

From a Mint on a Hotel Pillow to an Emolument

By Ciara Torres-Spelliscy*

PART I. INTRODUCTION TO THE TRUMP EMOLUMENTS CONTROVERSY

Is President Trump illegally profiting from the Presidency? Answering this question actually requires complex constitutional interpretation that breaks new legal ground and could change the rules for all future presidents.¹ The answer may also impact those who wish to deal with President Trump's businesses. Depending on the outcome of cases invoking the Constitution's two Emoluments Clauses,² many commercial interactions with the Trump Organization that are kosher today, may be ruled unconstitutional tomorrow.

The fact that President Trump had a business empire when he was elected immediately set off alarms that he could violate at least one of

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1. Linda Davidson, Editorial, *Bringing the Emoluments Clause to Bear on Trump's D.C. Hotel*, BOSTON GLOBE (Aug. 7, 2018), <https://www.bostonglobe.com/opinion/editorials/2018/08/06/bringing-emoluments-clause-bear-trump-hotel/76XhekGBkDfbHuRYfMsNIM/story.html> (“[T]he case itself could establish a welcome precedent to constrain any future presidents who might be tempted to hustle some extra cash on the side.”).

2. U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, 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.”); U.S. CONST. art. II, § 1, cl. 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.”).

the Constitution's two Emoluments Clauses the moment he was sworn in.³ As Representative Pocan stated in the *Congressional Record*, "These holdings potentially put President Trump in direct violation of the Emoluments Clause of the Constitution on day one."⁴

How far-fetched is a constitutional violation this early? Not far-fetched at all, it turns out. For instance, on August 31, 2018, under the Foreign Agent Registration Act (FARA),⁵ a man named W. Samuel "Sam" Patten was indicted by the Department of Justice (DOJ) for failure to register as a foreign agent for Ukraine.⁶ He was an associate of Paul Manafort, the one-time campaign manager for Donald Trump's 2016 campaign.⁷ Patten admitted to the FARA violation, lying to Congress, and arranging to make a \$50,000 straw purchase of tickets to the Trump inauguration in January 2017 for a Ukrainian client.⁸ This \$50,000 Ukrainian payment was illegal under U.S. campaign finance law because the money came from a foreign national.⁹ If any of those funds made it to the president, it could also violate the Foreign Emoluments Clause¹⁰ of the United States Constitution if they came from a foreign government. *The Washington Post* names the Ukrainian who funneled the \$50,000 in question as Serhiy Lovochkin, a member of the Ukrainian Parliament.¹¹ Normally, inaugural committees don't give

3. 163 CONG. REC. E68 (daily ed. Jan. 13, 2017) (statement of Rep. Kaptur) ("[The law] requires government employees to place loyalty to the Constitution, and laws and ethical principles above private gain Given the immensity of Mr. Trump's business dealings, grave concerns exist that he will immediately be in violation of this oath Any ongoing foreign business relationship threatens to violate the Constitution's Emoluments Clause. The Constitution must be upheld.")

4. 163 CONG. REC. H883-84 (daily ed. Feb. 2, 2017) (statement of Rep. Pocan).

5. 22 U.S.C. §§ 611-621 (2018).

6. Katelyn Polantz, *Lobbyist Pleads Guilty, Says He Helped Steer Foreign Money to Trump Inaugural and Lied to Congress*, CNN (Aug. 31, 2018), <https://www.cnn.com/2018/08/31/politics/w-samuel-patten-plea-russia-ukraine/index.html>.

7. Andrew Prokop, *Robert Mueller Got Another Cooperator: Sam Patten, an Associate of Paul Manafort and Cambridge Analytica, Struck a Plea Deal*, VOX (Aug. 31, 2018), <https://www.vox.com/2018/8/31/17805310/sam-patten-mueller-plea-manafort>.

8. See Statement of the Offense at 4, *United States v. Patten*, Case 1:18-cr-00260-ABJ (D.C. Cir. Aug. 31, 2018), http://cdn.cnn.com/cnn/2018/images/08/31/show_temp.pdf; see also Plea Agreement, *W. Samuel Patten, United States v. Patten*, Case 1:18-cr-00260-ABJ (D.C. Cir. Aug. 31, 2018), <https://www.documentcloud.org/documents/4806783-Sam-Patten-plea-agreement.html>.

9. 11 C.F.R. § 110.20(j) (2018) ("A foreign national shall not, directly or indirectly, make a donation to an inaugural committee No person shall knowingly accept from a foreign national any donation to an inaugural committee.")

10. U.S. CONST. art. I, § 9, cl. 8.

11. Rosalind S. Helderman & Spencer S. Hsu, *American Political Consultant Admits Foreign Money Was Funneled to Trump Inaugural*, WASH. POST (Sept. 1, 2018),

money to the president, but the accounting around the Trump inaugural committee's \$107 million has been troublingly opaque.¹² This leaves open the possibility that this episode was a violation of the Foreign Emoluments Clause literally the first day of the Trump Administration.

Shortly into Mr. Trump's presidency, three lawsuits were filed, one by over a hundred members of Congress, one by the State of Maryland joined by the District of Columbia (D.C.), and another by individuals in the hospitality industry, claiming that President Trump was in violation of the Emoluments Clauses (one is foreign and the other is domestic).¹³ A central theme in the lawsuits is that President Trump has created an illegal market for his hotels and real estate businesses that unconstitutionally benefits him.¹⁴ These suits are ongoing; consequently, this Article's ultimate conclusions will be impacted by the resolutions of these suits.

The Emoluments Clauses limit what the president can receive in income (under the Domestic Emoluments Clause)¹⁵ and what he can receive in the form of gifts from foreign governments (under the Foreign Emoluments Clause).¹⁶ The Foreign Emoluments Clause is at issue because the Trump Organization deals with foreign governments including the Bank of China, which is a tenant in Trump Tower in New York City.¹⁷ Also, since the Trump Organization runs hotels and golf

https://www.washingtonpost.com/local/public-safety/washington-consultant-for-ukraine-party-set-to-plead-guilty-to-violating-lobbyist-disclosure-law/2018/08/31/172cf2c8-ad23-11e8-a8d7-0f63ab8b1370_story.html?utm_term=.7a157ed10478.

12. Chris Riotta, *Nobody Knows Where Trump's Leftover Inauguration Funds Went, Causing Outrage and Change in Washington*, NEWSWEEK (Nov. 17, 2017), <https://www.newsweek.com/donald-trump-inauguration-donations-funds-missing-steve-kerrigan-congress-714118>; Fredreka Schouten, *A Record \$107 Million Was Raised for Trump's Inauguration. So Where Did It All Go? No One Will Say*, USA TODAY (Jan. 18, 2018), <https://www.usatoday.com/story/news/politics/2018/01/18/one-year-after-trumps-inauguration-no-one-say-how-they-spent-extra-money/1043804001/>.

13. *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.C. Cir. 2018); *D.C. v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018); *Citizens for Resp. & Ethics in Wash. (CREW) v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

14. Frank Lesser, *The Trump Taxes March*, SLATE (Jan. 23, 2017), http://www.slate.com/articles/news_and_politics/politics/2017/01/the_trump_taxes_march_on_april_15_let_s_make_it_happen.html ("His administration is already being sued by 'constitutional scholars, Supreme Court litigators and former White House ethics lawyers' over payments from foreign governments that might violate the Constitution's Emoluments Clause.").

15. U.S. CONST. art. II, § 1, cl. 7.

16. U.S. CONST. art. I, § 9, cl. 8.

17. Dan Alexander, *Trump's Biggest Potential Conflict of Interest Is Hiding in Plain Sight*, FORBES (Feb. 13, 2018), <https://www.forbes.com/sites/danalexander/2018/02/13/trump-conflicts-of-interest-tenants-donald-business-organization-real-estate-assets-pay/#>

resorts, an easy way to curry favor with the president would be to send a foreign delegation to stay at a Trump hotel or Trump resort before meeting with the president on official state business. The Domestic Emoluments Clause caps the president's salary and bars the fifty states or the federal government from augmenting that salary.¹⁸ This clause can be violated if state governments send state delegations (at state tax payer expense) to stay at a Trump property. Another way the Domestic Emoluments Clause could be violated is if one (or many) of the fifty states granted valuable tax abatements to the Trump Organization.

While there are three Emoluments suits, this piece will primarily focus on *District of Columbia v. Trump*,¹⁹ because it has progressed the farthest.²⁰ Because the Emoluments Clauses have not been the subject of litigation before, Judge Messitte in the *D.C. v. Trump* case got to make his minty fresh take on what the Emoluments Clauses mean. In oral argument in January 2018, a lawyer for Maryland named Steven Sullivan argued that “[b]y accepting emoluments, the president creates a constitutionally prohibited market.”²¹ Judge Messitte's rulings so far indicate that he is open to this argument. As will be discussed in more detail below, Judge Messitte found in *District of Columbia v. Trump*²² that Maryland and D.C. had standing to pursue their Emoluments Clauses claims because the plaintiffs

alleged injuries-in-fact to their quasi-sovereign, proprietary, and *parens patriae* interests that are concrete and particularized, actual and imminent. Those injuries are fairly traceable to the President's purported conduct and are likely to be redressed by the Court

4c716f4348f9 (“The largest American office of China’s largest bank sits on the 20th floor of Trump Tower, six levels below the desk where Donald Trump built an empire and wrested a presidency.”); Caleb Melby, Stephanie Baker & Ben Brody, *When Chinese Bank’s Trump Lease Ends, Potential Conflict Begins*, BLOOMBERG (Nov. 28, 2016), <https://www.bloomberg.com/news/articles/2016-11-28/trump-s-chinese-bank-tenant-may-negotiate-lease-during-his-term>.

18. U.S. CONST. art. II, § 1, cl. 7.

19. 315 F. Supp. 3d 875 (D. Md. 2018) (denying defendant’s motion to dismiss).

20. Dan Levine & Julia Harte, *Maryland, District of Columbia Sue over Payments to Trump Hotels*, REUTERS (June 12, 2017), <https://www.reuters.com/article/us-usa-trump-lawsuit/maryland-district-of-columbia-sue-over-payments-to-trump-hotels-idUSKBN1930AL>.

21. *Trump Ethics Judge Doesn’t Rule but Hints: Emolument Update*, BLOOMBERG (Jan. 26, 2018), <https://www.nreionline.com/finance-investment/trump-ethics-judge-doesnt-rule-hints-emolument-update>.

22. 291 F. Supp. 3d 725 (D. Md. 2018) (order finding the plaintiffs had standing).

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through appropriate injunctive and declaratory relief if Plaintiffs succeed on the merits.²³

This court also denied President Trump's motion to dismiss the case.²⁴ As Judge Messitte in July 2018 ruled,

[T]he Court determines that Plaintiffs have convincingly argued that the term 'emolument' in both the Foreign and Domestic Emoluments Clauses . . . means any 'profit,' 'gain,' or 'advantage' and that accordingly they have stated claims to the effect that the President, in certain instances, has violated both the Foreign and Domestic Clauses. The Court **DENIES** the Motion to Dismiss in that respect.²⁵

These *D.C. v. Trump* rulings grapple with matters of first impression, namely what exactly is an emolument, is the president bound by the clauses, and who has standing to sue to enforce the clauses?²⁶ This piece will argue that President Trump is in violation of both Emoluments Clauses, that the matter is justiciable, and that the plaintiffs who have sued have Article III standing to pursue their respective cases. As the Attorney General of Maryland has argued successfully thus far, the meaning of an "emolument" should be broad enough to encompass moneys that pass through a business to the president.²⁷ Meanwhile, the other two cases haven't gotten very far at all. The *Blumenthal v. Trump*²⁸ suit by members of Congress, as of October 2018, has a single ruling that the plaintiffs have standing to pursue their case.²⁹ Meanwhile *CREW v. Trump*³⁰ has been stopped in its tracks by a federal judge who ruled that none of the plaintiffs in that suit had standing.³¹

The very first thing Mr. Trump did upon assuming office of the Presidency was swear to uphold the Constitution. A key element of

23. *Id.* at 752–53.

24. *D.C. v. Trump*, 315 F. Supp. 3d at 878.

