NATIONAL CONSTITUTION CENTER

CREW v. TRUMP: DEBATE OVER THE EMOLUMENTS CLAUSES
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PODCAST RESOURCE MATERIALS

I. Overview and Participants

This podcast looks at the ongoing litigation in *CREW v. Trump*, a lawsuit over President Trump's alleged violation of the Foreign and Domestic Emoluments Clauses of the Constitution due to his failure to divest his business holdings in Trump hotels and other private enterprises. Oral arguments were recently heard in the Southern District of New York. (In January 2017, *We the People* hosted a podcast on the commencement of the case, featuring Brianne Gorod and Andy Grewal.)

Participants on this podcast to discuss the developments in the case are:

- **Josh Blackman**: is an Associate Professor of Law at the South Texas College of Law in Houston who specializes in constitutional law, the United States Supreme Court, and the intersection of law and technology. He filed an amicus brief in the CREW v. Trump lawsuit on behalf of another law professor, Seth Barrett Tillman.
- **Jed Shugerman**: is Professor of Law at Fordham Law School. He filed an amicus brief in the CREW/Emoluments litigation against President Trump along with a team of historians.

II. Constitutional provisions at issue

Foreign Emoluments Clause, Article I, Section 9, Clause 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, 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."

Domestic Emoluments Clause, Article II, Section I, Clause 7: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."

III. Background of case

At a press conference shortly before President Trump took office, Trump lawyer Sheri Dillon said he had taken efforts to prevent potential conflicts by transferring operation of the company to Trump's adult sons, Don Jr. and Eric Trump (but Trump would not give up his ownership stakes). Dillon announced that Trump would take other steps to avoid conflicts, including:

- The Trump Organization will make no new foreign deals while Trump is president;
- All new domestic deals will be subject to internal ethics review;
- Trump will not receive regular updates about the business.

Dillon also argued that Trump not divesting from Trump Hotels was not a violation of the the Foreign Emoluments Clause, because Trump's businesses will not be accepting "gifts" from foreign countries, but instead will be accepting payments for services rendered. Dillon said: "This is not what the Constitution says. Paying for a hotel room is not a gift or a present, and it has nothing to do with an office. It's not an emolument." But regardless, Dillon announced that Trump would turn over any "profits" made from foreign governments at his hotels to the U.S. Treasury. She concluded: "President-elect Trump should not be expected to destroy the company he built. [He will] take all steps realistically possible to make it clear that he is not exploiting the office the presidency for his personal benefit."

However, on Jan. 23, Citizens for Responsibility and Ethics in Washington (CREW)—a nonprofit legal watchdog group dedicated to holding public officials accountable for their actions—filed a lawsuit in the Southern District of New York, alleging that President Trump was still violating the Emoluments Clause of the U.S. Constitution by illegally receiving payments from foreign governments through his hotels and business empire. (It later filed two amended complaints adding plaintiffs, to address standing issues.) CREW Executive Director Noah Bookbinder said of the lawsuit:

> We did not want to get to this point. It was our hope that President Trump would take the necessary steps to avoid violating the Constitution before he took office. He did not. His constitutional violations are immediate and serious, so we were forced to take legal action. . . . President Trump has made his slogan 'America First.' So you would think he would want to strictly follow the Constitution's foreign emoluments clause, since it was written to ensure our government officials are thinking of Americans first, and not foreign governments.

CREW is represented in the case by a team of top constitutional scholars, ethics experts and litigators including CREW's board chair and vice-chair Norman Eisen and Richard Painter, the top ethics lawyers for the last two presidents, constitutional law scholars Erwin Chemerinsky, Laurence H. Tribe and Zephyr Teachout, and Deepak Gupta of Gupta Wessler PLLC.

- **CREW arguments and complaint**

The CREW suit alleges that because President Trump refused to divest from his businesses, he is now getting cash and favors from foreign governments, through guests and events at his hotels, leases in his buildings, and real estate deals abroad. Trump and the Trump Hotel chain conduct business with various countries like China, India, Indonesia and the Philippines, and now that Trump is President, his company's acceptance of any benefits from the governments of those countries violates the Constitution—specifically, the Foreign and Domestic Emoluments Clauses. As the complaint states:

> This case arises out of an unprecedented threat to two critical, and closely related, anti-corruption provisions in the Constitution aimed at ensuring that the President of the United States faithfully serves the people—free from the compromising effects of financial inducements from foreign nations, foreign leaders, individual states in the

Union, Congress, or other parts of the federal government. Never before have the people of the United States elected a President with business interests as vast, complicated, and secret as those of Donald J. Trump. Now that he has been sworn into office as the 45th President of the United States, Defendant's business interests are creating countless conflicts of interest, as well as unprecedented influence by foreign governments, and have resulted and will further result in numerous violations of Article I, Section 9, Clause 8 of the United States Constitution, the "Foreign Emoluments Clause," and Article II, Section 1, Clause 7 of the United States Constitution, the "Domestic Emoluments Clause."

The Foreign Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Congress has not consented to Defendant's receipt of the presents or emoluments at issue here.

Defendant's violations of the Foreign Emoluments Clause pose a grave threat to the United States and its citizens. As the Framers were aware, private financial interests can subtly sway even the most virtuous leaders, and entanglements between American officials and foreign powers could pose a creeping, insidious threat to the Republic. The Foreign Emoluments Clause was forged of the Framers' hard-won wisdom. It is no relic of a bygone era, but rather an expression of insight into the nature of the human condition and the essential preconditions of self-governance. And applied to Defendant's diverse dealings, the text and purpose of the Foreign Emoluments Clause speak as one: this cannot be allowed.

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

The Domestic Emoluments Clause, which is narrower than the Foreign Emoluments Clause, provides: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."

Like the Foreign Emoluments Clause, the Domestic Emoluments Clause arose to protect the government from corruption. The Founders intended that the Domestic Emoluments Clause guarantee that Congress, other parts of the federal government, and the states "can neither weaken [the President's] fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice." The Founders further intended the Clause to protect

> against self-dealing: insuring the President could not receive any benefit from his Office other than as the fixed compensation prescribed in advance by Congress.

CREW alleges numerous violations of the Foreign and Domestic Emoluments Clauses by President Trump since his inauguration[1]:

> (a) leases held by foreign-government-owned entities in New York's Trump Tower;
> (b) room reservations, restaurant purchases, the use of facilities, and the purchase of other services and goods by foreign governments and diplomats, state governments, and federal agencies, at Defendant's Washington, D.C. hotel and restaurant;
> (c) hotel stays, property leases, restaurant purchases, and other business transactions tied to foreign governments, state governments, and federal agencies at other domestic and international establishments owned, operated, or licensed by Defendant;
> (d) property interests or other business dealings tied to foreign governments in numerous other countries;
> (e) payments from foreign-government-owned broadcasters related to rebroadcasts and foreign versions of the television program "The Apprentice" and its spinoffs; and
> (f) continuation of the General Services Administration lease for Defendant's Washington, D.C. hotel despite Defendant's breach, and potential provision of federal tax credits in connection with the same property.

