No. 18-474

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RESTAURANT OPPORTUNITIES CENTERS (ROC) UNITED, INC., JILL PHANEUF, and ERIC GOODE,

Appellants,

v.

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

Appellee.

BRIEF OF *AMICI CURIAE* LEGAL HISTORIANS IN SUPPORT OF APPELLANTS

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Dated: May 1, 2018

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I. INTERESTS OF AMICI CURIAE

Amici curiae Professors Jed H. Shugerman, John Mikhail, Jack Rakove, Gautham Rao, and Simon Stern (collectively, the "Legal Historians") are accomplished scholars who have extensive expertise on constitutional issues, including the Foreign and Domestic Emoluments Clauses[1] This brief of *amici curiae*: (1) sets forth the history and purpose of these clauses, including the background from European history, the Articles of Confederation, the Constitutional Convention, the Ratifying Debates, and the Early Republic; and (2) provides historical context concerning the definition of the word "emolument" as it was used by the framers, including an historical survey of multiple U.S. and English dictionaries as well as legal and economic treatises from the relevant time period. In light of the complex and novel constitutional questions at bar, the Legal Historians submit that the accompanying *amici curiae* brief provides unique information and will aid the Court in its ruling.

II. INTRODUCTION

The Foreign Emoluments Clause ("FEC") of the U.S. Constitution states 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

[1] All parties consented to *amici* filing this brief. No party's counsel authored or funded the accompanying brief of *amici curiae*. No other person funded the preparation of the brief of *amici curiae*.

title, of any kind whatever, from any king, prince, or foreign state."[2] The Domestic Emoluments Clause ("DEC") states that "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."[3] The framers of the Constitution adopted these clauses to protect against corruption, conflicts of interest, and other threats to republican government, and wrote both clauses broadly to accomplish these purposes.

Two of the authors of this amicus brief have recently published an essay focused on the district court's historical analysis of the Emoluments Clauses' zones of interest and on the historical approach to the political question doctrine.[4] In this brief, amici address more broadly the historical background of the clauses and the contemporary use of the word "emolument." As Part III demonstrates, the president's interpretation of these clauses is at odds with the best historical understanding of the Emoluments Clauses and similar prohibitions in comparable legal documents. Part IV clarifies the original meaning of "emolument," based on a study of founding-era dictionaries and treatises.

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[2] U.S. Const. art. 1, § 9, cl. 8.
[3] U.S. Const. art. 2, § 1, cl. 7.
[4] Jed Handelsman Shugerman & Gautham Rao, *Emoluments, Zones of Interests, and Political Questions*, 45 Hastings Const'l L. Quarterly 651, 657–663 (2018). *See also* Brief of Plaintiffs-Appellants at 49-50.

III. HISTORY OF THE EMOLUMENTS CLAUSES

The framers adopted the Emoluments Clauses to advance core republican goals: to protect against corruption and conflicts of interest; to maintain a balance of state and federal power; and to avoid foreign entanglements.[5] The historical records demonstrate that the word "emolument" had a broad range of meanings, including any profit, advantage, gain, or benefit derived from private commercial transactions. Its meaning was not reducible to a simple fee or salary.

A. Historical Background from the English and Dutch to the Articles of Confederation Era

In Anglo-American political thought, a concern with emoluments was closely tied to the pervasive fear of political corruption. In the middle decades of the eighteenth century, this concern dominated Real Whig views of the insidious ways in which the British Crown had corrupted Parliament's vaunted independence and legal supremacy after the Glorious Revolution of 1688.[6] The concern was that the Crown could use an array of emoluments (e.g., offices, pensions, grants of income, and other benefits) to make members of both houses docile tools of the reigning ministry. The American colonists understood that the British were abusing their

[5] *See* Joseph Story, 3 *Commentaries on the Constitution* 202 (1833) (the FEC was adopted to protect against "Foreign influence of every sort"); *accord* Federalist No. 75 (Hamilton); George Washington's Farewell Address.

