

# Enforcing the Anti-Corruption Provisions of the Constitution

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*The United States currently has a President who, unlike those who came before him, refuses to extract himself from extensive business entanglements at home and abroad. Those entanglements violate the Emoluments Clauses of the Constitution. They also pose serious threats to the integrity of our democracy. This Article briefly lays out the legal argument for why the President's actions violate the Constitution. It also demonstrates that these clauses are judicially enforceable, and the states are well-positioned to enforce them. While the lawsuit brought by the D.C. Attorney General's Office, alongside the Maryland Attorney General's Office, against the President clearly articulates how the President is violating the law, this Article seeks to excavate the norms and principles that the laws protects and why their violation threatens our system of government.*

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“[The President] can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.”

—Alexander Hamilton<sup>1</sup>

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<sup>1</sup> THE FEDERALIST NO. 73 (Alexander Hamilton).

## INTRODUCTION

The United States of America faces a situation unprecedented in the history of our country but powerfully and presciently anticipated by the Framers of our Constitution. A sitting President refuses to give up far-reaching business entanglements that allow him to receive profits from foreign and domestic governments—profits that may influence his actions as President and divide his loyalty. Despite centuries of precedent whereby Presidents and other office holders took pains to avoid these conflicts, President Donald J. Trump has taken no such precautions; in fact, he has boasted about his receipt of profits from governments and that he “like[s] them very much.”<sup>2</sup> These actions leave the American people to wonder whom the President serves: his people or his own interests.

Thanks to the foresight of the founding generation, though, the American people have recourse. Our founding document, the Constitution, provides the roadmap. Twin clauses of the Constitution were written to prevent precisely this kind of undue influence and ensure faithful service to the American people. The Foreign Emoluments Clause prohibits any “Person holding any Office of Profit or Trust” from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state” without “the Consent of Congress.”<sup>3</sup> In the Domestic Emoluments Clause, the Constitution turns its gaze inward, allowing the President a salary but otherwise preventing him from “receiv[ing] . . . any other Emolument from the United States, or any of them” during his presidency.<sup>4</sup> Together, these provisions focus the President on his oath to “faithfully execute” his office and “preserve, protect and defend the Constitution of the United States”<sup>5</sup> free from monetary self-interest or other improper outside influence.

Our office, the Attorney General’s Office for the District of Columbia, alongside the Maryland Attorney General’s Office, have sued to enforce these two original anti-corruption provisions in the Constitution. As we have successfully argued,<sup>6</sup> constitutionally prohibited “emoluments” include any profit, gain, or advantage, including those gleaned from market rate transactions. President Trump’s failure to divest from his extensive business interests at home and abroad constitutes a violation of the Constitution’s Emoluments Clauses. Furthermore, despite President Trump’s insistence otherwise, these clauses are judicially enforceable, and the states—especially

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<sup>2</sup> Stephen Rex Brown, *Donald Trump made millions from Saudi Arabia, but trashes Hillary Clinton for Saudi donations to the Clinton Foundation*, N.Y. DAILY NEWS (Sept. 4, 2016, 4:00 AM), <http://www.nydailynews.com/news/politics/exclusive-donald-trump-made-millions-saudi-government-article-1.2777211> [<https://perma.cc/HT5C-GV42>].

<sup>3</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>4</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>5</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>6</sup> *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (holding that plaintiffs have stated a claim and denying the President’s motion to dismiss).

Maryland and the District of Columbia—are well-positioned to enforce them.

This Article touches on the legal arguments that we make in our lawsuit, but the emphasis of the Article is on what is at stake: the nature of the threat to the independence and legitimacy of the presidency today; the parallel historical concerns animating the Founders when they wrote these clauses; and the importance of there being a judicial enforcement mechanism in order to secure that independence. In other words, while our lawsuit clearly articulates how the President is violating the law, this Article seeks to excavate the norms and principles that the law protects and why their violation threatens our system of government.

This Article proceeds in three parts. Part I describes our President's extensive business entanglements and the threat they pose to our democracy today. Part II traces the deep historical roots of the concerns about corruption at our country's founding, and how that history informs how we must read the Emoluments Clauses today—as broad, prophylactic rules against corruption. Part III addresses why the Emoluments Clauses must be enforceable by the courts, and it demonstrates that the states are uniquely situated to enforce these anti-corruption provisions.

Our lawsuit seeks to enforce the lines drawn by the Emoluments Clauses. Our Founders had the foresight to be deeply concerned about the opportunities for governments, foreign and domestic, to exert undue influence on the President through appeal to his private interests. Nothing less than the loyalty of our leadership is at stake.

### I. ALL THE PRESIDENT'S EMOLUMENTS

In an unprecedented turn of events, we currently have a sitting President who refuses to give up his ownership interest in a global business empire that bears his name. That business puts him in dealings with a far-flung collection of domestic and foreign government officials, and the limited details we know of those dealings call into significant question the President's fidelity to his public duty above his private gain. In statements and apparent deeds, the President has acknowledged that he can, and might, profit from the presidency. This untenable situation puts American policy at the service of private interests, puts all comers before the President in a position of having to decide whether or not to participate in this corrosive scheme, and undermines the legitimacy of our public institutions.

Because President Trump has refused to extricate himself from his domestic and international business entanglements, he is receiving emoluments that could compromise his loyalty to the national interest in favor of his own bottom line. For starters, foreign officials and government entities regularly purchase rooms, event space, and services at Trump hotels. For example, the Kuwaiti government moved a major event previously scheduled to be at the Four Seasons in the District of Columbia to the Trump International Hotel

shortly after the election.<sup>7</sup> And the government of Saudi Arabia spent more than \$270,000 at the Trump International Hotel between November, 2016 and February, 2017, at the same time that they were lobbying to roll back a law that allows survivors of victims of the September 11th terrorist attacks to sue Saudi Arabia.<sup>8</sup> Indeed, profits at the Trump International Hotel have wildly exceeded expectations: the hotel made \$1.97 million in the first four months of the presidential term, in contrast to the \$2.1 million loss the hotel itself projected.<sup>9</sup> One foreign diplomat has made a statement that suggests an answer for the remarkable rise: “Why wouldn’t I stay at [the President’s] hotel blocks from the White House, so I can tell the new president, ‘I love your new hotel!’ Isn’t it rude to come to his city and say, ‘I am staying at your competitor?’”<sup>10</sup> That is to say, foreign diplomats are actively seeking to do business at the Trump International Hotel in order to curry favor with the President. Meanwhile, the President in his former and current lives has made his appreciation clear. Of Saudi Arabia, he has said, for instance, “I get along great with all of them. They buy apartments from me. . . They spend \$40 million, \$50 million. Am I supposed to dislike them? I like them very much.”<sup>11</sup>

Questionable hotel patrons are not limited to foreign governments; President Trump is also receiving emoluments from domestic governments.

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<sup>7</sup> See Jackie Northam, *Kuwait Celebration At Trump Hotel Raises Conflict Of Interest Questions*, NPR (Feb. 25, 2017, 6:33 AM), <https://www.npr.org/sections/parallels/2017/02/25/517039323/kuwait-celebration-at-trump-hotel-raises-conflict-of-interest-questions> [https://perma.cc/V7B3-FJDK].