CREW alleges that is has been injured because it has had to devote significant resources to fighting the Emoluments Clause issue: "CREW has been forced to divert essential and limited resources — including time and money — from other important matters that it ordinarily would have been handling to the Emoluments Clause issues involving Defendant, which have consumed the attention of the public and the media," the complaint alleged. In April, CREW filed its first amended complaint. The amended complaint added two parties: Restaurant Opportunities Centers United (ROC), an organization with members who are restaurant employees, and Jill Phaneuf, who "seeks to book embassy functions" and other events involving foreign governments in the District of Columbia. Both new plaintiffs claimed an injury based on a competitor theory of standing. In May — without any noted objection by the government — CREW filed a second amended complaint, adding yet another party: Eric Goode. It was thought that these other entities positioned to raise the issue legally as business competitors—like competing D.C. hotels—can demonstrate that they've lost clients or profits to Trump firms, particularly in cases where Trump's presidency benefits his company.

- **DOJ Arguments and Motion to Dismiss**

In response to CREW's complaint, the Department of Justice filed a motion in June 2017 on behalf of President Trump to dismiss the case in the district court.[2] First, they argued against

[1] Second Amended Complaint at 17-19, *CREW v. Trump*, Civil Action No. 1:17-cv-00458-RA (SD-NY May 10, 2017).
[2] Memorandum of Law in Support of Defendant's Motion to Dismiss, *CREW v. Trump*, No. 17 Civ. 458 (RA) (SD-NY Jun. 9, 2017). Link.

CREW's theory of standing—that the organization does not have standing because it has not suffered an injury that courts can resolve. As DOJ's motion notes:

> CREW's allegations of injury amount to little more than CREW's own value judgment about what issues warranted its advocacy. CREW's asserted injury, therefore, is entirely 'self-inflicted.' …At most, CREW's diversion of resources reflects an 'interest in seeing the law obeyed or a social goal furthered.' But it is well established that 'an organizations abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III.' *Simov v. E. Ky. Welfare Rights Org.,* 428 U.S. 26, 40 (1976).
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> Frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'"). As the Supreme Court explained in Sierra Club v. Morton, 405 U.S. 727, 739–40 (1972), "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem" does not give rise to a legally protected interest or a concrete injury. Id. at 739. This is so, the Court reasoned, because if any group with a bona fide special interest could sue, then "it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so."
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> Accordingly, an organization seeking to advance one of its policy goals would not acquire standing simply because it had devoted resources to that goal at the expense of its other interests. Nor could an organization circularly acquire standing to sue simply by expending the resources necessary to do so. See, e.g., Steel Co. v. Citizens for A Better Env't, 523 U.S. 83, 107 (1998) ("Obviously . . . a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."). CREW's theory of standing in this case is also foreclosed by Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). There, an association of members of the Armed Forces Reserve brought suit alleging that Members of Congress who also were members of the Armed Forces Reserve were violating the constitutional prohibition against serving in Congress while "holding any Office under the United States." Id. at 210–11. The Supreme Court held that the organization lacked standing because its asserted injury—deprivation of "faithful discharge of the [Members'] legislative duties" because of potential "undue influence by the Executive Branch" on the Members—was "an abstract injury" that reflected "only the generalized interest of all citizens in constitutional governance."
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> . . . Moreover, the Schlesinger Court explained that the requirement of concrete injury "is particularly applicable" where the plaintiff seeks "an interpretation of a constitutional provision which has never before been construed by the federal courts" and where "the relief sought would, in practical effect, bring about conflict with two coordinate branches." 418 U.S. at 221–22. "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract," the Court said, "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to

> an arguable charge of providing 'government by injunction.'" Id. at 222. Those considerations apply with equal force here.

On the merits, DOJ claims that CREW's suit incorrectly reads the Emoluments Clause. DOJ argues that for a payment to be an emolument, there must be a tie between the payment and the President's office or employment. This is evidenced by a textual reading of the Constitution and also a contextual reading, taking into account the text of the Domestic Emoluments Clause. As the complaint notes:

> As relevant here, the Clause prohibits benefits arising from services the President provides to the foreign state either as President (*e.g.*, making executive decisions favorable to the paying foreign power) or in a capacity akin to an employee of a foreign state (*e.g.*, serving as a consultant to a foreign power). The text of the Domestic Emoluments Clause bolsters that interpretation. The term "Compensation" in the Domestic Emoluments Clause is qualified by "for his Services" as President. …The use of the term 'Emolument' to refer to the receipt of value for services rendered or for a position held is also consistent with contemporaneous dictionary definitions."

The DOJ motion cites historical evidence and writings from the Constitutional Convention and the Federalist Papers: e.g., "The Framers settled on having fixed compensation and emoluments for the President for the duration of his office, restricting the legislators' ability to assume those offices whose emoluments were increased during the legislators' tenure, and prohibiting public officials' receipt of foreign gifts, emoluments, offices, or titles. There was no discussion about constraints on private business." For instance:

> Charles Pickney, who was credited with proposing the Foreign Emoluments Clause, maintained half a dozen plantations in South Carolina while holding various public offices. . . George Washington, who had left his nephew in charge of his highly successful business, required 'weekly reports' from his farm managers at Mount Vernon, and responded with detailed instructions. From his Presidential office, he wrote business plans, including those for his gristmill, from which he exported flour and cornmeal to 'England, Portugal, and the island of Jamaica.' . . . Jefferson maintained his farm and nail factory at Monticello and exported his tobacco crop to Great Britain. . . . . there is no evidence of these Presidents taking any steps to ensure that they were not transacting business with a foreign or domestic government instrumentality.

- **Oral argument in SDNY**

On October 18, the Southern District of New York heard oral arguments in *CREW v. Trump*. On his blog, Josh Blackman reported and commented on the recent oral arguments heard by SDNY in the case:

> On Wednesday, October 18, the oral arguments in *CREW et al v. Trump* began at 10:30 a.m. in courtroom 11A. The right side of the courtroom was packed with press, and the left side was filled with attorneys affiliated with the case. An overflow room was opened on the 26th floor for spectators to watch on a closed-circuit feed. Brett Shumate argued in

support of the Government's motion to dismiss. (Shumate was featured in a recent NLJ profile for his defense of the Government in the Emoluments Clause case, the DACA litigation, and the Sanctuary City suits). Deepak Gupta argued in opposition to the Government's motion to dismiss, and Joseph Sellers provided a brief argument about how discovery would proceed if the Plaintiffs prevailed. With only a five-minute recess, the argument stretched until about 1:10 p.m. Judge Daniels should be commended for his excellent preparation—he came engaged and ready to ask probing questions of both sides. The Court announced that a decision would be issued in about thirty to sixty days.

Article III Standing

The Government opened with the position it put forward in its brief: CREW's injury is "self-inflicted." Further the Government argued that the Supreme Court decision in *Havens Realty Corp. v. Coleman* (1980) requires a distinct injury that led to the diversion of CREW's resources. In other words, the diversion itself could not be the injury. Judge Daniels did not ask *any* questions during Shumate's discussion of CREW's standing.