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

power to deprive them of self-government and fair competition.[7] Parliament claimed the power to legislate for America "in all cases whatsoever."[8]

The use of emoluments to undermine self-governance was generally viewed as a significant problem. There was, however, another famous example in which an emolument conveyed from one king to another threatened the fundamental rights of the entire realm. This was the secret Treaty of Dover of 1670, when Louis XIV of France paid large sums of cash to Charles II (and provided a young French mistress) in order for Charles to convert to Catholicism and ally with France in an ill-fated war against Holland. Louis XIV also secretly paid James II in 1687 for similarly compromising allegiances.[9] These well-known events contributed to the Glorious Revolution of 1688, an inspiration for the American Revolution and the Founding, but the secret payments were not revealed until 1771.[10] At the Federal Convention, Gouverneur Morris, one of the chief architects of the presidency, explicitly invoked this episode during the July 20, 1787 debate over impeachment:

> Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first

[7] *See* Shugerman and Rao, *supra* note 4.
[8] Declaratory Act of 1766 (6 Geo. 3 c. 12).
[9] *See* George Clark, *The Later Stuarts (1660-1714)*, at 86-87, 130 (2d ed. 1956); Barry Coward, *The Stuart Age* 262-65, 267, 274-75 (1980).
[10] *See* J.P. Kenyon, *The History Men: The Historical Profession in England Since the Renaissance* 67-68 (Weidenfeld and Nicolson, 2d. ed., 1993).

> Magistrate in foreign pay, without being able to guard agst. it by displacing him. One would think the King of England well secured agst. bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV.[11]

Although Morris did not use the word "emolument" in these remarks, this incident provides a paradigmatic explanation for why the framers adopted a prohibition on foreign emoluments in the Constitution. The same lesson was drawn by Charles Cotesworth Pinckney, who, when debating the Constitution in the South Carolina legislature, cited the Treaty of Dover and "Charles II., who sold Dunkirk to Louis XIV"[12] in the course of warning against undue foreign influence on the president. Two early commentators on the Constitution, St. George Tucker[13] and William Rawle,[14] also emphasized the scandal of Louis XIV secretly paying Charles II as background for the Foreign Emoluments Clause. Justice Joseph Story cited these

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[11] 2 Max Farrahennd, *The Records of the Federal Convention of 1787*, at 68-69 (1911) ["Farrand"].

[12] 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution in 1787*, at 264 (Jonathan Elliot ed., 1836) ["Elliot's Debates"].

[13] 1 St. George Tucker, *Blackstone's Commentaries with Notes of Reference to the Federal Constitution and the Constitution of Virginia* 295-96 (1803) ("In the reign of Charles the second of England, that prince, and almost all of his officers of state were either actual pensioners of the court of France, or supposed to be under its influence, directly or indirectly, from that cause. The reign of that monarch has been accordingly proverbially disgraceful to his memory.")

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

pages from Tucker and Rawle in his own *Commentaries on the Constitution* in 1833.[15]

Several founding-era documents reflect concern with the corrupting effect of both foreign and domestic emoluments. The Articles of Confederation adopted the text that would become the FEC. The drafters may have borrowed from the Dutch rule, adopted in 1651, prohibiting foreign ministers from taking "any presents, directly or indirectly, in any manner or way whatever."[16] The French practice of giving expensive diplomatic gifts was called *presents du roi* or *presents du congé*, so these prohibitions likely stemmed initially from the problem of "presents."[17] The government's brief in the district court below claimed that a broad interpretation of "emolument" would produce a "surplusage" or redundancy because it would include presents, making the word "present" unnecessary.[18] The argument fails for at least two reasons. First, "presents" generally connotes gratuitous exchange, while "emoluments" encompasses benefits of commercial transactions. Second, the origin of this clause probably lies with the Dutch bar on "presents," which the Americans broadened by adding the term "emoluments," without deleting the earlier wording.

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[15] Story, *Commentaries*, *supra* note 5, at Sec. 1346, p. 216 n. 1.
[16] Zephyr Teachout, *Corruption in America: From Franklin's Snuff Box to Citizens United* (2014) (citing John Bassett Moore and Francis Wharton, *A Digest of International Law* 579 (1906)).
[17] *Id.* at 19.
[18] DOJ Brief, at 30-31.

As legal texts evolve, historical layers sometimes resist the logic of simple interpretive canons.

The Dickinson draft of the Articles of Confederation in June 1776 prohibited the colonies from engaging in any diplomatic relations with Great Britain "or any Foreign Prince or State; nor shall any Colony or Colonies, nor any Servant or Servants of any Colony or Colonies, accept of any Present, Emolument, Office or Title of any kind whatever from the King or Kingdom of G.B. or any foreign Prince or State."[19] The clause was further modified during the debates of late July and August 1776. In the August 20 version, Article IV read: "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."[20] This reference to "profit and trust" identified the two main satisfactions that eighteenth-century observers ascribed to public office: the financial rewards it would produce; and the prestige, status, and honor it would also provide. In the final text of the Articles that Congress submitted to the states in November 1777, this clause, now found in Article VI, remained unaltered. The government overlooked this timeline when it asserted in its brief below that events limited to office-holding in 1778 led to the drafting of the FEC.

