamilton) (Terence Ball ed., 2012) ("tedious delays—continual negotiation and intrigue—contemptible compromises of the public good").

165. *Id.* at 103 ("[W]here two thirds of all the votes were requisite . . . he would have to corrupt a smaller number.").

166. THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 220.

167. THE FEDERALIST NO. 64, at 316 (John Jay) (Terence Ball ed., 2012); *see also* THE CONVENTION OF PHILADELPHIA, *supra* note 24, at 485-86 (raising concern that the reeligibility of the president would render the president such that, "instead of being attentive to" the interests of the American public, "he will lean to the augmentation of his private emoluments").

168. *See* THE FEDERALIST NO. 57, at 277 (James Madison) (Terence Ball ed., 2012); *see also* TUCKER, *supra* note 123, at 386 ("Nothing can be more dangerous to

section examines how the broad definition of “emolument”—namely, any payment, benefit, or advantage provided by a foreign government—under the Clause is consistent with the Clause’s prophylactic nature designed in part to further ensure that the president remains dependent on the American people alone—that is, loyal.

Despite the historical evidence confirming that the Foreign Emoluments Clause is a powerful tool designed to prevent the president from furthering foreign nations’ interests over those of the American people, certain legal scholars insist that the scope of “emolument” as applied to the president is limited to those that flow from the president’s office. One such scholar is Grewal who, in assuming *arguendo* that the Clause applies to the president, concludes that the president could violate the Clause only if there is evidence that the president personally provided services to a foreign government in exchange for compensation.<sup>169</sup> Grewal argues that finding violations where the president accepts extra-office emoluments would lead to “strange results,” such as violations where U.S. officers own “building permits, trademarks, and licenses from foreign governments.”<sup>170</sup> But these results are not so “strange” considering that these benefits, especially if the president enjoys many of them, create a conflict of interest that could incentivize a president to betray their loyalties to the public while in office. Indeed, the Clause is geared towards eradicating these incentives in the first place. The transparency and accountability mechanisms that the Framers built into the design of the presidency and practical considerations show that Grewal’s interpretation of emolument is misguided.

Consistent with the disclosure regime demanded under the Foreign Emoluments Clause, the great weight that the Framers placed on ensuring transparency over presidential behavior and the presidency’s accountability to the public further lends credence to a broad application of the Clause to the president. Among the safeguards designed to protect the American public from unfaithful exercises of constitutional power, the “greatest” include public opinion and discoverability of misconduct.<sup>171</sup> By confining the pres-

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any state, than influence from without, because it must be invariably bottomed upon corruption within.”); THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 486 (“It is impossible to guard better against corruption.”).

169. Grewal, *supra* note 22, at 644.

170. *Id.* at 662-64.

171. See THE FEDERALIST NO. 70, at 346 (Alexander Hamilton) (Terence Ball ed., 2012).

idency to a single person, rather than multiple persons, the Framers sought to make certain that any misconduct on the part of the president is more easily discoverable for the purpose of punishing or impeaching the president. A “plurality of the executive,” Hamilton argued, would “deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power,” the securities including public opinion and the opportunity to discover, with “facility and clearness,” the president’s misconduct.<sup>172</sup> These securities, Hamilton reasoned, are necessary for the removal or punishment of the president.<sup>173</sup> Consequently, the narrow interpretations of emoluments as including no more than authorized benefits flowing from an office fall flat when taking into account that the Clause is a transparency tool designed to minimize foreign intervention attempts, which would most likely manifest in the form of unauthorized benefits to the president.

In many ways, the Framers’ commentary on a president’s undesirable, corrupt behavior that could ensue in the absence of certain constitutional limitations to presidential power casts a wide net on the types of emoluments banned by the Foreign Emoluments Clause. Prohibiting the reelection of an incumbent president is one scheme the Framers posited could entice an “avaricious” or “ambitious” president to engage in corrupt behavior,<sup>174</sup> which, according to Hamilton, would most likely involve some form of foreign intervention.<sup>175</sup> In response to an argument that the president should be prohibited from holding consecutive terms in office, Hamilton speculated that such a ban could provide an incentive for a president to engage in corrupt behavior, such as embezzlement or usurpation of other branches of government.<sup>176</sup> Hamilton continued:

An avaricious man, who might happen to fill the offices, looking forward to a time when he must at all events yield up the *emoluments* he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of the opportunity he enjoyed, while it lasted; and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory; though the same man probably,

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172. *Id.*

173. *Id.*

174. See THE FEDERALIST NO. 72, at 353 (Alexander Hamilton) (Terence Ball ed., 2012) (explaining that the re-eligibility of a president induces good behavior).

175. THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012) (noting that corruption in election would most likely stem from the “desire of foreign powers to gain an improper ascendant in our councils”).

176. THE FEDERALIST NO. 72, at 354 (Alexander Hamilton) (Terence Ball ed., 2012).

with a different prospect before him, might content himself with the *regular perquisites* of his station, and might even be unwilling to risk the consequences of an abuse of his opportunities.<sup>177</sup>

Since the above passage directly follows a discussion of embezzlement and other corrupt behavior, Hamilton appears to refer to emoluments as including the benefits or advantages from the improper conduct and not only those related to the president's office. This conclusion is further supported by the fact that Hamilton contrasts "emoluments" obtained by a corrupt president with "regular perquisites" of a President's office. Similarly, Hamilton explained that an "avaricious" president "might be tempted to betray the interests of the state to the acquisition of wealth" and an "ambitious" president "might make his own aggrandizement, by the aid of a foreign power."<sup>178</sup> In short, the use of "emolument" in this context shows that the term as understood under the Foreign Emoluments Clause includes both intra- and extra- presidential office benefits and advantages.

Apart from the foregoing transparency and accountability reasons, Grewal's view of "emolument" as applied to the president is also misguided from a practical standpoint. Under Grewal's definition requiring an exchange, a foreign emoluments violation is established only with evidence of a quid pro quo relationship.<sup>179</sup> Owing to the fact that the president may sometimes act in secrecy where the other branches of government cannot, any party seeking to challenge the president's violation of the Foreign Emoluments Clause may never be capable of establishing evidence of a quid pro quo or unauthorized compensation received by the president.<sup>180</sup> If a sitting president has the desire to accept illegal emoluments, they would always choose to do so in secrecy to prevent the discovery of

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177. *Id.* (emphasis added).

178. THE FEDERALIST NO. 75, at 365-66 (Alexander Hamilton) (Terence Ball ed., 2012).

179. See Grewal, *supra* note 22, at 644 (submitting that a foreign emolument "refers only to the compensation that a U.S. Officer receives from providing services for a foreign government"). For example, Grewal states that, "if a foreign government paid the United States Secretary of the Treasury a consultation fee in exchange for economic advice," the payment would constitute an emolument. *Id.* at 650.

180. Cf. THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 484 ("It is not many years ago – since the revolution – that a foreign power offered emoluments to persons holding offices under our government. It will, moreover, be difficult to know whether he receives emoluments from foreign powers or not.").

a “smoking gun.”<sup>181</sup> For the Clause to have any affect at all on the president, an interpretation of emolument under the Clause must include, not only a broad interpretation of “emolument” as any payment, benefit, or advantage, but any direct or indirect benefit with or without any evidence of a *quid pro quo*. Putting aside the impracticality of a *quid pro quo* requirement, the Clause is not only about ferreting out U.S. officeholders’ corrupt activities with foreign governments, but it is also about blocking foreign governments from accessing the U.S. political process through foreign emoluments from the very beginning.<sup>182</sup>

#### IV. THE MODERN PRESIDENCY AND FOREIGN EMOLUMENTS

This part explains how the modern president’s growing unilateral activity in foreign affairs at the exclusion of congressional participation exacerbates the risk of foreign emoluments violations. In addition, it discusses the accumulation of foreign emoluments that President Trump has amassed as a result of his presidency. It concludes with preliminary compliance proposals, such as disclosure of tax returns and dissociation from business holdings. These proposals are not intended to provide a comprehensive policy solution. Rather, they serve as a starting point to further the discussion re-

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181. A group of Members of Congress alleges in its lawsuit against President Trump that, because President Trump has received foreign payments “in secret,” the lawmakers are unable to review any undisclosed emoluments that the president has accepted. See Ellis Kim, *Trump Tells Xi Jinping U.S. Will Honor ‘One China’ Policy*, NAT’L L. J., June 7, 2018, <https://www.law.com/nationallawjournal/2018/06/07/judge-grapples-with-democrats-standing-in-trump-emolument-lawsuit/?slreturn=20180817231847>.