<sup>8</sup> See Byron Tau & Rebecca Ballhaus, *Trump Hotel Received \$270,000 From Lobbying Campaign Tied to Saudis: Gulf kingdom opposes law that lets Americans sue foreign countries over terrorist attacks*, WALL ST. J. (June 6, 2017, 7:53 AM), <https://www.wsj.com/articles/trump-hotel-received-270-000-from-lobbying-campaign-tied-to-saudis-1496700739> [https://perma.cc/BU4D-J482]. Saudi Arabia is implicated in more than one instance of significant payments to the Trump empire. The Trump International Hotel in Manhattan put up an impressive 13% increase in profits in the first quarter of 2018, thanks in large part to a visit from a large set of travelers accompanying the Crown Prince. Reporting has been unable to uncover whether any of the payments from those rooms came from the government of Saudi Arabia, which only points to a larger problem: The opacity of the President’s business dealings, and the public’s inability to understand who might be influencing the President. See David A. Fahrenthold & Jonathan O’Connell, *At President Trump’s hotel in New York, revenue went up this spring — thanks to a visit from big-spending Saudis*, WASH. POST (Aug. 3, 2018), [https://www.washingtonpost.com/politics/at-president-trumps-hotel-in-new-york-revenue-went-up-this-spring—thanks-to-a-visit-from-big-spending-saudis/2018/08/03/58755392-9112-11e8-bcd5-9d911c784c38\\_story.html?utm\\_term=.F8e67aa910a2](https://www.washingtonpost.com/politics/at-president-trumps-hotel-in-new-york-revenue-went-up-this-spring—thanks-to-a-visit-from-big-spending-saudis/2018/08/03/58755392-9112-11e8-bcd5-9d911c784c38_story.html?utm_term=.F8e67aa910a2) [https://perma.cc/T8ZW-JRPN].

<sup>9</sup> See Jonathan O’Connell, *Trump D.C. hotel turns \$2 million profit in four months*, WASH. POST (Aug. 10, 2017), [https://www.washingtonpost.com/politics/trump-dc-hotel-turns-2-million-profit-in-four-months/2017/08/10/23bd97f0-7e02-11e7-9d08-b79f191668ed\\_story.html?utm\\_term=.74bf26afd775](https://www.washingtonpost.com/politics/trump-dc-hotel-turns-2-million-profit-in-four-months/2017/08/10/23bd97f0-7e02-11e7-9d08-b79f191668ed_story.html?utm_term=.74bf26afd775) [https://perma.cc/Z7EZ-XHSU].

In addition, the average rate for rooms at the Trump International Hotel beat the hotel’s own expectations by 57%, to the point where they may now be the most expensive rooms in town. See *id.*

<sup>10</sup> Jonathan O’Connell & Mary Jordan, *For foreign diplomats, Trump hotel is place to be*, WASH. POST (Nov. 18, 2016), [https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35\\_story.html?utm\\_term=.74e2ef91fb83](https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.74e2ef91fb83) [https://perma.cc/88AK-DTVX].

<sup>11</sup> Brown, *supra* note 2.

For instance, last year Maine Governor Paul LePage drew media scrutiny for his use of taxpayer funds at the Trump International Hotel when attending White House meetings. The Portland Press Herald found that the hotel expenses for LePage's security team alone totaled \$2,250, including \$40 breakfasts. LePage's spokesman defended the expenditures, telling the newspaper that the governor was meeting with federal officials "in an effort to benefit the Maine people."<sup>12</sup> This is precisely the problem: that government officials may be spending funds at the Trump International Hotel in order to influence the President and advance their causes.

These descriptions of happenings at the Trump International Hotel in Washington, D.C. are only a small slice of the concerning conduct in which the President has engaged. From federal and local government entities spending money at Trump properties,<sup>13</sup> to the State Department advertising for Trump properties,<sup>14</sup> to government concessions and permissions granted to the Trump Organization,<sup>15</sup> to the myriad other examples<sup>16</sup> of actions taken by foreign and domestic governments to the benefit of the Trump Organization, a distinct impression is created that these activities are specifically to benefit President Trump's vast global business empire—and President Trump himself. If his private business interests are winning, it is the American people who are losing: losing a faithful public servant, and losing out on substantive policies that are in the best interest of the country.

Past Presidents have recognized that the financial investments they hold before office can cause conflicts of interest, and they have taken steps to avoid such conflicts. Presidents going back as far as Dwight D. Eisenhower have used blind trusts—in which an independent financial manager oversees assets without the owner's involvement—as a way to separate themselves from knowledge of their financial interests that might actually influence or

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<sup>12</sup> Kevin Miller & Scott Thistle, *Luxury hotels, fine dining for LePage on taxpayers' dime*, PORTLAND PRESS HERALD (July 23, 2017), <https://www.pressherald.com/2017/07/23/luxury-hotels-fine-dining-for-lepage-on-taxpayers-dime-records-review-show-lepage-administration-spent-35000-on-d-c-trips/> [<https://perma.cc/G5VV-ZTPV>].

<sup>13</sup> See Derek Kravitz, Alex Mierjeski & Gabriel Sandoval, *We've Found \$16.1 Million in Political and Taxpayer Spending at Trump Properties*, PROPUBLICA (June 27, 2018, 6:00 AM), <https://www.propublica.org/article/political-and-taxpayer-spending-at-trump-properties-16-1-million> [<https://perma.cc/Z7CG-RZ7L>] (finding \$400,000 in such spending but noting that "[t]he state and local tally appears to be a gross undercount because of the agencies' spotty disclosures and reporting").

<sup>14</sup> See, e.g., Darren Samuelsohn, *State Department, U.S. embassies promoted Trump's Mar-a-Lago*, POLITICO (Apr. 24, 2017, 3:50 PM), <https://www.politico.com/story/2017/04/24/state-department-us-embassy-mar-a-lago-237537> [<https://perma.cc/644B-9KSF>].

<sup>15</sup> See, e.g., Michael LaForgia & Steve Eder, *When that Feisty Neighbor Becomes the President*, N.Y. TIMES (May 6, 2017), <https://www.nytimes.com/2017/05/06/us/politics/donald-trump-mar-a-lago.html> [<https://perma.cc/2A5M-X8JX>].

<sup>16</sup> See, e.g., CITIZENS FOR ETHICS AND RESPONSIBILITY IN WASHINGTON, PROFITING FROM THE PRESIDENCY: A YEAR'S WORTH OF PRESIDENT TRUMP'S CONFLICTS OF INTERESTS (Jan. 2018), <https://www.citizensforethics.org/profitfromthepresidency/> [<https://perma.cc/PV8M-G3EZ>].

be seen as influencing their policy decisions.<sup>17</sup> Others, like Barack Obama, have only held investments that, by their nature, do not exert direct influence in favor of or against particular presidential actions.<sup>18</sup>

The danger, and indeed, illegality of President Trump's actions and the steps his predecessors have taken have been made clear to the President, but to no avail. President Trump continues to have intimate knowledge of his business holdings. Though he turned control of his businesses over to his sons, he retains significant ownership, and he apparently receives regular financial reports.<sup>19</sup> And although he has promised to turn all profits from foreign entities over to the United States Treasury in order to avoid the appearance of a conflict of interest, there is no transparency in the way those payments are calculated and no way to ensure that they are accurate.<sup>20</sup> And President Trump has taken no action whatsoever to account for the domestic emoluments he has received.<sup>21</sup>

This cloud over the presidency is making a difference in the minds of Americans. Transparency International, a nonprofit recognized for globally tracking corruption and the perception of corruption, found stark increases in the perception of corruption among Americans between fall 2016 and fall 2017.<sup>22</sup> Of all the government institutions asked about, the Office of the President was found to be considered the most corrupt, and that perception is on the rise: 44% of respondents perceive the White House as corrupt, up from 36% the year before.<sup>23</sup> And almost 70% of Americans believe the government is failing to fight corruption, up from just over 50% the year before.<sup>24</sup> What these numbers tell us is that an increasing number of Americans no longer believe that their government is working for them or that their office holders have the public interest at heart. Over the long term, that loss of faith can turn to lack of participation and can corrode the vitality of our political system. Our Founders knew the dangers of undue influence on the presidency. That is why they provided against it.