25. *Id.*

26. Jennifer Rubin, *The Emoluments Case Is the Nightmare Trump Has Long Feared*, WASH. POST (July 25, 2018), https://www.washingtonpost.com/blogs/right-turn/wp/2018/07/25/trump-loses-big-in-emoluments-case/?utm_term=.d02dfb1b8645 ("The decision, running over 50 pages, is an impressive, detailed analysis of the Constitution and 18th century language. This is a judge who did his homework. The ruling is the inevitable result of Trump's decision to maintain ownership of his far-flung business operations and to continue to reap the benefits, foreign and domestic, resulting from his presidency.")

27. *D.C. v. Trump*, 315 F. Supp. 3d at 886.

28. 335 F. Supp. 3d 45 (D.C. Cir. 2018).

29. *Id.* at 61.

30. 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

31. *Id.* at 195.

upholding the Constitution is abiding by it—including the two Emoluments Clauses. But as the former head of the Office of Government Ethics, Walter Shaub, stated, with President Trump there is “an appearance that [his] businesses are profiting from his occupying the presidency.”³²

The Emoluments Clauses of the Constitution have never been litigated, in part because America has never had a president in the modern post-Nixon era who has even come close to violating them. For one, other recent presidents did not have active businesses that might have raised this potential conflict of interest.³³ And secondly, other recent presidents took the precaution of putting their investments in blind trusts, so that even the appearance of impropriety was avoided.³⁴ In contrast to President Trump’s behavior, President Jimmy Carter famously put his beloved peanut farm in an independent trust while he was president.³⁵

Although these parts of the Constitution have never been interpreted by a federal court before 2017, there are Office of Legal Counsel (OLC) memos on the subject of Emoluments, which give guidance for federal officials, including past presidents, about what is and is not allowed.³⁶ For example, there was some concern about whether President Obama’s receipt of the Nobel Peace Prize was a prohibited foreign emolument, but this did not generate actual litigation.³⁷ In the end, the OLC decided that his Nobel did not constitute a violation “because the Nobel

32. Ben Popken, *Trump’s Presidency Is Bad for Business—His Own*, NBC (Oct. 16, 2017), <https://www.nbcnews.com/business/business-news/trump-s-presidency-bad-business-his-own-n809886> (quoting Walter M. Shaub Jr.).

33. See CIARA TORRES-SPELLISCY, *BOYCOTTING THE PRESIDENT’S BRAND: COMMERCIAL REACTIONS TO TRUMP 2015–2017* (2018).

34. Jennifer Wang, *Why Trump Won’t Use a Blind Trust and What His Predecessors Did with Their Assets*, FORBES (Nov. 15, 2016), <https://www.forbes.com/sites/jenniferwang/2016/11/15/why-trump-wont-use-a-blind-trust-and-what-his-predecessors-did-with-their-assets/#34e2d69029c0>.

35. David S. Broder & Susan Morrison, *Ethics Code Is Outlined by Carter*, WASH. POST (Jan. 5, 1977), https://www.washingtonpost.com/archive/politics/1977/01/05/ethics-code-is-outlined-by-carter/e26a96dc-f9f9-40bf-8ce4-1049a961f4e3/?utm_term=.576b9911a345.

36. Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1 (2009) [hereinafter *Receipt of the Nobel Peace Prize*], <https://www.justice.gov/olc/opinion/applicability-emoluments-clause-and-foreign-gifts-and-decorations-act-presidents-receipt>; Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114 (1993) [hereinafter *Non-Government Members of ACUS*], <https://www.justice.gov/file/20456/> download.

37. *Receipt of the Nobel Peace Prize*, *supra* note 36, at 1 (“The Emoluments Clause of the Constitution does not apply to the President’s receipt of the Nobel Peace Prize.”).

Committee that awards the Peace Prize is not a ‘King, Prince, or foreign State,’ the Emoluments Clause does not apply.”³⁸

Receipt of a Nobel Prize is a one-time event. If the Trump businesses are violating the Emoluments Clauses, they are doing so on a nearly continuous basis as each rent payment from a foreign government is deposited, or as each hotel books another member of a foreign sovereign delegation, or as each golf resort sets a tee time for a member of a governor’s entourage. Tax abatements would also offer the possibility of continuous violations of the Domestic Emoluments Clause. Another OLC opinion that may be more analogous to the Trump Organization situation is an opinion that federal workers who were lawyers could not draw profits from a private law firm because the law firm had foreign governments as clients, even if the lawyer in question did not work directly on the legal matters on behalf of the foreign government clients.³⁹ This opinion indicates that moneys flowing through a private business (in this case a private law firm) are subject to the Foreign Emoluments Clause.⁴⁰

Here’s how this Article will proceed. First, I will discuss the text of the two Emoluments Clauses as well as the limited legislative drafting history of the clauses. I also include a discussion of some of the objections that have been raised by members of Congress who are worried that President Trump is violating the Emoluments Clauses, as well as examples that have been highlighted by the press as potential emoluments violations. Then I will discuss the three ongoing Emoluments lawsuits: *CREW v. Trump*,⁴¹ *Blumenthal v. Trump*,⁴² and *D.C. v. Trump*.⁴³ Finally, I will argue in closing that one of the reasons why it would be appropriate for a federal court to treat President Trump as an alter ego for the Trump Organization for the purposes of the Emoluments Clauses is the Supreme Court of the United States has already punched holes in the corporate veil in two recent cases, *Burwell*

38. *Id.*

39. Non-Government Members of ACUS, *supra* note 36, at 119 (Foreign Emoluments Clause prohibited officers from drawing shares of their law firms’ profits because those firms had foreign governmental clients, even where the officers “did not personally represent a foreign government, . . . had no personal contact with that client of the firm, [and] could not be said to be subject to the foreign government’s ‘control’ in his or her activities on behalf of the partnership”).

40. *Id.* at 123.

41. 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

42. 335 F. Supp. 3d 45 (D.C. Cir. 2018).

43. 291 F. Supp. 3d 725 (D. Md. 2018).

*v. Hobby Lobby Stores, Inc.*⁴⁴ and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.⁴⁵

PART II. THE EMOLUMENTS CLAUSES' TEXT

A. *The Foreign Emoluments Clause*

Unless you were a linguist studying eighteenth-century language, or perhaps a constitutional law scholar focused on corruption, knowledge of what an “emolument” is likely escaped you.⁴⁶ Before delving into what the Emoluments Clauses mean, here is a reminder of what the Clauses say. The Foreign Emoluments Clause of the Constitution states, “[N]o Person holding any Office of Profit or Trust under them [namely, 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.”⁴⁷ This part of the Constitution bars the president from getting gifts or other valuables from foreign governments unless he has the consent of Congress.⁴⁸ As of October 2018, Congress has not granted President Trump any such consent. This means unless Congress gives him permission, President Trump cannot accept money or gifts from foreign governments.

President Trump’s business raises huge risks of the very types of conflicts of interest from which the founding fathers tried to protect the young nation.⁴⁹ The history of the drafting of the Foreign Emoluments Clause is relatively sparse. For one, unlike the amendments to the Constitution which were adopted more recently, the Foreign Emoluments Clause was part of the original 1789 Constitution. This means finding the history of the genesis of the Clause requires examination of founding era documents.

Professor Zephyr Teachout noted in her book, *Corruption in America*, the Constitution’s Foreign Emoluments Clause was based on a similar clause that was in the Articles of Confederation that was more

44. 573 U.S. 682 (2014).

45. 138 S. Ct. 1719 (2018).

46. Christal Hayes, *‘Emolument’ Searches Skyrocket 9000 Percent After Trump Loses Bid to Toss Constitution Violation Suit*, USA TODAY (July 25, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/07/25/emolument-merriam-webster-trump-constitution/836894002/>.

47. U.S. CONST. art. I, § 9, cl. 8.

48. *Id.*

49. Jeff Spross, *The Massive Conflicts of Interest in Trump’s Business Empire*, THE WEEK (Nov. 14, 2016), <http://theweek.com/articles/661431/massive-conflicts-interest-trumps-business-empire>.

restrictive—indeed, a total ban.⁵⁰ The relevant text from the Articles of Confederation was “nor 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.”⁵¹ The current version in the Constitution is more flexible than the Articles of Confederation because it allows for foreign gifts to the president (and other federal officials) with congressional consent.⁵²

The Framers of the Constitution were clearly trying to guard against foreign influences with the Foreign Emoluments Clause.⁵³ As Delegate Edmund Randolph of Virginia told his constitutional convention delegation, “[t]his restriction [in the Foreign Emoluments Clause] was provided to prevent corruption.”⁵⁴ U.S. Supreme Court Justice Story in the *Commentaries on the Constitution of the United States* explained, “The [Foreign Emoluments] clause, as to the acceptance of any emoluments, title, or office, from foreign governments, is founded in a just jealousy of foreign influence of every sort.”⁵⁵

The Foreign Emoluments Clause was inserted into the constitutional text at the request of Delegate Charles Pinckney of South Carolina, who “urged the necessity of preserving foreign Ministers & other officers of the [U.S.] independent of external influence.”⁵⁶ In these Emoluments suits discussed *infra* both sides have been trying to claim Charles

50. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 2 (2014). Professor Teachout was one of the lawyers in *CREW v. Trump*. She wrote her book three years before the lawsuit.

51. ARTICLES OF CONFEDERATION OF 1781 art. VI, § 1.

52. TEACHOUT, *supra* note 50, at 26–27.

53. Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL’Y 663, 685 (2011) (“One commonly intoned justification for regulation of foreign political expression is that the United States has a legitimate interest in preventing undue foreign influence over elections. A subset of this concern is the government’s interest in restricting political propaganda from other nations.”); Karl A. Racine, Brian E. Frosh & Norman L. Eisen, *Trump’s Emoluments Trap*, N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/opinion/trumps-emoluments-trap.html> (“[The framers] designed the Emoluments Clauses as a prophylactic measure to prevent actual corruption and the specter of corruption—where a foreign power (or a domestic government) buys favorable policy decisions by engaging with the head of the executive branch commercially, outside the normal avenues of state.”).

54. TEACHOUT, *supra* note 50, at 27 (quoting Randolph).

55. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 243, § 1352 (1838).

56. The Founders’ Constitution, *Records of the Federal Convention*, U. CHI. PRESS, http://press-pubs.uchicago.edu/founders/documents/a1_9_8s6.html (as related to U.S. CONST. art. I, § 9, cl. 8) (last visited Feb. 19, 2019).

Pinckney as providing historical support for their side's legal position. While the plaintiffs point out that Pinckney introduced the clause, the DOJ, while representing President Trump, has argued that

[h]istorical evidence confirms that the Foreign Emoluments Clause was not designed to reach commercial transactions that a President (or other federal official) may engage in as an ordinary citizen through his business enterprises Charles Pinckney, who was credited with proposing the Foreign Emoluments Clause, maintained half a dozen plantations in South Carolina while holding various public offices.⁵⁷

Yet, as Professor Teachout notes, there is no exception in the Constitution for *de minimis* gifts from foreign governments and the prohibition on foreign emoluments is broader than a ban on bribes, which would require the American official to do something in return for the foreign funds.⁵⁸ All emoluments from foreign governments—whether reciprocated or not—are treated the same under the Constitution as disallowed, unless and until Congress blesses them on a case by case basis.⁵⁹ Norman L. Eisen, Richard Painter, and Laurence H. Tribe, note that the long history of interpretation of the Foreign Emoluments Clause includes “when Simon Bolivar presented President Andrew Jackson with a gold medal, Jackson asked Congress whether he could keep it—and Congress said no. Similarly, Presidents John Tyler and Martin Van Buren both turned to Congress for approval when offered gifts by foreign leaders.”⁶⁰ Even President “Honest Abe”

57. Statement of Points & Authorities in Support of Defendant's Motion to Dismiss at 20–21, *Blumenthal*, 335 F. Supp. 3d 45 (No. 17-cv-1154-EGS), 2017 WL 6034903, <https://www.courtlistener.com/docket/6073688/15/1/blumenthal-v-trump/>; see also Amended Complaint at ¶ 24, 291 F. Supp. 3d 725 (D. Md. 2018), *D.C. v. Trump* (No. 8:17-cv-1596-PJM), 2018 WL 1336021 (“The Foreign Emoluments Clause was not included initially at the Constitutional Convention, but it was added without dissent at the request of Charles Pinckney, who ‘urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence.’”).