182. It is worth noting that the U.S. Supreme Court’s recognition of and rationale behind a quid pro quo requirement for placing restrictions on political contributions does not apply to the realm of officeholders’ acceptance of foreign emoluments. See *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). For one thing, the Court left open the question of whether there is a compelling governmental interest in “preventing foreign influence over the political process” that would justify such contribution restrictions. *Id.* at 362. Needless to say, the Framers’ foreign influence concern driving the Foreign Emoluments Clause is not exclusive to elections, but also extends to events concerning a U.S. official while they are in office, regardless of whether they are running for reelection. Thus, *Citizens United* may have been alluding to a different sense of foreign influence. Second, the Court in *McCutcheon v. FEC* made a distinction between quid pro quo corruption and general influence. See 134 S.Ct. 1434, 1444 (2014). That being said, the relationship between foreign influence in U.S. political campaigns on the one hand, and foreign influence by way of prohibited emoluments on the other, is beyond the concern of this Note.

garding steps that the president ought to take in order to avoid a violation of the Foreign Emoluments Clause.

A. *Unilateral Executive Action in Foreign Affairs: Increasing Risk of Foreign Emoluments Violations*

With the modern practice of presidents undertaking unilateral actions in foreign affairs, there has been a growing secrecy surrounding the modern presidency that creates a grave risk of foreign emoluments violations. Indeed, the roles of the president and Senate in foreign affairs have drastically evolved in ways that depart from the Framers' intentions. Today, the president often undertakes unchecked action in foreign affairs even where the president lacks the constitutional authority to do so or when their constitutional power is shared with Congress.<sup>183</sup> For example, although the Constitution gives the Senate the power to declare war, several presidents in modern times have left in their wake a pattern of engaging the United States in wars without Senate approval.<sup>184</sup> Despite the president and Congress's "joint agency" to make treaties,<sup>185</sup> many presidents have unilaterally made clandestine deals with foreign nations.<sup>186</sup> This is deeply troubling because the Framers intended for the joint agency between the president and Congress embedded in the treaty power to serve as a safeguard against treaties that are the product of corruption or improper foreign influence. Hamilton stressed that the security against "corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them."<sup>187</sup>

The practice of presidential unilateral decision-making in foreign affairs implicates the Foreign Emoluments Clause because the safeguard of joint agency has essentially been cast aside. Conse-

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183. For an informative discussion on the adverse consequences associated with unilateral executive decision-making, see Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301 (2009).

184. Examples include President Truman's decision to initiate the Korean War and President Nixon's clandestine war in Cambodia. See CHRIS EDELSON, *POWER WITHOUT CONSTRAINT: THE POST-9/11 PRESIDENCY AND NATIONAL SECURITY* 15 (2016).

185. THE FEDERALIST NO. 66, at 325 (Alexander Hamilton) (Terence Ball ed., 2012).

186. The Iran-Contra affair is one famous example of a secret foreign deal under which the Reagan administration agreed to sell missiles to Iran in exchange for the release of American hostages detained in Lebanon. See EDELSON, *supra* note 184, at 38-39.

187. THE FEDERALIST NO. 66, at 325 (Alexander Hamilton) (Terence Ball ed., 2012).

quently, foreign nations now have further incentive to persuade or bribe a disloyal president to advance their interests, knowing full well that the modern president can effectively conceal these efforts from Congress and the public eye by simply branding such interactions as matters of “national security.” The absence of congressional participation in foreign policy decisions leads to less oversight of the exchanges between the president and foreign nations. Without congressional supervision, the president has access to numerous hidden channels through which they may accept prohibited foreign emoluments with little chance of being discovered. Surely, the overarching anti-foreign influence goal of the Clause commands that the Clause play a significant role in a world where the president is increasingly engaged in unilateral foreign policy decision-making. In the following section, consider how the current lack of supervision over the Executive Branch in national security matters might have further enabled President Trump to expand his spoils of office to include unchecked, massive foreign profits and benefits.