In contrast, Judge Daniels asked several questions of Gupta about CREW's manufacturing standing, and specifically, whether CREW was required to investigate Trump's business interests, or merely chose to do so. Judge Daniels explained that "CREW didn't have to divert resources; it chose to do so." At one point, Judge Daniels said CREW could not "play policeman." Indeed, the Court said nothing "forced CREW" to bring this suit, but the group "wanted to pick a fight with the President." The lack of questions for the Defendant, and the length of questions for the Plaintiffs, suggests that CREW's standing claim is in doubt. (I wrote about this topic some time ago on January 22, 2017).

Judge Daniels asked a number of questions concerning the theories of competitor standing for the "hospitality" plaintiffs (i.e., ROC, Goode) who assert ownership over hotels and restaurants in New York, as well as Jill Phaneuf, an event planner who seeks to book diplomatic affairs at D.C. Hotels. Judge Daniels asked Gupta several times whether there is any evidence that Phaneuf has ever actually booked a diplomatic event, actually lost business, or had her previous customers booked events at Trump hotels. Gupta responded that such evidence was not required.

The Court asked no specific questions about the status of the other hospitality plaintiffs, although I would note that in court, Deepak Gupta asserted that Eric Goode "owned" the Bowery Hotel, and he later referred to "Eric Goode's hotels." As Seth Barrett Tillman and I noted in a *Volokh Conspiracy* post, Goode is, by all accounts, a partial owner of these hotels. These records did not come up during the oral argument, though I suspect these issues will be raised as this case goes moves forward or goes upstairs, much like standing issues were only raised for the plaintiffs in *King v. Burwell* as the case progressed to the Supreme Court.

Zone of Interest

Judge Daniels spent a significant amount of time inquiring about the zone of interest—far more time than I expected. He suggested that the Foreign Emoluments Clause is an anti-corruption provision. Because the Framers were concerned about corruption, not competition, those asserting competitor standing are not within the zone of interests sought to be protected by the provision. Gupta replied that because this case involved a structural provision of the Constitution, the zone of interest inquiry was not relevant for the Plaintiffs. Gupta cited cases like *Free Enterprise Fund v. PCAOB*, *INS v. Chadha*, and *Bond v. United States*. Also, the Supreme Court's recent *Lexmark v. Static Control Components* decision suggested that the zone of interest test is prudential.

Jurisdiction and Political Question Doctrine

The Government has cited *Mississippi v. Johnson* for the proposition that federal courts lack jurisdiction to issue an injunction against the President. Shumate argued that *Franklin v. Massachusetts*—and in particular, Justice Scalia's concurring opinion—reaffirmed this principle. Judge Daniels suggested that even if the Court could not issue injunctive relief against the President, he could still issue a declaratory judgment. Shumate replied that such a decision would be little more than an advisory opinion, with the same separation of powers concerns discussed in *Johnson* and *Franklin*. The Court suggested that such a declaratory judgment, absent an injunction, could be enough to get the President to voluntarily comply with his ruling and "self-divest." He noted in such circumstances, there would be no need to monitor the President's finances, which would have implications for the separation of powers involving supervising the President's compliance with an injunction. The Court also suggested that "Congress can take action after a declaration." The meaning of this statement was not clear, at least in my notes. Impeachment? Passing a statute? Or a resolution expressing the opinion of Congress that the President ought to self-divest?

Gupta attempted to recast *Johnson* as a case decided under the political question doctrine. Judge Daniels turned that argument around on the Plaintiffs. The Constitution does not impose a prohibition on the receipt of emoluments, he noted; rather, Congress must consent to the acceptance of prohibited emoluments. As a result, Judge Daniels asked, why should the Court intervene if this is a question committed to the other two branches of the federal government. (I made that argument back in January 2017). He added that if Congress consents, then Plaintiffs have no cause of action. "Why is it appropriate for the judiciary to allow the President to fight this out in a 'street brawl,'" he asked. (This line of questions will be especially apt for oral arguments in *Blumenthal v. Trump*, which was filed by members of Congress who, because they lack the votes to disapprove of the President's business interests, turned to the courts.)

Meaning of Emolument

Shumate at several junctures referred to the "original public meaning of emolument," which included profits that arise from the provision of services connected to an office.

Judge Daniels—who did not reference founding-era dictionaries, corpus linguistics, or any historical practice for that matter—offered a different definition of "emolument." Namely, "compensation." He derived that definition from the Domestic Emoluments Clause, which links the President's "emoluments" to his salary or compensation. The Government rejected this definition as too broad, but Judge Daniels continued to push this definition with a hypothetical: if a foreign government offered the President $1 million for signing a treaty, how would it be characterized? The Government maintained that such an offer would be a "present," which is also forbidden by the Foreign Emoluments Clause, but would not be an "emolument." Judge Daniels dismissed the reference to a "present." Seth and I had offered a different answer to this question in our briefs: because of the *quid-pro-quo* nature of the offer, it would not be a present, but would be a "bribe," which is an enumerated ground for impeachment. Whether or not the President follows through, and signs the treaty does not matter, it is still a bribe. It is entirely predictable what sort of headlines would result from a DOJ lawyer using the word "impeachment" in court, so Shumate's answer is understandable, although not satisfying.

Judge Daniels also asked what would happen if Donald Trump sold hot dogs for $100,000 each, and a foreign government official bought one. After some back-and-forth, Shumate conceded that if the profits from a business transaction went "beyond reasonable market value," and if there was provision of services (such as the signing of a treaty), it could be an emolument.

Discovery if Motion to Dismiss Denied

Gupta, while arguing for the Plaintiffs, reserved five minutes for his co-counsel, Joseph Sellers to discuss how discovery would proceed if the motion to dismiss was denied. No doubt, this was done to assuage the Court of any concerns that it would not have to supervise a lengthy discovery process involving the Trump Organization and other Trump entities. Sellers said they would need three to five months for discovery, followed by a one-week trial. Based on my experiences clerking in the district court, where discovery in more mundane cases took twice that long, if not considerably longer, Sellers's forecast was fairly optimistic. Sellers also noted that if the President agrees to divest his business entities, the Court would not need to oversee the process. Sellers also suggested a thirty-party could oversee the divestiture, which would obviate the need for the court to get involved. Again, in the unlikely event divestment begins, disputes between the Plaintiffs and Defendant will no doubt arise about the scope of divestment, occasioning judicial oversight. During a press conference after the hearing, Sellers explained: "We will be looking for detailed financial records" and "if the tax returns turn out to be relevant, we will seek them." Of course, that is all you need to know.

"Assuming" The Foreign Emoluments Clause Applies to the President

From my perspective, the Government saved its most interesting comment for last. In the final sentence of Shumate's rebuttal, he said the Government was only "assuming" the Foreign Emoluments Clause applies to the President. (I heard him say "Domestic

> Emoluments Clause" here, but from the context it was obvious what he meant.) Peter Overby, of NPR's *All Things Considered*, heard the same thing. He reported, "At the end of the hearing, Shumate opened a possible argument that the presidents are not even covered by the Foreign Emoluments Clause."

