

Conflicts of Interest, Emoluments, and the Presidency¹

Fritz Allhoff

Western Michigan University

Jonathan Milgrim

University of Washington

ABSTRACT: The past presidential election reinvigorated interest in the applicability of conflict of interest legislation to the executive branch. In §2, we survey various approaches to conflicts of interest, paying particular attention to 18 U.S.C. §208. Under 18 U.S.C. §202, this conflict of interest statute is straightforwardly inapplicable to the President. We then explore the normative foundations of such an exemption in §3. While these sections are ultimately lenient, we go on to consider the Emoluments Clause of the United States Constitution in §4. In §§5–6, we apply the Emoluments Clause to the presidency, arguing that it complements conflict-of-interest regimes with regards to foreign affairs, but with more substantial restrictions.

1. INTRODUCTION

On November 8, 2016, Donald J. Trump was elected President of the United States. While pollsters were almost unanimous in thinking that he would lose the election²—including projections late into that Tuesday evening, before Rust Belt returns changed the tide³—the truly groundbreaking aspect of his presidency deals with his immense wealth. At the time of his election, President Trump “appears to own or control more than 500 businesses in some two-dozen countries around the world.”⁴ His unwillingness to disclose his tax information makes the extent of his wealth unknowable, but even by conservative estimates, he is still the wealthiest president in United States history—and very likely has more inflation-adjusted wealth than all his predecessors combined.⁵ Standard practice, at least for the past several presidents, has been to divest their wealth or to place it into blind trusts.⁶ However, President Trump has been reluctant to do this, and it is far from clear that it would be possible even if he wanted to.⁷

This reluctance has raised questions about whether the President has conflicts of interest between his myriad business holdings and his role as President. Trump allies, as well as many non-supporters, have argued that the President is not bound

by standard conflict of interest laws.⁸ In addition, the complex nature of President Trump's holdings means that he regularly receives income from businesses on foreign soil, and that foreign states routinely spend money in domestically-located businesses.⁹ This international component of his profile raises questions, not just about conflicts of interest, but also about the applicability of the Emoluments Clause of the United States Constitution.¹⁰

In this article, we will explore the theoretical foundations and practical applications of conflicts of interest, specifically as applied to the presidency. Though we conclude that the President is statutorily immune from conflicts of interest (i.e., as a matter of law), we go on to investigate whether this conclusion can be morally justified. Answering in the affirmative, we then turn to the Emoluments Clause, arguing that it circumscribes presidential power in important ways, particularly as it pertains to foreign states.

While we recognize that the Trump presidency has catalyzed interest in these questions, we propose to consider the broader theoretical issues rather than specifically focusing on his holdings or on his presidency. It is our hope that, in taking this approach, the article makes a more thoroughgoing contribution to the debate that is not narrowly applicable to a single administration.

2. CONFLICTS OF INTEREST

Conflicts of interest were recognized at least as early as the Bible, and have gone on to be extensively discussed more recently.¹¹ Much of this discussion is rooted in professional contexts, with law playing a particularly formative role.¹² In 1908, the American Bar Association adopted the Canons of Professional Ethics,¹³ and Canon 6 spoke to conflicts of interest:

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests while, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.¹⁴

The Canons of Professional Ethics gave way to the Model Code of Professional Responsibility in 1969,¹⁵ then the Model Rules of Professional Conduct in 1983.¹⁶ The Model Rules have been adopted by every jurisdiction in the United States except California¹⁷ and Puerto Rico,¹⁸ both of which have their own rules for conflicts of interest. Several of the Model Rules speak to conflicts of interest,¹⁹ including Rule 1.7, which states that a conflict of interest exists if “the representation of one client will be directly adverse to another client” or if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”²⁰

But this focus on other parties—whether current clients, former clients, or other third parties—is unnecessarily narrow. A broader principle might be that a “conflict of interest exists whenever the attorney . . . has interests adverse in any way to the advice or course of action which should be available to the present client.”²¹ And the conflict exists even if the attorney ultimately resolves it in favor

of his client.²² Rather, a conflict simply recognizes “the variety of interests which *might dilute* a lawyer’s loyalty to his clients.”²³ This “dilution account” allows for infringing interests of third parties, such as the lawyer’s “family, friends, business associates, employer, the legal profession, and society as a whole.”²⁴ But it also allows for endogenous infringing interests (i.e., the *lawyer’s*), such as might be manifest through “financial security, prestige, and self-esteem.”²⁵

While the legal context is historically important for understanding conflicts of interest, philosophers have made contributions as well. An early attempt by Joseph Margolis understands conflicts of interest as avoidable exploitation of conflicting roles.²⁶ Michael Davis offers a more robust account that recognizes, as we did above, the significance of the American Bar Association in developing conflict-of-interest analysis. Davis’s project is ultimately to take that analysis²⁷ and to *generalize* it to non-legal contexts.²⁸ We get an interim proposal that is fairly digestible, then a final one that devolves into philosophical formalism. The former goes like this: “A person has a conflict of interest if he is in a relationship with another requiring him to exercise judgment in that other’s service and he has an interest tending to interfere with the proper exercise of judgment in that relationship.”²⁹ And so Davis’s judgment-based account is ultimately quite similar to the dilution-based account intimated by the Model Rules and made explicit by Aronson.

As is relevant here, the federal government has approached conflicts of interest fairly narrowly, focusing principally on economic conflicts. The Ethics in Government Act was enacted in 1962, and 18 U.S.C. §208 specifically addressed government employees with financial interests.³⁰ The upshot is that government employees are generally prohibited from participating in matters in which they have financial interests.³¹ And the Act goes on to characterize two tiers of penalty for violation: anyone who violates the prohibition faces up to one year imprisonment or a fine, whereas anyone who *willfully* violates the prohibition faces up to five years imprisonment or a fine.³²

Turning now to the principal focus of this article, what ultimately matters is that the President is exempt from 18 U.S.C. §208. The way we get there, though, is somewhat circuitous. When the Act was passed in 1962, the President would seemingly have been bound by the conflict of interest strictures. In 1972, Richard Nixon won his presidential re-election, with Spiro Agnew as his running mate. In 1973, Agnew came under investigation for various improprieties and was ultimately charged with having accepted bribes of more than \$100,000 during his time as Baltimore County Executive, Governor of Maryland, and Vice President.³³ He pled no contest to having accepted undeclared income on the condition that he resign as Vice President.

Nixon then appointed House Minority Leader Gerald Ford as Vice President; when Nixon resigned after Watergate in 1974, Ford became President. Ford selected former governor of New York Nelson Rockefeller for Vice President, and conflict of interest issues surged to the fore given Rockefeller’s extensive wealth and holdings. The then-Chairman of the Committee on Rules and Administration was Senator Howard Cannon (D-Nevada), who sought clarification from the Justice Department as to whether Rockefeller was bound by the conflict of

interest statute—and, if so, what he would need to do in terms of divesting his assets to assume the vice presidency.