58. TEACHOUT, *supra* note 50, at 28.

59. *Id.*

60. NORMAN L. EISEN, RICHARD PAINTER & LAURENCE H. TRIBE, THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 9–10 (2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf. Mr. Eisen and Mr. Painter are Chair and Vice Chair respectively of CREW. Laurence Tribe is a Professor of Law at Harvard Law School and a lawyer in *CREW v. Trump*.

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Lincoln wasn't allowed by Congress to keep an emolument from the King of Siam.⁶¹

B. The Domestic Emoluments Clause

The Domestic Emoluments Clause says, "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."⁶² This clause of the Constitution means that the president cannot augment his set salary with money from the fifty states or the federal government.⁶³

The Domestic Emoluments Clause also means that Congress cannot in a fit of rage, or pique, dock the president's salary to punish him. In the *Federalist Papers*, Alexander Hamilton explained that this provision provides the president with independence from the legislature.⁶⁴ As Hamilton wrote,

The third ingredient towards constituting the vigor of the executive authority, is an adequate provision for its support. It is evident that, without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, *either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations* There are men who could neither be distressed nor won into a sacrifice of their duty; but this stern virtue is the growth of few soils; and in the main it will be found that a power over a man's support is a power over his will. If it were necessary to confirm so plain a truth by facts, examples would not be wanting, even in this country, of the intimidation or seduction of the Executive by the

61. A Resolution providing for the Custody of the Letter and Gifts from the King of Siam, S.J. Res. 20, 37th Cong., 12 Stat. 616 (1862) (directing President Lincoln to deposit gifts from the King of Siam with the Department of Interior).

62. U.S. CONST. art. II, § 1, cl. 7.

63. BRIANNE J. GOROD, BRIAN R. FRAZELLE & SAMUEL HOUSHOWER, *THE DOMESTIC EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP* (2017), https://www.theusconstitution.org/wp-content/uploads/2017/07/20170726_White_Paper_Domestic_Emoluments_Clause.pdf.

64. THE FEDERALIST NO. 73 (Alexander Hamilton).

terrors or allurements of the pecuniary arrangements of the legislative body.⁶⁵

As Hamilton also noted in the text above, the cap on the presidential salary is both a ceiling and floor to prevent the legislature from attempting to control the president by offering him more money.⁶⁶ Alexander Hamilton continued in his defense of the Domestic Emoluments Clause stating that the president is also insulated from temptation by the fifty states (or at the time thirteen states) as well, since “[n]either the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument . . . *He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.*”⁶⁷

President Ronald Reagan’s state pension from his time as the Governor of California raised questions of whether it ran afoul of the Domestic Emoluments Clause.⁶⁸ The OLC issued an opinion that because President Reagan’s California pension was fully vested before he became president, it did not violate the Clause.⁶⁹ This seems like the correct result since California had no ability to give Ronald Reagan a greater or lesser pension to reward or punish his behavior as president.

A vested state pension raises decidedly different issues from President Trump’s relationship with the fifty states today. President Trump can use his influence over federal policy such as tax policy to benefit or harm particular states. The 2017 tax bill was particularly onerous on states that had not voted for Trump in 2016 in the electoral college because the tax law capped the deductibility of local and state taxes at \$10,000, which is particularly high in many “blue” states like New York and California.⁷⁰ This tax consequence for “blue” states could be coincidence. It could also be targeted political retribution.⁷¹ Other policies, like where off-shore oil drilling is permitted, could be used to

65. *Id.* (emphasis added).

66. *Id.*

67. *Id.* (emphasis added).

68. President Reagan’s Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187 (1981), <https://www.justice.gov/olc/file/626816/download>.

69. *Id.* at 192.

70. Laura Saunders, *The New Tax Law: State and Local Tax Deductions, The Tax Overhaul Caps the Deduction for State and Local Taxes at \$10,000 per Return*, WALL ST. J. (Feb. 13, 2018), <https://www.wsj.com/articles/the-new-tax-law-state-and-local-tax-deductions-1518542356>.

71. Carolyn Y. Johnson, Reuben Fischer-Baum & Aaron Williams, *Blue States Will Be Hit Hardest by GOP Tax Plan’s Limits on Deductions*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/11/02/the-gop-tax-plan-limits-deductions-used-in-blue-states/?utm_term=.5a832ee30a16.

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punish or reward certain states.⁷² And thus, it matters a great deal whether states can unconstitutionally offer financial benefits to the president in an effort to sway these types of national policies which can have uneven local impacts. The Domestic Emoluments Clause was meant to prevent each of the fifty states from essentially bribing the president to be beneficent towards her at the expense of her forty-nine sister states.

PART III. CONGRESSIONAL STATEMENTS ON THE EMOLUMENTS CLAUSES

The question of compliance by President Trump with the Emoluments Clauses has also been raised on the floors of Congress. Before Mr. Trump was sworn into office, Senator Cardin introduced *Senate Concurrent Resolution 56* asking the then president-elect to avoid violating the Foreign Emoluments Clause.⁷³ Senator Cardin stated in his floor speech,

On November 22, [2016,] President-elect Trump stated, “The law’s totally on my side, meaning, the president can’t have a conflict of interest.” In typical Trump sleight of hand, he selectively picks his own facts as he shows a troubling and callous disregard for our Constitution and for the duty he owes to the American people [The Foreign] [E]moluments [C]lause prevent[s] foreign governmental financial influence over the President.⁷⁴

The Resolution continues,

It was the enduring wisdom of our Founders to recognize that America is not magically immune from the corruption problems in other countries, and that not all men are angels. This is why we place our trust in the Constitution, not in individuals. A man with more wealth and extensive foreign holdings than prior presidents is, by an order of magnitude, more vulnerable to foreign corruption and interference than any president before him. The Emoluments Clause has greater bearing on Mr. Trump’s presidency than his predecessors, not less.

72. Oliver Milman, *Coastal States to Trump: Why Is Florida Exempt from Drilling and Not Us?*, THE GUARDIAN (Feb. 14, 2018), <https://www.theguardian.com/environment/2018/jan/10/trump-offshore-drilling-florida-ryan-zinke>.

73. S. Con. Res. 56, 114th Cong. (2016).

74. 162 CONG. REC. S6555 (daily ed. Nov. 29, 2016) (statement of Sen. Cardin).

No man can gain such wealth and power that he outgrows the limits of our Constitution.⁷⁵

The solution offered by Senator Cardin was straightforward, a complete divestment.⁷⁶ As the Resolution stated: “President-elect . . . Trump [has only] to follow the precedent established by prior [p]residents and convert his assets to simple, conflict-free holdings, adopt blind trusts managed by [truly] independent trustee[s] with no relationship to [Mr.] Trump or his businesses.”⁷⁷

Mr. Trump did not take the advice of this Senate resolution. He placed the Trump Organization into a see-through trust where he could extract funds at any time.⁷⁸ After Mr. Trump ascended to the Presidency, the complaints continued from certain members of Congress precisely because he did not put his assets in a blind trust with truly independent trustees. For example, Representative Jayapal introduced legislation that would stop President Trump from promoting his own business.⁷⁹

[T]his [] restricts the President from making public statements to promote his own business interests This President, however, has avoided those calls for him to sell his assets or place them into a blind trust President Trump has moved the assets over, just in name, to his son and a longtime employee, but that Trump himself, the President of the United States, is the sole beneficiary of all of those trusts [T]here is no wall erected between his businesses and his Presidency, and anyone who wants to buy influence can simply do so openly. His entire Presidency can be seen as a promotion of his business interests and be used by domestic and

75. S. Con. Res. 4, 115th Cong., 163 CONG. REC. 564 (daily ed. Jan 4, 2017) (statement of Sen. Cardin).

76. 162 CONG. REC. S6556 (daily ed. Nov. 29, 2016) (statement of Sen. Cardin). Senator Cardin was not alone in urging divestment. See Rebekah Entralgo, *All the Ways in Which the Trump Administration Violated Basic Ethics Rules If Only He Just Fully Divested*, THINK PROGRESS (Aug. 8, 2017), <https://thinkprogress.org/trump-administration-violated-basic-ethics-rules-542205ad3784/> (“If Trump *really* was going to place the Constitution above private gain, he would have completely divested.”).

77. S. Con. Res. 56.

78. Drew Harwell, *Trump Can Quietly Draw Money from Trust Whenever He Wants, New Documents Show*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/politics/trump-can-quietly-draw-money-from-trust-when-ever-he-wants-new-documents-show/2017/04/03/7f4c0002-187c-11e7-9887-1a5314b56a08_story.html?utm_term=.2bb2c59af7b7.

79. 163 CONG. REC. H1482 (daily ed. Mar. 2, 2017) (statement of Rep. Jayapal relating to the Regulatory Integrity Act of 2017).

foreign governments to curry favor and produce benefit to his personal empire.⁸⁰

In a similar vein, Representative Kaptur complained in the *Congressional Record*, “With hotels and property developments all over America and the world, the Trump empire is . . . raising vital questions as to the Trumps’ profiting from public service, including from foreign entanglements that violate the Constitution And the American people should never have to wonder whose interests the President serves.”⁸¹ Representative Johnson carped, “There is also the elephant in the room as to whether this Trump hotel business is violating the U.S. Constitution.”⁸² Representative Blumenauer was even more stark: “[T]he presidency should not be a get-rich-quick scheme.”⁸³ And Representative Raskin noted that President Trump has not even bothered to ask for permission to keep foreign emoluments.⁸⁴ All of these statements quoted above were from Democratic members of Congress at a time when Republicans controlled both Houses of Congress. Thus, unsurprisingly, none of the legislative suggestions that accompanied these critiques of President Trump’s conflicts of interest became law.

PART IV. EXAMPLES OF POSSIBLE VIOLATIONS OF THE EMOLUMENTS CLAUSES

Because the Trump Organization’s businesses stretch into several corners of the globe at once, there are multiple instances where the Foreign Emoluments Clause could be violated simultaneously.⁸⁵ As the

80. *Id.*

81. 163 CONG. REC. H1575 (daily ed. Mar. 7, 2017) (statement of Rep. Kaptur regarding President Trump’s family business).

82. 163 CONG. REC. H1600 (daily ed. Mar. 8, 2017) (statement of Rep. Johnson regarding the Trump Hotel).

83. 163 CONG. REC. E300 (daily ed. Mar. 9, 2017) (statement of Rep. Blumenauer).

84. 163 CONG. REC. H923 (daily ed. Feb. 2, 2017) (statement of Rep. Raskin) (“[W]hat we have got now is a President who has hundreds of millions of dollars of interest all over the world—in Russia, in the Philippines—millions of dollars of loans from the Government of China, the Trump Hotel, which is renting out banquet rooms, dining halls, floors, hotel rooms, to foreign governments and embassies from all over the world who come here to try to influence our government. And what do we hear about the emoluments clause? Has the President come to ask us whether or not we approve of these arrangements? [No].”).

85. Helaine Olen, *Trump’s Latest Violation of the Emoluments Clause*, WASH. POST (May 15, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/05/15/trumps-latest-violation-of-the-emoluments-clause/?noredirect=on&utm_term=.e6723c3484b9 (“[R]eporters asked how, precisely, the involvement of China in the Indonesia resort

Christian Science Monitor hypothesized, what if a “foreign official travels to Washington, books the Ivanka Suite at the Trump International Hotel for \$1,595 per night, and later makes glowing comments about the hotel during a meeting at the White House with President Trump.”⁸⁶ Then the paper listed actual instances which, depending on how the Emoluments suits discussed herein are resolved, could all be violations of the Foreign Emoluments Clause because the foreign sovereign revenues ultimately go to the President of the United States.⁸⁷ “In February 2017, the Kuwaiti Embassy held its national day celebration at the hotel The Embassy of Bahrain also held a national day celebration there The ambassador and permanent representative of Georgia to the United Nations stayed at the hotel during a visit to Washington in April 2017.”⁸⁸

Newsweek listed other potential emoluments that could run afoul of the Foreign Emoluments Clause:

In Indonesia, a local government approved plans to construct a road that would shorten the drive between Trump’s new six-star resort . . . and the main airport In Panama, the federal government installed sewer and water pipes around the Trump Ocean Club International Hotel and Tower in Panama City to ensure the construction on the sail-shaped skyscraper would be completed after the contractor went bankrupt.⁸⁹

Vox reported, “Trump has a huge stake in a real estate holding underwritten with a loan from the Chinese government. He has tens of millions of dollars riding on building projects in Saudi Arabia. Foreign diplomats have already admitted to spending money at his hotels to curry favor with the president.”⁹⁰ As reported in *The Hill*, “Rep. Adam Schiff (D-Calif.) said Tuesday that he believes President Trump is violating the Constitution’s emoluments clause by making a deal with

project didn’t violate the emoluments clause of the Constitution, and how it squares with the president’s assurances that the Trump Organization wouldn’t get involved in ‘foreign deals’ as long as he remained in the White House.”).