### B. *President Trump’s Foreign Emolument Conundrum*

The historical failure to enforce the Foreign Emoluments Clause and thus Congress’s constitutional role in serving as the gatekeeper of foreign emoluments to U.S. officials has allowed President Trump’s foreign dealings to avoid the level of scrutiny that could be necessary to expose whether any of his policy decisions have been compromised by a foreign nation. As examined in this section, President Trump has appeared to have benefitted considerably from this lack of oversight. Since he took office, his business enterprise has experienced record profits<sup>188</sup> and continues to expand around the world. President Trump’s business interests, which extend across 25 countries globally, create vast financial conflicts of interest between the president and foreign governments.<sup>189</sup> In response to these conflicts of interest, President Trump stated, “[T]he law’s totally on my side, the president can’t have a conflict

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188. See, e.g., Alexandra Berzon, *Trump Hotel in Washington Saw Strong Profit in First Four Months of 2017*, WALL ST. J. (Aug. 11, 2017), <https://www.wsj.com/articles/trump-hotel-in-washington-saw-strong-profit-in-first-four-months-of-2017-1502424589> [<https://perma.cc/E6DA-YYBD>].

189. See Carolyn Kennedy & John Norris, *Trump’s Conflicts of Interest*, CTR. FOR AM. PROGRESS (June 14, 2017, 12:01 AM), <https://www.americanprogress.org/issues/security/news/2017/06/14/434171/trumps-conflicts-interest/> [<https://perma.cc/VJ3F-XHVY>].

of interest.”<sup>190</sup> President Trump has reaped millions of dollars’ worth of benefits from foreign governments. Benefits include foreign governments’ ownership of property leases and condominiums connected with the Trump Organization, foreign diplomats’ transactions with Trump hotels and other properties, foreign government broadcast companies’ payments to air “The Apprentice,” and favorable treatment that President Trump has received from foreign governments with respect to his trademarks.<sup>191</sup> In 2018, President Trump’s former personal and business attorney Michael Cohen pled guilty to lying under oath for false statements he made before Congress in which he lied about having knowledge of business negotiations that took place during the 2016 presidential election in connection with a Trump tower in Moscow.<sup>192</sup> Ongoing investigations into President Trump’s financial dealings and foreign interference in the 2016 presidential election will hopefully establish a complete record of President Trump’s attachments to foreign nations.<sup>193</sup>

Of deep concern, President Trump’s history of bankruptcy arising from some of his real estate dealings harken back to land speculation and indebtedness in early America,<sup>194</sup> a vulnerability which the Framers believed foreign nations might seek to exploit.<sup>195</sup> And the many ways in which President Trump has increasingly profited from foreign governments suggest that foreign governments believe that providing special treatment to the Trump Organization is an optimal means to further their governments’ agendas. For example, immediately following President Trump’s announcement that the United States would uphold the one-China policy,<sup>196</sup> President Trump received 38 trademark approvals from

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190. Issac Arnsdorf, *Trump: ‘The president can’t have a conflict of interest’*, POLITICO (Nov. 22, 2016), <https://www.politico.com/story/2016/11/trump-the-president-cant-have-a-conflict-of-interest-231760> [<https://perma.cc/SD9N-FFPM>].

191. See Original Complaint, *supra* note 5, at 4.

192. See Plea Agreement, *supra* note 4, at 1-8.

193. See *supra* 4 and accompanying text.

194. See Dean Obeidallah, *For Trump this Time Bankruptcy Won’t Get Him Out of a Mess*, CNN (Jan. 22, 2018, 5:37 AM), <https://www.cnn.com/2018/01/22/opinions/trump-bankruptcy-opinion-obeidallah/index.html> [<https://perma.cc/TV2A-B68S>].

