

The Constitution Trumps: What the Founders Have to Say About Presidential Businesses

By: Paige Wheeler

I. INTRODUCTION

When Donald J. Trump became the 45th President of the United States, he made an oath to “faithfully execute the office of the president of the United States, and to the best of [his] ability, preserve, protect and defend the Constitution of the United States.”¹ This oath to “preserve . . . the Constitution of the United States,”² however, could be challenged due to the appearance of President Trump’s continued receipt of income from foreign governments and some of the financial benefits through his many businesses abroad.³ Receiving such benefits through President Trump’s personal businesses potentially undermines the integrity of our nation’s highest office.⁴

II. THE EMOLUMENTS CLAUSE

America’s Founding Fathers and the Framers of our Constitution greatly feared foreign interference in the American political system and saw this as one of the nation’s gravest dangers.⁵ As history reveals, the United States, as a newly established government, was vulnerable to possible manipulation by great world powers, and it was common that foreign sovereigns and their agents tried to influence officials of the United States by giving them gifts, money, and other things of value.⁶ It was in response to this practice and the peril that it

¹ U.S. Const. art. II, § 1.

² U.S. Const. art. II, § 1.

³ Ron Fein, *If Discovered, He May Be Impeached: President Trump and the Foreign Emoluments Clause*. AMERICAN CONSTITUTION SOCIETY (Feb. 2, 2017), <https://www.acslaw.org/acsblog/“if-discovered-he-may-be-impeached”-president-trump-and-the-foreign-emoluments-clause>.

⁴ *Id.*

⁵ Norman L. Eisen, Richard Painter, and Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, GOVERNANCE STUDIES AT BROOKINGS (Dec. 16, 2016), <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/>.

⁶ *Id.*

represents, that the Framers included the Foreign Emoluments Clause of Article I, Section 9 (“the Clause”) in the Constitution.⁷

The Clause provides, “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.”⁸ The Clause expresses the insight of the Framers into the nature of the human condition that private financial interests could influence even the most honorable leaders and result in entanglements between American officials and foreign powers, posing a danger to the Republic.⁹

Legal scholars conclude the Clause was added to the Constitution out of concern that American ambassadors overseas could potentially be corrupted through receiving gifts from European powers.¹⁰ Issues surrounding the Clause have rarely come up throughout American history.¹¹ Two rare examples of issues pertaining to the Clause include (1) when Benjamin Franklin accepted a snuff box adorned with diamonds from the King of France and (2) when John Jay accepted a horse from the King of Spain.¹² Outside of these examples, the Clause has seldom been invoked and has never been the substance of a major court case.¹³ Further, the Clause has never been the issue of a case taken up by the U.S. Supreme Court, leaving the meaning of the clause ambiguous.¹⁴

⁷ *Id.*

⁸ U.S. Const. art. I, § 9, cl. 8.

⁹ Norman L. Eisen, *supra* note 5.

¹⁰ Allison Michaels, *Do President Trump’s Business Conflicts Violate the Constitution?* THE WASHINGTON POST (Feb. 24, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/02/24/do-president-trumps-business-conflicts-violate-the-constitution/?utm_term=.16451ca0de9f.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

A. Interpretation of the Emoluments Clause

As recent as 2009, the Department of Justice Office of Legal Counsel (OLC) has affirmatively answered the question of whether or not the Clause applies to the President of the United States.¹⁵ When asked if the Clause applied to President Obama receiving the Nobel Peace Prize, the OLC answered, “The President surely ‘hold[s] an[] Office of Profit or Trust.’”¹⁶ The view that the Clause applied to the President is consistent with established OLC precedent and is the only position supported by the text of the Constitution, which continually refers to the President as holding an “Office.”¹⁷ Thus, looking at the Constitution as a whole, it is obvious that referencing “any Office of Profit or Trust” in the Clause refers to the President.¹⁸ Further, the Office of the President is “under the United States,” because the President is unmistakably a federal officeholder rather than a state officeholder.¹⁹

Past centuries of Executive Branch interpretation and practice expose a consistent understanding that the Clause applies to the President.²⁰ In addition, Congress has acted in accordance with the position that the Clause applies to the President. This is evidenced by Congressional approval or disapproval of problematic transactions, typically gifts, between presidents and foreign powers.²¹ For example, when Simon Bolivar presented President Andrew Jackson with a gold medal, President Jackson asked Congress’s permission to keep it, and

¹⁵ Eisen, *supra* note 5, at 7.

¹⁶ *Id.* (quoting David J. Barron, *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, 4 (2009)).

¹⁷ Eisen, *supra* note 5, at 7-8.

¹⁸ *Id.* at 8.; U.S. Const. art. I, § 9, cl. 8.

¹⁹ Eisen, *supra* note 5, at 8.

²⁰ *Id.* at 9.