86. Warren Richey, *In Trump Emoluments Case, Questions of Ethics and Constitutional Intent*, CS MONITOR (Mar. 23, 2018), <https://www.csmonitor.com/USA/Politics/2018/0323/In-Trump-emoluments-case-questions-of-ethics-and-constitutional-intent>.

87. *Id.*

88. *Id.*

89. Leah Thomas, *Trump Is Receiving Gifts from Foreign Governments and Violating the Constitution, Ethics Watchdogs Warn*, NEWSWEEK (Jan. 3, 2018), <https://www.newsweek.com/trump-still-doing-business-foreign-governments-769177>.

90. Jeff Stein & Libby Nelson, *Donald Trump and the Emoluments Clause, Explained*, VOX (Jan. 24, 2017), <https://www.vox.com/policy-and-politics/2016/11/23/13715150/donald-trump-emoluments-clause-constitution>.

Beijing over Chinese telecommunications company ZTE.”⁹¹ Also related to China, the *Associated Press* stated, “China has granted preliminary approval for 38 new Trump trademarks.”⁹²

Meanwhile, *Politico* noted, “A lobbying firm working for Saudi Arabia paid for a room at Donald Trump’s Washington hotel after Inauguration Day, marking the first publicly known payment on behalf of a foreign government to a Trump property since he became president.”⁹³ If a federal court decides that money from foreign governments flowing through the Trump Organization to President Trump is a violation of the Foreign Emoluments Clause, then there are multiple examples of violations from right down the street to all around the world.

PART V. EMOLUMENTS CLAUSES SUITS

As I write this Article, there are three ongoing suits arguing that President Trump is in violation of at least one of the Emoluments Clauses. There could soon be more. The Attorney General of New York indicated interest in investigating whether the Trump Organization is violating the Foreign Emoluments Clause.⁹⁴ This state matters because the Trump Organization has businesses in New York and Florida, respectively.

A. CREW v. Trump

While Congress has not taken legislative steps to rein in President Trump’s conflict of interests between his business and his public office, litigants have asserted that the president is violating one or both of the Emoluments Clauses. Following President Trump’s refusal to divest

91. Mallory Shelbourne, *Schiff: Trump Deal with ZTE a ‘Violation of the Emoluments Clause,’* THE HILL (May 15, 2018), <http://thehill.com/homenews/house/387723-schiff-trump-deal-with-zte-a-violation-of-the-emoluments-clause>.

92. Erika Kinetz, *China Grants Preliminary Approval to 38 New Trump Trademarks,* AP NEWS (Mar. 9, 2017), <https://apnews.com/8f54b14808a2459f9efcb0089f41f056/china-grants-preliminary-approval-38-new-trump-trademarks>.

93. Isaac Arnsdorf, *Saudis Foot Tab at Trump Hotel,* POLITICO (Feb. 9, 2017), <https://www.politico.com/story/2017/02/trump-hotel-saudi-arabia-234878>.

94. Colby Hamilton, *New York AG Investigating Trump for in-State Emoluments Violations According to Reports Friday, the President’s Hotel in Manhattan Saw a Substantial Turnaround in Finances After Saudi Royalty Made a Five-Day Stay in May,* N.Y. L.J. (Aug. 3, 2018), <https://www.law.com/newyorklawjournal/2018/08/03/new-york-ag-investigating-trump-for-in-state-emoluments-violations/> (“New York Attorney General Barbara Underwood is investigating President Donald Trump’s business practices in New York for possible violations of the emoluments clause of the U.S. Constitution, a spokeswoman confirmed Friday.”).

from his global businesses,⁹⁵ *CREW v. Trump*⁹⁶ was the first Emoluments suit to be filed just days after Trump was inaugurated.⁹⁷ The plaintiffs in the case include Citizens for Responsibility and Ethics in Washington (CREW), a nonpartisan nonprofit, and Restaurant Opportunities Centers United, Inc. (ROC United), which represents 30,000 restaurant employees.⁹⁸ The other two co-plaintiffs are Eric Goode, who owns hotels, restaurants, and bars, and Jill Phaneuf, who books embassy functions in the D.C. market.⁹⁹ Collectively, the latter three plaintiffs are known as the “Hospitality Plaintiffs” in the case.¹⁰⁰

One of the first hurdles that CREW and Hospitality Plaintiffs faced was the fact that they were the first plaintiffs ever to sue a president for violating the Emoluments Clauses, so there was no guidance for them about how to establish standing to sue or what types of injuries would be legally cognizable by the courts under the Clauses. Legal nonprofits, like CREW, often sue on behalf of their members or clients to vindicate constitutional rights. CREW cited existing case law about why it would be appropriate for the court to grant them standing.¹⁰¹ CREW argued in its Complaint that “Defendant’s violations of the Foreign Emoluments Clause have required CREW to divert and expend its valuable resources specifically to counteract those violations, impairing CREW’s ability to accomplish its mission.”¹⁰² CREW used the precedent of *Ragin v. Harry Macklowe Real Estate Co.*¹⁰³ and *Havens Realty Corp. v. Coleman*¹⁰⁴ to show that without injunctive relief,¹⁰⁵

95. *D.C. v. Trump*, 315 F. Supp. 3d at 878 (“Donald J. Trump is the President of the United States and the sole or a substantial owner of both the Trump Organization LLC and The Trump Organization, Inc. (collectively, the Trump Organization), umbrella organizations under which many, if not all, of the President’s various corporations, limited-liability companies, limited partnerships, and other entities are loosely organized.”).

96. 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

97. Complaint, *CREW*, 276 F. Supp. 3d 174 (No. 1:17-cv-00458), 2017 WL 277603; Stephen F. Rohde, *Is the Emoluments Clause a Threat to Trump’s Presidency?*, L.A. LAW. 36 (Mar. 2017), <https://www.lacba.org/docs/default-source/lal-back-issues/2017-issues/march-2017.pdf> (“CREW’s complaint accuses Trump of violating the emoluments clause as a result of his ongoing business dealings (from which he has refused to divest ownership) with more than 20 governments around the globe.”).

98. *About Us*, RESTAURANT OPPORTUNITIES CTRS. UNITED, INC., <http://rocunited.org/about-us/> (last visited Aug. 31, 2018).

99. *CREW*, 276 F. Supp. 3d at 180.

100. *Id.* at 184.

101. Complaint, *supra* note 97, ¶ 4.

102. *Id.* ¶ 51.

103. 6 F.3d 898 (2d Cir. 1993).

104. 455 U.S. 363 (1982).

CREW will suffer “a significant diversion and depletions’ of its ‘time, resources, and efforts,’ which it would otherwise devote to the myriad of ethical issues it has been addressing for 15 years.”¹⁰⁶ In the Plaintiffs’ Memorandum in Opposition to the Defendant’s Motion to Dismiss, they asserted that while every American is harmed by the president’s violation of the Emoluments Clauses, CREW was nonetheless specifically injured as well:

The defendant’s [President Trump’s] acceptance of emoluments and presents violates rules that protect our constitutional order, and thereby affects each and every American. But his conduct also directly inflicts concrete and particularized injury on the plaintiffs, who have been injured in two distinct ways—both cognizable under Article III. First, the defendant’s conduct has tilted the marketplace, resulting in competitor injury to the plaintiffs in the hotel and restaurant industries. Second, the defendant has inflicted organizational injury on CREW by making it more costly to carry out its established mission.¹⁰⁷

CREW continued, the Foreign Emoluments Clause is violated “as several [foreign] officials have admitted . . . [because of] the chance to feather the president’s nest and display their loyalty to his brand—that has led them to favor and patronize his properties.”¹⁰⁸

*CREW v. Trump*¹⁰⁹ landed in the courtroom of Judge George B. Daniels of the Southern District of New York. Judge Daniels heard arguments from both sides about the meaning of “emolument,” justiciability, and standing.¹¹⁰ During oral arguments, a lawyer for CREW stated that Trump’s D.C. hotel was “an emoluments magnet.”¹¹¹ An amicus brief by conservative law professor Seth Barrett Tillman

105. Complaint, *supra* note 97, ¶ 4 (“[T]here has been a ‘concrete and demonstrable injury to the organization’s activities, with the consequent drain on the organization’s resources.’” (citing *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904–05 (2d Cir. 1993))).

106. Rohde, *supra* note 97.

107. Plaintiffs’ Memorandum in Opposition to Defendant’s Motion to Dismiss at 9, *CREW v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-GBD), 2017 WL 3444116.

108. *Id.* at 15.

109. 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

110. *Id.* at 181–84.

111. Sheelah Kolhatkar, *Are the Emoluments Lawsuits Filed Against President Trump Dead?*, *NEW YORKER* (Oct. 19, 2017), <https://www.newyorker.com/news/news-desk/are-the-emoluments-lawsuits-filed-against-president-trump-dead> (quoting CREW’s lawyer Deepak Gupta).

argued to the contrary for a narrow reading of what counts as an “emolument.” To wit,

[f]inancial gain arising from private business transactions are not emoluments Plaintiffs’ reading of the Foreign Emoluments Clause cannot account for the fact that our Founding-era presidents openly received diplomatic gifts from foreign governments. President Washington received a portrait of King Louis XVI from the French Ambassador to the United States. President Jefferson received a bust of Czar Alexander I. President Madison received two pistols from a revolutionary South American government. Congress’s consent was not sought for any of these gifts.¹¹²

By contrast, other legal historians in *CREW* argued in their amicus brief for a more expansive definition of “emoluments.” They stated,

The word “emolument” was not a term of art in the eighteenth century; it was used, in both legal and non-legal contexts, in a much broader sense than the unduly narrow and artificial one defended by the government. In particular, “emolument” encompassed profits or advantages arising from private commercial transactions. Second, DOJ’s interpretation is at odds with historical understandings of the Emoluments Clauses and of similar prohibitions adopted from 1776 to 1789. Third, DOJ’s interpretation of these clauses is inconsistent with the founders’ purposes of preventing corruption and conflicts of interest, avoiding dangerous foreign entanglements, and preserving a careful balance of state and federal power.¹¹³

For Professor Tillman, writing in support of President Trump’s position, the Foreign Emoluments Clause is nearly a dead letter because it had not been enforced against previous presidents in the way plaintiff urged the clause be enforced against President Trump. For the legal scholars arguing against him, “emoluments” could be anything of value including moneys flowing through Trump’s businesses, and the Foreign Emoluments Clause is very much alive and enforceable.

One scholar pointed out that the DOJ briefing seemed to acknowledge that the Foreign Emoluments Clause had been violated

112. Brief for Scholar Seth Barrett Tillman as Amicus Curiae in Support of the Defendant, *CREW*, 276 F. Supp. 3d 174 (No. 17 Civ. 458 (RA)), 2017 WL 2692500.

113. Brief of Amicus Curiae by Certain Legal Historians on Behalf of Plaintiffs, *CREW*, 276 F. Supp. 3d 174 (No. 17 Civ. 458 (GBD)), 2017 WL 5483629 (legal scholars brief).

under their own proffered definition of “emolument.”¹¹⁴ Associate Professor of Law at Georgetown Law Marty Lederman concluded,

The [CREW] complaint further alleges (paras. 111–118) that although Trump had sought Chinese trademark protection for his name in connection with building construction services ever since 2006, China only granted that application, after several rejections, on February 14, 2017, five days after Trump pledged to Chinese President Xi Jinping that he would honor the United States’s longstanding “One China” policy.