195. See *supra* Section II.C.

196. Mark Landler & Michael Forsythe, *Trump Tells Xi Jinping U.S. Will Honor ‘One China’ Policy*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/world/asia/donald-trump-china-xi-jinping-letter.html> [<https://perma.cc/N524-FCSJ>].

the Chinese Government.<sup>197</sup> One of these trademarks was the subject of a lawsuit that lasted for 10 years.<sup>198</sup> Additionally, after switching its reservation at the Four Seasons, the Kuwaiti Embassy moved its National Day event to the Trump hotel in Washington, D.C.<sup>199</sup> And a local Indonesian government permitted the construction of a roadway between a Trump resort and the main Bali airport, which reduced the time it takes to drive between the two.<sup>200</sup> Finally, to further secure the completion of a Trump hotel in Panama City, Panama's federal government constructed water and sewer pipes in the area surrounding the hotel.<sup>201</sup>

President Trump's failure to transfer his global business holdings and release his tax returns also likely gives rise to Foreign Emoluments Clause violations. In January 2017, President Trump announced that he was transferring control of the Trump Organization to his sons, Donald Jr. and Eric, through a "revocable trust," from which he may readily withdraw funds and exclusively benefits.<sup>202</sup> In addition, the president can regain control of the organization at any point.<sup>203</sup> On February 22, 2018, the Trump Organization announced that it donated its profits attributable to foreign governments from 2017 to the U.S. Treasury.<sup>204</sup> Nevertheless, the Trump Organization admitted to the difficulty in identifying whether the payments came from foreign governments,<sup>205</sup> so the donated amount likely represents an under-estimation. Because President Trump's significant ties to his business dealings remain largely intact, the president has failed to allay the American public's

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197. Adam Jourdan & Eric Walsh, *China Gives Greenlight to Dozens of Trump Trademarks*, REUTERS (Mar. 8, 2017), <https://www.reuters.com/article/us-usa-trump-china-trademarks/china-gives-greenlight-to-dozens-of-trump-trademarks-id-USKBN16F2JP> [<https://perma.cc/N524-FCSJ>].

198. *Id.*

199. Aaron C. Davis & Karen Tumuity, *D.C. and Maryland AGs: Trump 'Flagrantly Violating' Emoluments Clause*, WASH. POST (June 12, 2017), [https://www.washingtonpost.com/investigations/dc-and-marylands-lawsuit-trump-flagrantly-violating-emoluments-clause/2017/06/12/8a9806a8-4f9b-11e7-be25-3a519335381c\\_story.html?utm\\_term=.c291277e52ef](https://www.washingtonpost.com/investigations/dc-and-marylands-lawsuit-trump-flagrantly-violating-emoluments-clause/2017/06/12/8a9806a8-4f9b-11e7-be25-3a519335381c_story.html?utm_term=.c291277e52ef) [<https://perma.cc/M6B4-NF24>].

200. Anita Kumar, *Foreign Governments are Finding Ways to Do Favors for Trump's Business*, McCLATCHY DC BUREAU (Jan. 2, 2018, 5:00 AM), <http://www.mcclatchydc.com/news/nation-world/article192131074.html> [<https://perma.cc/6855-GYWS>].

201. *Id.*

202. Kennedy & Norris, *supra* note 189.

203. *Id.*

204. Cristina Alesci, *Questions Remain Over Trump Organization's Donation of Foreign Profits*, CNN (Feb. 27, 2018), <https://www.cnn.com/2018/02/27/politics/trump-organization-foreign-profits/index.html> [<https://perma.cc/Z87D-6NLY>].

205. *Id.*

concerns regarding the mounting conflicts of interest associated with his presidency. Even though divestiture from business dealings would not prevent the Trump Organization from profiting to some extent from the Trump presidency, it would at least blunt the conflicts of interest by separating President Trump from the profits while he holds office.

President Trump has reneged on several of his public promises that he would take certain steps to separate himself from the Trump Organization. Immediately after taking office, President Trump announced that he would withdraw his involvement in the day-to-day operations of the Trump Organization and would not discuss the business with his sons.<sup>206</sup> However, President Trump's son has stated that the president regularly receives updates on the business.<sup>207</sup> Trump International Hotel's revenue management director, Jeng Chi Hung, stated that "DJT is supposed to be out of the business and passed on to his sons, but he's definitely still involved . . . I had a brief meeting with him a few weeks ago, and he asked if his presidency hurt the business."<sup>208</sup>

Further, in January of 2017, President Trump announced that the Trump Organization would not undertake any new foreign deals,<sup>209</sup> but the company continues to pursue such deals. For example, in August 5, 2017, the Trump Organization announced a new Dubai real estate project entailing the development of luxury villas connected to President Trump's golf resort in Dubai.<sup>210</sup> President Trump has denied having any business connections in Russia even though he went on record in 2007 stating that he "has done a lot of business with the Russians."<sup>211</sup> In addition, President Trump

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206. *Id.*

207. Jennifer Calfas, *Eric Trump Says He'll Give the President Quarterly Updates on Business Empire*, FORTUNE (Mar. 24, 2017), <http://fortune.com/2017/03/24/eric-trump-president-business-organization/> [https://perma.cc/525B-3893].