Acting Attorney General Laurence Silberman argued that Rockefeller was not so bound, and for several reasons. First, Silberman claimed that the Twenty-Fifth Amendment—which details presidential removal and succession—placed no such encumbrances on the (prospective) Vice President.³⁴ Second, Silberman cautions “serious doubt” against an interpretation of 18 U.S.C. §208 that would bind the President and continued that it would seem “almost certain” that the President and Vice President should be treated alike under this statute (i.e., if the President is not bound, then neither is the Vice President).³⁵ Silberman points out that neither officer is explicitly mentioned under the purview of the statute, which only speaks to an “officer or employee of the executive branch.” He also points to the legislative history of §§202–209, noting no evidence that these were meant to apply to “the Chief Executive and his immediate successor.”³⁶ He also points to an influential report, maintaining that the President and the Vice President “must inevitably be treated separately from the rest of the executive branch.”³⁷ As the House and Senate committees that formulated the Ethics in Government Act were substantially influenced by this report, Silberman thinks it implausible that a break from this edict would have been nowhere noted in committee notes.³⁸

Whether Silberman’s arguments were compelling or not was ultimately rendered moot when Congress revisited this issue in the Ethics Reform Act of 1989.³⁹ In this legislation, Congress amended 18 U.S.C. §202—the definitions section of the Ethics in Government Act—such that “the terms ‘officer’ and ‘employee’ [in §208 and elsewhere] *shall not* include the President, the Vice President, a member of Congress, or a federal judge.”⁴⁰ And so, statutorily, the President is exempt from the conflict of interest provision in 18 U.S.C. §208. This is a point worth emphasizing: for all the talk about whether the President is subject to conflicts of interest, he is quite literally exempted from those requirements under federal law.⁴¹

3. NORMATIVE FOUNDATIONS

Whether the President *is* exempt portends a different question from whether he *should* be. In other words, it is completely fair for us to question the wisdom of the revisions to 18 U.S.C. §202, even if such a project is merely academic. Perhaps surprisingly, there is limited discussion on the Ethics Reform Act of 1989, at least on this issue in particular.⁴² But, broadly speaking, two separate answers have been given as to the justification for this exemption. The first is that the President—or any other exempted official—certainly has the ability to divest himself of conflicts of interest, regardless of a legal requirement to that end. Most recent presidents have placed their assets in blind trusts, even if they had no legal obligation to do so; these include Lyndon Johnson, Jimmy Carter, Ronald Reagan, George W. Bush, George H. W. Bush, and Bill Clinton.⁴³ President Obama did not, but his assets were substantially less complicated, principally comprising mutual funds and bonds.⁴⁴

This answer strikes us as particularly weak: why make it supererogatory for elected officials to dissolve conflicts? If conflicts are ethically significant—and

we think they are—then compliance with relevant requirements should hardly be optional. An analogous line of reasoning would seem to be that presidents should not commit crimes, but we will simply exempt them from all criminal liability on the theory that they will do the right thing and not commit crimes in the first place. This is just not how criminal law—or, more specifically, criminal deterrence—works. Nobody should get a free pass on some maligned activity simply on the hopes that they will not exercise that freedom. And so, this answer could factor into some broader constellation of considerations, under which, given some reason to ground the exemption, presidents nevertheless have the option of going above and beyond their legal obligations, but we still need a story as to what these broader considerations or reasons are supposed to be.

The second putative answer is that it is simply not practical to enact a conflict-of-interest regime that would both restrict the President and simultaneously allow for effective governance.⁴⁵ In other words, we could postulate two different kinds of answers as to why the President should not be exempted from conflicts of interests; one approach would be to argue against the exemption on moral grounds, the other of which would be to argue against it on pragmatic grounds.⁴⁶ One difference between these two approaches is modal: the pragmatic arguments are contingent on various features (e.g., the structure of our government, the nature of politics, etc.), whereas moral arguments may not be (e.g., lying is at least *prima facie* wrong, regardless of the empirical details).

This strategy is not particularly novel. For example, in an influential article, David Luban considers arguments for and against the adversarial legal system we have in the United States, as contrasted with the inquisitorial system more popular in Europe.⁴⁷ The adversarial system has all sorts of flaws, specifically insofar as it prizes advocacy over outcomes;⁴⁸ for example, the criminal defense attorney's fiduciary role is to secure an acquittal for his client *regardless* of whether the client actually committed a crime.⁴⁹ This is not to say that the adversarial model is bankrupt. Rather, it serves other moral ends as well, such as creating trust between lawyers and clients—with their communications protected by confidentiality—thus promoting disclosure and communication.⁵⁰ But as to whether we should, say, *switch* from the adversarial model to the inquisitorial one, Luban points to transactional costs. And so even if the inquisitorial model might eradicate some of the foibles of the adversarial model, the adversarial model might end up being pragmatically justified—as opposed to morally justified—on the grounds that switching would be too onerous.

For present purposes, we are of course less concerned with the merits of this argument than the structural approach, namely in drawing a distinction between moral values and pragmatic ones. Then turning to whether the President should be exempted from conflict of interest requirements, we can explore the possibility of a pragmatic justification, as opposed to a moral one. This is ultimately what Luban does in the legal case, arguing that pragmatic justifications are weaker than more robust moral arguments, but that pragmatic justifications can be justificatory nonetheless, particularly in the absence of convincing moral arguments to the contrary. While Luban does not explain his thinking this way, we see these pragmatic arguments as functioning something like tie-breakers when the score

is close. And, importantly, this does not even require the exemption to otherwise enjoy some positive moral valence; even if there are reasons against the exemption, pragmatic arguments can be countervailing. All in, they are weaker than their moral counterparts, but this is simply meant to be a heuristic insofar as some richer discussion on the metaphysics of justification would take us too far afield.

So why, then, is it so onerous for the President to resolve conflicts of interest before entering the White House? In some ways, it is not; per above, most presidents have done just that, principally through blind trusts. We therefore need to set aside a facile argument that proceeds as follows. Suppose the President-elect is reluctant to let go of his holdings in Apple, but recognizes that such holdings might bias his decision-making, or—perhaps more relevantly—raise the specter of impropriety. The resolution here is simple: by creating a blind trust and assigning an executor, the President-elect no longer knows whether he has holdings in Apple. He therefore would not have any reason to pursue policies that disproportionately favor Apple over its competitors insofar as such policies might be detrimental to his own financial interests. Rather, not knowing what his holdings are, impartiality would be the most prudent course.

But this sort of argument can only go so far. Suppose the President is faced with a certain policy conundrum, and must choose one of two resolutions. The first is pro-business, likely to benefit the market, including the preponderance of his holdings therein. The second is regulatory, likely to hurt the market, again including the preponderance of his holdings.⁵¹ The blind trust approach does not actually help remove the conflict here because the President can be reasonably certain as to which policy will broadly promote his economic interests.

And this argument generalizes. The President makes myriad decisions, any of which might affect his interests—particularly economic ones. Even drawing a distinction between synchronic and diachronic interests fails to help. For example, we might postulate a difference between some policy decision that would *immediately* affect the President's net worth, as opposed to some policy decision that would curry favor with some sector of industry, paving the way for speeches worth hundreds of thousands of dollars after leaving office.⁵² For all intents and purposes, the latter effectuates a conflict of interest with regards to current policy (i.e., against future gains), but is completely un-navigable pragmatically. In other words, it would be wholly unreasonable to preclude the President from doing *anything* during his tenure in the White House that *might* result in lucrative remuneration after leaving office.

This is a substantial argument against wholly binding the President from conflicts of interest, simply on the grounds that such a bind would be pragmatically impossible.⁵³ A critic might nevertheless try to draw distinctions, saying that these sorts of diachronic worries need not get in the way with regards to synchronic conflicts. Maybe, but then all that would have to get sorted out, and it is far from obvious how the principled resolution would go. Is it really different for a President to adopt some contemporaneous policy that would benefit Apple and his associated holdings, rather than adopting that same policy in the hope that he will be invited to Apple's Cupertino corporate headquarters a handful of years later?⁵⁴ We just do not see this as a viable distinction.

Or, to try another tack, there would be substantial transactional costs in implementing associated policy, and to what end? The speaking circuit—both literally and metaphorically—awaits regardless, and so, at best, the prospective compensation is delayed, not barred. Meanwhile, there are other things to be done, like leading the country. And resources—whether the President’s or others’—diverted into conflict of interest analysis inherently distract from these other pursuits. So, given both these transactional costs and the functional impotence of such an approach, we see a compelling argument in favor of the exemption that 18 U.S.C. §202 offers.⁵⁵ To be sure, this is not an argument that the President *should not* resolve conflicts of interest, but simply that he should not be *required* to do so. It is also not an argument that the President is *definitionally incapable* of being conflicted. Rather, our view is far more modest than either of these more ambitious proposals, both of which we think are radically implausible.