²¹ *Id.*

Congress said no.²² Presidents John Tyler and Martin Van Buren similarly asked for Congressional approval when offered gifts from foreign leaders.²³

Recently, a study revealed “[e]very president in the past four decades has taken personal holdings he had before being elected and put them in a blind trust in which the assets were controlled by an independent party” in order to avoid conflicts, including those involving the Emoluments Clause.²⁴ Thus, many factors point to the conclusion that the Emoluments Clause undoubtedly applies to the President of the United States.²⁵

The term “Emolument” is given broad construction by its specific reference to “any kind whatever.”²⁶ In the 1790s, the term emolument was understood to encompass anything conferring a possible benefit or advantage, whether the result of money, objects, titles, offices, or other items of some economic value.²⁷ Thus, “everything about the Clause militates in favor of giving the broadest possible construction to the payments it encompasses.”²⁸ Therefore, the Clause extends to any situation in which a federal officeholder receives money, items of value, or services from a foreign state.²⁹ Although many may argue that payment for services rendered is not a gift, and therefore is not in violation of the Clause, the clause could cover fair market transactions that result in economic profit or similar benefit to the individual federal officeholder.³⁰ On the other hand, a president asking permission for every stock purchase

²² *Id.*

²³ *Id.* at 9-10.

²⁴ Michael D. Shear and Eric Lipton, *Ethics Office Praises Donald Trump for a Move He Hasn't Committed to*, THE NEW YORK TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/us/politics/donald-trump-business-president-elect.html>; Eisen, *supra* note 5, at 10.

²⁵ Eisen, *supra* note 5, at 9-10.

²⁶ *Id.* at 11.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

because the company has foreign citizen shareholders or officers in untenable. In that case, even 401(k) allocations would be suspect.

What qualifies as a “King, prince, or foreign State,” as defined in the Emoluments Clause is answered by OLC precedent addressing this question.³¹ The factors considered when determining whether an actor qualifies as a “foreign State” include: (1) whether a foreign government has an active role in the management of the decision-making entity; (2) whether the foreign government makes the ultimate decision regarding the gift or emolument; and (3) whether a foreign government is a substantial source of funding for the entity.³² Aside from these formal factors of analysis, the most commonsense approach to understanding questions surrounding the Clause was explained by then-Deputy Assistant Attorney General, Samuel A. Alito, Jr.³³ In 1986, Alito explained, “[t]he answer to the Emoluments Clause question . . . must depend [on] whether the consultancy would raise the kind of concern (*viz.*, the potential for ‘corruption and foreign influence’) that motivated the Framers in enacting the constitutional prohibition.”³⁴ Further, the OLC determined that corporations which are owned or in any way controlled by foreign governments are presumed to be foreign states under the Clause.³⁵ Companies owned by foreign citizens are excluded under this analysis.

III. TRUMP’S BUSINESS ABROAD

Reflecting on our nation’s previous leaders, no other president presents as many conflict

³¹ *Id.* at 12.

³² Memorandum Opinion for the Assistant General Counsel, Department of Commerce, from Daniel L. Kofofsky, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development*, 34 Op. O.L.C. 1, 3 (2010) (citations omitted).

³³ Eisen, *supra* note 5, at 12.

³⁴ *Id.* (quoting Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales* at 4-5 (May 23, 1986)).

³⁵ Eisen, *supra* note 5, at 13.

of interest questions in foreign entanglements than President Donald J. Trump.³⁶ President Trump is the leader of a vast business empire, his business interests are global in scope, and he will steadily receive monetary benefits from foreign powers and their agents by virtue of his continued interest in the Trump Organization.³⁷ As a result of these dealings, President Trump may not solely be guided by the interests of the United States, but also by the business interests of the organization that shares his name.³⁸ It is this sort of blurred loyalty that the foreign emoluments clause seeks to eliminate.³⁹

Although it is possible that many transactions between foreign governments and the Trump Organization would not involve any actual impropriety, “it is [a] virtual certainty that many would create the risk of divided or blurred loyalties that the Clause was enacted to prohibit.”⁴⁰ President Trump has placed himself in a compromising position. Many Americans will worry that his foreign business interests could translate to adverse trade deals or other domestic or foreign policies.⁴¹ Even worse, foreign interests could result in American soldiers being deployed on foreign soil, given the President’s expeditionary powers.⁴² There will likely be no way to know or check if any presidential decision is the result of sound judgment or, potentially, the result of business interests.

President Trump has continually insisted that because he no longer manages his businesses directly, he is in no way in violation of the Clause.⁴³ Even though President Trump

³⁶ Eisen, *supra* note 5, at 2.

³⁷ *Id.*

³⁸ Joshua Matz & Lawrence H. Tribe, *President Trump Has No Defense Under the Foreign Emoluments Clause*, ACSLAW.ORG, (last visited July 26, 2017), <https://www.acslaw.org/sites/default/files/pdf/Trump%20and%20the%20Emoluments%20Clause.pdf>.