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[19] 5 *Journals of the Continental Congress 1774-1789* 547 (Ford et al. eds., 1904-37) ["JCC"].
[20] *Id.* at 675.

Two other foundational constitutional texts of 1776 illustrate the link between the concept of emolument and fundamental republican values. Article IV of the Virginia Declaration of Rights states "[t]hat no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." Article V of the Pennsylvania Declaration of Rights similarly declares "[t]hat government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett of men, who are a part only of that community." Later, New Hampshire's 1784 Constitution[21] and Vermont's 1793 Constitution[22] contained almost identical clauses, which their state courts have applied to general benefits under a "principle of equality."[23] All these state constitutions used the word "emolument" broadly to mean a benefit or advantage. Moreover, like the Emoluments Clauses, these provisions reflected fundamental republican values: that government is a public trust derived directly from the people; that the material benefits it provides are to be regarded solely as a compensation for public duties, and not a means of personal

[21] N.H. Const. art. 10 (1784 text).
[22] Vt. Const. Ch. 1, art. 7 (1793).
[23] *See, e.g.*, *Opinion of the Justices* 746 A.2d 981, 987 (N.H. 1999); *In re Opinion of the Justices*, 190 A. 425 (N.H. 1937); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

enrichment and luxury; and that the idea of hereditary power, which is so closely linked to aristocracy, is anathema to American government.

In the years between the drafting of the Articles of Confederation and the calling of the Federal Convention of 1787, these values were sorely tested. Because neither the Continental Congress nor the state governments had anything resembling an institutional bureaucracy, they necessarily relied on merchants and commissaries to obtain the goods and materiel needed to sustain the war effort. There were no mechanisms readily available to monitor these exchanges, and charges of corruption, which were often easy to allege but difficult to prove, flowed freely. Merchants like Robert Morris, who played a critical role in importing military supplies while also serving as Superintendent of Finance, frequently blended their public and private ventures. Drawing a manageable line between these activities proved both difficult and controversial.[24] Nevertheless, an emoluments restriction was placed in the 1784 and 1788 Consular Conventions with France,[25] as well as the 1789 Act to Establish

[24] *See, e.g.*, E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790*, at 70-105 (1961). Morris's critics frequently attacked his conflicts of interest, often referring explicitly to his pursuit of personal "emoluments." *See, e.g.*, *Boston Evening Post and the General Advertiser*, front page (May 3, 1783) (printing one such criticism by "Lucius" a few weeks after the Newburgh controversy).

[25] *See* "Consular Convention between His Most Christian Majesty and the Thirteen United States of North America," in 4 *The Diplomatic Correspondence of the American Revolution* 198-208, 199-200 (1829); "Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls between the United States and France," in 1 *The American Diplomatic Code, Embracing a*

the Treasury Department.[26] In its brief to the district court, the Department of Justice ("DOJ") asserted that "the history and purpose" of the Clauses' adoption is "devoid of concern about private commercial business arrangements."[27] The example of Robert Morris, the emoluments prohibitions adopted by American governments from 1776 to 1789, and the constitutional debates themselves all demonstrate the fallacy in DOJ's claim.

B. The Constitutional Convention

As the legislative history indicates, the Foreign Emoluments Clause was not controversial at the Federal Convention. Notwithstanding its prior version in Article VI of the Confederation, the Virginia Plan contained no comparable clause. Its first appearance came with the work of the Committee of Detail, which convened on July 26, 1787, and reported on August 6, 1787, and even then it was restricted solely to a prohibition against the United States granting "any Title of Nobility."[28] On August 23, 1787, Charles Pinckney took the initiative, moving that "No person holding any office of profit or trust under the U.S. shall without the consent of the Legislature, accept of any present, emolument, office or title of any kind whatever, from any King, Prince or foreign State." As reported by James Madison, Pinckney's urged

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Collection of Treaties and Conventions between the United States and Foreign Powers 70-82 (1834).

[26] *See* 1 Stat. 65 (1789-1799).

[27] DOJ Brief, at 34.

[28] 2 Farrand, *supra* note 11, at 169, 183.