4. THE EMOLUMENTS CLAUSE

While the President may not be bound by conflict of interest laws that normally apply to other elected and appointed officials, there is a specific range of conflicts that are expressly forbidden by the Constitution. These conflicts are articulated in the Emoluments Clause and stand as a prohibition against accepting gifts or payments from a foreign agent.⁵⁶ The Clause reads:

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.

This clause serves as a means of preventing the various officers of the government from engaging in conflicts of interest leading to corruption by foreign states. It poses two obvious questions. First, to whom does it apply? And, second, what, specifically, does it proscribe? Before examining these two questions, it is helpful to explore the Framers’ reasoning for including such a provision in the Constitution.

It is odd to think of the United States as a fragile country that could be destroyed in short order not only by military might, but by the corrupting influences of foreign governments.⁵⁷ However, that is exactly the worry faced in the late 1700s when the Constitution was being drafted. The fledgling democracy faced severe challenges on many different fronts, ranging from a limited economy to the inability to protect its ships abroad.⁵⁸ The concern regarding foreign influence was, at the very least, on par with these concerns, leading to the conclusion that “the Framers of our Constitution considered political corruption a key threat—if not the key threat—to the young country.”⁵⁹

One area of concern for the Framers was the way European countries, as well as Russia, normally conducted business. It was commonplace for the various kings and queens to shower visiting foreign diplomats with lavish gifts.⁶⁰ This was such a long-standing practice that, by the mid-seventeenth century, the Dutch established rules preventing their foreign ministers from accepting such gifts.⁶¹ The rationale was simply that persons receiving gifts and payments from foreign

rulers might not be trusted to fully and truthfully represent their countries' interests to the exclusion of their own financial interests. This practice exemplified the type of conflicts of interest and corruption about which the Framers were so worried. Over a century later, they followed the lead of lawmakers in Holland and codified a similar rule in the Constitution.⁶²

The Emoluments Clause is, of course, not the only anti-corruption language written into the Constitution. The Framers' concerns about corruption informed their aims regarding elections, the judiciary, jury requirements, and numerous other governance issues included in the Constitution.⁶³ When considered together, it is apparent that there was an obsession with corruption, against which the Emoluments Clause was meant to be a prophylactic.

5. EMOLUMENTS AND THE PRESIDENCY

In this section, we consider whether the Emoluments Clause applies to the presidency. Some argue that the President is exempt from this clause; this would be putatively analogous to the President being exempt from conflict of interest provisions, such as those discussed above.⁶⁴ However, there are statutory reasons (cf., 18 U.S.C. §202) why the President is not subject to conflicts of interest, and those reasons are impotent against the constitutional provision that speaks to emoluments. More substantively, the Framers considered the threat of corruption to be so great that that emoluments picks out a special case of conflicts of interests that enjoys privileged restriction, namely with regards to certain interactions with foreign states. In developing this line of thinking, we propose to consider textualist interpretations of both the Constitution and the related Articles, as well as the Framers' intent.⁶⁵

Under a textualist reading of the Emoluments Clause, the phrase "[a]nd no person holding any office of profit or trust under them" would have to somehow be understood as not applying to the presidency.⁶⁶ The type of corruption that the Framers were protecting against with this clause—the acceptance of gifts and titles—was most often an issue with foreign diplomats.⁶⁷ The President is generally not in everyday contact with foreign officials and would be less prone to the type of corruption faced by such interactions. This would mean that 'office' applies to some specific set of government agents, such as those appointed instead of those elected. However, this is a difficult explanation to accept considering the numerous times the word 'office' is associated with the presidency in the Constitution. To name a few: "[the President] . . . shall exercise the Office of President of the United States;"⁶⁸ "[the President] . . . shall hold his office during the term of four years;"⁶⁹ "No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the Office of President;"⁷⁰ and [the President] . . . shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."⁷¹ In addition to these instances, there are numerous other instance of the President being referred to as holding an "office" or similar language.⁷²

There are additional problems with denying that the President is an office holder in the ordinary sense of the word. For example, if the President is not an

office holder, then Article I, Section 7 would not apply to him, and a person who had been impeached and removed from office would be forbidden from holding any federal office, except the presidency.⁷³ Or Article I, Section 6 would not apply and a person could be President and either a Representative or Senator at the same time.⁷⁴ There are similar examples, and all point to the same conclusion: the Emoluments Clause must apply to the President—as well as other federal office holders—lest the Constitution be rendered incoherent.

Another argument against the Emoluments Clause's applicability to the President trades on the Framers' intent. This argument rests on the premise that, when crafting this clause, the focus of the concern was *foreign* diplomats, and that the Framers never intended the clause as a restriction on the *domestic* President.⁷⁵ To be sure, diplomats and the President are differently situated with regards to foreign hospitality—or at least were more likely to have been differently situated before the advent of Air Force One.⁷⁶ It was, and still is, common for diplomats to be afforded the finest hospitality in an effort to secure good will and favorable interstate relationships.⁷⁷ Add expensive gifts to the mix, and it is easy to see how ambassadors to foreign states might put personal gain over the American citizenry they serve. This worry was likely exacerbated in the late 1700s when “home” was accessible only by sea voyages that could last weeks or longer.⁷⁸

An additional concern for diplomats sent to Europe were the protocols themselves.⁷⁹ While the United States' government would want the diplomats to remain free of potential conflicts, the foreign governments—including their high-ranking nobility—often considered the giving and acceptance of gifts to be an important part of the diplomatic process. The rejection of a gift by a diplomat, while preferred or required by American law, could very well be viewed as an insult or breach of protocol that was significant enough to break off negotiations or to end diplomatic access.⁸⁰ A diplomat could easily claim that a gift was being accepted to maintain diplomatic relations; without a clear-cut prohibition, it would be difficult to reject this line of reasoning.

This prospective entanglements of diplomats is obvious, and these entanglements establish a compelling case that they were a target of the Emoluments Clause. However, it is not clear is that they were the *only* target; or, in other words, that the Framers intended the clause to pertain to only to *some* office holders (e.g., diplomats), as opposed to all of them (e.g., including the President). The worry about corruption would seem to suggest just the opposite. The foundational worry was not that corruption should be avoided simply because corruption is wrong. Rather, the worry was that corruption was such a threat that it could endanger the very existence of our fledgling democracy.⁸¹ The Framers looked at the governments of Europe and Russia and identified corruption as one of the major weaknesses, a weakness that the United States could not tolerate.⁸² With this in mind, it makes little sense to apply the Emoluments Clause to some group of office holders that could harm the country, yet exempt the single office holder that could do the most harm. If anything, the Framers would be *more* worried about the President, not less, for no other reason than the President's power—far greater than that of any diplomat—portends such great damage if subject to corruption.

Perhaps the best indicator that the intent of the Emoluments Clause was meant to bind the presidency comes from the words of those present during the debates to ratify the Constitution. During Virginia's ratification debate, George Mason raised the worry: "[w]ill not the great powers of Europe, as France and Great Britain, be interested in having a friend in the President of the United States; and will they not be more interested in his election, than the King of Poland?"⁸³ This is entirely consistent with the reasoning mentioned above, that corruption by the President should be a greater worry than a diplomat with much less authority. Edmund Randolph, the second Secretary of State and later the first United States Attorney General, represented Virginia at the Constitutional Convention.⁸⁴ He responded to this worry by stating:

There is another provision against the danger mentioned by the honorable member, of the president receiving emoluments from foreign powers. If discovered, he may be impeached. If he be not impeachable he may be displaced at the end of the four years. By the ninth section, of the first article, "No person holding an office of profit or trust, shall accept of any present or emolument whatever, from any foreign power, without the consent of the representatives of the people."⁸⁵

Randolph's sentiment is emblematic of the safeguards set in place by the Framers. More importantly, he has answered a worry about the President being corrupted by pointing to the Emoluments Clause as the protection against such corruption; if the clause did not apply to the President, this response would have been curious. Combined with the Framers' general worry about corruption, and the reasoning that presidential corruption would be an even greater worry, this interaction during the ratification process provides compelling evidence that the Emoluments Clause was intended to apply to the presidency.