Blackman concludes: "As should be clear from the above discussion, there is no certainty that the Government wins on standing, justiciability, jurisdiction, or even the meaning of "emolument." I've described the argument advanced in our briefs as a "silver bullet." If the "silver bullet" argument were successful, it tosses out the bulk of the Plaintiffs' case. There were no questions about it today, but this issue will not disappear. It will gain salience as the case goes up the pipeline."

On his own blog, *Shugerblog*, Jed Shugerman also responded to the oral arguments in the case:

> I was struck by Judge Daniels's resistance to CREW's arguments. The problem is that this is the first time courts have addressed this clause, so there is no direct precedent to answer this specific question.
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> However, this Emoluments clause is certainly not the only place in the Constitution that uses a similar structure: a prohibition against some act, but a grant of a power to Congress to make exceptions. In fact there are two other examples in the Article I, Section 10, immediately after the Foreign Emoluments Clause (Art. I, Sec. 9). They are prohibitions on state power with the same language, "without the Consent of Congress."
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> Art I, Sec. 10, Clause 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."
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> The argument here would be the same: Because Congress can always declare or legislate its non-consent, this clause is a political question for Congress, not a justiciable question for the courts. In fact, this clause has a double measure for congressional authority, adding that these state laws are "subject to Revision and Controul of the Congress," so the possibility that this clause is only a "political question" is even stronger than the Foreign Emoluments Clause. However, I can find about two dozen Supreme Court cases ruling on this clause, treating it as clearly justiciable. See, e.g., Chief Justice John Marshall's decision in Brown v. Maryland, 25. U.S. 419 (1827).
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> The next clause is similar. Clause 3: "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

It has the same structure: a general prohibition plus an exception for congressional consent. Is this clause nonjusticiable because it is a political question for Congress? The Supreme Court has ruled on tonnage duties under this clause at least a dozen times. It has ruled on the troops provision, and there are countless cases on interstate compacts.

Moreover, the same section that includes the Foreign Emoluments Clause also offers a prohibition on the executive branch, with grant of power to Congress: Art I, Sec. 9, cl. 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Is this clause a political question? Its structure is similar to the Foreign Emoluments Clause: it is a prohibition, unless Congress consents (by passing an appropriations measure). But I have found half a dozen Supreme Court cases that treated the clause as justiciable.

What about Congress's role in accepting new states? Art. IV, Sec. 3: "[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

Presumably if California tried to split into two states, perhaps a Democratic Senate decided to seat an extra two Democratic Senators, though a Republican President and a Republican House rejected the creation of a North California and a South California. What if they sent an extra pair of electors to the Electoral College, too? Surely the courts would have something to say about such shenanigans. This question would be justiciable (though the question of standing would be separate).

For another example, turn to the appointment power in Art II, Sec. 2:"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."

Let's say President Obama decided that Congress's silence on his nomination of Judge Garland to the Supreme Court or his nomination of Elizabeth Warren to head an agency was tantamount to implicit consent. Could these appointments be challenged in court? Surely if Justice Garland tried to rule on a case or if agency head Warren tried to regulate a bank, a plaintiff would have a day in court to challenge the legitimacy of those appointments. The fact that Congress has a role in permitting a president to act does not make its silence establish consent, nor does its potential role make the question non-justiciable.

I should add that this interpretation that silence equals consent would be particularly problematic in our current debates about individuals and their consent, from the domains of contract law and sexual contact.

Shugerman concludes: "The bottom line is that the framers drafted several provisions in the Constitution that the structure of a broad prohibition, but also carved out a power for Congress to make exceptions, twice with the exact same language of "without the consent of Congress." The

courts have treated those clauses as justiciable from Chief Justice Marshall through contemporary cases. Thus, the Foreign Emoluments Clause is justiciable, an appropriate and manageable question for the federal courts."

IV. Legal issues in *CREW v. Trump*

- **Standing issues**

One big threshold challenge for the suit is the issue of standing: As Erik Jensen, a law professor at Case Western Reserve University in Cleveland, said: "Just complaining about bad government does not give rise to standing — or you or I would have standing to challenge just about anything that goes on. And the system just couldn't work." To have standing to sue, the watchdog group must show evidence it was harmed by Trump's actions.

The group's alleged injury is that its workload has increased because Trump has given them new concerns to investigate, and that it has to turn its resources away from fighting other kinds of corruption to fighting against Trump's alleged violations. Richard Painter, a University of Minnesota law professor and former chief White House ethics lawyer for President Bush (one of the attorneys on the case and vice chairman of the watchdog group's board) says: "The injury to the organization is that it's much more difficult to accomplish the organization's mission. Basically the administration has opened up a whole new avenue of corruption."

Other legal scholars have been skeptical: Josh Blackman has said "This injury is self-inflicted . . . and does not find support in the [Supreme Court's] caselaw." E.g., *Clapper v. Amnesty International USA*. According to Blackman's notes on the oral arguments last week, Judge Daniels of the SDNY still expressed some doubts on the standing claim. The court also seemed dubious that the other plaintiffs that CREW added to its amended complaints.

- **Justiciability issues**

Josh Blackman also raised another potential issue regarding the overall justiciability of the suit:

> Putting aside the question of standing, a serious justiciability hurdle is whether this is a political question. (No court has ever addressed this Clause). The foreign emoluments clause specifically references Congress . . . Under *Baker v. Carr* (if those factors even matter any more), there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department." [Citing from *Baker v. Carr*:]
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> > "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning

> adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Blackman concluded: "There is every reason for the courts to stay away from this issue."

- **Dispute over interpretations of the Emoluments Clauses and the history of the Clauses (including participant commentary)**

Another point of contention concerns the interpretation of the Emoluments Clause. Professor Marty Lederman, in a blog response to DOJ's motion and interpretation,[3] said that it contradicts past administrations' interpretations of the Foreign Emoluments Clause.

> A requirement that the payment or profit "arise from" the officer's office or employment would also be difficult to reconcile with at least some cases in which the Executive itself has conceded the Clause's prohibition applies... It would also depart from the functional test the Executive has often applied. For example, a 1981 OLC opinion concluded, based primarily upon Framing-era history—including Edmund Randolph's use of the term "emolument" to refer to a present rather than compensation for services in the Virginia ratifying convention—that 'the term emolument has a strong connotation of, if it is not indeed limited to, payments which have a potential of influencing or corrupting the integrity of the recipient'…"

More importantly for Lederman, however, even under the DOJ's reading, President Trump appears to be in violation of the Clause. He continues:

> DOJ's argument, recall, is that "emolument" means any "profit arising from an office or employ" (p.31)—the "receipt of value for services rendered or for a position held" (p.29). In other words, if President Trump accepts any profits from payments made by a foreign nation or official that would not have been made but for the fact that he is the President, he has accepted a forbidden foreign emolument (and/or, in some cases, perhaps, a forbidden 'present'). Well, as it happens, the plaintiffs have alleged just that. For example, their complaint alleges (para. 62) that some foreign diplomats have indicated an intent to stay at the Trump International Hotel in D.C., or to hold events there, in order to curry favor with the President. (If the allegations are true, this is hardly an accident for which the Trump Organization bears no responsibility (paras. 60-61): After the President was elected, the Organization "pitched the hotel to about 100 foreign diplomats, and the hotel hired a 'director of diplomatic sales' to facilitate business with foreign states and their diplomats and agents.)
>
> … If the complaint's allegations are true, in each of these cases a foreign nation or official made payments or gave benefits to the Trump Organization because of his new federal office—and therefore, on DOJ's view, Trump's acceptance of the profits and

[3] Marty Lederman, *How the DOJ Brief in CREW v. Trump Reveals that Donald Trump is Violating the Foreign Emoluments Clause*, Take Care Blog, Jun. 12, 2017. Link.