³⁹ *Id.*

⁴⁰ Eisen, *supra* note 5, at 13.

⁴¹ Matz, *supra* note 38.

⁴² *Id.*

⁴³ The Editorial Board, *Donald Trump’s Tangled Web*, THE NEW YORK TIMES, (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/opinion/what-trump-can-do-to-eliminate-his-conflicts-of-interest.html>.

has handed over control of the Trump Organization and the more than 500 limited liability companies through which he owns his assets to his three adult children, he has not dissociated from his businesses.⁴⁴ His children, Donald Jr., Eric, and Ivanka, control the Trump organization, but they do not act independent of him.⁴⁵ His children were part of the transition team, which demonstrates their close affiliation with their father in his role as the President.⁴⁶ Trump has created little separation between himself and his businesses. As a result, foreign business dealings are likely to have a continued effect on President Trump. His family has continued to be involved in both foreign business deals to develop real estate projects or license his brand.⁴⁷

President Trump is ultimately still aware of the existence of his business interests and how his actions as the President could help or hinder those interests.⁴⁸ Thus, it may be very hard for the President to untangle his private interests in the Trump Organization and his public role.⁴⁹

V. COULD A VIOLATION OF THE EMOLUMENTS CLAUSE BE GROUNDS FOR IMPEACHMENT?

The Emoluments Clause cannot be accurately understood without referencing the specific historical experiences and political principles that caused the Framers to support and uphold it.⁵⁰ There is strong evidence that violating the Clause is grounds for impeachment, which was first discussed by the Framers.⁵¹ In July of 1787, at the Constitutional Convention, Gouverneur Morris of Pennsylvania, the “Penman of the Constitution,” observed that “no one would say that we ought to expose ourselves to the danger of seeing the first magistrate [the president] in foreign pay, without being able to guard against it by displacing him.” Some of the Framers

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Eisen, *supra* note 5, at 4.

⁵¹ Fein, *supra* note 3.

viewed the Emoluments Clause as a broad anti-corruption measure.⁵² For example, at the Virginia Ratifying Convention in June of 1788, Edmund Jennings Randolph described the Emoluments Clause as grounds for impeachment of the President:

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 four years . . . I consider, therefore, that he is restrained from receiving any present of emoluments whatever. It is impossible to guard better against corruption.⁵³

A violation of the Emoluments Clause giving cause for impeachment is also consistent with the views of other Framers.⁵⁴ Alexander Hamilton described impeachable offenses as resulting from “the misconduct of public men, or . . . the abuse or violation of some public trust.”⁵⁵ James Iredell of North Carolina, a future Supreme Court Justice, labeled impeachable conduct as including occasions where the president “acted from some corrupt motive,” and provided an example of a president receiving “a bribe . . . from a foreign power, and under the influence of that bribe . . . [getting Senate] consent to a pernicious treaty,”⁵⁶ thus clearly referring to the Clause.

Some scholars argue President Trump is in violation of the Emoluments Clause and subject to possible impeachment as a result, but others argue that President Trump’s actions do not rise to the level of a Constitutional violation.⁵⁷ Because of the current issues with President Trump, the exact meaning of the text of the Clause is under scrutiny and its application to the current president is up for debate. While many scholars argue that the Emoluments Clause

⁵² Eisen, *supra* note 5, at 5.

⁵³ *Id.* at 13; Davd Robertson, *Debates and other Proceeding of the Convention of Virginia*, JOHN ADAMS LIBRARY AT THE BOSTON PUBLIC LIBRARY (June 2, 1788), <https://archive.org/details/debatesotherproc00virg>.

⁵⁴ Fein, *supra* note 3.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Dan McLaughlin, *Following up on the Foreign Emoluments Clause and Gerrymandering*, NATIONAL REVIEW, (Feb. 18, 2017), <http://www.nationalreview.com/corner/445053/no-trumps-business-doesnt-violate-emoluments-clause>.

should be applicable to President Trump's business empire, there are those who argue that President Trump is not in violation of the Clause or that it does not apply in the present situation.⁵⁸ Those in opposition to the application of the Clause assert that the Clause should be interpreted narrowly.⁵⁹

V. CONCLUSION

When Donald J. Trump became the President of the United States, many were quick to point out the possibility of conflicts of interests that may arise due to the President's remaining ties to the Trump Organization's immense global business dealings. In immediate opposition to his presidency, many legal scholars were quick to point to his flaws that would make him unfit to be President of the United States. The Clause and its relation to President Trump's remaining ties with his business empire is a strong legal argument, one that could be tested in the near future as a result of three lawsuits being brought against the current president.⁶⁰ Thus, the modern day interpretation and application of the Emoluments Clause is yet to be determined.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Gretchen Frazee, *How the Emoluments Clause is Being used to sue Trump* PBS, (June 22, 2017) <http://www.pbs.org/newshour/updates/emoluments-clause-used-sue-trump/>.