In addition to the textualist and original intent arguments discussed above, there is at least one other reason to believe that it applies to the President. This is the past precedent of Presidents acting as though they are bound by this clause. There are dozens of such instances since the ratification of the Constitution. For example:

- President Andrew Jackson was given a medal by the President of Columbia in 1830. He notified Congress, which directed him to deposit the medal in "the Department of State."⁸⁶
- President John Tyler was given two horses by the Imam of Muscat. Congress directed him to sell the horses and give the proceeds to the Treasury.⁸⁷
- President Benjamin Harrison was presented medals by Brazil and Spain while President, which Congress expressly allowed him to keep.⁸⁸
- President Theodore Roosevelt accepted the Nobel Peace Prize and asked Congress to establish a foundation to hold the award money.⁸⁹
- President Barack Obama also won the Nobel Peace Prize, and the Office of Legal Counsel advised him that the prize would not violate the Emoluments Clause.⁹⁰

In each of these instances—and numerous others—the President was given a gift of some sort.⁹¹ Sometimes Congress required that the gift be given to the government, and other times the President was allowed to keep it. However, in each case the President acted as if the Emoluments Clause applied.

6. WHAT COUNTS AS AN EMOLUMENT?

While we have thus far argued that the Emoluments Clause applies to the presidency, myriad interpretive questions remain. Consider first what is meant by a “foreign state.” It is uncontroversial to assume that this means any head of state, but also any person acting on behalf of a foreign country. So, gifts from kings or queens, presidents, prime ministers, or any of the numerous foreign dignitaries with whom presidents normally interact would be restricted by the Emoluments Clause. On the other side of the spectrum, a gift from an ordinary foreign citizen is not restricted. These are the easy cases, but intermediate ones are more problematic.

President Obama’s 2009 Nobel Peace Prize money and medal comprise one such case. The prize was awarded by a foreign entity, the Norwegian Nobel Committee.⁹² However, the Office of Legal Council concluded that the prize was not restricted by the Emoluments Clause because the Nobel Committee was not itself a foreign state, nor was it controlled by a foreign state.⁹³ Note that the text of the clause only references foreign leaders and states; had the intent been to prohibit gifts from *any* foreign entity, the wording would have been broader. So, gifts from a diplomat (i.e., a state representative), foreign leader, or even an organization controlled by a foreign government would be controlled by the clause, while gifts from citizens, businesses and non-government organizations would not be.

This leads to the final part of the Emoluments Clause: what is meant by “present, emolument, office, or title”?⁹⁴ Presents are fairly straightforward. Horses, medals, jewel-encrusted swords, snuff boxes, and even small potted plants are readily identifiable as presents or gifts.⁹⁵ Likewise, an office or title is easy to identify. The President, or other office holders, cannot hold their position and simultaneously be employed by a foreign government. The current President cannot be President and be knighted by the Queen of England.⁹⁶ However, the extension of ‘emolument’ is less obvious.

There are at least two possible interpretations here. The first, and most broad, would be that emoluments comprise any form of payment or profit, for any reason. This would cover everything from direct payments for services to business-related profits accrued through patronage from foreign states. For example, under this broad understanding, a president would be guilty of violating the Emoluments Clause if he owned a pub in which foreign diplomats or dignitaries purchased meals, estates that rented rooms (e.g., President Trump’s Mar-a-Lago), or any number of other normal business transactions that led to a profit.⁹⁷ A broad interpretation such as this would require that the President either completely divest his or her interests prior to assuming office, or have all profits from owned businesses donated directly to the Treasury unless Congress expressly authorized otherwise.

A second, and more narrow, way to understand what is meant by ‘emolument,’ is to interpret it as (only) a direct payment by a foreign state.⁹⁸ Examples of this type would be consultancies, honoraria, retirement accounts, or even bribes.⁹⁹ Consider, for example, that without the Emoluments Clause—and particularly the use of ‘emolument’ within the clause—the President could receive direct payments from another.¹⁰⁰ This direct payment would certainly not be an office or a title; interpreting it as a payment is possible, but would make superfluous the emoluments provision (i.e., as contrasted with payments). The “office or title” portion of the clause prevents the President from also holding an office in another country, and it could be interpreted that with the “emolument” portion the Framers were further trying to prevent payments or any form of financial allegiance.¹⁰¹

The question here is how to determine which of these is the right way to understand ‘emoluments.’ Precedent is of little use; past presidents sought permission from Congress to keep certain gifts, but none was known to have the complicated international financial interests of their contemporary counterparts.¹⁰² And, as discussed above, most contemporary presidents chose to put their financial interests into blind trusts regardless.¹⁰³ So, while precedent tells us that the Emoluments Clause applies to the President, it does not help to specifically delimit what counts as an emolument.

A better place to start might be the Framers’ intent. As previously discussed, the Framers were certainly worried about corruption.¹⁰⁴ However, it is not clear that they sought to prohibit any and all financial dealings with foreign states. Their concern with corruption might have extended to an objection to George Washington accepting a title of Lord Washington from the British monarchy, but it is less clear that they would consider him renting out a room at Mount Vernon to a British minister as a form of corruption. Furthermore, given the more localized wealth that existed at the time,¹⁰⁵ it is hard to imagine that the Framers—including Washington—had profits from a chain of Washington Inns and Carriage Services across Europe in mind when they wrote the clause. In short, while we can discern the general intent behind the Framers writing the Emoluments Clause, we cannot discern that they specifically intended to prohibit profits from businesses owned by the President.¹⁰⁶

Given this ambiguity, the best way to determine what the Framers meant by ‘emoluments’ is to take a strict textualist approach. The *Oxford English Dictionary* documents the first usage of ‘emoluments’ in 1480, with fairly static usage through the Framers’ time.¹⁰⁷ Its current definition is consistent with those usages: “[p]rofit or gain arising from station, office, or employment; dues; reward, remuneration, salary.”¹⁰⁸ There is nothing in this definition that convincingly suggests that ‘emolument’ extends to fair market profits from a business. The two portions that come closest, ‘employment’ and ‘salary,’ are related but mean something distinctly different. For example, Jeff Bezos owns *The Washington Post*, but it would be odd to think of him as an employee of the newspaper, or to think of his profits as salary.¹⁰⁹ In short, this definition supports the narrower reading of the Emoluments Clause.¹¹⁰ Additionally, this interpretation of ‘emolument’ as meaning something specific and more in line with the above definition, is supported by other uses within the Constitution.

There are multiple instances in the Constitution of ‘emoluments’ being used to signify compensation for government service. The Domestic Emoluments Clause reads:

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.¹¹¹

There can only be the one interpretation of ‘emoluments’ in this context. To read this as applying to any form of financial gain, even fair market value for legitimate business dealings, would be odd indeed and wholly inconsistent with how presidents and their finances are treated.¹¹² Another clause in the Constitution, the Legislative Emoluments Clause, reads similarly:

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments thereof shall have been increased during such time.¹¹³

This again supports an understanding of ‘emoluments’ that is similar to the modern definition.