> benefits violated the Foreign Emoluments Clause. Moreover, even where the complaint does not allege that Trump's presidency was a 'but for' cause of a foreign entity's decision to do business (or grant trademarks), the complaint also alleges that some of the profits from foreign officials' transactions were the result of the fact that Trump is now President."

The other issue is whether the President is covered under the Clause's prohibitions as an "officer" of the United States. The leading legal scholar arguing that the President is not covered is Seth Barrett Tillman (who wrote the Interactive Constitution explainers on the Foreign Emoluments Clause with Zephyr Teachout.)

Josh Blackman, on behalf of Seth Barrett Tillman, filed an amicus brief in the case to present the historical and constitutional arguments in favor of Tillman's theory. The brief echoes Tillman's arguments made in the Interactive Constitution (included below), arguing that the President is not covered by the Foreign Emoluments Clause as he is not someone who holds "office under the United States." Tillman relies on a particular piece of evidence: a list of "persons holding office under the United States and their salaries" put together by Treasury Secretary Alexander Hamilton that "did not include any elected officials in any branch." According to Tillman, this document demonstrates that "officers under the United States are appointed; by contrast, the president is elected, so he is not an officer under the United States. Thus, the Foreign Gifts Clause, and its operative office under the United States language, does not apply to the presidency."

This assertion, however, resulted in a constitutional "spat" among scholars over the interpretation of historical documents—in particular, over the letter submitted by Hamilton to the Senate. Progressive scholars argued that other documents, excluded by Tillman, countered his assertion—but review by historians and other experts revealed Tillman's interpretation and identification of documents to be correct—the progressive scholars were not citing to an original Hamilton letter but only a scrivener's copy.

Jed Shugarman had written a blog post urging Tillman to issue a correction to his brief and to his arguments, but after historians and other experts wound up agreeing with Tillman, and Shugarman issued him an apology. Here is an excerpt from Shugarman's original blog post from Aug. 31, 2017:

> The amicus brief filed on behalf of President Trump in CREW v. Trump (the first Emoluments suit) by Seth Barrett Tillman and Josh Blackman has some serious problems with how it represented its historical sources. The brief argues that the Foreign Emoluments Clause does not apply at all to the president, because the presidency is not "an office under the United States." No court has ever adopted this interpretation, and their only historical document that supports their claim is one letter by Alexander Hamilton to the Senate in 1793 (because that letter did not include the President). However, it turns out that a second Hamilton letter to the Senate on the same day shows the opposite (because it included the President). Their amicus brief buries this second letter in a footnote and, in order to bury it even deeper, it makes incorrect factual claims about it (that it was undated, unsigned, and written by an unknown Senate functionary).

> This post examines this scholarship more closely to understand how these irregularities happened and to correct the record.
>
> . . . One might expect that when a brief before a court contains significant factual errors or misleading interpretations of evidence, the authors of that brief will offer to correct their briefs or retract the sections if they are no longer supported by the evidence. Fortunately, Professor Tillman still has ample time to address these questions and correct the record. As the Emoluments cases progress, I look forward to continuing to engage with his legal and historical arguments. However, it is vital that we all describe our historical sources clearly, accurately, and openly, and that we are careful to make sure our arguments are fairly supported by the historical evidence.

But later, after Blackman and Tillman responded and experts agreed with them, Shugarman issued an apology:

> I am satisfied that Tillman and Blackman have provided support for their perspective on these documents. I note that we found the "Condensed Letter" in the archives only six weeks ago, and I will continue to examine it in light of these experts' reports. There is much more to the arguments about the Emoluments Clauses, and I look forward to engaging them in future briefs. Most importantly, I offer them a public and personal apology for my public questioning of their claims. I was wrong to suggest that Tillman misused sources, and I was wrong to question his credibility. I take full responsibility for my Aug. 31st blog post, which was my work alone, and solely my error in judgment. Even if my questions were reasonable and posed in good faith, I regret that I did not ask these questions by email to give Tillman an opportunity to respond directly. Tillman is a diligent, creative, intelligent, and learned scholar who deserved more respect than the way I handled these exchanges. I'm sincerely sorry for any trouble or hardship I caused for Mr. Tillman and his family.

(At Liberty Law site, Mike Rappaport praised Shugarman's integrity in admitting to his mistake and issuing an apology to Tillman.)

Adam Liptak reported on this constitutional debate in the NY Times, 'Lonely Scholar With Unusual Ideas' Defends Trump, Igniting Legal Storm':

> Seth Barrett Tillman is a lecturer in the law department of Maynooth University in Ireland. He is, he said in a recent court filing, a "lonely scholar with unusual ideas, who is unaffiliated with the popular, the organized and the wealthy."
>
> One of his unusual ideas is that President Trump cannot be sued for violating the Constitution's foreign emoluments clause, which prohibits federal officials from taking payments from foreign governments.
>
> Several lawsuits have accused Mr. Trump of violating the clause by doing business with entities controlled by foreign governments. If Mr. Tillman is right, those lawsuits should be dismissed.

In June, Mr. Tillman filed a friend-of-the-court brief saying that some framers of the Constitution did not think the emoluments clause applied to the president. One of his key pieces of evidence was a document signed by Alexander Hamilton.

The reaction was swift and brutal. Legal historians and a lawyer for members of Congress suing Mr. Trump said Mr. Tillman had misunderstood, misrepresented or suppressed crucial contrary evidence in a second document.

Jed Shugerman, a law professor at Fordham, wrote a blog post urging Mr. Tillman to issue a correction. “One might expect,” Professor Shugerman wrote, “that when a brief before a court contains significant factual errors or misleading interpretations of evidence, the authors of that brief will offer to correct their briefs or retract the sections if they are no longer supported by the evidence.”

In another blog post, Brianne J. Gorod, a lawyer with the Constitutional Accountability Center, which represents lawmakers suing Mr. Trump, said Mr. Tillman’s account was “not accurate, not even remotely so.”

Five legal historians, including Professor Shugerman, filed their own friend-of-the-court brief. They said Mr. Tillman’s had “incorrectly described” the evidence in a footnote in his brief.