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<sup>17</sup> Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2218 n.162 (2018).

<sup>18</sup> *Id.*

<sup>19</sup> See Dan Alexander, *After Promising Not To Talk Business With Father, Eric Trump Says He'll Give Him Financial Reports*, FORBES (Mar. 24, 2017, 9:00AM), <https://www.forbes.com/sites/danalexander/2017/03/24/after-promising-not-donald-talk-business-with-father-eric-trump-says-president-give-him-financial-reports/#337e50d7359a> [<https://perma.cc/CLD4-WZDQ>].

<sup>20</sup> See David A. Fahrenthold, *President Trump's company reveals how much foreign profit it donated to the U.S. Treasury: \$151,470*, WASH. POST (Mar 9, 2018), [https://www.washingtonpost.com/news/post-politics/wp/2018/03/06/the-presidents-company-wont-say-how-much-money-it-made-in-foreign-profits-last-year-have-you-got-a-guess/?utm\\_term=.98ea58bcaca](https://www.washingtonpost.com/news/post-politics/wp/2018/03/06/the-presidents-company-wont-say-how-much-money-it-made-in-foreign-profits-last-year-have-you-got-a-guess/?utm_term=.98ea58bcaca) [<https://perma.cc/TSN8-6FRR>].

<sup>21</sup> *Id.*

<sup>22</sup> *Corruption in the USA: The Difference a Year Makes*, TRANSPARENCY INT'L (Dec. 12, 2017), [https://www.transparency.org/news/feature/corruption\\_in\\_the\\_usa\\_the\\_difference\\_a\\_year\\_makes](https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes) [<https://perma.cc/R4QV-EHRK>].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## II. A HISTORY OF GUARDING AGAINST EMOLUMENTS

We have argued—and a federal judge has agreed—that the text of the Constitution is clear: “emoluments” prohibited by the Constitution include any profit, gain, or advantage, including those gleaned from market rate transactions like the ones President Trump amasses through his prodigious business dealings domestically and abroad.<sup>25</sup> The Foreign and Domestic Emoluments Clauses thus prevent the President from receiving any such benefits. That reading, as is spelled out in detail in the judicial order denying the President’s motion to dismiss, is supported by the lion’s share of dictionaries from the Founding era,<sup>26</sup> specialized legal and economic treatises of the era,<sup>27</sup> and use by members of the founding generation themselves.<sup>28</sup> It is also supported by the surrounding, sweeping text of both clauses.<sup>29</sup> The Foreign Emoluments Clause bars the President from accepting “any” emoluments and other enumerated benefits “of any kind whatever”—text that the Department of Justice’s Office of Legal Counsel has called an “absolute prohibition”<sup>30</sup> that is “both sweeping and unqualified.”<sup>31</sup> The Domestic Emoluments Clause likewise bars the President from taking “any other Emolument” from federal or state government outside his salary.<sup>32</sup>

Note what this broad language *does not* include: any requirement of a corresponding action by the President. This is not a prohibition on quid pro quo corruption or bribery only. It bars him from receiving payments and benefits from governments *at all*. That type of bar recognizes that the very act of accepting benefits from governments may influence the President in impermissible ways, and it serves as a prophylactic rule against both actual and apparent corruption, both corrosive to democracy.

A close examination of the history of the Emoluments Clauses gives life to the concerns that animated the Founders, as do the decades of interpretation by the political branches of government that relied on the Framers’

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<sup>25</sup> The Court ruled that “that the term ‘emolument’ in both Clauses extends to any profit, gain, or advantage, of more than *de minimis* value, received by him, directly or indirectly, from foreign, the federal, or domestic governments. This includes profits from private transactions, even those involving services given at fair market value.” *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 904 (D. Md. 2018).

<sup>26</sup> *Id.* at 891.

<sup>27</sup> *Id.* at 892–93.

<sup>28</sup> *Id.* at 893–95.

<sup>29</sup> *Id.* at 887–88.

<sup>30</sup> Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 17 (1994).

<sup>31</sup> Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114, 121 (1993) (citing 49 Comp. Gen. 819, 821 (1970)).

<sup>32</sup> U.S. CONST. art. II, § 1, cl. 7. The President has argued in our lawsuit that this reading of the term “emolument” would make the term “present” redundant. Far from it. As has been articulated in this case, the term “present” at the Founding referred to the specific practice of European heads of state giving gifts as a part of foreign affairs; “emolument” captures broadly “all types of financial transactions—solicited or unsolicited, reciprocated or unreciprocated, official or private.” *District of Columbia*, 315 F. Supp. 3d at 888–89.

broad purposes to interpret the clauses. Matching those concerns against the President's actions today paints a striking picture of a leader who is flagrantly transgressing the boundaries the Framers gave us.

At the Founding, a myriad of interests other than the national one pulled at our public figures. The Founders of our fledgling democracy feared the undue influence of the more powerful European countries looking to advance their own goals.<sup>33</sup> In addition, our first attempt at a federal government under the Articles of Confederation dissolved in large part due to the factious nature of the states' different interests, and to those states putting their own interests ahead of the whole.<sup>34</sup> No less then than today, democracy required vigilance against undue influence by those outside interests at home and abroad in order to be preserved and to flourish.

Political corruption specifically was a core concern at the birth of our country, both as a motivating factor in the break with Great Britain<sup>35</sup> and as a consideration in how to set up a republic that would endure.<sup>36</sup> James Madison recorded "corruption" in his notes from the Constitutional Convention no less than 54 times—more than factions, violence, or instability.<sup>37</sup> As Charles Cotesworth Pinckney, the delegate credited with introducing the Foreign Emoluments Clause, put it, the Founders wanted to make sure that "corruption was more effectually guarded against, in the manner this government was constituted, than in any other that had ever been formed."<sup>38</sup> In drafting both the Foreign and Domestic Emoluments Clauses, the Founders contemplated the real political corruption they saw corroding the governments that surrounded them domestically and abroad, and considered how to write broad, prophylactic rules to guard against that corrosion.

The Articles of Confederation, and later the Constitution, were written against a backdrop of European corruption from which the newly minted Americans wished to make a clean break. Notorious incidents of foreign corruption played into the Founders' thinking as they imagined what provisions were necessary to safeguard their young republic. In particular, the Founders noted two seventeenth century incidents of outright bribery, in

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<sup>33</sup> See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 353 (2009) [hereinafter *The Anti-Corruption Principle*]; ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 18 (2014) [hereinafter CORRUPTION IN AMERICA].

<sup>34</sup> See generally GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION (2017) (describing state and regional infighting over issues like trade and western expansion as key reasons for the failure of the Articles of Confederation).