"the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence." This rationale tracks the Dutch rule's focus on "foreign ministers,"[29] but the FEC's wording went further, covering any office of profit or trust under the United States. This amendment was promptly approved unanimously (*nemine contradicente*).[30]

A narrow definition of "emolument" limited to payments for official services is inconsistent with the text adopted by the framers. The FEC seeks to prevent activities that have the potential to influence or corrupt the person who profits from them. That is why it prohibits "present[s]" as well as "emolument[s]." Nothing in the historical record suggests that the ban of foreign "present[s]" would extend only to gifts received for the performance of an official duty, or that titles of nobility would be permissible if they were not connected to a federal office. Similarly, nothing in the text or context of the FEC suggests that the Framers wanted a special unwritten exception for "emoluments" in the clause, to permit foreign states to give benefits so long as they were not for official services. Such an exception would open a loophole for foreign states (and for U.S. officials) to defeat the FEC's purposes.[31]

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[29] Teachout, *Corruption in America*, supra note 16, at 27.
[30] 2 Farrand, *supra* note 11, at 389.
[31] On DOJ's reading, the FEC extends to (1) all gifts whatsoever, and (2) all honorary titles and offices whatsoever, but *only* (3) those forms of income relating to the performance of official duties. This interpretation leaves out a large swath of arrangements that reliably and predictably create opportunities for corruption and undue influence—namely, commercial transactions. The context alone shows that

Such a narrow reading is particularly in tension with the FEC's text: "any" emolument "of any kind whatever" would not be limited to official services.

In discussions about the allocation of the treaty power, some of the framers focused on the possibility of foreign corruption of American officials. Nathaniel Gorham, for example, noted that such discussions "will be generally influenced by two or three men, who will be corrupted by the Ambassadors here."[32] He might have been contemplating the controversial negotiations that Secretary of Foreign Affairs John Jay had conducted with the Spanish emissary Don Diego de Gardoqui the year before. Jay had not acted corruptly in 1786, but his actions indicated how much the conduct of diplomacy could pivot on individuals. Gorham and other framers also probably knew about the allegations that swirled around John Sullivan of New Hampshire, who was widely suspected of having been bribed by the French minister, the Chevalier de la Luzerne, in 1781, to draft new instructions directing John Adams, the American peace commissioner in Paris, to accept French "advice and opinion."[33] This may have been the incident that George Mason, a framer turned Anti-Federalist, alluded to in the Virginia ratification convention, when he noted that "It is not many

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"emolument" cannot refer exclusively to payments connected with discharging the duties of an office, but must be understood to include such transactions.

[32] 2 Farrand, *supra* note 11, at 393.

[33] *See* Charles P. Whittemore, *A General of the Revolution: John Sullivan of New Hampshire* 165-79 (1961).

years ago, since the revolution, that a foreign power offered emoluments to persons holding offices under our Governments."[34]

The desire to insulate all national officials from improper foreign influence encountered no opposition. It became, in effect, a constitutional norm of American diplomacy. Nothing in the admittedly limited records of debate could be read to justify restricting this norm to official salaries or exempting the president. Indeed, the decision to give the president a more significant role in directing American foreign policy, made during the final weeks of debate, likely would have increased rather than diminished the perceived importance of the FEC. Before this, it was by no means clear that the president would enjoy such a role. Joseph Story would later explain that the FEC was adopted to protect against "Foreign influence of every sort."[35]

C. The Ratification Debates

Once the Constitution was submitted to the state ratification conventions, the Emoluments Clauses were largely though not wholly neglected. Alexander Hamilton devoted a significant portion of Federalist No. 73 to the DEC:

> The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him

[34] 10 *Documentary History of the Ratification of the Constitution*, at 1365-66 (Jensen et al., eds., 1976-present) ["DHRC"].
[35] Story, 3 *Commentaries*, *supra* note 5, at 202.