Mr. Tillman took none of this lightly. In a sworn statement last week, he repeated his original position. “I stand entirely behind the above footnote: behind every sentence, every phrase, every word and every syllable,” he wrote. “I made no mistake, intentional or inadvertent. I retract nothing, and I do not intend to retract anything.”

Mr. Tillman, who is represented by Josh Blackman, an energetic law professor and litigator, rounded up declarations from experts in founding-era documents and on Hamilton. They agreed that the document said to contradict Mr. Tillman’s account was not signed by Hamilton and was prepared after his death.

I asked Mr. Tillman’s critics for their reactions. Professor Shugerman responded with “a public and personal apology.” “I am satisfied that Tillman and Blackman have provided support for their perspective on these documents,” he wrote on his blog. “I was wrong to suggest that Tillman misused sources, and I was wrong to question his credibility. Tillman is a diligent, creative, intelligent and learned scholar who deserved more respect than the way I handled these exchanges. I’m sincerely sorry for any trouble or hardship I caused for Mr. Tillman and his family.” Professor Shugerman’s fellow historians — John Mikhail, Jack Rakove, Gautham Rao and Simon Stern — said they were still studying the matter.

Ms. Gorod did not offer a direct response. “While there is a fascinating academic discussion to be had about the provenance of these particular documents, and that specific discussion will surely continue, it’s ultimately immaterial to what’s going on in the courts

because at the end of the day, it is clear that the foreign emoluments clause applies to the president," she said in statement. "Even the Department of Justice agrees."

She is right that the cases are very unlikely to turn on Mr. Tillman's arguments. All of the parties, including Mr. Trump's lawyers, agree that the foreign emoluments clause applies to the president. The Justice Department instead argued that Mr. Trump had not violated the clause because he had taken no money in exchange for his official actions.

Mr. Tillman said the clause does not apply to the president in the first place, pointing to a 1793 document submitted by Hamilton, who was the secretary of the Treasury. The Senate had asked him to list "every person holding any civil office or employment under the United States." That language tracks but is a little broader than what is in the emoluments clause, which was not the subject of the request.

In Hamilton's response, which the editors of his papers say he signed, he did not list the president or any other elected official. That is some evidence, though more than a little indirect, about what one of the framers of the Constitution thought about how broadly the emoluments clause swept.

In his brief, Mr. Tillman noted but discounted a contrary piece of evidence. "An entirely different document (but bearing a similar name)," he wrote, did include the president. It was "undated," "not signed by Hamilton" and "was drafted by an unknown Senate functionary."

Mr. Tillman's critics said that second document was the crucial one, adding that it bore both a date and Hamilton's signature. In court papers Mr. Tillman sought to file last week, he argued that the second document was "a scrivener's copy — the antebellum equivalent of a photocopy — which was not signed by Hamilton." Indeed, Mr. Tillman said, internal evidence in the second document indicated that it "was drafted long after Hamilton's death in 1804."

Judge George B. Daniels of the Federal District Court in Manhattan promptly rejected Mr. Tillman's request to file more papers, which, after all, concerned an issue that is not disputed between the parties. Mr. Tillman's plea, though, was probably addressed to an audience wider than a single judge. It has yielded a gracious apology, and it has demonstrated a couple of things.

The lawsuits are bitterly contested because they are important. And, whatever the value of using indirect evidence to interpret the Constitution, the demands of historical research and vigorous legal advocacy can tug in different directions.

Blackman also wrote a series of posts on *Volokh Conspiracy* explaining arguments from the Tillman brief:

The Emoluments Clauses litigation, Part 1: The Constitution's taxonomy of officers and offices (Sept. 25, 2017) (explaining that that under the Constitution's taxonomy,

appointed — and not elected — officials hold office "Under … the United States; as a result, the president is not subject to the foreign emoluments clause.")

The Emoluments Clauses litigation, part 2 — the practices of the early presidents, the first Congress and Alexander Hamilton (Sept. 26, 2017) (describing the early practices of the Framers and the practices of presidents during the early republic, the first Congress, and Alexander Hamilton, while serving as America's first secretary of the treasury, confirm that they understood that the president was not subject to the Foreign Emoluments Clause and its "Office … under the United States" language.)

The emoluments clauses litigation, Part 3: So what if the president does not hold 'Office … under the United States'? (Sept. 28, 2017) (offering an FAQ of what happens if the president does not hold "Office … under the United States," under the incompability clause, disqualification clause, and religious text clause, and responding to several questions advanced by the plaintiffs and their amici).

The emoluments clauses litigation, part 4 — an emolument is the "profit derived from a discharge of the duties of the office" (Sept. 29, 2017) (analyzing the meaning of the word "emolument" in the presidential (or domestic) emoluments clause, as well as in the foreign emoluments.)

The emoluments clauses litigation, part 5 — problems with the complaints in CREW v. Trump (Oct. 1, 2017) (breaking down the standing issue in the case by looking at the facts relating to the plaintiffs' individual standing claims—e.g., are the plaintiffs actual owners of the entities in question, and can they assert concrete injuries?)

On his own blog, Shugerman argues that there is another way that President Trump can be sued for a constitutional violation: states attorneys general with Trump corporation businesses in their state (New York, Florida, Illinois, New Jersey) can bring suit against the President.[4] He explains how this might get over the hurdles of standing, for instance, in a case brought by private individuals (such as the plaintiffs in the CREW lawsuit):

> The problem is that government officials often impact the general public and create diffuse problems, so that the harm is broad, not particular to a smaller set of people. Over the past three decades, conservatives on the Supreme Court have built up obstacles for private citizens trying to sue the government by increasing the requirement for injury, causation, and 'zone of interests.' Counterintuitively, when a government official harms the public more widely, it is often harder for any individual citizen to have particular standing. And counterintuitively, when the government official is more powerful, the harms are more diffuse, and there are a mix of rules making it harder to see him or her (e.g., qui tam rules; Congress exempting the president from conflict of interest laws). The valid concern is too much litigation against public officials, by too many people with less compelling claims. A good pro-plaintiff argument for standing is that challengers to

[4] Jed Shugerman, *State Attorneys General Can Enforce the Emoluments Clause with Quo Warranto vs. Trump's Hotels*, Shugerblog, Feb. 9, 2017. Link.

> government misconduct are best served when courts must choose the plaintiff with the most compelling, most sympathetic case. But standing rules go too far when they completely insulate government officials from the citizens and the courts.
>
> … I suggest a solution: Instead of private parties suing the public official (Trump), public officials can sue the private parties (the Trump hotels and other business entities). The public officials in the Department of Justice – the U.S. Attorney General or the U.S. Attorneys – could theoretically open an investigation, but it's not a realistic hope. However, the state attorneys have the power through state courts. Could the state attorneys sue President Trump directly for violating the U.S. Constitution? That is a different Fed Courts questions for a different day. But corporations are a creature of state law, not federal law, and state attorneys general have a special role in making sure that corporations adhere to federal and state law.