<sup>35</sup> BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION xiii (enlarged ed. 1992).

<sup>36</sup> See *The Anti-Corruption Principle*, *supra* note 33, at 347.

<sup>37</sup> See *id.* at 352–53, 352 n.49 (2009) (citing Notes of James Madison (June 23, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *passim*; Notes of Robert Yates (June 23, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *passim*).

<sup>38</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 302 (Jonathan Elliot ed., 1836).

which Louis XIV paid Charles II and later James II for strategic alliances in foreign affairs.<sup>39</sup> For example, Charles Coteworth Pinckney, speaking at the South Carolina Ratification Convention, noted the bribe of “Charles II., who sold Dunkirk to Louis XIV.”<sup>40</sup>

But the Founders’ concerns were not limited to outright bribery. In Europe at the time, there was a known practice, spoken of during the constitutional debates, of heads of state giving gifts at moments of foreign diplomacy. The French, in particular, had a practice of giving *présents du roi* or *présents du conge* at key diplomatic moments—indeed, the practice engendered some of the United States’ earliest emoluments clause incidents.<sup>41</sup> As one delegate put the problem during the Virginia debates,

A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.<sup>42</sup>

Thus, when the Founders looked about for the real-world situations their President and other officials would face, they found themselves concerned not only with outright bribery, but also with exchanges suggesting influence, or the *potential* to corrupt, and with the *perception* that America’s public office holders were motivated by anything other than the public good.

The Americans were not alone in their concern. They may have looked to an extant Dutch rule adopted in the seventeenth century, prohibiting foreign ministers from taking “any presents, directly or indirectly, in any man-

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<sup>39</sup> GEORGE CLARK, *THE LATER STUARTS: 1660–1714*, at 86–87, 130 (2d ed. 1956); see BARRY COWARD, *THE STUART AGE* 262–65, 267, 274–75 (1980).

<sup>40</sup> *DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 38, at 264. Numerous others noted concern for the same incidents. Gouveneur Morris remarked that even a king, who “[o]ne would think . . . well secured agst. Bribery . . . was bribed by Louis XIV.” 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 68–69 (Max Farrand ed., rev. ed. 1966). Early commentators noted the same. See, e.g., ST. GEORGE TUCKER, 1 *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 295 (1803) (“In the reign of Charles the second of England, that prince, and almost all of his officers of state were either actual pensioners of the court of France, or supposed to be under its influence, directly, or indirectly, from that cause. The reign of that monarch has been, accordingly proverbially disgraceful to his memory.”); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 120 (2d ed. 1829) (“[I]t is now known that in England a profligate prince [Charles II] and many of his venal courtiers were bribed into measures injurious to the nation by the gold of Louis XIV.”).

<sup>41</sup> *CORRUPTION IN AMERICA*, *supra* note 33, at 19–20; see also *infra* notes 68–70 and accompanying text.

<sup>42</sup> *The Anti-Corruption Principle*, *supra* note 33, at 362 (citing DAVID ROBERTSON, *DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION IN VIRGINIA* 331–32 (2d ed. 1805) (1788) (recording the statement of Governor Edmund Randolph)).

ner or way whatever.”<sup>43</sup> They wrote a similarly strict rule into the Articles of Confederation, which lacked the exception for Congress’s consent.<sup>44</sup> In the years between the Articles of Confederation and the Constitution, a practice developed whereby officials came to Congress with gifts that were awkward to turn away.<sup>45</sup> And so the exception allowing for Congress’s consent was created, and the Foreign Emoluments Clause was enshrined in the U.S. Constitution.

Foreign corruption was not the only concern at the Founding. Corruption from within was also prevalent in the minds of the Founders. They had watched as Great Britain, a great experiment in good governance, had fallen prey to the parochial interests of the monarch and of wealth-seeking individuals by way of payments and gifts of offices and titles.<sup>46</sup> Indeed, they went so far as to consistently compare Britain with Rome, lamenting the descent of a well-designed government into corruption.<sup>47</sup> They also looked to the corruption in their own state legislatures and the Continental Congress as cautionary tales as they tried to create the right structure for their new government.<sup>48</sup> For the period between the institution of the Articles of Confederation and the Constitutional Convention, the federal and state governments were awash with commercial transactions that blurred the lines between public finance and private profit, pointing to the need for clear guidelines to separate public office from private gain.<sup>49</sup>

So came the Domestic Emoluments Clause, preventing the President from receiving “any other Emolument” besides his salary “from the United States, or any of them.” In explaining the virtues of the clause, Alexander Hamilton wrote that the power over the President’s compensation would allow the legislature to “render him . . . obsequious to their will . . . either reduc[ing] him by famine, or tempt[ing] him by largesses, to surrender at

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<sup>43</sup> CORRUPTION IN AMERICA, *supra* note 33, at 20 (citing JOHN BASSETT MOORE & FRANCIS WHARTON, A DIGEST OF INTERNATIONAL LAW 579 (1906)).

<sup>44</sup> “[N]or 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.” ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 1.

<sup>45</sup> See *infra* notes 68–70.

<sup>46</sup> See CORRUPTION IN AMERICA, *supra* note 33, at 18; *The Anti-Corruption Principle*, *supra* note 33, at 349–50. See also James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 175 (1994).

<sup>47</sup> See CORRUPTION IN AMERICA, *supra* note 33, at 350.

<sup>48</sup> See *id.* at 348–49.

<sup>49</sup> Brief of Amici Curiae by Certain Legal Historians on Behalf of Plaintiffs at 14, n.41, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 17-1596). The example of Robert Morris is particularly notable: A merchant who helped supply the military while also holding public office, his conduct was routinely attacked by critics. As he put it in a letter to George Washington, others would have to determine “whether a sincere Regard to public Justice and public Interest or a sinister Respect to my own private Emolument were influential Motives of my Conduct.” *Id.* (citing Letter from Robert Morris to George Washington (May 23, 1783), in 8 THE PAPERS OF ROBERT MORRIS, 1781–1784, at 130–31 (E.J. Ferguson ed. 1995)). This exchange also serves as an example, discussed below, of the use of the word “emolument” at the time of the Founding to mean broadly a profit, gain or advantage.

discretion his judgment to their inclinations.”<sup>50</sup> The Domestic Emoluments Clause guards against this dangerous eventuality. By preventing legislative changes to the President’s salary and prohibiting federal and state governments from providing other benefits to him, the President’s independence and fidelity to the people could be preserved:

They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. — Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive any other emolument, than that which may have been determined by the first act. He can of course have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.<sup>51</sup>

This history—the Founders’ concern for a republic led by servants of the public good, and their construction of the Emoluments Clauses to help achieve that republic—points to a broad understanding of those clauses. The clauses are concerned not simply with direct bribery, but with improper influence, and with shoring up the public’s perception of their government as having integrity. The clauses are prophylactic, meant to guard against becoming the France, or Great Britain, or corrupt state legislature of their day.

The broad, prophylactic purpose of the clauses demonstrated by this history has been the starting point for government ethics officials and legal counselors as they have interpreted the Emoluments Clauses and applied them to the conduct of various officials. There exist decades of interpretation from the Department of Justice’s Office of Legal Counsel, the Government Accountability Office’s Comptroller General, and guidance from other parts of the government, including the Department of Defense.<sup>52</sup> Over and over from those sources, what we see is a reliance on the broad original purposes of the clauses, as well as their sweeping language, in determining how they apply to a specific set of facts. The analysis in those opinions hinges on the Framers’ concern for potential improper influence, not merely a narrow conception of bribery or quid pro quo corruption.