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 benefits violated the Foreign Emoluments Clause.¹¹⁵

Alas, Judge Daniels did not get to the merits of the case to address this interpretation of the clause. Indeed, Judge Daniels was not persuaded by any of the plaintiffs’ arguments in *CREW*. Consequently, he threw every possible obstacle in the way of the *CREW* case proceeding as he dismissed the suit.¹¹⁶ Judge Daniels ruled, on December 21, 2017, that all four plaintiffs in the *CREW* case lacked standing to continue with the lawsuit.¹¹⁷ In essence, the judge ruled that any injury to plaintiffs flowing from President Trump’s ownership of his businesses was too speculative. The judge also noted that

[e]ven before Defendant [Trump] took office, he had amassed wealth and fame and was competing against the Hospitality Plaintiffs in the restaurant and hotel business. It is only natural that interest in his properties has generally increased since he became President. As such, despite any alleged violation on [Trump’s] part, the Hospitality Plaintiffs may face a tougher competitive market overall. Aside from [Trump’s] public profile, there are a number of reasons why patrons may choose to visit [Trump’s] hotels and restaurants including service, quality, location, price and other factors related to individual

114. Marty Lederman, *How the DOJ Brief in CREW v. Trump Reveals that Donald Trump Is Violating the Foreign Emoluments Clause*, TAKE CARE BLOG (June 12, 2017), <https://takecareblog.com/blog/how-the-doj-brief-in-crew-v-trump-reveals-that-donald-trump-is-violating-the-foreign-emoluments-clause>.

115. *Id.*

116. *CREW*, 276 F. Supp. 3d at 195 (“Defendant’s motion to dismiss is GRANTED. Accordingly, Plaintiffs’ claims and this case are DISMISSED.”).

117. *Id.* at 179, 193 (“Defendant’s motion to dismiss for lack of standing under Rule 12(b)(1) is GRANTED.”).

preference. Therefore, the connection between the Hospitality Plaintiffs' alleged injury and [Trump's] actions is too tenuous to satisfy Article III's causation requirement.¹¹⁸

Judge Daniels also claimed that his court could give the plaintiffs no relief under the Foreign Emoluments Clause because Congress could eventually, at some unknown point in the future, consent to the foreign gifts.¹¹⁹

Then, Judge Daniels went out of his way to slam the courthouse door on CREW and its co-plaintiffs. He noted that the Foreign Emoluments Clause accusations raised non-justiciable political claims—basically, the case raised issues that were inappropriate for a federal court to hear.¹²⁰ As Judge Daniels raised the issue, “Plaintiffs’ Foreign Emoluments Clause claims do implicate political question concerns. The political question doctrine . . . bars courts from deciding cases that are inappropriate for judicial resolution based on a lack of judicial authority or competence, or other prudential considerations.”¹²¹ Answering his own rhetorical question, he concluded, “[T]his case presents a non-justiciable political question.”¹²² And the judge also asserted that the plaintiffs’ claim was not ripe, because Congress could still act to rein in the president.¹²³

On February 16, 2018, the CREW plaintiffs appealed the dismissal of the case.¹²⁴ Oral argument is set for October 30, 2018, in the Second Circuit.¹²⁵ As of this piece’s writing, the United States Court of Appeals for the Second Circuit has not issued an opinion. But at least for now, CREW v. Trump is not moving forward.

118. *Id.* at 186.

119. *Id.* at 186–87 (“Congress could still consent and allow Defendant to continue to accept payments from foreign governments in competition with Plaintiffs.”).

120. *Id.* at 193.

121. *Id.*

122. *Id.* at 194.

123. *Id.* (“Plaintiffs’ Foreign Emoluments Clause claims are indeed not ripe for judicial review.”).

124. Notice of Civil Appeal on Behalf of Appellant, CREW v. Trump (Feb. 16, 2018) (No. 18-474).

125. Emoluments Clause Litigation, GUPTA WESSLER, <http://guptawessler.com/emoluments> (last visited Oct. 12, 2018).

B. Blumenthal v. Trump

On June 14, 2017, nearly 200 members of Congress joined together to sue President Trump for violation of the Foreign Emolument Clause.¹²⁶ The *Blumenthal* lawsuit alleges, like the other two suits, that “emoluments” include business transactions and that President Trump’s turning over management to his sons is not enough to distance himself from these transactions, since he continues to be the ultimate owner of the Trump Organization.¹²⁷ The lawsuit filed by Democratic members of Congress (both House and Senate) alleges that Trump has conflicts of interests in at least twenty countries.¹²⁸ The Complaint says that Trump needs the consent of Congress before accepting any gifts or emoluments, but no requests for permission from President Trump have come to Congress for approval.¹²⁹ According to the complaint, “[Congressional] Plaintiffs seek declaratory relief establishing that Defendant violates the Constitution when he accepts any monetary or nonmonetary benefit—any ‘present, Emolument, Office, or Title, of any kind whatever’—from a foreign state without first obtaining ‘the Consent of the Congress.’”¹³⁰

Judge Emmet G. Sullivan ruled on September 28, 2018, that *Blumenthal v. Trump*¹³¹ could move forward because he found that the members of Congress had standing to sue¹³² to challenge President Trump under the Foreign Emoluments Clause because the text of the Constitution is clear that congressional consent to keep foreign

126. Complaint at 18, *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 1:17-cv-01154), 2017 WL 2561946 (“Plaintiffs, 30 members of the United States Senate and 166 members of the United States House of Representatives, bring this action against President Donald J. Trump to obtain relief from the President’s continuing violation of the Foreign Emoluments Clause of the United States Constitution, which was designed to ensure that our nation’s leaders would not be corrupted by foreign influence or put their own financial interests over the national interest.”).

127. Gretchen Frazee, *How the Emoluments Clause Is Being Used to Sue Trump*, PBS NEWSHOUR (June 22, 2017), <http://www.pbs.org/newshour/updates/emoluments-clause-used-sue-trump/>.

128. Complaint, *supra* note 126, at 35.

129. *Id.* at 18–19 (“Because the Foreign Emoluments Clause requires the President to obtain ‘the Consent of the Congress’ before accepting otherwise prohibited ‘Emolument[s],’ Plaintiffs, as members of Congress, must have the opportunity to cast a binding vote that gives or withholds their ‘Consent’ before the President accepts any such ‘Emolument.’”); Brooke Seipel, *Nearly 200 Democrats Sue Trump Citing Emoluments Clause Violation*, THE HILL (June 14, 2017), <http://thehill.com/blogs/blog-briefing-room/news/337710-nearly-200-democrats-file-emoluments-lawsuit-against-trump>.

130. Complaint, *supra* note 126, at 19.

131. 335 F. Supp. 3d 445 (D.D.C. 2018).

132. *Id.* at 51.

emoluments is required.¹³³ As the Court noted, quoting an Office of Legal Counsel Opinion, “The language of the Emoluments Clause is both sweeping and unqualified.”¹³⁴ And moreover, that because President Trump has not bothered to ask Congress for the constitutionally required consent, this has left them with no other recourse besides suing.¹³⁵

In *Blumenthal*, the Congressional Plaintiffs had an uphill challenge to establish standing because there are Supreme Court and D.C. Circuit precedents that severely limit the circumstances under which members of Congress can access the federal courts.¹³⁶ Basically, if Congress itself can fix a particular problem, then they should not have standing to sue. President Trump’s lawyers argued that the Congressional Plaintiffs should similarly not have standing here.¹³⁷ But the Court disagreed and noted that the structure of the Foreign Emoluments Clause requires that if the president wants to keep money or gifts from a foreign sovereign, then he must ask for permission from Congress first.¹³⁸ Thus, there is no legislation which Congress could enact that would solve the problem of President Trump ignoring the Constitution.¹³⁹

Another interesting wrinkle of the *Blumenthal* analysis of whether congressional standing would be appropriate is Judge Sullivan drawing on a recent election law case called *Arizona State Legislature v. Arizona Independent Redistricting Commission*¹⁴⁰ to justify standing.¹⁴¹ In

133. *Id.* at 54–55.

134. *Id.* at 53 (citing Non-Government Members of ACUS, *supra* note 36, at 121).

135. *Id.* at 54–55 (“[A]lthough plaintiffs’ claims raise separation-of-powers concerns, plaintiffs have no adequate legislative remedy and this dispute is capable of resolution through the judicial process.”).

136. See *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (Congressional Plaintiffs’ injury was an institutional one and not sufficiently concrete and personal for Article III standing); *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000) (holding members of Congress lacked standing to sue President Clinton over the War in Kosovo); *Chenoweth v. Clinton*, 181 F.3d 112, 117 (D.C. Cir. 1999) (“[Congressional Plaintiffs] cannot claim their votes were effectively nullified by the machinations of the Executive.”).

137. *Blumenthal*, 335 F. Supp. 3d at 54 (“The President argues that the Court lacks jurisdiction over plaintiffs’ claims because plaintiffs have not met their burden to establish a judicially cognizable injury as is required by Article III.”).

138. *Id.* at 62 (“The Clause requires the President to ask Congress before accepting a prohibited foreign emolument. Accepting the allegations in the Complaint as true, which the Court must at this juncture, the President is accepting prohibited foreign emoluments without asking ‘and’ without receiving a favorable reply from Congress.”).

139. *Id.* at 63 (“To be clear, plaintiffs’ alleged injury is caused by the President’s alleged refusal to give them the opportunity to exercise their constitutional right to vote on whether to consent prior to his acceptance of prohibited foreign emoluments.”).

140. 135 S. Ct. 2652 (2015).

Arizona State Legislature, the Supreme Court concluded that the Arizona Legislature had standing to sue over the establishment of an anti-gerrymandering redistricting commission created by a ballot initiative.¹⁴² The Arizona Legislature had a cognizable injury because the initiative took away their ability to redistrict.¹⁴³ Judge Sullivan in *Blumenthal* reasoned that, like the Arizona Legislature, these members of Congress also had a legislative function completely negated by President Trump's refusal to abide by the Foreign Emoluments Clause.¹⁴⁴ The argument that members lack standing to sue would hold more sway if President Trump had asked for permission to keep certain emoluments and the Congress had failed to vote on the measure. Here, the facts are different. If the president is violating the Foreign Emoluments Clause through his receipt of money from foreign sovereigns through his businesses, then the constitutional duty falls on the president to ask for permission from Congress. And the Court should be able to order him to comply with this part of the Constitution, or barring that, order him to fully divest, or pay back unconstitutional moneys that have flowed through the Trump Organization.

C. District of Columbia v. Trump

Along with members of Congress and workers in the hospitality business, states have also been concerned about the potential violation of the Constitution by President Trump's ongoing ownership of his business.¹⁴⁵ Consequently, D.C. and Maryland sued President Trump for violation of the Emoluments Clauses on June 12, 2017.¹⁴⁶

141. *Blumenthal*, 335 F. Supp. 3d at 57 (“[The Supreme] Court held that the [Legislative] plaintiff had standing because ‘their votes have been completely nullified.’”).

142. *Ariz. State Legislature*, 135 S. Ct. at 2677; *Blumenthal*, 335 F. Supp. 3d at 58.

143. *Blumenthal*, 335 F. Supp. 3d at 58 (“In *Arizona State Legislature*, the legislature, as an institutional plaintiff authorizing the lawsuit, had standing to sue based on the alleged nullification of their votes ‘now’ or ‘in the future’ as a result of a ballot initiative.”).

144. *Id.* at 62 (“Accordingly, plaintiffs adequately allege that the President has completely nullified their votes.”).

145. David A. Fahrenthold & Jonathan O’Connell, *What Is the ‘Emoluments Clause’? Does It Apply to President Trump?*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/politics/what-is-the-emoluments-clause-does-it-apply-to-president-trump/2017/01/23/12aa7808-e185-11e6-a547-5fb9411d332c_story.html?utm_term=.3c6d99bf143f (The Maryland and D.C. Attorneys General believe 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”).