208. Betsy Woodruff, *Trump Inc. Had a Rough Year, but His D.C. Hotel Is Killing It*, DAILY BEAST (Dec. 28, 2017, 7:00 PM), <https://www.thedailybeast.com/trump-inc-had-a-rough-year-but-his-dc-hotel-is-killing-it> [https://perma.cc/VQ66-94DB].

209. *Donald Trump's News Conference: Full Transcript and Video*, N.Y. TIMES, (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html>.

210. Jeremy Venook, *Trump's Interests vs. America's, Dubai Edition*, ATLANTIC (Aug. 9, 2017), <https://www.theatlantic.com/business/archive/2017/08/donald-trump-conflicts-of-interests/508382/> [https://perma.cc/Y3CA-86QG].

211. Jeremy Venook, *Trump's Been Talking About His Business Interests in Russia for 30 Years*, ATLANTIC (May 10, 2017), <https://www.theatlantic.com/business/archive/2017/05/trump-lawyers-up-conflicts-of-interest/526185/> [https://perma.cc/73LX-USYP].

held the Miss Universe Pageant in Russia.<sup>212</sup> On presidential election night, the Russian government approved the extension of President Trump's six trademarks that were set to expire.<sup>213</sup>

Increasingly, the Trump International Hotel, which is located in Washington, D.C., markets itself to foreign diplomats, many of whom have expressed their intentions to stay at Trump Hotels.<sup>214</sup> One week following the election, the Trump International Hotel hosted approximately 100 foreign diplomats at an event to promote the hotel.<sup>215</sup> Diplomats entered into raffles to win overnight stays at Trump hotels.<sup>216</sup> One diplomat from an Asian country stated, "Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new President, 'I love your new hotel!' Isn't it rude to come to his city and say, 'I am staying at your competitor?'"<sup>217</sup> In a filing to the Department of Justice, a representative from Saudi Arabia disclosed a payment of \$190,272 towards the representative's stay at a Trump hotel.<sup>218</sup> Following President Trump's oath of office, the Trump International Hotel significantly raised its rates and exceeded its profit predictions.<sup>219</sup>

In addition to benefits from foreign governments, President Trump has enjoyed significant financial advantages from the U.S. government, further showing that the presidency has been converted into a means for profit. Perhaps to avoid criticism from the Trump Presidency, the D.C. government recently reduced its tax assessment of the Trump International Hotel.<sup>220</sup> The General Services Administration has leased out the Old Post Office building to President Trump, which now serves as an extension of the Trump International Hotel, implicating both the Domestic Emoluments

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212. *Id.*

213. Venook, *supra* note 210.

214. See, e.g., Jonathan O'Connell & Mary Jordan, *Foreign Diplomats, Trump Hotel is Place to Be*, WASH. POST (Nov. 18, 2016), [https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35\\_story.html?utm\\_term=.4a953f8c57e0](https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.4a953f8c57e0) [<https://perma.cc/6KSZ-KJWS>].

215. *Id.*

216. *Id.*

217. *Id.*

218. Chuck Ross, *Saudis Spent \$270K at Trump Hotel in Lobbying Campaign Against 9/11 Bill*, DAILY CALLER (Jun. 4, 2017), <http://dailycaller.com/2017/06/04/saudis-spent-270k-at-trump-hotel-in-lobbying-campaign-against-911-bill/> [<https://perma.cc/R6K2-Z2WQ>].

219. Berzon, *supra* note 188.

220. See Josh Gerstein, *Judge Seems Open to Emoluments Suit Against Trump*, POLITICO (Jan. 25, 2018 1:11 PM), <https://www.politico.com/story/2018/01/25/trump-emoluments-lawsuit-369445> [<https://perma.cc/PQJ6-6PDT>].

Clause and Foreign Emoluments Clause.<sup>221</sup> The combined benefits President Trump receives from U.S. and foreign government entities underscore the enormous profits President Trump has made as a result of his presidency.