According to those sources, the clauses are concerned with “payments which have a *potential* of influencing or corrupting the integrity of the recipient.”<sup>53</sup> The Framers looked to bar, and modern interpretations should seek to snuff out, payments that could “be *construed* as being . . . received in consequence of [the officer’s] possession of the Presidency,” that could “sway” the President, and through which an entity “could ‘appeal to [the

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<sup>50</sup> THE FEDERALIST NO. 73 (Alexander Hamilton).

<sup>51</sup> *Id.*

<sup>52</sup> See Brief of Former Government Ethics Officers as Amici Curiae Supporting Plaintiffs at 1–2, *District of Columbia*, 315 F. Supp. 3d 875 (No. 17-1596) [hereinafter, Brief of Former Government Ethics Officers].

<sup>53</sup> *President Reagan’s Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 188 (1981) (emphasis added).

President's] avarice' by rewarding sympathetic actions."<sup>54</sup> The Foreign Emoluments Clause in particular must be read to be "directed against every possible kind of influence by foreign governments."<sup>55</sup>

"Every possible kind of influence" includes payments that are mediated through a commercial transaction or corporate entity. This is an unsurprising result, given that the clauses have been applied broadly to serve their intended purposes. So, for instance, the Office of Congressional Ethics has concluded that receiving proceeds from a rental property rented to a foreign government violates the Foreign Emoluments Clause because there is "no exception" for "profit from a fair market value commercial transaction."<sup>56</sup> The Office of Legal Counsel likewise concluded that government officers who are at the same time partners in a law firm and who receive a "proportionate share" of the profits derived from those services, violate the Foreign Emoluments Clause because "the partnership would in effect be a conduit for that [foreign] government,"<sup>57</sup> even though they are not directly engaged in providing services to foreign governments.

The history of the Emoluments Clauses at the time they were written and the interpretation of those Clauses over the years support the textual reading that prohibited "emoluments" include any profit, gain, or advantage, including those gleaned from market rate transactions. That broad prophylactic rule undeniably catches within its net President Trump's current business dealings with foreign and domestic governments. As a formal matter, all the payments the President receives for hotel rooms and other goods and services through the Trump International Hotel described in Part I constitute receipt of emoluments in direct contravention of the Constitution. So too does his receipt of other non-monetary benefits briefly noted above, such as free advertising for Trump properties by the State Department, or concessions and permits for construction and other business needs by local governments. No matter that these payments and benefits flow to the President by way of a corporation: that corporation serves merely as "a conduit" for the

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<sup>54</sup> U.S. Comp. Gen., Opinion Letter on Query Concerning President Reagan's State Pension (Jan. 18, 1983), B-207467, 1983 WL 27823, at \*3 (citing THE FEDERALIST NO. 73 (Alexander Hamilton)) (emphasis added); see also Att'y Gen., B-122100, 1955 WL 918 (Comp. Gen. Jan. 12, 1955) (finding payments not to be prohibited by the Foreign Emoluments Clause because they "obviously were not intended to influence [the employee] as an office of the United State").

<sup>55</sup> Memorandum for Andrew F. Gehmann, Exec. Assistant, Office of the Att'y Gen., from Norbert A. Schlei, Assistant Att'y Gen., O.L.C. (Oct. 16, 1962), <https://www.justice.gov/olc/page/file/935741/download> [<https://perma.cc/F56Z-XWVU>]. For a lengthy discussion of these opinions, see generally Brief of Former Government Ethics Officers, *supra* note 52.

<sup>56</sup> OFFICE OF CONG. ETHICS, U.S. HOUSE OF REPRESENTATIVES, REVIEW NO. 17-1147: DELEGATE MADELEINE Z. BORDALLO (2017), [https://ethics.house.gov/sites/ethics.house.gov/files/OCE%20Report%20and%20Findings\\_6.pdf](https://ethics.house.gov/sites/ethics.house.gov/files/OCE%20Report%20and%20Findings_6.pdf) [<https://perma.cc/P53E-G3EU>].

<sup>57</sup> Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114, 119 (1993).

impermissible emoluments to transfer from the hands of foreign and domestic governments to the hands of the President.<sup>58</sup>

Stepping back from the law to gain perspective on the harm at hand, it is clear that President Trump's dealings encompass all the Founders' concerns about Great Britain, a cautionary tale of a great government gone to rot, with the executive open for business in the form of personal favor. As noted in Part I, government officials do business with the President's businesses in order to curry favor and fail to object when those businesses push for concessions in order to avoid potential negative consequences. And the President favorably takes note of lucrative business dealings, going so far as to admit that he has "a little conflict of interest" in places like Turkey where he owns properties and with whom the United States has significant and delicate matters to work through.<sup>59</sup> These are dealings that absolutely have the "potential of influencing or corrupting" the President;<sup>60</sup> they surely "appeal[] to his avarice."<sup>61</sup> The President has gone outside the bounds the Framers created, and he must be stopped.

### III. STANDING UP FOR THE EMOLUMENTS CLAUSES

There can be no question but that our country's original anti-corruption provisions are crucial to our democracy in general and to this moment in particular. The question becomes, how can they be vindicated? By what mechanism can the corruption line be policed and made real in a moment of crisis? These are the real questions at the heart of the legal battles over the justiciability of the Emoluments Clauses. Part III.A discusses what is at stake in these debates, focusing less on the doctrines of the various justiciability issues raised in the Emoluments Clause lawsuits that have been filed and more on the practical implications of enforcement. Part III.B goes on to discuss why states, and Maryland and the District of Columbia in particular, are well suited to vindicate these constitutional provisions.

#### A. *Why Judicial Enforcement Matters*

Multiple plaintiffs have brought suit against the President for his violation of the Emoluments Clauses. In addition to the suit brought by the District of Columbia and Maryland, private plaintiffs<sup>62</sup> and members of

<sup>58</sup> *Id.*; see also *District of Columbia v. Trump*, 315 F. Supp. 875, 902–03 (D. Md. 2018).

<sup>59</sup> Jeremy Venook, *Could Trump's Financial Ties Have Influenced His Phone Call With Erdogan?*, THE ATLANTIC, (Apr. 18, 2017), <https://www.theatlantic.com/business/archive/2017/04/trump-erdogan-conflict-of-interest/523485/> [<https://perma.cc/L8A7-CF5J>].

<sup>60</sup> *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 188 (1981).

<sup>61</sup> THE FEDERALIST NO. 73 (Alexander Hamilton).

<sup>62</sup> See *CREW v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017). Plaintiffs include a non-profit organization whose mission is to protect rights of citizens to be informed about activities of government, an organization that advocates to improve working conditions in food industry, and hospitality business operators.