146. Complaint, *D.C. v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-01596-PJM), 2017 WL 2559732.

The *District of Columbia v. Trump*¹⁴⁷ Complaint is a wonder to behold. The D.C. Complaint says that President Trump has “used his position as President to boost this patronage of his enterprises, and foreign diplomats and other public officials have made clear that the defendant’s position as President increases the likelihood that they will frequent his properties and businesses.”¹⁴⁸ The Complaint alleges the following actions violate the Foreign Emoluments Clause: (a) remuneration from leases of Trump’s properties held by foreign-government-owned entities; (b) foreign government or government-owned entities purchasing condos in Trump properties; (c) hotel accommodations, restaurant purchases, use of venues by foreign governments and diplomats at Trump’s properties; and (d) payments from foreign-government-owned broadcasters related to “The Apprentice” and its spinoffs.¹⁴⁹

The lawsuit filed by the Attorneys General of Maryland and D.C. alleged that they are injured as competitors in the marketplace because President Trump has created an unconstitutional market.¹⁵⁰ They point to specific instances where foreign governmental groups have changed their hotel bookings to demonstrate that Trump is receiving emoluments from foreign governments like the Kuwaiti Embassy, which had an initial booking at the Four Seasons hotel, but changed it to a Trump hotel.¹⁵¹ As Judge Messitte noted of the plaintiffs’ Complaint,

They argue they have been placed at a competitive disadvantage because the President, by virtue of the pre-eminence of his office, is unfairly skewing the hospitality market in favor of his Hotel. He is not merely a market participant, they say; he is actively diverting business from Plaintiffs’ entities. In fact, Plaintiffs cite specific instances of foreign governments foregoing reservations at other hotels in the arena [sic] and moving them to the President’s [D.C.] Hotel. See Pls.’ Opp’n at 17 (noting that both Kuwait and Bahrain moved events from the Four Seasons and Ritz Carlton to the Hotel

147. 291 F. Supp. 3d 725 (D. Md. 2018).

148. Complaint, *supra* note 146, ¶ 13.

149. *Id.* ¶ 9.

150. *Id.* ¶ 114.

151. Aaron C. Davis & Karen Tumulty, *D.C. and Maryland AGs: Trump ‘Flagrantly Violating’ Emoluments Clause*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/investigations/dc-and-marylands-lawsuit-trump-flagrantly-violating-emoluments-clause/2017/06/12/8a9806a8-4f9b-11e7-be25-3a519335381c_story.html?utm_term=.de7bec38848d.

after the President was elected). Statements from foreign diplomats have confirmed that they will almost certainly be doing likewise.¹⁵²

Judge Messitte continued finding the plaintiffs factual proffers compelling:

Plaintiffs' . . . allegation is bolstered by explicit statements from certain foreign government officials indicating that they are clearly choosing to stay at the President's Hotel, because, as one representative of a foreign government has stated, they want him to know "I love your new hotel," a sentiment the President appears to suggest he likes "very much."¹⁵³

In *D.C. v. Trump*, the plaintiffs argue President Trump has also violated the Domestic Emoluments Clause by taking money from the Governor of Maine, Paul LePage, who stayed in a Trump hotel on a trip to Washington on the dime of Maine taxpayers.¹⁵⁴ They also argue he violated this clause by getting tax breaks for his businesses from D.C. and Mississippi, which, again, flows to him—thereby illegally and unconstitutionally augmenting his base salary as president.¹⁵⁵ The Complaint also alleges that the Domestic Emoluments Clause has also been violated due to the continuation of the General Services Administration lease for Trump's D.C. hotel.¹⁵⁶ Judge Messitte signaled quite early that he was taking the allegation of violations of the U.S. Constitution seriously. In 2017, he granted the Attorneys General in D.C. and Maryland permission to subpoena twenty-three Trump businesses and require them to preserve documents in *D.C. v. Trump*.¹⁵⁷

1. *D.C. v. Trump* Standing to Sue

The plaintiffs in *D.C. v. Trump* argue in part that because both D.C. and Maryland run meeting spaces like convention centers that compete with Trump's D.C. hotel, they are suffering sufficient injuries to be in court.¹⁵⁸ Judge Messitte ruled, on March 28, 2018, that both D.C. and Maryland had standing.¹⁵⁹ As the judge concluded,

152. *D.C. v. Trump*, 291 F. Supp. 3d at 745.

153. *Id.* at 749–50.

154. *Id.* at 734.

155. *Id.* at 741.

156. Complaint, *supra* note 146, ¶ 9.

157. Ciara Torres-Spelliscy, *17 Things We Learned About Money in Politics in 2017*, BRENNAN CTR. FOR JUST. (Dec. 20, 2017), <https://www.brennancenter.org/blog/17-things-we-learned-about-money-politics-2017>.

158. 291 F. Supp. 3d at 744–45.

159. *Id.* at 732.

Plaintiffs have sufficiently alleged that the President is violating the Foreign and Domestic Emoluments Clauses of the Constitution by reason of his involvement with and receipt of benefits from the Trump International Hotel and its appurtenances in Washington, D.C. as well as the operations of the Trump Organization with respect to the same. Plaintiffs have demonstrated their standing to challenge those purported violations because they have shown injury-in-fact, fairly traceable to the President's acts, and that the injury is likely redressable by the Court.¹⁶⁰

The judge found it was appropriate for D.C. and Maryland to protect the interests and rights of their citizens who work in the hotel and event space industries: "The Court concludes that Plaintiffs are not attempting to 'stand in the shoes' of a limited number of businesses as the President suggests; they are, quite plausibly, trying to protect a large segment of their commercial residents and hospitality industry employees from economic harm."¹⁶¹ This result is in stark contrast to *CREW v. Trump*,¹⁶² which did not find standing for the Hospitality Plaintiffs, who were actual competitors in the hospitality industry. But in *D.C.*, the States are recognized as having standing to protect their citizens who work in the hospitality industry.

One issue the judge in *D.C. v. Trump* had to confront was if President Trump is violating the Emoluments Clauses, he is arguably doing so in multiple locations across the nation and across the globe. The judge decided to narrow the issues in the case to just the Trump D.C. hotel, which was the most direct source of trouble for the plaintiffs, D.C. and Maryland, in the case.¹⁶³ The court rejected efforts by the plaintiffs for a ruling that would reach all Trump properties worldwide:

How . . . have Maryland or the District of Columbia suffered and how are they suffering immediate or impending injury as a result of whatever benefits the President might be deriving from foreign and state government patronage at the Trump Organization's Mar-a-Lago property in Florida or in the grant of patents to the Trump Organization or Trump relatives by China? . . . [T]he Court . . . sees neither immediate nor impending harm to Plaintiffs. Hence, the Court finds that these particular Plaintiffs lack standing to challenge the operations of the Trump Organization or the benefits

160. *Id.* at 757.

161. *Id.* at 748 (internal citation omitted).

162. 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

163. 291 F. Supp. 3d at 753.

the President may receive from its operations outside the District of Columbia.¹⁶⁴

Judge Messitte was careful to note that his decision to limit the instant case to the Trump D.C. hotel should not and would not prevent other plaintiffs in other jurisdictions from suing the president for his other business locations' alleged violations of the Constitution.¹⁶⁵ As he stated,

This is in no way meant to say that other States or other businesses or individuals immediately affected by the same sort of violations alleged in the case at bar, e.g., a major hotel competitor in Palm Beach (near Mar-a-Lago) or indeed a hotel competitor anywhere in the State of Florida, might not have standing to pursue litigation.¹⁶⁶

This leaves other courts in other jurisdictions to solve potential problems like foreign sovereign money at Mar-a-Lago in Florida, foreign sovereign money in Trump Tower in New York, or foreign sovereign money in Trump International Hotel Waikiki.¹⁶⁷

Among the accusations that D.C. and Maryland asserted against the president was that the Domestic Emoluments Clause was violated because of tax benefits his businesses have received from D.C. and Mississippi.¹⁶⁸ As Judge Messitte wrote, “[W]hile ordinarily there may be a presumption of regularity as far as the decisions of the tax authorities are concerned, the fact remains that Trump Organization hotels, from which the president allegedly derives substantial illegal profits, have been the beneficiaries of these decisions.”¹⁶⁹ As Center for Responsive Politics has been cataloging, lots of political committees who are potentially seeking favor with the president have shown up at Trump-owned properties, many potentially running afoul of the Constitution through spending lavishly at the president’s many

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 738 (“[D]uring oral argument, Plaintiffs clarified that their alleged competitive injuries—namely, Maryland’s claimed injuries to its sovereign interest in taxes, to both parties’ proprietary interests, and, to some extent, to both parties’ *parens patriae* interests—centered almost exclusively around the District of Columbia-based Trump International Hotel and its appurtenant restaurant, bar, and event space.”).

168. *Id.* at 735.

169. *Id.* at 741.

businesses—if the money is from prohibited sources like state or federal governments.¹⁷⁰

Judge Messitte recognized the gravity of the problem of a president potentially violating the Constitution through his business dealings. In his ruling, Judge Messitte used the word “illegal” multiple times when referring to President Trump’s alleged actions.¹⁷¹ For example, Judge Messitte wrote, “the government official himself [President Trump] is the one allegedly receiving illegal benefits.”¹⁷²

The defendant in *D.C. v. Trump* had hoped that the federal court in Maryland would dispose of the case by following the lead of Judge Daniels in New York: “[T]he President . . . urges the Court to adopt the interpretation set forth by Judge Daniels in *CREW* . . . namely that the history of the Emoluments Clauses indicates that they were not meant to protect commercial competitors so that a plaintiff asserting such a competitive injury necessarily falls outside the zone.”¹⁷³ Even at oral argument, Judge Messitte told President Trump’s lawyers, “Don’t cite Judge Daniels to me.”¹⁷⁴ Judge Messitte in Maryland noted his respectful disagreement with Judge Daniels’s approach in New York, writing, “The Court disagrees with the conclusion reached by Judge Daniels . . . that the draftsmen of the Constitution did not have competitors in mind when they composed the Emoluments Clauses, with the implication that no competitors anywhere are ever within the zone of interests of the Clauses.”¹⁷⁵ As Judge Messitte read the Constitution, “[T]he Emoluments Clauses clearly were and are meant to protect all Americans. The President concedes as much.”¹⁷⁶

While Judge Daniels in the *CREW* case did not acknowledge his own power over the president, Judge Messitte could envision issuing a declaratory judgement against President Trump. As he said, “The Court

170. *All the President’s Profiting*, OPENSECRETS.ORG, <https://www.opensecrets.org/trump/trump-properties> (last visited Sept. 10, 2018).

171. *D.C. v. Trump*, 291 F. Supp. 3d at 736 (“Maryland argues that, like the District of Columbia, it is harmed because these entities compete with the Hotel for the business of both foreign and domestic governments and that the President’s violations of the Emoluments Clauses have illegally skewed the hospitality market in his favor.”); *Id.* at 743–44 (“The Supreme Court has recognized that plaintiffs with an economic interest have standing to sue to prevent a direct competitor from receiving an illegal market benefit leading to an unlawful increase in competition.”).

172. *Id.* at 749.

173. *Id.* at 754.

174. Sharon LaFraniere, *Lawsuit on Trump Emoluments Violations Gains Traction in Court*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-emoluments-lawsuit.html> (quoting Messitte, J.).

175. *D.C. v. Trump*, 291 F. Supp. 3d at 755.

176. *Id.*

sees no problem in invoking its equitable jurisdiction here. Precedent makes clear that a plaintiff may bring claims to enjoin unconstitutional actions by federal officials and that they may do so to prevent violation of a structural provision of the Constitution.”¹⁷⁷

Perhaps trying to head off claims that President Trump is violating the Foreign Emoluments Clause, the Trump Organization said that it would give money to the United States Treasury that was an estimated payment of the money that it had received in profits from foreign governments.¹⁷⁸ The press reported on February 26, 2018, that the Trump Organization stated that it made this payment to the Treasury Department, but that the amount was undisclosed.¹⁷⁹ Inquiries from reporters for more details about this payment went unanswered.¹⁸⁰ Interestingly, in *D.C. v. Trump*,¹⁸¹ Judge Messitte noted that

[a]ccording to a recent press report, the President has stated that he has now paid to the U.S. Treasury the profits the Hotel has received from foreign governments. No details with respect to such payments, however, have been provided, viz., how the payments were calculated, who verified the calculations, how much was calculated over what period of time, and which foreign payor(s) were involved.¹⁸²

This language was repeated in the court’s denial of the Defendant’s Motion to Dismiss.¹⁸³ Presumably, as this case goes forward, Judge Messitte is going to want to see real proof that any money was given to the Treasury by the Trump Organization, and in what amount, and the basis of the calculations.

2. *D.C. v. Trump* Motion to Dismiss Denied

Four months after ruling that plaintiffs had standing to sue, the court turned to President Trump’s Motion to Dismiss in *District of Columbia v. Trump*.¹⁸⁴ A key question in this second opinion was what

177. *Id.*

178. Tami Abdollah, *Trump Company Donates Foreign Profits but Won’t Say How Much*, BOS. GLOBE (Feb. 27, 2018), <https://www.bostonglobe.com/news/nation/2018/02/26/trump-company-donates-foreign-profits-but-won-say-howmuch/GskDZPfAj1Uj6pwM7EuZmI/story.html>.