Considering the myriad ways in which President Trump has already financially benefited from his presidency, the number of potential foreign emoluments violations will conceivably rise. As the Trump Organization expands across the globe and reaps further profits, foreign governments will continue to find new opportunities to curry favor with the president.

*C. Compliance Practices: Divestiture, Blind Trusts & Tax Returns*

In keeping with the Foreign Emoluments Clause's prophylactic goal of minimizing foreign threats to the president's dependency on the American people, compliance with the Clause requires the president to disassociate themselves from any private financial interests that foreign nations may seek to exploit. Therefore, before entering office, the president has two plausible options: (1) transfer any of their business interests to an independent party; or (2) seek congressional approval for maintaining any of these business interests while in office. An incoming president who owns a business, for example, might be required to establish a blind trust or liquidate the assets.<sup>222</sup> Whatever the nature of the financial interests may be, the president must submit them for congressional review before entering office so that lawmakers can screen out any business affairs that create points of access between the president and any foreign government. The decision over whether the president's business dealings are vulnerable to foreign influence is categorically Congress's alone. Without these preliminary measures, constitutional congressional supervision over the many forms of benefits that the president could receive from their business throughout their term of office would be impossible, given administrability issues and Congress's limited resources.

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221. OFFICE OF INSPECTIONS, OFFICE OF INSPECTOR GEN., U.S. GEN. SERVS. ADMIN., JE19-002, EVALUATION OF GSA'S MANAGEMENT AND ADMINISTRATION OF THE OLD POST OFFICE BUILDING LEASE 1 (2019) (finding that the GSA improperly failed to give due consideration to the Emoluments Clauses issues posed by leasing the building to the president despite its awareness of these issues).

222. Examples of presidents who established blind trusts include George W. Bush, Bill Clinton, Lyndon Johnson, Ronald Reagan, and Jimmy Carter. See Glenn Kessler & Michelle Ye Hee Lee, *Trump's Claim that 'the President Can't Have a Conflict of Interest*, WASH. POST (Nov. 23, 2016), [https://www.washingtonpost.com/news/fact-checker/wp/2016/11/23/trumps-claim-that-the-president-cant-have-a-conflict-of-interest/?utm\\_term=.f5916eaa258c](https://www.washingtonpost.com/news/fact-checker/wp/2016/11/23/trumps-claim-that-the-president-cant-have-a-conflict-of-interest/?utm_term=.f5916eaa258c) [<https://perma.cc/8ASG-N5Y7>].

Compliance with the Foreign Emoluments Clause could also require the president to release their tax returns to Congress, so that Congress can review them for evidence of potential foreign emoluments violations. One might argue that Congress lacks the resources to review the tax returns of every U.S. officeholder. But, because the presidency raises unique conflicts of interest given the office is particularly an object of foreign influence, the president ought to be compelled to submit their tax returns to Congress. Besides, the release of tax returns is a common practice among presidents—they have been doing so for over forty years.<sup>223</sup> Certainly, the public's interest in holding presidents accountable for representing foreign nations' interests at the expense of the United States' outweighs any confidentiality the president may seek to maintain in their financial interests.

## V. CONCLUSION

The Foreign Emoluments Clause plays an instrumental role in preserving the democratic institutions, ideals, and principles upon which the U.S. system of government was delicately built. The Framers' concern that foreign influence in the form of emoluments to U.S. officeholders corrodes American democracy remains vital today, especially as the Executive Branch increasingly operates in foreign affairs matters unilaterally and secretly. Moreover, the continued failure on the part of the branches of government to hold President Trump accountable for his looming foreign emoluments violations sets a dangerous precedent for the modern presidency. Consequently, the American people are increasingly left wondering whether a foreign policy decision is the product of a U.S. goal, foreign nation's interest, or personal agenda. Resolving the Foreign Emoluments Clause debate should not be left for another day, lest we may never learn the truth behind whether the same foreign influence that has invaded U.S. elections has also made its way into the presidency.

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223. See Jill Disis, *Presidential Tax Returns: It Started with Nixon. Will it End with Trump?*, CNN BUSINESS (Jan. 26, 2017, 2:06 PM), <http://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html> [<https://perma.cc/SR8A-9BCC>].