Congress<sup>63</sup> have sued to enforce the clauses. In each case, the President has raised objections that go to the ability of those plaintiffs to bring suit at all. Among other objections, he has challenged whether the plaintiffs have standing; that is, whether they are proper parties to bring suit.<sup>64</sup> He has questioned whether the plaintiffs have a cause of action: that is, whether the Constitution contemplates a judicial enforcement mechanism.<sup>65</sup> And closely related, he has essentially argued that these cases present a “political question” that is committed to the political branches, rather than the judiciary, to answer.<sup>66</sup>

Each of these doctrines by itself is complex, but they strike at the same heart: whether the judiciary can enforce these clauses. This question begs another: what is at stake if the judiciary cannot? For that is the conclusion that follows from the President’s arguments taken together: if one of the doctrines of general applicability bars the judiciary from hearing these cases, or if neither states, nor Congress, nor private plaintiffs can invoke the power of the judicial branch to curb Emoluments Clause violations by the President, perhaps no one can police the lines those clauses create.<sup>67</sup>

To understand the consequences of the conclusion that no one can enforce the clauses, we can look to the role the Foreign Emoluments Clause played at the beginning of our history. From its inception, it has been an information-forcing mechanism, bringing into the light exchanges that have the potential for corrupting influence. Because the clause contains an exception allowing acceptance of foreign emoluments upon prior consent of Congress, it forced our earliest statesmen to come forward and declare foreign gifts for public evaluation. For example, under the Articles of Confederation, when our emissaries to the courts of France and Spain were offered the customary French gifts, they came forward to get the permission of their new

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<sup>63</sup> See *Blumenthal v. Trump*, No. 17-1154, 2018 WL 4681001 (D.D.C. Sept. 28, 2018). Plaintiffs are more than two hundred U.S. Senators and members of the U.S. House of Representatives, and their suit concerns only the Foreign Emoluments Clause.

<sup>64</sup> See Statement of Points and Authorities in Support of Defendant’s Motion to Dismiss at 5, *Blumenthal*, 2018 WL 4681001 (No. 17-1154) [hereinafter Motion to Dismiss, *Blumenthal*]; Memorandum in Support of Defendant’s Motion to Dismiss at 7, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 17-1596) [hereinafter Motion to Dismiss, *District of Columbia*]; Memorandum in Support of Defendant’s Motion to Dismiss at 7, *CREW*, 276 F. Supp. 3d 174 (No. 17-458) [hereinafter Motion to Dismiss, *CREW*].

<sup>65</sup> See Motion to Dismiss, *Blumenthal*, *supra* note 64, at 14; Motion to Dismiss, *District of Columbia*, *supra* note 64, at 26; Motion to Dismiss, *CREW*, *supra* note 64, at 26.

<sup>66</sup> See Motion to Dismiss, *Blumenthal*, *supra* note 64, at 2, 17; Motion to Dismiss, *District of Columbia*, *supra* note 64, at 4; Motion to Dismiss, *CREW*, *supra* note 64, at 3, 50; *but see* Defendant’s Reply in Support of Motion to Dismiss n. 7, *District of Columbia*, 315 F. Supp. 3d 875 (No. 17-1596) (“Finally, Plaintiffs argue that their claims should not be dismissed pursuant to the political question doctrine. Opp’n at 54–55. The President, however, did not invoke the doctrine; he merely argued that Congress’s consent power under the Foreign Emoluments Clause and the inherently political nature of the judgments associated with the Clause are another factor counseling against the Court inferring a cause of action in equity here.”).

<sup>67</sup> Indeed, the judge in the suit brought by members of Congress found this suggestion “troubling.” Zoe Tillman, *Democrats Can’t Stop Trump In Congress, But They’re Hoping They Can At Least Sue Him*, BUZZFEED NEWS (June 7, 2018, 4:24PM), <https://www.buzzfeednews.com/article/zoetillman/trump-democrats-sue-emoluments> [https://perma.cc/8Y7W-WSYB].

government to keep the gifts.<sup>68</sup> Many were approved, some were not; and all were brought to light and scrutinized publicly by the legislative branch of government to ensure that the American people knew the influences that might be at work upon their government officials.<sup>69</sup> Thus, the clause appeared to work as intended. But even in that era and among our central Founders, efforts to thwart the clause happened. Most notably, Thomas Jefferson, a critic of the tradition of gift-giving in Europe and aware that the Constitution prevented acceptance of such gifts without consent of Congress, nevertheless accepted a French snuff box when acting as a diplomat in France, never declared it, and surreptitiously sold off expensive pieces of it to pay down debts.<sup>70</sup> Congress could not approve a gift that the recipient refused to put forward for approval, and so the clause could be, and was, circumvented.

These divergent trajectories show the inadequacy of an unenforceable clause. The clause is only as good as the disclosures that Congress gets. If a President refuses to seek consent from Congress either for an otherwise unknown emolument or for one that he or she refuses to admit is an emolument, Congress's hands are functionally tied.<sup>71</sup> Indeed, a federal court has found that a President who simply accepts emoluments as if consent had been given when in fact it has not "completely nullif[ie]s" the votes of members of Congress.<sup>72</sup> And the harms the Founders sought to address—the potential corruption of our public figures, and the erosion of trust between the people and their government—are unredressable.

Not only is the clause weakened without an enforcement mechanism; it is actively undermined. A President who wishes to receive emoluments and

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<sup>68</sup> See CORRUPTION IN AMERICA, *supra* note 33, at 1–5, 22–26, 30. French snuff boxes were received by Silas Deane, Arthur Lee, and Benjamin Franklin. Of them, Deane did not ask for permission to keep the box, but disclosed it for other political reasons, and his acceptance of it cast doubt on his intentions and fealty to the United States in the minds of his critics. In addition, John Jay wrote for and received permission to keep a horse from the king of Spain.

<sup>69</sup> Discussion on the floors of Congress the first time it was formally asked to consent to a benefit bestowed by a foreign power in 1798 confirmed this understanding of the information-forcing function of the Foreign Emoluments Clause. Representative Bayard, for instance, declared that the Clause required officeholders "to make known to the world whatever presents they might receive from foreign Courts, and to place themselves in such a situation as to make it impossible for them to be unduly influenced by any such presents." 5 ANNALS OF CONG. 1583 (1798). Similarly, Representative Harrison Gray Otis argued that "[w]hen every present to be received must be laid before Congress, no fear need be apprehended from the effects of any such presents. For, it must be presumed, that the gentleman who makes the application has done his duty, as he, at the moment he makes the application, comes before his country to be judged." 5 ANNALS OF CONG. 1585 (1798). See also Complaint at para. 27–29, *Blumenthal*, 2018 WL 4681001 (No. 17-1154).

<sup>70</sup> See CORRUPTION IN AMERICA, *supra* note 33, at 28–30. Jefferson attempted to have his assistant reject the gift with the explanation that the Foreign Emoluments Clause barred it. When rejecting the gift proved difficult, he wrote that he did not wish to go through the necessary process with Congress. Instead, in cypher and with a demand for secrecy, Jefferson gave his assistant instructions on how to sell off pieces of the box.

<sup>71</sup> See Complaint, *supra* note 69, at 19 para. 5 (arguing that members of Congress arguing that they have been "denied . . . the opportunity to give or withhold their 'Consent'").

<sup>72</sup> *Blumenthal*, 2018 WL 4681001, at \*11.

who knows that Congress, his only regulator, is unable or unlikely to act without being asked to do so, will simply never ask. Without an enforcement structure through the judiciary, any officer who wishes to thwart the clause could effectively do so.<sup>73</sup> A judicially unenforceable Foreign Emoluments Clause thus fails to stop precisely the worst offenders of the Founders' anti-corruption principles.