179. *Id.*

180. *Id.*

181. 291 F. Supp. 3d 725 (D. Md. 2018).

182. *Id.* at 734 n.5.

183. *Id.* at 757.

184. 315 F. Supp. 3d 875, 904 (D. Md. 2018).

exactly counts as an “emolument.”¹⁸⁵ This is a matter of first impression as the *CREW v. Trump*¹⁸⁶ case did not reach the merits of the argument (ruling instead that the *CREW* plaintiffs lacked standing to proceed). What’s a court to do when it has to decode a part of the Constitution that has somehow escaped judicial interpretation for over 200 years? This happened in 2008 in *District of Columbia v. Heller*¹⁸⁷ when the Supreme Court finally got around to interpreting the Second Amendment after 200 years of avoiding it.¹⁸⁸ Like in *Heller*, the trial judge in *D.C. v. Trump* started with the text, history, and intent of the constitutional provision before him.

Judge Messitte rejected President Trump’s narrow reading of what counts as an “emolument,” which would have led to dismissal of the case.¹⁸⁹ As he wrote,

[T]he Court finds the President is subject to both Emoluments Clauses of the Constitution and that the term “emolument” in both Clauses extends to any profit, gain, or advantage, of more than *de minimis* value, received by him, directly or indirectly, from foreign, the federal, or domestic governments. This includes profits from private transactions, even those involving services given at fair market value. In the case of the Foreign Emoluments Clause, unless Congress approves, receipt of the emolument is prohibited. In the case of the Domestic Clause, receipt of any emolument is flatly prohibited.¹⁹⁰

Moreover, nothing that President Trump’s lawyers could point to in the historical record (which was nearly identical to the historical arguments canvassed above in *CREW*) moved this judge in Maryland, who concluded, “Notwithstanding the parade of horrors the President calls up, the Court does not see how the historical record reflects anything other than an intention that the Emoluments Clauses

185. *Id.* at 882.

186. 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

187. 554 U.S. 570 (2008).

188. *Id.* at 576.

189. *Bringing the Emoluments Clause to Bear on Trump’s D.C. Hotel*, BOS. GLOBE (Aug. 7, 2018), <https://www.bostonglobe.com/opinion/editorials/2018/08/06/bringing-emoluments-clause-bear-trump-hotel/76XhekGBkDfbHuRYfMsNlM/story.html> (“The Department of Justice, representing the president, argued that the case should be dismissed because the term ‘emolument’ should be understood to mean, narrowly, a payment to a public official in addition to his official salary, and thus that financial reward from Trump’s business would not be covered.”).

190. *D.C. v. Trump*, 315 F. Supp. 3d at 904.

function as broad anti-corruption provisions.”¹⁹¹ This broader reading of emoluments that Judge Messitte adopted has also been embraced by some scholars. For example, Professor John Mikhail stated, “[T]here is ample evidence that ‘emolument’ was often used at the founding in a much wider sense, one that went beyond the duties of an office and encompassed the fruits of ordinary market transactions.”¹⁹²

Thus, on July 25, 2018, Judge Messitte denied the president’s motion to dismiss *D.C. v. Trump*.¹⁹³ This ruling means that D.C. and Maryland can go forward with the suit and can conduct discovery against the president, and as a result, the Attorneys General of D.C. and Maryland might get their hands on closely guarded internal documents from the Trump Organization. On August 17, 2018, the DOJ asked for special permission from Judge Messitte for the ability to launch an “interlocutory appeal and stay proceedings pending resolution of the interlocutory appeal.”¹⁹⁴ Typically, litigants cannot immediately appeal a motion to dismiss, hence why they need Judge Messitte’s permission to do so. This seems like a bold effort to stave discovery. In the meantime, the plaintiffs are pushing forward, asking the Judge to approve a discovery schedule.¹⁹⁵ The Fourth Circuit Court of Appeals will hear oral arguments in *D.C. v. Trump* on March 19, 2019, and has stayed discovery in the case.¹⁹⁶

The public does not know how this story will end, especially if the case gets appealed to the Fourth Circuit or even the Supreme Court. But *D.C. v. Trump* demonstrates that federal judges still know that the president is not above the law, including the 231-year-old strictures of the Constitution.¹⁹⁷ As the Attorneys General who brought the *D.C. v.*

191. *Id.* at 896.

192. John Mikhail, *A Note on the Original Meaning of “Emolument,”* BLOGSPOT (Jan. 18, 2017), <https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html>.

193. *D.C. v. Trump*, 315 F. Supp. 3d at 904.

194. Motion of the President, in His Official Capacity, for Certification of this Court’s March 28 and July 25, 2018 Orders, *D.C. v. Trump*, 315 F. Supp. 3d 875 (No. 8:17-cv-1596-PJM), 2018 WL 3969639 (request for appeal).

195. Statement Pursuant to F.R.C.P. 26(f), *D.C. v. Trump*, 315 F. Supp. 3d 875 (No. 8:17-cv-1596-PJM) (filed Sept. 14, 2018).

196. Josh Kovensky, *Federal Appeals Court Halts Emoluments Case While Trump Appeals*, TPM (Dec. 20, 2019), <https://talkingpointsmemo.com/muckraker/federal-appeals-courts-halts-emoluments-case-while-trump-appeals>.

197. *Bringing the Emoluments Clause to Bear on Trump’s D.C. Hotel*, *supra* note 189 (“A federal judge recently cleared the way for a lawsuit related to the [Trump International] hotel that not only might expose the president’s deepest financial secrets, but also clarify constitutional guardrails against corruption that the courts have never

Trump case explained in *The New York Times*, “Judge Messitte’s ruling is so important [because] [i]t opens a path to enforcement of the ethics regime that the framers developed as a bulwark against corruption in the highest office in the land.”¹⁹⁸

PART VI. TREATING PRESIDENT TRUMP AND THE TRUMP ORGANIZATION
AS INTERCHANGEABLE

One argument that has been raised by the Department of Justice in their attempts to dismiss all of the Emoluments cases is there is a difference between Trump the man and Trump the brand. Put another way, President Trump and the Trump Organization are distinguishable entities as a matter of corporate law. Thus, even if President Trump, the man, cannot take gifts from a foreign prince (or a state) under the Emoluments Clauses, so the argument goes, his business can accept money from those sources.

A. The Department of Justice’s Arguments

In these cases, President Trump is being sued both in his official capacity and in his personal capacity. Mr. Trump’s personal lawyers are representing him in his personal capacity. Meanwhile, the DOJ is representing him in his official capacity as president. The DOJ, in *CREW*, argued that the fact that money flows through the Trump Organization essentially immunizes the money from the Emoluments Clauses.¹⁹⁹ As the Government put it,

Plaintiffs’ [CREW et al.’s] interpretation of the term “Emolument” as covering “anything of value” received by any business in which the President has a financial interest from any foreign, federal, or state government instrumentality exceeds the Clauses’ intended scope and meaning. Neither the text nor the history of the Clauses shows that they were intended to reach benefits arising from a President’s private business pursuits having nothing to do with his office or personal service to a foreign power.²⁰⁰

The DOJ asserted in *CREW*, “Plaintiffs’ broad-brush claims effectively assert that the Constitution disqualifies the President from serving as President while maintaining ownership interests in his

fully fleshed out—because, for 229 years, no president has been so determined to push the boundaries.”)

198. Racine et al., *supra* note 53.

199. Memorandum of Law in Support of Defendant’s Motion to Dismiss at 26, *CREW v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458 (RA)), 2017 WL 3421202.

200. *Id.*

commercial businesses.”²⁰¹ And the DOJ’s brief in *CREW* states, “[T]he Emoluments Clauses apply only to the receipt of compensation for personal services and to the receipt of honors and gifts based on official position. They do not prohibit any company in which the president has any financial interest from doing business with any foreign, federal, or state instrumentality.”²⁰² The DOJ further argued in *CREW* about the Domestic Emoluments Clause that it “does not preclude a President from acting on the same terms as any other citizen in transacting business with a federal or state instrumentality, such as entering into a lease or applying for a tax credit.”²⁰³

Perhaps one of the strongest arguments DOJ raised in *CREW* (as well as in other Emoluments suits) for why it was appropriate for President Trump to continue to receive benefits from his D.C. Hotel was the precedent of the Hyatt Hotels and Secretary of Commerce Pritzker under President Obama.²⁰⁴ As the DOJ noted, “[D]uring her time in office, former Commerce Secretary Penny Pritzker owned a large quantity of stock in the Hyatt Hotels Corporation, which is substantially owned by her family and has hundreds of establishments throughout the world. No issue concerning the Foreign Emoluments Clause arose.”²⁰⁵ One way to distinguish between Hyatt and the Trump Organization is Hyatt is a publicly traded company with multiple shareholders, while the Trump Organization is privately held by President Trump alone. And moreover, just because no one raised any Emoluments Clause objections to Secretary Pritzker is not the same as stating that no one legally could.

Not surprisingly, the DOJ briefs in all three Emoluments cases make nearly identical legal arguments. For one, the plaintiffs have raised similar constitutional objections, so the legal ground that the DOJ has to cover is nearly the same in all three cases. Moreover, since the essential defense has been that there is no violation by President Trump of the Emoluments Clauses, it makes sense that the language in each brief largely overlaps. For instance, in the *D.C. v. Trump* case, the DOJ noted, “Plaintiffs’ broad-brush claims effectively assert that the Constitution disqualifies the President from serving as President while maintaining ownership interests in his commercial businesses.”²⁰⁶ This language mirrors what the DOJ has asserted in the other two cases.

201. *Id.* at 1.

202. *Id.* at 27.

203. *Id.* at 29.

204. *Id.* at 47.

205. *Id.*

206. *Id.* at 1.

The DOJ has consistently urged the federal judges overseeing all of these cases to reject competitor injuries under the Emoluments Clauses. As the DOJ wrote in a brief in *D.C. v. Trump*,

[T]he Emoluments Clauses were intended to guard generally against the corruption of, and foreign influence on, federal officials and to ensure the independence of the President. To the extent that they could be seen to create private rights in any circumstances, they do not confer any right for businesses to avoid commercial competition from businesses in which the President holds financial interests. Plaintiffs' alleged injuries arising from such competition—whether through loss of tax revenues or loss of profit by their residents' businesses or by businesses in which they have proprietary interests—are thus outside of the zone of interests of the Clauses.²⁰⁷

And the DOJ concluded, “Were Plaintiffs’ interpretation [of the Emoluments Clauses] correct, Presidents from the very beginning of the Republic, including George Washington, would have received prohibited ‘Emoluments.’”²⁰⁸

According to the DOJ in *D.C. v. Trump*, the Foreign Emoluments Clause

does not reach benefits arising from commercial transactions engaged in by businesses in which the President has a financial interest, particularly where, as here, a plaintiff has not plausibly alleged that the officeholder is using the businesses as a conduit to receive benefits from foreign governments in exchange for his official action or personal service.²⁰⁹

The DOJ also warned that reading the Emoluments Clauses too broadly would impact the ability of federal officials to own stock in companies that do business with foreign governments.²¹⁰ According to the DOJ, to accept the plaintiffs’ reading of the Foreign Emoluments Clause would mean that

no President, Member of Congress, or military officer could hold stock in any chain of hotels that is patronized by any representative of a foreign government who was traveling on official business. Nor could

207. Memorandum in Support of Defendant’s Motion to Dismiss at 23, *D.C. v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-1596-PJM), 2017 WL 5557942.

208. *Id.* at 24.

209. *Id.* at 25.

210. *Id.* at 34.