> by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations… [I]n the main it will be found that a power over a man's support is a power over his will.[36]

Hamilton warned of the "intimidation or seduction of the Executive by the terrors or allurements of the pecuniary arrangements of the legislative body." Thus, once Congress set a president's salary prior to his taking office, "they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences." Hamilton emphasized that this clause was meant to protect the President's independence and to guard against corruption:

> They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.[37]

Meanwhile, a striking exchange on the FEC, involving two framers—George Mason and Edmund Randolph—took place in the Virginia ratification convention on June 17, 1788, in conjunction with a debate over presidential elections. Randolph first explained the purposes of the clause in terms of "greater security" in the context of war, diplomacy, and anti-corruption:

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[36] Federalist No. 73 (Hamilton).
[37] *Id.*

> This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened operated in producing the restriction. A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states, I believe that if, at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.[38]

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

Mason was particularly concerned that the president might seek to stay in office "for life." Mason agreed that "the great powers of Europe" would have a deep interest in the selection and continuation of the president. "This very executive officer, may, by consent of Congress, receive a stated pension from European

[38] 3 Elliot's Debates, *supra* note 12, at 465-66; 3 Farrand, *supra* note 11, at 327.

Potentates," Mason warned. It would also "be difficult to know, whether he receives emoluments from foreign powers or not." Moreover, the electors in the states might also "be easily influenced," again by foreign emoluments.[39] In reply, Randolph argued that the requirement that electors be appointed separately in the states and vote on the same day "renders it unnecessary and impossible for foreign force or aid to interpose." But should the president be charged with "receiving emoluments from foreign powers," Randolph continued, the Constitution provided a simple remedy: impeachment.[40] This exchange between Mason and Randolph—the two Virginia delegates who refused to sign the Constitution—is certainly revealing, especially insofar as it refers to foreign intervention in presidential elections.

The records of the ratification debates of 1787-88 remain important for another reason. They demonstrate that "emolument"—a word which today sounds archaic, but which was commonly used in the eighteenth century—had an array of uses. As one might expect in constitutional debates, the salary and fees one might earn from holding government office were among the most obvious uses of the word. But its common usage was hardly limited to that context. In general, "emolument" was synonymous with multiple forms of material benefits and enrichment that applied not only to individuals, but also to whole communities, classes, and regions.

[39] 10 *DHRC*, *supra* note 34, at 1365-66.
[40] *Id.* at 1367.

In the Virginia ratifying convention, for example, William Grayson, later a senator in the First Congress, referred to the economic advantages to be enjoyed by merchants residing at the national capital: "The whole commerce of the United States may be exclusively carried on by the merchants residing within the seat of Government, and those places of arms, which may be purchased of the State Legislatures. How detrimental and injurious to the community, and how repugnant to the equal rights of mankind, such exclusive emoluments would be, I submit to the consideration of the Committee."[41] Likewise, James Madison described the potential benefits of American neutrality in a future European war in this manner: "We need not expect in case of such a war, that we should be suffered to participate of the profitable emoluments of the carrying trade, unless we were in a respectable situation."[42]

D. The Founding Generation Used the Word "Emolument" Broadly

A search for the word "emolument" in one of the most comprehensive resources on the Founding Era, the University of Virginia's "Founders Early Access Rotunda" ("Rotunda") site, produces numerous examples of the founders using the term to mean general benefits or advantages: statements by Hamilton, Madison, Washington, Adams, Jefferson, Jay, Gouverneur Morris, and John Marshall; by

[41] *Id.* at 1191. *See also id*. at 1263; and 11 DHCR at 284.
[42] 10 DHRC, *supra* note 34, at 1206.

those writing to them; and by others in the Convention and ratifying debates—more examples than could possibly be cited here.[43] Here are some further illustrations:

In response to the Townshend Acts, American colonists formed nonimportation associations, which pledged not to purchase British goods until their grievances were met. In 1770, one such group in Virginia retaliated against local merchants who refused to join the boycott. Denouncing these holdouts, George Washington, Thomas Jefferson, and other prominent Virginians vowed to "avoid purchasing any commodity … from any importer or seller of British merchandise or European goods, whom we may know or believe . . . to have preferred their own private *emolument*, by importing or selling articles prohibited by this association."[44]

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

[43] *See infra* note 47 for many examples of George Washington's frequent uses of "emolument" in a broad sense of benefit or profit from market transactions. *See also* John Adams, *Notes of Debates on the Articles of Confederation* (Rotunda) (July 26, 1776); *The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts*, 28-31 October 1779 (Rotunda).

[44] 1 *The Papers of Thomas Jefferson*, at 43-48 (Boyd ed., 1950).

years."[45] In his successful argument in *Hite v. Fairfax* in 1786, John Marshall described a property title dispute in these terms: "Again, the words are 'and where upon such grants, quit-rents have been reserved[,]' [p]lainly referring the word *such* to those grants, from the terms of which some advantages, profits and *emoluments* arose to the crown."[46] Finally, Washington frequently used the word "emolument" in private commercial contexts or to convey a broader meaning of benefits and advantages.[47]

[45] 10 *The Papers of Thomas Jefferson*, at 235 (Julian P. Boyd ed., 1954) (emphasis added).