To be sure, there exist rights without remedies in our legal scheme—places where conduct is not permitted, but the regulatory authority for that conduct lies outside the judiciary, and thus outside of individual plaintiffs' power to vindicate through the courts, even where the effects of that limitation are perverse.<sup>74</sup> But the Emoluments Clauses present an issue far removed from these circumstances.

This is not a circumstance where the Constitution commits the resolution of a conflict to the political branches.<sup>75</sup> For instance, some provisions express “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>76</sup> To be sure, the Foreign Emoluments Clause contemplates a specific role for Congress: the President and other officials are prohibited from receiving emoluments and other gains “except with the consent of Congress.” (The Domestic Emoluments Clause contains no such exception.) But other such clauses exist in the Constitution, and they have not been barriers to enforcement of those clauses by the courts.<sup>77</sup> Moreover, what a counterintuitive result, given the perverse consequences described above: without judicial enforcement, the clause is flipped from an information-forcing one with a robust role for Congress to an inducement to those inclined to be receptive to influence to obfuscate or hide that influence instead, thus leaving Congress impotent. Judicial enforcement respects, rather than undermines, Congress's role in the scheme.

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<sup>73</sup> Congress can exercise its role by giving consent in advance for receipt of a particular emolument, thereby reiterating the prohibition on acceptance of others. It has done so for certain categories, as with the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2012), which prevents federal employees from accepting any more than a *de minimis* “gift or decoration” except under certain provisions. Even if Congress *can* give consent in advance, however, that doesn't mean it has to, or that there is any less of a burden on the officer to come forward and seek consent where it hasn't been given in advance. Without an enforcement mechanism, that burden is flipped, and an “ask forgiveness, not permission” officer could rely on the unlikelihood of congressional action as a safeguard against the loss of a desired emolument. That is not the way the Foreign Emoluments Clause was written. See *Blumenthal*, 2018 WL 4681001, at \*15; Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, *Blumenthal*, 2018 WL 4681001 (No. 17-1154).

<sup>74</sup> See *infra* notes 75–81 and accompanying text.

<sup>75</sup> The President has suggested as much, though not going so far as to name the doctrine, in the briefing in this case. See Motion to Dismiss, *District of Columbia*, *supra* note 64. See also *CREW v. Trump*, 276 F. Supp. 3d 174, 193–94 (S.D.N.Y. 2017).

<sup>76</sup> *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

<sup>77</sup> See, e.g., *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6 (2009) (finding that the Tonnage Clause is judicially enforceable); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 342–43 (1964) (finding that the Export-Import Clause is judicially enforceable); *Canton R.R. Co. v. Rogan*, 340 U.S. 511, 513–14 (1951) (same); *Brown v. Maryland*, 25 U.S. 419, 421–22 (1827) (same).

Nor is this a circumstance where, as the President has argued, plaintiffs cannot enforce a structural constitutional norm. The Emoluments Clauses are not merely “good governance” provisions that are “intended to guard generally against . . . corruption” and not to create individual rights.<sup>78</sup> On the contrary, the structural principles of the Constitution like federalism and separation of powers are, as the Supreme Court has explained, fundamentally concerned with the individual liberties of all Americans.<sup>79</sup> As such, “[i]f the constitutional structure of our Government . . . is compromised,” those “who suffer otherwise justiciable injury may object.”<sup>80</sup> Indeed, this is the principal way in which “judicial decisions” on “checks and balances” have come about.<sup>81</sup>

### B. *Why State Enforcement Makes Sense*

States are particularly well situated to enforce the Foreign and Domestic Emoluments Clauses given their historical interest in vindicating anti-corruption principles and their unique and cognizable interests both in anti-corruption in foreign policy and in their ability to participate appropriately in the federal scheme.

The overarching concern for anti-corruption at the Founding came first from state constitutions and declarations, expressing the notion that republics could stand only where public servants were dedicated to the public good and guarding against corrupting influences. Maryland’s own Declaration of Rights, adopted August 14, 1776, provides that “all persons invested with the legislative or executive powers of government are trustees of the public.”<sup>82</sup> It also contains a precursor to the federal Constitution’s Emoluments Clauses: “That no person ought to hold, at the same time, more than one office of profit, nor ought any person, in public trust, to receive any present from any foreign prince or state, or from the United States, or any of them, without the approbation of this state.”<sup>83</sup> That same year, Virginia declared “[t]hat no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public ser-

<sup>78</sup> Motion to Dismiss, *District of Columbia*, *supra* note 64.

<sup>79</sup> *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 222 (2011) (“The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate. . . . Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution’s concern. The structural principles secured by the separation of powers protect the individual as well.”).

<sup>80</sup> *Id.* at 223.

<sup>81</sup> *Id.* at 222.

<sup>82</sup> MD. DECLARATION OF RIGHTS of 1776, art. IV.

<sup>83</sup> *Id.* at art. XXXII.

vices.”<sup>84</sup> Pennsylvania similarly declared “[t]hat government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community.”<sup>85</sup> These anti-corruption concerns were top of mind as the states entered the union and a core concern as they submitted themselves to this new federal government.<sup>86</sup>

Violation of the Emoluments Clauses not only offends the states as stewards of these anti-corruption principles but also as entities both specially contemplated by the clauses and specially disadvantaged by their violation. As the Supreme Court has recognized, governments may appeal to courts to defend their “interest in securing observance of the terms under which [they] participate[ ] in the federal system” and to protect the “benefits that are to flow from participation in” that system.<sup>87</sup> There is no doubt but that one of the important “terms” under which they participate is that their federal office holders will not be corrupted by either foreign or domestic entities.

“[W]hen a State enters the Union, it surrenders certain sovereign prerogatives,”<sup>88</sup> including the ability to treat with foreign states either by diplomacy or force. “Those prerogatives are now lodged with the Federal Government,”<sup>89</sup> and the Constitution demands that that Federal Government abide by the prohibition on office holders’ receipt of emoluments as a way to prevent foreign corruption from entering into our political life. As discussed above, this protection against corruption was one of the core concerns of the states before entering the union and as they hammered out the Constitution. Such concerns are ones that states “would likely attempt to address through [their] sovereign lawmaking powers”<sup>90</sup> but no longer can. Such interests, for which there is no longer a recourse in politics, are precisely the kind the Supreme Court has recognized as cognizable in the courts.<sup>91</sup> States’ recourse to the courts is therefore crucial to ensure that their

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<sup>84</sup> VA. DECLARATION OF RIGHTS of 1776, art. IV.

<sup>85</sup> PA. DECLARATION OF RIGHTS of 1776, art. V; *see also* N.H. CONST. of 1784, art. X (“Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men . . . .”); VT. CONST. of 1793, ch. I, art. 7 (“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . .”). These early texts also serve as proof that the people drafting such documents in the Founding era considered “emolument” to cover a broad range of benefits or advantages.

<sup>86</sup> In addition to including these prohibitions in their declarations and constitutions, the states actively hauled public figures into court for violating anti-corruption laws and provisions. *See, e.g.,* Jenifer v. Lord Proprietary, 1 H. & McH. 535 (Md. 1774); *Respublica v. Burns*, 1 Yeates 370 (Pa. 1794); *Newell v. Commonwealth*, 2 Va. 88 (Va. 1795).

<sup>87</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607–08 (1982).

<sup>88</sup> *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007).