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any of them hold stock in any company that does business with any foreign government or government-owned corporation.²¹¹

There is some variation in the government briefs in the three cases as the DOJ responds to novel arguments raised by a particular plaintiff. For example, the DOJ in *D.C. v. Trump* responded to certain arguments which would only be raised by a State, like

Maryland's claim that it would not have joined the Union had it known that the Emoluments Clauses would be interpreted to allow the President to have ownership interests in private businesses that have dealings with foreign governments is not judicially cognizable, whether the injury is characterized as a loss of the State's political power or as an abstract disagreement with the President's interpretation of the Constitution.²¹²

Finally, in *Blumenthal v. Trump*,²¹³ the DOJ argued against the Members of Congress suing the president:

The prohibited foreign benefit must be conferred on the covered official in exchange for services rendered by the official in his capacity This construction accords with relevant historical sources; the practices of public officials ranging from George Washington to Nelson Rockefeller Plaintiffs also allege that the various foreign benefits arising from commercial transactions or by operation of law also constitute "presents" under the Foreign Emoluments Clause, that interpretation is unnatural and nothing indicates that the Framers would have intended the Clause to be applied in that way.²¹⁴

The DOJ objected to Congressional Plaintiffs in *Blumenthal* thusly that they

assume that the Constitution imposes an affirmative obligation on a holder of an 'Office of Profit or Trust' to seek the consent of Congress whenever the official's private businesses have dealings with foreign states, even when the official does not believe that he is accepting any prohibited emoluments. The Constitution clearly imposes no such obligation.²¹⁵

211. *Id.*

212. *Id.* at 10.

213. 335 F. Supp. 3d 45 (D.D.C. 2018).

214. Statement of Points & Authorities in Support of Defendant's Motion to Dismiss, *supra* note 57, at 3.

215. *Id.* at 7 n.2 (internal citations omitted).

The DOJ in *Blumenthal* also argued against the Congressional Plaintiffs who alleged that the president should have asked for permission to receive foreign sovereign funds through his businesses to avoid violating the Foreign Emoluments Clauses by stating that

[n]either the text nor the history of the Clause shows that the term “Emolument” in the Clause was intended to reach benefits arising from a President’s private business pursuits having nothing to do with his service to a foreign power in his capacity as President or in a capacity akin to an employee of the foreign power.²¹⁶

Finally, the DOJ in *Blumenthal* argued against the remedy of divestment, stating that

even as the Framers confronted the competing concerns that public officials would be influenced by pecuniary inducements and that capable persons might not have sufficient means to assume public office, they gave no indication that they intended to require officeholders to divest their private commercial businesses in order to assume federal office.²¹⁷

For the DOJ, a president can fulfill his duties so long as the president doesn’t directly get money or gifts from a foreign sovereign, no matter how much foreign sovereign money flows through the president’s businesses while he is in office.

B. Treating Corporations and Owners of Corporations as Alter Egos

Even though the text of both Emoluments Clauses is silent on the matter of whether funneling money from a prohibited source renders the money allowable under the Constitution, many of the quarrels (above) from the DOJ in the Emoluments suits boil down essentially to an argument about the separateness in corporate law between the corporate entity and owner (typically a shareholder). This is sometimes referred to as the corporate veil in corporate law cases. State court judges have been very reticent to pierce the corporate veil to treat a corporation and its owners as interchangeable alter egos.

However, the Supreme Court has recently poked several holes in the corporate veil. Most recently, in 2018, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,²¹⁸ the Supreme Court permitted a bakery (a corporation) to get away with discriminating against a gay

216. *Id.* at 18.

217. *Id.* at 38.

218. 138 S.Ct. 1718 (2018).

couple (despite a Colorado law which made such discrimination illegal) because of the baker's (the owner's) deeply held religious beliefs.²¹⁹ The *Masterpiece Cakeshop* case started when Mr. Mullins and Mr. Craig, a same sex couple, visited Masterpiece Cakeshop in July 2012, seeking a wedding cake to celebrate their nuptials. The baker, Mr. Phillips, refused to make a cake for the couple, citing his religious objections to same sex marriage. His refusal appeared to violate Colorado's public accommodations law, the Colorado Anti-Discrimination Act (CADA),²²⁰ and so the couple sued.²²¹ Over the course of the litigation of *Masterpiece Cakeshop*, the business changed from being a corporation (Inc.) to being a limited liability corporation (Ltd.).²²² The original case was captioned *Craig v. Masterpiece Cakeshop Inc.*²²³ In 2017, the entity was reincorporated to be a limited liability corporation under Colorado law. But at all relevant points, both at the point of discrimination in 2012 and at the Supreme Court's decision point in 2018, the entity in question was an artificial business entity.

Accordingly, in *Masterpiece Cakeshop*, the Supreme Court had a corporate entity essentially making claims to religious liberties, including the religious liberty to refuse service to gay men and lesbians.²²⁴ The specter that corporations could use religious rights as a basis for discrimination was raised in the *Burwell v. Stores, Inc.*²²⁵ dissent by Justice Ginsburg a few years earlier. As Justice Ginsburg's eagle eyes perceived in *Hobby Lobby*, granting corporations religious rights (whether under the First Amendment or statutorily under Religious Freedom Restoration Act of 1993 (RFRA))²²⁶ could open Pandora's box of religiously based corporate discrimination.²²⁷ The facts and results in *Masterpiece Cakeshop* show Justice Ginsburg's basic

219. *Id.* at 1724.

220. COLO. REV. STAT. § 24-34-601(2)(a) (2018).

221. *Masterpiece Cakeshop*, 138 S.Ct. at 1723.

222. Masterpiece Cakeshop Incorporated, Certificate and Articles of Incorporation of Masterpiece Cakeshop Incorporated (Dec. 2, 1992), <http://tinyurl.com/yac5ol43>; Masterpiece Cakeshop, Ltd., Articles of Organization (July 5, 2017), <http://tinyurl.com/ybkn9ksx>.

223. *See* 370 P.3d 272 (2015).

224. *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

225. 573 U.S. 682 (2014).

226. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000a to 2000a-6 (2018)).

227. *Hobby Lobby*, 572 U.S. at 769–70 (Ginsburg, J., dissenting) (“Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs (citing *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration)).

prediction in her *Hobby Lobby* dissent was correct. Granting corporations religious liberties invites all manner of discrimination including, discrimination against same sex couples, who under intervening Supreme Court precedents,²²⁸ have a constitutionally protected right to get married.

Masterpiece Cakeshop builds on the precedent of *Hobby Lobby*, which allowed the owners' RFRA rights to be imputed to a corporation.²²⁹ From a corporate law point of view, *Hobby Lobby* and *Masterpiece Cakeshop* suffer from a similar malady. As I and fellow amici argued in a brief filed in *Masterpiece Cakeshop*, typically in corporate law, the corporation, Masterpiece Cakeshop, and Mr. Phillips, its owner, are treated as distinct legal entities.²³⁰ If a business supplier of Masterpiece Cakeshop provides it with 1000 pounds of flour and the corporation could not pay for some reason, like massive boycotts, because of the firm's homophobia, the supplier is out of luck. The supplier cannot typically go after Mr. Phillips to be made whole. The same is true of suppliers to Hobby Lobby. Even though Hobby Lobby is a closely held corporation, their suppliers need to be paid by Hobby Lobby the corporation, not the religious family that owns it.

C. Applying Hobby Lobby's Logic to the Emoluments Suits

What in the world do *Hobby Lobby* and *Masterpiece Cakeshop* have to do with the Emoluments suits? Potentially nothing, depending on how these cases develop. But these corporate religious rights cases could become very important to the plaintiffs in *D.C. v. Trump*²³¹ (or other Emoluments case plaintiffs) because the weakening of the corporate veil in *Hobby Lobby* and *Masterpiece Cakeshop* demonstrates that the Supreme Court is open to treating corporations and owners of corporations as alter egos in certain circumstances. Arguably, President Trump's sole ownership of the Trump Organization is akin to Mr. Phillips's ownership of the bakery in *Masterpiece Cakeshop*. If the Free Exercise Clause of the First Amendment²³² permeates the corporate veil

228. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (invalidating state laws that outlawed same sex marriage); *see also* *United States v. Windsor*, 570 U.S. 744, 775 (2013) (invalidating the federal Defense of Marriage Act).

229. *Hobby Lobby*, 573 U.S. at 688.

230. Brief of Amici Curiae Corporate Law Professors in Support of Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1724 (No. 16-111), 2017 WL 5127303.

231. 315 F. Supp. 3d 875 (D. Md. 2018); 291 F. Supp. 3d 725 (D. Md. 2018).

232. U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

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in *Masterpiece Cakeshop*, the Emoluments Clauses should similarly permeate the Trump Organization to reach the president, its owner.

As Justice Alito noted in *Hobby Lobby*,

[W]e reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.²³³

Just as a businessman does not give up his First Amendment (or RFRA) rights when he incorporates, logically, the corporate structure should not be able to protect a businessman turned president from his constitutional duties either.

Justice Alito, writing for the conservative majority in *Hobby Lobby*, criticized the Government's position, which would have prevented a for-profit business from asserting religious rights and would have put observant businessmen and women to an inappropriate choice:

According to HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.²³⁴

Similarly, if owners do not lose constitutional religious rights by incorporating, they should not lose constitutional responsibilities by incorporating either.

Justice Kennedy, in his *Hobby Lobby* concurrence, argued for the appropriateness of allowing for religious morality in the economic sphere. As Justice Kennedy wrote, "Free exercise . . . implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community."²³⁵ In the end, the majority of the Supreme Court in *Hobby Lobby* agreed with the position taken by the United States Court of Appeals for the Tenth Circuit in the case below which concluded, "[R]eligious conduct includes

233. *Hobby Lobby*, 573 U.S. at 691.

234. *Id.* at 706.

235. *Id.* at 736–37 (Kennedy, J., concurring) (internal citation omitted).

religious expression, which can be communicated by individuals and for-profit corporations alike.”²³⁶ Thus at the end of the day, the Court treated the Greens (the owners of Hobby Lobby) and Hobby Lobby, Inc. as interchangeable alter egos. Similarly, in *Masterpiece Cakeshop*, the Court doesn’t distinguish between Mr. Phillips (the baker/owner) and the bakery. The bakery (the corporation) is the one being sued, but it’s Mr. Phillips’s religious right to be treated neutrally by the State under the Free Exercise Clause that carries the day.²³⁷ Thus, the Supreme Court set aside the ruling below because the Colorado authorities were insufficiently “neutral” on the matter of religion; the Court excused both the man and his corporation from the consequences of his anti-gay bigotry.²³⁸ And in *Masterpiece Cakeshop*, the rights are even more expansive than in *Hobby Lobby*, since *Hobby Lobby* was decided not on statutory grounds, while *Masterpiece Cakeshop* was decided on the constitutional grounds of the Free Exercise Clause. The Supreme Court may soon have to address the question of whether President Trump and the Trump Organization should also be treated as interchangeably under the Emoluments Clauses.

So far, no litigant in the Emoluments suits I explore in this Article has made the argument I am making here about *Hobby Lobby* and *Masterpiece Cakeshop*. It is possible that a federal court’s ruling on the applicability of the Emoluments Clauses will skip corporate law in their analysis, as Judge Messitte has done thus far. But if a federal court wishes to engage with the corporate law arguments, that Trump and his businesses are distinct legal entities, then they will need to take *Hobby Lobby* and *Masterpiece Cakeshop* into account when considering whether the legal fiction of the corporate veil should be honored or whether it should be ignored. Because all of the Trump Organization’s profits ultimately go to President Trump, there is a particularly strong case for ignoring the corporate veil where, under his constitutionally required oath of office, he must first and foremost abide by both Emoluments Clauses, which precludes foreign emoluments without congressional consent, and prevents his receiving salary bumps from the fifty states and the federal government.

PART VII. CONCLUSION

The legal answer to the question I opened with, is President Trump illegally profiting from the Presidency, is one that will likely be

236. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1134 (10th Cir. 2013).

237. *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (“[T]he Commission’s actions here violated the *Free Exercise Clause*; and its order must be set aside.”).

238. *Id.* at 1732.

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answered by the Supreme Court eventually. Here, I have made the normative argument that President Trump is in violation of both Emoluments Clauses because of the moneys that flow through the Trump Organization from constitutionally prohibited sources such as foreign sovereigns and American states.

In 2017, an artist projected the words “Pay Trump Bribes Here” over the entrance to Trump International D.C. Hotel.²³⁹ That’s a more crass way of condensing the argument I have laid out here. But the artist is not incorrect. The presidency should not be a get-rich-quick scheme. And so, I hope that federal courts seriously grapple with what it means to have a president who is publicly flouting constitutional restrictions that have prevented corruption and served the nation well for centuries.

239. Nicole Chavez & Emily Smith, *‘Pay Trump Bribes Here’ Sign Projected onto Trump’s DC Hotel*, CNN (May 16, 2017), <https://www.cnn.com/2017/05/16/politics/trump-hotel-projection/index.html>.