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

[47] *See, e.g.*, Letter from George Washington to Colonel Josias Carvil Hall (Apr. 3, 1778), in U. of Va. Rotunda Database (Rotunda); Letter from Washington to William Livingston (Apr. 11, 1778) (Rotunda); Letter from George Washington to John Price Posey (Aug. 7, 1782), in *The Papers of George Washington 8 April–31 May 1779*, at 181–82 (Edward G. Lengel ed., Univ. of VA Press, 2010); Letter from George Washington to Elias Boudinot (June 17, 1783), *Founders Online*, National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Washington/99-01-02-11469; Letter from Washington to Friedrich von Poellnitz (Mar. 23, 1790) (Rotunda); Letter from Washington to Samuel Vaughn (Aug. 25, 1791) (Rotunda); Letter from Washington to James McHenry (July 7, 1797) (Rotunda). *See also* Letter from Alexander Hamilton to George Washington (Jan. 24, 1795) (Rotunda); Military Order (Jan. 15, 1777) (Rotunda).

Furthermore, the First and Second Continental Congress,[48] the U.S. Supreme Court[49] and state supreme courts[50] of the Early Republic also used "emoluments" in the context of market transactions, profits, and general benefits. DOJ seeks refuge in an obscure 1850 case, but it overlooks that the fact that the Supreme Court was not interpreting a constitutional provision in that case, but rather a statute explicitly related to official compensation.[51] In fact, when the founding generation wanted to refer to the narrower office-based definition that DOJ proposes, they often used the phrase "emoluments of office" or similar language. Madison did so, for example, in Federalist No. 55.[52] Likewise, Washington, Jefferson, Adams, Jay, Tench Coxe, the

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[48] *See*, *e.g.*, Address to the People of Great Britain (Oct. 21, 1774) (1 JCC 84); Declaration by the Representatives of North-America (July 6, 1775) (2 JCC 144); Olive Branch Petition (July 8, 1775) (2 JCC 159); and Address to the Inhabitants of the United Colonies (Feb. 13, 1776) (4 JCC 144)).

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

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

[51] *Hoyt v. United States*, 51 U.S. 109, 135 (1850). In *Hoyt*, the Supreme Court wrote that "the term emoluments . . . embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of the office." Id. *Hoyt* was a statutory case, however, which required the Court to interpret an 1802 statute specifically referring to "the annual emoluments of any collector of the customs." 1 Stat. at Large, 172, § 3 (April 30, 1802). The Court's language makes perfect sense in that specific statutory context, but it has no constitutional implications. It certainly did not purport to circumscribe the scope of "emolument" for constitutional purposes.

[52] Federalist No. 55 (Madison); cf. 1 Farrand, *supra* note 11, at 386 (June 23, 1787).

Anti-Federalist writer Federal Farmer, and the U.S. Congress also employed this type of qualified language to refer to office-based emoluments.[53]

IV. "EMOLUMENT" IN FOUNDING-ERA DICTIONARIES AND TREATISES

A. DOJ's Narrow Definition of "Emolument" is Inaccurate, Unrepresentative, and Misleading

In its brief to the district court, DOJ narrowly defines the word "emolument" as "profit arising from office or employ," arguing that this original understanding of "emolument" is grounded in "contemporaneous dictionary definitions."[54] However, the government's linguistic evidence is weak and cannot withstand scrutiny.

First, the government's dictionary-based argument is fundamentally flawed. Little or no evidence indicates that the two obscure sources—Barclay (1774) and Trusler (1766)—on which DOJ relies for its "office- and employment-specific" definition of "emolument" were owned, possessed, or used by the founders, let alone had any impact on them, or on those who debated and ratified the Constitution. For

[53] *See, e.g.*, "An Act Further to Establish the Compensation of Officers of the Customs," (May 7, 1822), U.S. Statutes at Large, 17th Cong., Sess. 1, at 695; "An Act Respecting the Compensation of the Collectors Therein Mentioned" (Mar. 3, 1817), U.S. Statutes at Large, 14th Cong., Sess. 2, at 368; Letter from George Washington to Joseph Jones (Dec. 14, 1782); Letter from George Washington to Benjamin Lincoln (Oct. 2, 1782); Letter from Thomas Jefferson (Sept. 9, 1792) (Rotunda); Federal Farmer, "An Additional Number of Letters to the Republican," (N.Y. Jan. 4, 1788) (Rotunda); Letter from Tench Coxe to Thomas Jefferson (Mar. 10, 1801) (Rotunda); Letter from John Jay to Samuel Shaw (Jan. 30, 1786) (Rotunda).