A quo warranto proceeding enables a state attorney general to access information about whether the entities are conduits for illegal emoluments, to enjoin those activities, to force President Trump to divest, and/or to dissolve those entities.. He explains:

> It would be difficult for a private citizen to use quo warranto against President Trump for his receipt of emoluments. Instead, states have statutes allowing a state official (or a shareholder and sometimes a member of the general public) to sue a corporation through quo warranto for acting "ultra vires" (beyond legal authority). A group of people create a legal corporation through state law, to create legal privileges and gain legal rights as legally fictional person. In order to retain these rights and privileges, a corporation must act only within the bounds of its charter and within the bounds of the law. The "ultra vires" doctrine originated with the English quo warranto writ.

V. Interactive Constitution

The IC explainers on the Foreign Emoluments Clause, written by Seth Barrett Tillman and Zephyr Teachout, discuss the constitutional history in further detail:

- **Joint explainer: The Foreign Emoluments Clause**

History. Between the fourteenth and eighteenth centuries, it was routine diplomatic practice for the royalty of a host country to give expensive gifts to departing foreign emissaries or diplomats at the end of their tenure in the host country.

However, in the mid-seventeenth century, the Dutch enacted a rule forbidding their foreign ministers from taking "any presents, directly or indirectly, in any manner or way whatever." This was motivated by a fear of corruption. This new rule was alien to customary international relations, and it was strongly criticized by Abraham de Wicquefort, one of the more well-known Dutch political writers. Wicquefort wrote: "The custom of making a present . . . is so well established that it is of as great an extent as the law of nations itself, there is reason to be surprised at the regulation that has been made on that subject in Holland." Wicquefort mocked his countrymen for fussing over trivial items, like a plate of fruit, and accused them of trying to

create a "Republic of Plato in their fens and marshes." The new rule was too high-minded and abstract, Wicquefort thought, and it, in essence, "condemn[s] the sentiments of all the other kings and potentates of the universe."

But the new Americans were interested in such high-minded principles, even if they violated the sensibilities of kings and potentates. The Articles of Confederation, America's first national constitution, apparently borrowing from the Dutch, included a provision in Article VI stating: "[N]or shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State."

This Clause proved problematic in practice. Foreign powers gifted their departing American emissaries with the same kinds of gifts they had customarily given other diplomats, and the new Americans had to figure out how to square their American ban with standard international practice. American diplomats squirmed under two conflicting desires: on the one hand, the desire to please their foreign hosts by accepting their gifts, and on the other, the desire to stay true to the new constitution. (Of course, some American diplomats wanted not only to *accept* the gifts, but to *keep* them too.) When the King of France gave Benjamin Franklin a very expensive diamond encrusted snuff box, there were some public murmurings, but the Articles Congress ultimately permitted Franklin to keep the gift.

When the Constitution of 1787 was debated and drafted by the Philadelphia Convention, early drafts had no provision akin to the Articles of Confederation's Foreign Emoluments Clause. However, towards the end of the Convention, on August 23, 1787, Charles Pinckney "urged the necessity of preserving foreign Ministers & other officers of the U. S. independent of external influence," and he moved to insert a provision closely tracking the language in the Articles. Ultimately, Pinckney's provision became Article I, Section 9, Clause 8. The provision occasioned little other recorded debate. However, at the Virginia ratifying convention, Governor Edmund Randolph explained:

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

Text. As explained, the Constitution's Foreign Emoluments Clause (also known as the Emoluments Clause, Gifts Clause, Foreign Gifts Clause, and Foreign Titles Clause) was modeled on its Articles of Confederation predecessor. The original Articles of Confederation provision provided: [N]or shall any person holding any office of profit or trust under the United States, *or any of them*, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State.

Whereas the Constitution's Foreign Emoluments Clause now provides:

> [N]o Person holding any Office of Profit or Trust under them [i.e., the United States], shall, *without the Consent of the Congress*, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Thus, the modern Foreign Emoluments Clause's text departed from its Confederation-era predecessor in two distinct ways. First, the modern Foreign Emoluments Clause, unlike its predecessor, expressly permitted *Officers . . . under the United States* to accept gifts from foreign governments if those officers had the consent of Congress. Some believe that this subclause introduced a substantive change, but others believe that it merely codified the prior practice of the Articles Congress.

Second, the Articles of Confederation provision applied both to *Offices of profit or trust under the United States* and also to *Offices of profit or trust under . . . any . . . State*, whereas the Constitution's Foreign Emoluments Clause only applies to *Offices of Profit or Trust under them*, i.e., under the United States. The prevailing view is that the modern Foreign Emoluments Clause, unlike its Articles predecessor, does not reach state positions. Thus, some would argue that the modern Foreign Emoluments Clause has a somewhat more limited bite or scope than its Confederation-era predecessor.

Purpose. American ambassadors stationed abroad are prohibited from accepting gifts from foreign governments and their officials. The purpose is to prevent such diplomats from being bribed by foreign lucre and corrupted by other foreign gifts, and also to ensure that their loyalties remained undivided, i.e., running exclusively to the United States, its government, and its people. Substantial early American materials from the ratification era strongly support this view.

Scope. However, the text of the Constitution's Foreign Emoluments Clause is not limited to American ambassadors or even to American diplomatic personnel. Instead, the Constitution's Foreign Emoluments Clause applies to *Offices of Profit or Trust under the United States*: a substantially wider category. It is undisputed that this category applies to all officials holding appointed positions in the Judicial and Executive Branches of the national government.

What about the Legislative Branch? In 1792, the Senate asked Secretary of the Treasury Alexander Hamilton to compile a list of all persons holding *Offices . . . under the United States* and their salaries. Hamilton's 1793 response included nonelected officials in each branch, including the Legislative Branch.

The question whether this category, and therefore the Constitution's Foreign Emoluments Clause, reaches any or all federal elected positions—i.e., Representative, Senator, Vice President, President, and presidential elector—poses a difficult interpretive challenge. For example, Hamilton's list did not include members of Congress or any other elected state or federal positions. Likewise, George Washington, while President, accepted and kept two diplomatic gifts, but he never asked for or received congressional consent. However, subsequent presidents, such as Andrew Jackson, in similar circumstances, sought congressional consent. Whose practice should we rely on?

Further Implications. The Clause is important in its own right, but also for what it might signify about the Framers' thinking about corruption. The Clause is a solid example and strong evidence of the radicalism of the Framers' anti-corruption commitment—a commitment that constitutionalized an anti-corruption rule which flew directly in the face of international convention and which made diplomacy more difficult for the new Republic's officials. This anti-corruption-centered understanding of the Clause and of the Framers' worldview might inform our understanding of other constitutional provisions and of the Constitution's global structure. But the validity of such interpretations, which rely in large part on Framers' intentions rather than specific constitutional text, is highly controversial.

- **Teachout's individual explainer, "The Foreign Emoluments Clause": (the Clause reflects the Framers' concern for corruption in government)**

What is a bribe, what is a gift? In one culture, a gift to a public official will be considered a bribe. In another culture, the same gift might be treated as a generous expression of appreciation. Gifts can be one of the best parts of society: they create bonds and love and warmth in a non-transactional way. But gifts can also be dangerous, creating ties that lead to unfairness and preferences, instead of equal treatment under the law. Part of the job of building a political society is identifying and separating that which is corrupt from that which is not corrupt. Societies separate and sort "corrupt" and "non-corrupt" differently. In short: whether an offering is treated as corrupt and bad or generous and valuable depends upon cultural and political context, and on how we write our laws.