This section has established two conclusions. The first is that the presidency is bound by the Emoluments Clause. The second is that the President is prohibited from receiving any type of direct payment from a foreign government official or office, or from holding a title or position in any foreign government. While the current global economy is so interconnected, and business entanglements are likely given the vast wealth of some presidents, these phenomena were not foreseen by the Framers. They certainly worried about corruption, seeking to place various anti-corruption principles within the Constitution; had they been able to look forward through time, they may have conceived of the Emoluments Clause more broadly. However, such breadth comports with neither text, intent, nor precedent and should be rejected.

7. CONCLUSION

Conflicts of interest are problematic for at least two reasons. First, they actually compromise fiduciary obligations. But, second, they may create an appearance of impropriety, regardless of whether fiduciary obligations are actually compromised. Functionally, this latter may be more significant than the former. The creation of blind trusts, judges’ recusal, the appointment of special prosecutors, and so on are often mechanisms to calm a jittery public; regardless of any actual impropriety, the atmospheric matter.

The codified restrictions matter, too, though, as they put exogenous checks on behavior that is not supererogatory. And so we recognize the wisdom of Congress in passing 18 U.S.C. §208, just as we recognize the wisdom of the various bar associations and legal ethics’ codes that provided the foundation for this statutory regime. But Congress chose to exempt the President from this regime; such an exemption is explicitly provided for under 18 U.S.C. §202. At least legally, then,

the President need not resolve conflicts of interest—or at least not the financial ones proscribed under 18 U.S.C. §208. We further presented normative arguments in favor of this conclusion, specifically relating to the complexity of modern presidential holdings and to the fact that such resolution would be functionally impossible given income opportunities that exist after office. For emphasis, this does not discourage divestment—the presidents who have created blind trusts should be recognized for their efforts—but simply recognizes that divestment should not always be required.

Lest we be accused of presidential apologetics, though, the analysis changes when considering conflicts of interest between the President and foreign governments. We argued that the Emoluments Clause applies to the President, and that it prohibits certain foreign entanglements. But, in some situations—such as receiving fair market profits from a president’s businesses—the Emoluments Clause is not prohibitive. This result might have given the Framers pause; had the constitutional convention been held in 2017 instead of 1787, the clause might have been more restrictive. Furthermore, it was important to the Framers that the President avoids the appearance of impropriety. Given the current state of global wealth and multi-national corporations, even fair market profits from businesses raise flags—or at least the hackles of the media. There may not be a conflict of interest between what is good for the country and for the President’s foreign-related profits, but the appearance of impropriety remains.

Remediating this problem is complicated. The world economy has evolved since the Framers’ time such that the prohibitions within the Constitution may not now provide complete safeguards against corruption. But fair market value provides a useful heuristic in conceptualizing this. Charging a foreign emissary \$100,000 for a round of golf or \$5,000 for a hotel room—or even *accepting* those levels of payment—could be inapposite when the sticker price for those are \$1,000 and \$500, respectively.

We can therefore maintain that fair market transactions are allowed under the Emoluments Clause, but simultaneously hold that overpayments comprise violations. To ensure appropriate oversight, we can legislate in favor of tax disclosures—both of the President’s personal and business holdings. We can empanel review boards that would notify Congress of possible improprieties. In this way, the Emoluments Clause could be used as a tool against presidential corruption, without subjecting the clause to an implausibly broad reading. And in this way, we take the thrust of this article to ultimately espouse a moderate position: the President is immune from domestic conflicts of interest, but the Emoluments Clause provides a check against foreign entanglements, specifically honoring the Framers’ concerns with regards to corruption.

ENDNOTES

1. We thank Elliot D. Cohen and Michael Davis for helpful conversations regarding this essay. We also thank Derek Miller for editorial assistance.

2. Carl Bialik, "Top Pollsters Expect Clinton to Win," *FiveThirtyEight*, October 18, 2016, <http://fivethirtyeight.com/features/top-pollsters-expect-clinton-to-win/>. Accessed June 28, 2017.

3. Alexia Fernández Campbell, "One Reason the Rust Belt Turned Red," *The Atlantic*, November 14, 2016, <https://www.theatlantic.com/business/archive/2016/11/one-reason-the-rust-belt-turned-red/507611/>. Accessed June 28, 2017.

4. Alex Altman, Joseph Hincks, and Tara John, "Trump's Many, Many Business Deals in 1 Map," *Time*, January 10, 2017, <http://time.com/4629308/donald-trump-business-deals-world-map/>. Accessed June 25, 2017.

5. Ethan Wolf-Mann, "Trump Has More Money than Every U.S. President Combined," *Money*, September 25, 2015, <http://time.com/money/4041300/donald-trump-has-more-money-than-every-u-s-president-combined/>. Accessed June 25, 2017.

6. Anne VanderMey and Nicolas Rapp, "Who Needs a Blind Trust?" *Forbes*, October 22, 2012, <http://fortune.com/2012/10/22/who-needs-a-blind-trust/>. Accessed June 25, 2017.

7. The structure of President Trump's wealth makes it difficult for him to divest without suffering significant loss. Much of his wealth is in real estate holdings, and selling those in less than three months' time as President-elect would have created a buyers' market. Additionally, completely stepping away from his "brand" would have substantially devalued it. See David Rivkin and Lee Casey, "It's Unrealistic and Unfair to Make Donald Trump Use a Blind Trust," *Washington Post*, November 22, 2016, https://www.washingtonpost.com/opinions/its-unrealistic-and-unfair-to-make-trump-use-a-blind-trust/2016/11/22/a71aa1d4-b0c0-11e6-8616-52b15787add0_story.html?utm_term=.d9a8cc14d32a. Accessed June 29, 2017.

8. Chris Cillizza, "This Is the Single Most Dangerous Thing Donald Trump Said in His New York Times Interview," *The Washington Post*, November 22, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/this-is-the-single-most-dangerous-thing-donald-trump-said-in-his-new-york-times-interview/?utm_term=.34f171ac8f39. Accessed June 21, 2017. See also Lauren Carroll, "Giuliani: President Trump Will Be Exempt from Conflict-of-Interest Laws," *Politifact*, November 16, 2016, <http://www.politifact.com/truth-o-meter/statements/2016/nov/16/rudy-giuliani/giuliani-president-trump-will-be-exempt-conflict-i/>. Accessed June 21, 2017. See also Glenn Kessler and Michelle Ye Hee Lee, "Trump's Claim that 'The President Can't Have a Conflict of Interest,'" *Washington Post*, November 23, 2016, https://www.washingtonpost.com/news/fact-checker/wp/2016/11/23/trumps-claim-that-the-president-cant-have-a-conflict-of-interest/?utm_term=.914a98c76a44. Accessed June 21, 2017.

9. Altman, Hincks, and John, "Trump's Many, Many Business Deals."

10. David Fahrenthold and Jonathan O'Connell, "What is the Emoluments Clause?: Does it Apply to President Trump?" *The Washington Post*, January 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=.fc0c54816027. Accessed June 25, 2017.

11. "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon" Matthew 6:24 (King James). Quoted in Robert H. Aronson, "Conflict of Interest," *Washington Law Review* 52 (1977): 807–859, at 808.

12. While not relevant to the present discussion, medical ethics has also played an important role. Archetypical cases here involve physicians receiving compensation from pharmaceutical companies; these would comprise conflicts between the physicians' economic interests and, perhaps, the well-being of their patients. See, for example, Ashley

Wazana, "Physicians and the Pharmaceutical Industry: Is a Gift Ever Just a Gift?," *Journal of the American Medical Association* 283.3 (2000): 373–380. This issue also came up quite visibly with physicians developing interrogational protocols for detainees at Guantánamo Bay. See, for example, Fritz Allhoff, "Physician Involvement in Hostile Interrogations," *Cambridge Quarterly of Healthcare Ethics* 15.4 (2006): 392–402. For more general discussion of conflicts in military medicine, see Fritz Allhoff, *Physicians at War: The Dual-Loyalties Challenge* (Dordrecht: Springer, 2008).