[54] DOJ Brief at 2, 28-29, 32.

example, neither of these sources is mentioned in the more than 178,000 searchable documents in the *Founders Online* database, which makes publicly available the papers of the six most prominent founders. Nor do these volumes appear in other pertinent databases, such as *Journals of the Continental Congress*,[55] *Letters of Delegates to Congress*,[56] *Farrand's Records*,[57] *Elliot's Debates*,[58] or the *Documentary History of the Ratification of the Constitution*.[59] By contrast, all of the dictionaries that the founding generation did possess and use regularly define "emolument" in the broad manner favoring the plaintiffs: "profit," "advantage," "gain," or "benefit."[60]

Second, a careful review of English language dictionaries from 1604 to 1806 shows that *every* definition of "emolument" published during this period relies on one or more of the elements of the broad definition DOJ rejects in its brief: "profit,"

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[55] *See* JCC, *supra* note 19.
[56] *See Letters of Delegates to Congress 1774-1789* (Smith *et al*. eds., 1976-2000).
[57] *See* Farrand, *supra* note 11.
[58] *See* Elliot's Debates, *supra* note 12.
[59] *See* DHRC, *supra* note 34.
[60] *See, e.g.*, Samuel Johnson, *A Dictionary of the English Language* (1st ed. 1755) ("Profit; advantage"); Nathan Bailey, *A Universal Etymological Dictionary* (2d ed. 1724) ("Advantage, Profit"); Thomas Dyche & William Pardon, *A New General English Dictionary* (8th ed. 1754) ("Benefit, advantage, profit"); John Ash, *The New and Complete Dictionary of the English Language* (1st ed. 1775) ("An advantage, a profit"); John Entick, *The New Spelling Dictionary* (1st ed. 1772) ("Profit, advantage, benefit"). Cf. Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419 (2012) (identifying Johnson, Bailey, Dynche & Pardon, and Ash as "the most useful and authoritative" English dictionaries from 1750 to 1800).

"advantage," "gain," or "benefit." Furthermore, over 92% of these dictionaries define "emolument" *exclusively* in these terms, with no reference to "office" or "employment." By contrast, DOJ's preferred definition—"profit arising from office or employ"—appears in less than 8% of these dictionaries. Even those outlier dictionaries always include "gain, or advantage" in their definitions, a fact obscured by DOJ's selective quotation of only one part of its favored definition from Barclay. Finally, Trusler's volume is not a standard dictionary, but rather a thesaurus, which presumes that "gain," "profit," and "emolument" are synonyms; moreover, its explanation of "emolument" was copied directly from a French thesaurus, hence it is not even reliably grounded in English usage. The impression DOJ creates in its brief by contrasting four historical definitions of "emolument"—two broad and two narrow—is, therefore, highly misleading.[61]

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

[61] *See* John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries* 1523-1806 (June 30, 2017), *available at* https://ssrn.com/abstract=2995693.

In fact, this term is only used in these legal dictionaries to define or explain other, less familiar words and concepts. These findings reinforce the conclusion that "emolument" was not a term of art with a highly restricted meaning.[62]

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

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

In William Blackstone's *Commentaries on the Laws of England*—probably the best-known legal treatise when the Constitution was adopted—the word "emolument" occurs on sixteen occasions.[63] Although some of these contexts involve government officials, the majority of Blackstone's usages of "emolument" refer to benefits other than public salaries or perquisites.

For example, Blackstone uses "emolument" in the context of family inheritance, private employment, and private ownership of land. He refers to "the power and emoluments" of monastic orders; to "the rents and emoluments of the estate" managed by ecclesiastical corporations; and to the "pecuniary emoluments" which the law of bankruptcy assigns to debtors. Blackstone describes the advantages to third-party beneficiaries of a gift as "the emolument of third persons." He uses "emolument of the exchequer" to refer to an increase in the national treasury. Finally,

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[62] *Id.*

[63] *See* John Mikhail, *"Emolument in Blackstone's Commentaries,"* Balkinization (May 28, 2017), at https://balkin.blogspot.ca/2017/05/emolument-in-blackstones-commentaries.html.