<sup>89</sup> *Id.*

<sup>90</sup> *Snapp*, 458 U.S. at 607.

<sup>91</sup> *See Massachusetts*, 549 U.S. at 520–21; *Snapp*, 458 U.S. at 607.

interests in preventing corruption and safeguarding responsive government are vindicated.

Moreover, the Domestic Emoluments Clause specifically contemplates the danger of domestic corruption to state and local governments and to the “fundamental principle of *equal* sovereignty among the states.”<sup>92</sup> That clause ensures that no state or federal instrumentality can curry favor with its financial clout, or by holding in play other benefits the President may want, such as tax deals and permits; and conversely, that no state averse to such dealings or without position to engage in them might be “discriminatorily denied” their “rightful status” in the federal scheme.<sup>93</sup> The Constitution secures to the District of Columbia, Maryland, and other domestic governments the right to make their own political, policy, and budgetary decisions free from the pressure to compete with others for the President’s favor or the risk of disfavor. Again, it is precisely in these circumstances, where a state’s standing in the federal scheme is threatened, that the Supreme Court has found States able to avail themselves of a judicial forum to vindicate these privileges.

The District of Columbia and Maryland are uniquely situated with respect to the President’s Emoluments Clause violations because being at or near the seat of power means playing host to some of those very violations. The Trump International Hotel, where foreign and domestic dignitaries stay to be able to say “I love your new hotel!”<sup>94</sup> is visible from the District of Columbia Attorney General’s office. Some government officials have cancelled reservations at District hotels in favor of patronizing a Trump property.<sup>95</sup> Our local economy is particularly affected, as the luxury hotel and restaurant industry in our jurisdictions have to compete directly with a presidential hotel that can support foreign and domestic government lobbyists. And, conversely, our jurisdictions are particularly dependent on the federal government for employment and spending because of our close physical proximity to the White House. The District of Columbia and Maryland rank first and fourth, respectively, when it comes to per capita federal government expenditures, and federal funds make up 25% and 30%, respectively, of the District of Columbia and Maryland budgets for fiscal year 2018.<sup>96</sup> And the federal government employs approximately 17% and 10%,

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<sup>92</sup> *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (emphasis in the original) (internal quotation marks omitted).

<sup>93</sup> *Snapp*, 458 U.S. at 607–08.

<sup>94</sup> Northam, *supra* note 7.

<sup>95</sup> See, e.g., Kira Lerner & Judd Legum, *Under political pressure, Kuwait cancels major event at Four Seasons, switches to Trump’s D.C. hotel*, THINK PROGRESS (Dec. 19, 2016, 10:05 PM), <https://thinkprogress.org/under-political-pressure-kuwait-cancels-major-event-at-four-seasons-switches-to-trumps-d-c-1f204315d513/> [<https://perma.cc/GV5V-6BR5>].

<sup>96</sup> U.S. CENSUS BUREAU, CONSOLIDATED FEDERAL FUNDS REPORT FOR FISCAL YEAR 2010 23, 32 (Sept. 2011), <https://www.census.gov/prod/2011pubs/cffr-10.pdf> [<https://perma.cc/XUJ8-Q5F3>]; COMM. OF THE WHOLE, COUNCIL OF THE D.C., REPORT ON BILL 22-241, THE “FISCAL YEAR 2018 FEDERAL PORTION BUDGET REQUEST ACT OF 2017” 2 (May 2017), [http://chairmanmendelson.com/wp-content/uploads/2017/05/B22-241-FY18-Federal-Portion-BRA\\_draft-report-w-attachments.pdf](http://chairmanmendelson.com/wp-content/uploads/2017/05/B22-241-FY18-Federal-Portion-BRA_draft-report-w-attachments.pdf) [<https://perma.cc/8W6J-HVZ5>]; Md.

respectively, of the jurisdictions' total workforce.<sup>97</sup> Thus, the dilemma that the Domestic Emoluments Clause seeks to prevent—that of acquiescing to pressure to feed a hungry executive, or risk disfavor by the federal government—is particularly acute for our jurisdictions.<sup>98</sup>

Other plaintiffs have set forth other theories for why they are proper parties to advance these interests in court, and litigation is ongoing.<sup>99</sup> The stakes are high. The Founders wrote the Emoluments Clauses into the Constitution out of a real and present fear that corruption would be one of the greatest threats to their young union. They meant for the clauses to be effective as against the dangers that they saw. As our office has successfully argued, the District of Columbia and Maryland are proper parties to sue.<sup>100</sup>

### CONCLUSION

President Trump's vast business entanglements shake our democracy at its core, both by opening our government up to undue influence and by corroding its legitimacy. These are threats anticipated by our Founders and provided for in the Emoluments Clauses of the Constitution. They are threats that have been guarded against for decades by government ethics officials applying those clauses so as to effectuate their purpose. They are threats that can be meaningfully dealt with only by recourse to the courts. We believe that President Trump's receipt of foreign and domestic benefits through his vast business empire is unconstitutional. We also believe that, as with so many other arenas in which state attorneys general have stood up for the rule of law, our jurisdictions are proper parties to bring these violations before the judiciary for resolution. A federal judge has agreed. As George Mason put it, "if we do not provide against corruption, our government will

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DEPT OF LEGISLATIVE SERVS., MD. GEN. ASSEMBLY, THE 90 DAY REPORT: A REVIEW OF THE 2017 LEGISLATIVE SESSION A-28 (Apr. 2017), <http://mgaleg.maryland.gov/Pubs/Legal-Legal/2017rs-90-day-report.pdf> [<https://perma.cc/NM5S-HVZ8>].

<sup>97</sup> *Data, Analysis & Documentation: Federal Employment Reports*, OFFICE OF PERS. MGMT. (Sept. 2017), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/> [<https://perma.cc/UC4Y-PDXX>]; D.C. DEPT OF EMP'T SERVS., WAGE AND SALARY EMPLOYMENT BY INDUSTRY AND PLACE OF WORK (Dec. 2015), [https://does.dc.gov/sites/default/files/dc/sites/does/release\\_content/attachments/CESdcDec15.pdf](https://does.dc.gov/sites/default/files/dc/sites/does/release_content/attachments/CESdcDec15.pdf) [<https://perma.cc/63BW-7KV4>]; John Fritze, *Trump's budget suggests major changes in Md.*, BALT. SUN (Mar. 16, 2017, 8:09 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-trump-budget-20170316-story.html> [<https://perma.cc/4UZ7-T6F6>].

<sup>98</sup> In our lawsuit, a federal judge has also agreed that we have standing pursuant to both our proprietary interests—that is, injuries to our own instrumentalities, such as the Walter E. Washington Convention Center, and to our direct financial interests, such as Maryland's interest in the Bethesda Marriott Conference Center, which compete against the Trump Hotel—and as *parens patriae* to our residents. See *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 742–48, 757 (D. Md. 2018).

<sup>99</sup> See *supra* notes 62–63.

<sup>100</sup> See *District of Columbia*, 291 F. Supp. 3d at 746–47 (also noting that no other general justiciability concern bars our suit).

soon be at an end.”<sup>101</sup> The President must be held accountable to his duty to the American people, and not to his own bottom line.

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<sup>101</sup> Notes of Robert Yates (June 23, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 391–92 (Max Farrand ed., rev. ed. 1966); *see also* Notes of James Madison (June 23, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385, 387.