13. "These were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 as *Professional Ethics*, and from the fifty resolutions included in David Hoffman's *A Course of Legal Study*." Center for Professional Responsibility, American Bar Association, "Model Rules of Professional Conduct: Preface." Available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface.html. Accessed June 14, 2017.

14. Aronson, "Conflict of Interest," 808.

15. Center for Professional Responsibility, American Bar Association, "Canons of Professional Ethics Centennial," https://www.americanbar.org/groups/professional_responsibility/resources/canons_professional_ethics_centennial.html. Accessed June 14, 2017.

16. Canon 5 included ethical considerations (ECs) relating to conflicts of interest. EC 5-1 stated: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client" (internal footnote omitted). American Bar Association, Model Code of Professional Responsibility, <https://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM>. Accessed June 14, 2017.

17. The California Rules of Professional Conduct are in the process of being redrafted so as to more closely track the content and structure of the Model Rules. After spending more than a decade on this project, the revisions were rejected by the California Supreme Court in 2014 and returned to the California Bar Association with directions to start over. The new version is due soon. Joan C. Rogers, "California Justices Tell State Bar to Redo Proposals for Updating Lawyer Conduct Rules," *Bloomberg BNA*, October 2, 2014, <https://www.bna.com/california-justices-tell-n17179895795/>. Accessed June 14, 2017. For the original, see *California Rules of Professional Conduct* (2015), <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules>. Accessed June 14, 2017.

18. *Código de Ética Profesional* (1970), especially Canon 21. Available in Spanish at <http://www.ramajudicial.pr/leyes/Codigo-de-Etica-Profesional-de-Puerto-Rico-1970.pdf>. Accessed June 14, 2017.

19. See, for example, Rules 1.7, 1.8, 1.10, and 1.11. American Bar Association, *Model Rules of Professional Conduct* (2016), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. Accessed June 14, 2017.

20. *Ibid.*

21. Aronson, "Conflict of Interest," 809.

22. *Ibid.*

23. *Ibid.*, at 811 (emphasis added).

24. *Ibid.*

25. *Ibid.* The remainder of Aronson's article is quite useful in terms of cataloging myriad ways in which conflicts of interest may arise, not all of which appear to be anticipated by the Model Rules.

26. Joseph Margolis, "Conflict of Interest and Conflicting Interests," in *Ethical Theory and Business* (Englewood Cliffs, NJ: Prentice-Hall, 1979), 361–72.

27. See, e.g., the discussion of Model Rule 1.7 above.

28. Michael Davis, "Conflict of Interest," *Business and Professional Ethics* 1.4 (1982): 17–27.

29. *Ibid.*, at 21. The latter goes as follows. A person P_1 has a conflict of interest in role R if, and only if: P_1 occupies R; R requires exercise of (competent) judgment with regard to certain questions Q; a person's occupying R justifies another person relying on the occupant's judgment being exercised in the other's service with regard to Q; person P_2 is justified in relying on P_1 's judgment being exercised in the other's service with regard to Q; person P_2 is justified in relying on P_1 's judgment in R with regard to Q (in part at least) because P_1 occupies R; and P_1 is (actually, latently, or potentially) subject to influences, loyalties, temptations, or other interests tending to make P_1 's competent judgment in R with regard to Q less likely to benefit P_2 than P_1 's occupying R justifies P_2 in expecting. *Ibid.*, at 24.

30. Specifically: "Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest." 18 U.S.C. 208(a).

31. While the focus on financial interests is comparatively narrow, those specific kinds of interests are construed fairly broadly. For example:

an executive branch or independent agency, employee (including military officers, but not enlisted personnel) cannot participate "personally and substantially as a Government officer or employee" in matters in which he or she is "negotiating or has any arrangement concerning prospective employment." Negotiating future employment includes discussing or communicating with "another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person" or making "an unsolicited communication to any person, or a such person's agent or intermediary, regarding possible employment with that person. In other words, government employees cannot solicit or negotiate for non-government employment or fail to reject unsolicited offers. In such cases, the government employee must disqualify him or herself from any matter involving the contractor.

Scott H. Amey, "The Politics of Contracting," Appendix F (Washington, DC: Project of Government Oversight, 2004), <http://pogoarchives.org/m/gc/politics-of-contracting/AppendixF.pdf>. Accessed June 16, 2017.

32. U.S.C. §216 (emphasis added). The fines are controlled by 18 U.S.C. §3571 and range from \$5,000 to \$500,000, depending on various considerations.

33. Richard M. Cohen and Jules Whitcover, *A Heartbeat Away: The Investigation and Resignation of Spiro T. Agnew* (New York: Viking Press, 1974).

34. Laurence Silberman, "Dear Mr. Chairman," September 20, 1974, <https://fas.org/irp/agency/doj/olc/092074.pdf>. Accessed June 21, 2017. See also U.S. Constitution, Amendment XXV.

35. Silberman, "Dear Mr. Chairman," 2.

36. *Ibid.*

37. *Ibid.*, 2–3. Referencing Special Committee on the Federal Conflict of Interest Laws, Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* (1960).

38. *Ibid.*, 3.

39. The intervening Ethics of Government Act of 1978—passed after Watergate—did require public disclosure of financial and employment history; it also restricted lobbying efforts of public officials after leaving office. This legislation explicitly applied to all public officials, including the President and Vice President.

40. U.S.C. 202 (emphasis added). More fully: "Section 202 of title 18, United States Code, is amended by adding at the end thereof the following new subsections: '(c) Except as otherwise provided in such sections, the terms "officer" and "employee" in sections 203, 205, 207, 208, and 209 of this title, mean those individuals defined in sections 2104 and 2105 of title 5. The terms "officer" and "employee" shall not include the President, the Vice President, a member of Congress, or a federal judge.'" Available at <https://www.congress.gov/bill/101st-congress/house-bill/3660/text>. Accessed June 21, 2017.

41. It further bears emphasis that even the liberal media agrees with this. See, for example, Carroll, "Giuliani"; Cillizza, "The Single Most Dangerous Thing"; and Kessler and Lee, "Trump's Claim."

42. More generally, see Eric J. Murdock, "Finally, Government Ethics as if People Mattered: Some Thoughts on the Ethics Reform Act of 1989," *George Washington Law Review* 58 (1989): 502–25. See also Robert S. Collins, "Ethics and the First Amendment: The Applicability of the Honorarium Ban of the Ethics Reform Act of 1989 to the Executive Branch," *George Washington Law Review* 62 (1993): 888–919. See also David A. Golden, "The Ethics Reform Act of 1989: Why the Taxman Can't Be a Paperback Writer," *BYU Law Review* (1991): 1025–51.

43. Kessler and Lee, "Trump's Claim." See also VanderMey and Rapp, "Who Needs a Blind Trust?." See also Laura Lee, "What Is a Blind Trust?: And Why It May Be Donald Trump's Best Option," *Fox Business*, December 13, 2016, <http://www.foxbusiness.com/politics/2016/12/13/what-is-blind-trust-and-why-it-may-be-donald-trumps-best-option.html>. Accessed June 25, 2017.

44. VanderMey and Rapp, "Who Needs a Blind Trust?."

45. For example, "the uniqueness of the President's situation is also illustrated by the fact that disqualification of the President from policy decisions because of personal conflicting interests is inconceivable." Laurence Silberman, "Memorandum for Richard T. Burrell," August 28, 1974, p. 4, quoting Special Committee on the Federal Conflict of Interest Laws (1960), 16–17.