in explaining the law of corporations, he characterizes "parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish" as among the "emoluments" vested in the church parson.[64]

A further illustration of Blackstone's broad understanding of emoluments can be found in the forms of "Conveyance by Lease and Release" that appear at the end of Book II of the *Commentaries*. In the first of these forms ("Lease, or Bargain and Sale, for a year"), Blackstone lists "emoluments" among the benefits that are transferred when conveying parcels of land. Blackstone uses the same language in his second form ("Deed of Release"). Both forms can also be found in his *Analysis of the Laws of England* (1756). In fact, many form books and other legal manuals of the period included similar templates. In Giles Jacob's *Law Dictionary* (1729), for instance, one finds a "Form of a Release and Conveyance of Lands" with similar language, in which "A.B." conveys to "C.D." a piece of property together with "all . . . Easements, Profits, Commodities, Advantages, Emoluments, and Hereditaments whatsoever."[65]

When Americans bought and sold property during the founding era, they frequently referred to emoluments in their deeds and conveyances. To take one

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[64] *See* William Blackstone, 2 *Commentaries on the Laws of England* 18, 23, 50, 185, 318 (2016) (Stern, ed.); 1 *Commentaries* 75, 247, 304 (2016) (Lemmings, ed.); 4 *Commentaries* 277 (2016) (Paley, ed.).

[65] *See* Mikhail, *"Emolument" in Blackstone's Commentaries*, *supra* note 63.

pertinent illustration, on January 5, 1787, Francis Lewis, a prominent New Yorker who signed the Declaration of Independence and Articles of Confederation, placed a notice in *The New-York Packet* announcing the sale of land at a public auction, together with "all buildings, ways, paths, profits, commodities, advantages, emoluments and hereditaments whatsoever . . . ." Lewis's advertisement ran throughout the spring and summer of 1787. As with Blackstone's form contracts, the emoluments to which he referred were not government salaries, but rather private benefits that ran with the land.[66]

2. "Emolument" in Pufendorf's *Law of Nature and of Nations* and Smith's *Wealth of Nations*

With the possible exception of Hugo Grotius, no early modern writer on the law of nations was more influential than Samuel Pufendorf. The founders were familiar with Pufendorf's treatise and often quoted Basil Kennet's English translation.[67] In Kennet's translation, the word "emolument" occurs twice, both referring to private market transactions.[68] Likewise, many of the founders were well-acquainted with Adam Smith and his influential economic theories.[69] The word

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[66] *Id*.

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

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

[69] *See* 23 *The Papers of Benjamin Franklin* 241-43 (1983) (Willcox, ed.); 6 *The*

"emolument" also occurs twice in *The Wealth of Nations*. Once again, both instances involve private market transactions (monopolistic profits and bank interest).[70]

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

V. CONCLUSION

English language dictionaries published from 1604 to 1806, the influential writings of Blackstone, Pufendorf, and Smith, and contemporary usage by the Founding generation in the constitutional debates and in their private writings all confirm a broad definition of the word "emolument": as "profit," "advantage," "gain," or "benefit." In its brief to the district court, the government cherry-picked from two marginal dictionaries and from the historical sources, despite a mountain of evidence to the contrary. More significantly, the history of the Emoluments Clauses, beginning with their European background through the Articles of Convention, the Philadelphia Convention, and the ratifying debates, clearly demonstrates that they were meant to serve as a broad and robust protection against

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Papers of James Madison 62-115 (Hutchinson & Rachal, eds., 1969); David Lefer, *The Founding Conservatives* 245-246 (2013); 1 *Collected Works of James Wilson*, *supra* note 67, at 60-79, 73-74.

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

corruption, conflicts of interest, and foreign entanglements, and to defend republican values. The founders feared that foreign governments would use financial pressure and incentives to influence and corrupt American officials, or to create the appearance of corruption. They also worried that Congress and the states might use various forms of payments to influence the President and undermine the balance of federalism. Only a broad interpretation of the Foreign and Domestic Emoluments Clauses can guard against such improper influence and be true to the founders' republican purposes.

Dated: May 1, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Local Rules 29.1(c) and 32.1(a)(4)(A) because it contains 6,957 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Time New Roman font using Microsoft Word.

DATED: May 1, 2018

By: /s/ H. Laddie Montague
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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 1st day of May, 2018, to be served on all counsel of record via ECF.

DATED: May 1, 2018

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