As the history of the Emoluments Clause shows, the debate about the difference between which gifts are corrupt and which gifts are societally valuable made it into the Constitutional Convention. The early Americans made the radical choice, defying international convention.

The Emoluments Clause is remarkable for its stark departure from European diplomatic culture at the time of our Founding. The Framers chose to make a commitment to preventing corruption even though it complicated diplomacy between the fledgling United States and European nations. That choice alone is evidence of the Framers' commitment to the independence of its public officials.

But when the Emoluments Clause alone is considered in the broader context of the Constitution, it becomes evident the Constitution contains within it a structural commitment to fighting corruption. Put simply, fighting corruption was a central reason for the Constitution. That matters for how we understand the Constitution's meaning, and the one Clause, combined with the dozens of other clauses reflecting a strong anti-corruption principle, reflects back on each of those clauses and on the entire document itself, helping create a lens through which to understand what the best interpretation of the Constitution should be.

Just as a car is designed to go forward—and therefore any effort to understand a piece in the car assumes that function—the Constitution was designed to combat corruption, and therefore any effort to understand a piece in the document should fit with that function.

What is the evidence? There are nearly two dozen features of the original American Constitution that were designed to combat corruption. These clauses include the veto power, designed to limit the corrupting power of the Presidency; the Census, designed to keep Congressional districts from becoming "rotten"; the residency requirements for representatives, designed to keep rich adventurers from buying congressional seats, and the rules regarding transparency, to make sure there was a check on representatives dipping into the public till. One delegate to the Constitutional Convention called the provision to prevent public office from being sold or traded for political power the "corner-stone" of the new Constitution.

But also, during the Constitutional Convention and afterwards, the Framers talked about corruption more than almost anything—the word "corruption," is written in his elegant handwriting fifty-four times in Madison's famous notebook from the summer of 1787. The problems of corruption and bribery were the hot topic of the hot summer—they arose more often than even factions or violence. As Alexander Hamilton said in *The Federalist No. 68*, describing the work of writing the Constitution: "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."

Perhaps this Clause alone stands as a somewhat small clause, forcing one to sort out gifts and bribes in a particular context, but when it is placed in the larger puzzle of the Constitution, it is part of a pattern that shows that American Constitution was designed in order to fight corruption.

- **Seth Barrett Tillman's individual explainer, "The Foreign Emoluments Clause Reached Only Appointed Officers": (the Clause does not reach the President as he is not an Appointed Officer)**

In 1966, Congress enacted the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342. The 1966 Act provides elected and appointed officials and employees of the United States government with concrete guidance in regard to the receipt of gifts from foreign governments. Although there have been a few exceptional cases, primarily relating to President Obama's Nobel Prize and federal employees' working for foreign government universities, in general, over the last half century, there has been little need for the judiciary or others to expound on the Constitution's Foreign Emoluments Clause; there has been little need because in most cases the propriety of foreign gifts is now tested by a detailed, modern federal statute, rather than by the more than 200-year-old and obscure Foreign Emoluments Clause.

Recently, the Foreign Emoluments Clause has enjoyed a surprising intellectual revival. This revival did not come about in response to a scandal or controversy connected to any specific foreign gifts. Instead, the Clause was the heart of a concerted intellectual effort, initiated by two prominent legal academics, Professors Lawrence Lessig and Zephyr Teachout, to rewrite the history of the Philadelphia Convention and our understanding of the Framers' original intentions. As the new view has it, this Clause, in conjunction with other clauses, was part of the Framers' anti-corruption project and that collectively these clauses gave rise to an implicit structural nontextual anti-corruption constitutional principle.

Other nontextual constitutional principles—such as separation of powers and federalism—have long been recognized, and such principles carry considerable weight, both in judicial decision-making and in scholarship. If an anti-corruption principle of similar weight were judicially recognized, then this principle—according to its intellectual proponents—would permit Congress to regulate contributions to congressional (and presidential) election campaigns, notwithstanding competing First Amendment concerns relating to freedom of association and free expression. Indeed, the new scholarship, and its focus on the Framers' anti-corruption concerns, were cited favorably by the four dissenting Supreme Court Justices in Citizens United v. Federal Election Commission (2010) (Stevens, J.). But in his concurrence, Justice Scalia rejected the dissent's position, in part, because the purported anti-corruption principle leaves "no limit to the Government's censorship power."

I think the new scholarship's focus on the Framers' deep concern in regard to bribery, divided loyalties, and corruption is entirely correct. The problem for the new scholarship is that the Framers' abstract corruption-related concerns are not our law—the text of the Constitution is our law.

When turning to the Foreign Emoluments Clause's Office . . . under the United States language, the new scholarship must confront a difficult interpretive question: does the Clause's Office-related language apply to elected federal positions: e.g., members of Congress and the Presidency? If there are significant gaps within the reach of the Clause, that is, if the scope of the Clause's Office-language reaches only appointed, as opposed to elected, federal positions, then it becomes difficult, if not impossible, to make the argument that the newly discovered nontextual anti-corruption constitutional principle founded on this Clause (and on other similarly worded clauses) extends or should extend to elected positions. The new scholarship's nontextual anti-corruption principle cannot or ought not extend beyond the actual language of the Clause, particularly where, as here, the Framers could have easily added language (or used other suitable and more general language) making the Foreign Emoluments Clause squarely applicable to some or all elected positions.

Traditionally, precedents established by President George Washington and his administration carry great weight. President George Washington accepted and kept two diplomatic gifts, but he neither asked for nor received congressional consent. Washington's conduct was widely reported in the press. So it would seem to indicate that he, his administration, Congress, and the public did not believe that the Clause applied to the presidency.

This interpretation is confirmed by Secretary Hamilton's list. Hamilton was asked by the Senate to produce a financial statement listing all persons holding Office . . . under the United States and their salaries. Members of Congress were not on the list, nor was the President. With all due respect to Professor Lessig's and Professor Teachout's revised, modern understanding of the history and scope of the Constitution's Foreign Emoluments Clause, Washington's understanding, Hamilton's understanding, and their eighteenth century contemporaries understanding must count for more. Because the original public meaning of the Foreign Emoluments Clause never embraced state or federal elected positions, any nontextual anti-corruption constitutional principle, to the extent one can be inferred from the Constitution's

structure and the Framers' intent, cannot or, at least, should not reach elected positions. Thus, if Congress intends to regulate contributions to federal election campaigns, it cannot rely on the Foreign Emoluments Clause as a source of authority to do so.

NB: Teachout detailed her arguments from the IC in a 2009 Cornell Law Review article—focusing on the desire of the Clause to combat corruption:[5] In a separate law review article, Tillman rebutted Teachout's reading of the Clause as focusing on preventing corruption.[6]

[5] Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009). Link.
[6] Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013). Link.