46. We do not take these grounds to be mutually exclusive (e.g., all else equal, expedience is a moral good), but rather to identify broadly different strategies.

47. David Luban, "The Adversary System Excuse," in *The Good Lawyer* (Totowa, NJ: Rowman and Allanheld, 1983), 83–122. For more on the inquisitorial legal system see Abraham S. Goldstein, "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure," *Stanford Law Review* 26 (1973): 1009–26. For discussion of the German system in particular, see Nigel G. Foster and Satish Sule, *German Legal System and Laws* (New York: Oxford University Press, 2010); reprinted in Fritz Allhoff and Anand J.

Vaidya, eds., *Professions in Ethical Focus: An Anthology* (Peterborough, Ontario: Broadview Press, 2008), 337–68

48. Elliot D. Cohen, “Pure Legal Advocates and Moral Agents: Two Concepts of a Lawyer in an Adversary System,” *Criminal Justice Studies* 4.1 (1985): 38–59; reprinted in Allhoff and Vaidya, *Professions in Ethical Focus*, 368–78.

49. Monroe H. Freedman, “Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,” *Michigan Law Review* 64 (1965): 1469–84; reprinted in Allhoff and Vaidya, *Professions in Ethical Focus*, 326–37.

50. Bruce M. Landesman, “Confidentiality and the Lawyer-Client Relationship,” *Utah Law Review* 4 (1980): 765–86; reprinted in Allhoff and Vaidya, *Professions in Ethical Focus*, 388–404.

51. Of course, the policy implications will likely be more variegated; this is a simplified example for illustrative purposes.

52. Presidents receive generous remuneration for speeches: President Obama recently received \$400,000; President George W. Bush has commanded in excess of \$100,000; and President Clinton has earned as much as \$500,000, while averaging over \$200,000 between 2001 and 2015. See Robert Yoon, “\$153 Million in Bill and Hillary Clinton Speaking Fees, Documented,” CNN, February 6, 2016, <http://www.cnn.com/2016/02/05/politics/hillary-clinton-bill-clinton-paid-speeches/index.html>. Accessed June 25, 2017. See also Daniel Gross, “Stop Freaking Out over Obama’s \$400,000 Speaking Fee,” *Slate*, April 26, 2017, http://www.slate.com/articles/business/moneybox/2017/04/barack_obama_is_taking_400_000_for_a_wall_street_speech_and_that_s_fine.html. Accessed June 25, 2017.

53. This is particularly true with regards to President Trump; see Rivkin and Casey, “Unrealistic and Unfair.”

54. Michael Davis accuses us of conflating conflict of interest with bias in this example (personal communication). However, for our purposes the distinction is unimportant. The potential bias toward some company, in hopes of later gaining from that bias, matches our understanding of what constitutes a conflict of interest. For more on the distinction see Davis, “Trumping Conflicts of Interest” (*International Journal of Applied Philosophy* 31.1: 9–20).

55. While space constraints prevent us from exploring this more fully, note there may be an analogy drawn to the immunities presidents typically enjoy while in office; the analogy would maintain that conflict of interest litigation would be similarly inapposite. See Restatement (Second) of Torts, §895D, comment b. More fully:

The basis of the immunity has been not so much a desire to protect an erring officer as it has been a recognition of the need of preserving independence of action without deterrence or intimidation by fear of personal liability and vexatious suits. This, together with the manifest unfairness of placing any person in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may be acting largely on the basis of hindsight, has led to a general rule that tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function.

See also *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949) (“The immunity is absolute and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions.”)

Note also that the President enjoys absolute immunity for acting within the scope of his office. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). But see also *Clinton v. Jones*, 520 U.S. 681 (1997) (rejecting immunity from civil litigation arising from events that pre-date assumption of office). Presidential aides, by contrast, are only afforded qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

56. U.S. Const. art. I, §9, cl. 8.

57. Despite political posturing and election-related fear mongering, worries about the United States' decline and China's rise to preeminence on the world stage are likely overstated. See Sara Hsu, "Why China Won't Replace the U.S. as the World's Superpower," *Forbes*, February 2, 2017, <https://www.forbes.com/sites/sarahsu/2017/02/02/why-china-wont-replace-the-u-s-as-the-worlds-superpower/#6cad8b63234d>. Accessed June 25, 2017.

58. For a visual on the economic comparison of the United States versus the rest of the world, see Derek Thompson, "The Economic History of the Last 2000 Years in One Little Graph," *The Atlantic*, June 19, 2012, <https://www.theatlantic.com/business/archive/2012/06/the-economic-history-of-the-last-2-000-years-in-1-little-graph/258676/>. Accessed June 15, 2017. For an examination of American military weakness in the late 1700s and early 1800s, see Frank Lambert, *The Barbary Wars* (New York: Hill and Wang, 2005), 3–5 and 49–52.

59. Zephyr Teachout, "The Anti-Corruption Principle," *Cornell Law Review* 94 (2009): 341–414, at 347–348.

60. Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Boston: Harvard University Press, 2016), 2–3.

61. John Moore, *A Digest of International Law* (Washington, DC: Government Printing Office, 1906), 579.

62. The prohibition against receiving gifts, and the corruption that the Founders worried it welcomed, was similarly included in the earlier Articles of Confederation (1781). That prohibition read:

Nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

The placement of very similar prohibitions against receiving gifts both in the Articles of Confederation and in the Constitution lends weight to the argument that the Framers were deeply concerned about foreign influence of government officials. Zephyr Teachout, "Gifts, Offices, and Corruption," *Northwestern University Law Review* 107 (2012): 30–54, at 30.

63. Teachout, "The Anti-Corruption Principle," 355.

64. See, for example, Stephen Kershnar, "Does the Emolument Rule Exist for the President?" *International Journal of Applied Philosophy* 31.1: 31–43.

65. By way of disclosure, one of us is more sympathetic to the former, the other to the latter. Since either line of inquiry reaches the same conclusion, this difference is largely irrelevant. For discussion of the differences between the approaches, see Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, MN: West, 2012).

66. U.S. Const. art. I, §9, cl. 8.

67. Andy Grewal, "The Foreign Emoluments Clause and the Chief Executive," *Minnesota Law Review* 102 (2017): 1–59, at 8.

68. U.S. Const. art. I, §3, cl. 5.

69. U.S. Const. art. I, §2, cl. 1.

70. U.S. Const. art. II, §1, cl. 5.

71. U.S. Const. art. II, §4.

72. Several amendments to the Constitution refer to the “Office of the President.” The Presidential Oath, taken when assuming office, also points toward this conclusion: “I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.” U.S. Const. art. II, §1, cl. 8.

73. Norman Eisen, Richard Painter, and Laurence Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump* (Washington, DC: The Brookings Institute, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf. Accessed March 30, 2017.

74. *Ibid.*

75. Grewal, “The Foreign Emoluments Clause,” 8.

76. Even now, the President spends comparatively little time abroad, particularly as compared to foreign emissaries.

77. Clair Carter, “‘Ambassador, You Are Really Spoiling Us’: British Diplomats Splash out £350,000 on Entertaining Visitors at Lavish Parties,” *Dailymail.com*, November 10, 2014, <http://www.dailymail.co.uk/news/article-2828289/British-diplomats-splash-350-000-entertaining-visitors-lavish-parties.html>. Accessed June 20, 2017.

78. A ready reminder of the time taken for travel comes—in this case, through the conveyance of news—through the War of 1812, when the Battle of New Orleans was fought for several weeks after the Treaty of Ghent was signed ending the war. See Charles Brooks, *The Siege of New Orleans* (Seattle: University of Washington Press, 1961).

79. Teachout, *Corruption in America*, 2–3.

80. *Ibid.*, at 19–20.

81. Teachout, “The Anti-Corruption Principle,” 348.

82. Teachout, *Corruption in America*, 19.

83. David Robertson, *Debates and other Proceedings of the Convention of Virginia* (Richmond, VA: Enquirer Press, 1805), 344.

84. Kevin Gutzman, “Edmund Randolph and Virginia Constitutionalism,” *The Review of Politics* 66 (2004): 470–77. Randolph served under President Washington following Thomas Jefferson’s resignation as the first Secretary of State.

85. Robertson, *Debates and other Proceedings*, 345.

86. Asher Hinds, *Hind’s Precedents of the House of Representatives of the United States*, vol. II, (Washington, DC: Government Printing Office, 1907), 1039.

87. Zephyr Teachout, “Trump’s Foreign Business Ties May Violate the Constitution,” *New York Times*, November 17, 2016, <https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/trumps-foreign-business-ties-may-violate-the-constitution>. Accessed June 19, 2017.

88. th Congress 2nd Session, House Reports (Public), Report 695 (Washington, DC: Government Printing Office, 1918), 8.

89. David Barron, Office of the Attorney General, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize* (Washington, DC: Government Printing Office, 2009), 4.

90. *Ibid.*, at 1.

91. th Congress, House Reports.

92. The other four Nobel prizes—physics, chemistry, physiology or medicine, and literature—are administered in Sweden. The Nobel Foundation established all five awards, based on the will of Alfred Nobel, who invented dynamite in 1867. See William Joseph Reader, *Imperial Chemical Industries: The Forerunners, 1870–1926*, vol. 1 (Oxford: Oxford University Press, 1970).

93. Barron, *Applicability of the Emoluments Clause*, 1.

94. U.S. Const. art. I, §9, cl. 8.

95. All of these have been given as gifts to past presidents. See Olga Oksman, “The Gifts of the Presidents,” *Atlantic*, February 15, 2016, <https://www.theatlantic.com/politics/archive/2016/02/the-unusual-gifts-given-to-presidents/462831/>. Accessed June 20, 2017.

96. Technically the Queen of the United Kingdom of Great Britain and Northern Ireland, but we will make the point colloquially. Thanks to Derek Miller for calling us on this.

97. This is the conclusion of Eisen, Painter, and Tribe. They argue that:

the best reading of the clause covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder. To start, the text supports this conclusion; since emoluments are properly defined as including “profit” from any employment, as well as “salary,” it is clear that even remuneration fairly earned in commerce can qualify. (*The Emoluments Clause*, 11)

This is also the foundational argument for a lawsuit filed by 196 Democratic lawmakers against President Trump on June 14, 2017. See *Blumenthal v. Trump*, No. 1:17CV01154 (D.D.C. June 14, 2017),: <http://www.politico.com/f/?id=0000015c-a627-d716-adff-aeff8ad30001>. Accessed June 28, 2017. See also Tom Hamburger and Karen Tumulty, “Congressional Democrats File Emoluments Lawsuit Against Trump,” *Washington Post*, June 14, 2017, https://www.washingtonpost.com/politics/congressional-democrats-to-file-emoluments-lawsuit-against-trump/2017/06/13/270e60e6-506d-11e7-be25-3a519335381c_story.html?utm_term=.416fb5cc1345. Accessed June 14, 2017.

98. More might be said about what ‘direct’ means in this context, but we mean it in the relatively commonsense usage: A receives direct payment from B when that payment is not mediated by some other entity, like A’s business holdings. This does not foreclose the possibility of disingenuously routing payments through business holdings, but probably at least amounts to shifting the explanatory burden away from A.

99. Perhaps an example would help to clarify this distinction. Suppose a person were on trial for murder, and found out that the decedent once used Airbnb to rent the judge’s cabin—not knowing the owner was a judge, much less presiding over the case. Alternatively, suppose the victim wrote a personal check to the judge for participation in a fantasy football league. Or contributed to the judge’s reelection campaign. Or simply put \$100 in the judge’s mailbox. These should be analyzed differently. We think the Airbnb instance is comparatively benign, the \$100 drop-off pernicious, and the other two occupy some middle space—probably shading toward pernicious.

100. This understanding of ‘emolument’ could also relate to fair market payments to a business for services. We return to this later in this article.

101. See Grewal, “The Foreign Emoluments Clause,” 11–22. In addition to arguments posed here, he points to passages from the original Articles of Confederation, as well as a failed would-be 13th Amendment in 1810.

102. For a more detailed explanation of presidential wealth, and how it has become more globalized, see Aaron Quinn, “Fake News, False Beliefs, and the Need for Truth in Journalism,” *International Journal of Applied Philosophy* 31.1: 21–29. See also Peter Grier, “Trump: Not First Wealthy President, but Unique Conflicts of Interest,” *Christian Science*

Monitor, November 21, 2016, <https://www.csmonitor.com/USA/Politics/2016/1121/Trump-Not-first-wealthy-president-but-unique-conflicts-of-interest>. Accessed June 4, 2017.

103. Jennifer Wang, “Why Trump Won’t Use a Blind Trust and What His Predecessors Did with Their Assets,” *Forbes*, November 21, 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/#3340f69129c0>. Accessed June 4, 2017.

104. Teachout, *Corruption in America*, 1–5.

105. For example, George Washington was quite wealthy, but his wealth was in land and slaves held in the continental United States. Thomas Jefferson had similar wealth. Vast foreign holdings did not exist for the early Framers. See Ashley Allen and Michael Sauter, “The 10 Richest U.S. Presidents,” *247Wallstreet*, February 9, 2016, <http://247wallst.com/special-report/2016/02/09/the-richest-and-poorest-presidents-of-all-time/4/>. Accessed June 30, 2017. See also John Alden, *George Washington: A Biography* (Baton Rouge: University of Louisiana Press, 1984).

106. The general intent was certainly to eliminate, or at least restrict, corruption. It is not clear that the Framers thought that fair market value for commercial transactions was a source of corruption.

107. “Emolument, n.,” *OED Online* (Oxford: Oxford University Press, 2017).

108. *Ibid.* Other dictionaries have similar definitions, both historically and contemporarily. For example: “the returns arising from office or employment usually in the form of compensation or perquisites,” under “Emolument,” in *Merriam-Webster.com* (2017), https://www.merriam-webster.com/dictionary/emolument?utm_campaign=sd&utm_medium=serp&utm_source=jsonld. Accessed June 30, 2017.

109. Matt Rossoff, “Jeff Bezos has Advice for the News Business: ‘Ask People to Pay, they Will Pay,’” *CNBC*, June 21, 2017, <http://www.cnn.com/2017/06/21/jeff-bezos-lessons-from-washington-post-for-news-industry.html>. Accessed July 1, 2017.

110. Detractors argue that the clause reads “present, emolument, office or title” and if ‘emolument’ were meant to mean money received from holding an office, then the language would be redundant. In other words, the Framers must have meant something more than just salary from foreign state employment. See Eisen, Painter, and Tribe, *The Emoluments Clause*, 11–12. But the Framers meant something more than just a salary from a foreign state. One of the primary concerns of the Framers was the corrupt nature of Great Britain and France. Within both countries, bribery and various other forms of funneling money through government offices was commonplace. By including the word ‘office,’ the Framers were adding a layer of protection, making sure that the President or other office holders could not accept unpaid positions within other governments that allowed them to take advantage of the existing corruption, at the expense of the United States. See Teachout, *Corruption in America*, 17–19.

111. U.S. Const. art. II, §1, cl. 6.

112. The concept of “fair market value” is useful here. Gross overpayment for a service in order to ensure some outcome or to establish a favorable relationship with the President would violate the Emoluments Clause. This type of transaction would violate both the spirit and the language of the clause. It would be a form of payment, not for the services rendered, but as a way of unjustly enriching the President.

113. U.S. Const. art. I, §6, cl. 2.