9-part series from *Volokh-Washington Post*, and *Volokh-Reason*

Explanatory Note: This overall 9-part series of separate, but related articles (i.e., lengthy blog posts) is a Tillman-organized & Tillman-compiled publication. Each individual article was first published on ***The Volokh Conspiracy*** ("***VC***"). Parts 1 to 5 were first published when ***VC*** appeared on ***The Washington Post*** and parts 6 to 9 were first published when ***VC*** appeared (as it still does) on ***Reason***'s website. Each of the nine blog posts was co-authored with Professor Josh Blackman—but this overall compilation is a Tillman publication. You can find citations (with links) to the individual blog posts below. You can cite this overall collection as:

Seth Barrett Tillman, *A Compilation: The Emoluments Clauses Litigation*, VOLOKH CONSPIRACY (Sept. 25, 2017–Aug. 3, 2018), <http://ssrn.com/abstract=3311758>.

This 9-part series has been actively cited. *See, e.g.*,

[1] Michael J. Gerhardt, **The Federal Impeachment Process: A Constitutional and Historical Analysis** (3d ed., 2019), <https://tinyurl.com/y5qv8unu>;

[2] Michael J. Gerhardt, **Impeachment: What Everyone Needs to Know** (2018), <https://tinyurl.com/y7ul7kl9>, <https://tinyurl.com/yc2zw53b>;

[3] Jonathan Hennessey, The Foreign Emoluments Clause Applies to the President, Vice President, and All Other Positions in the Federal Government: A Response to Prof. Seth Barrett Tillman (May 14, 2019), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3382876>; and,

[4] The Insidious Power of the Anti-Choice Movement 7 (2018), <https://www.prochoiceamerica.org/wp-content/uploads/2018/01/NARAL-Research-Report_FINAL-DIGITAL.pdf>.

PART 1

Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 1: The Constitution's taxonomy of officers and offices*, WASHINGTON POST—THE VOLOKH CONSPIRACY (Sept. 25, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/25/the-emoluments-clauses-litigation-part-1-the-constitutions-taxonomy-of-officers-and-offices/?utm_term=.7b840bb24101; 2017 WLNR 29474639, http://ssrn.com/abstract=3311758.

The Foreign Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." In a series of coordinated lawsuits brought under the Foreign Emoluments Clause, plaintiffs contend that because "Defendant Donald J. Trump is the President of the United States of America," he "thus holds an 'Office of Profit or Trust' under the United States." Their argument certainly has an intuitive appeal: How could the presidency not qualify as an "Office of Profit or Trust under the United States" for purposes of this important anti-corruption provision? But an intuition is not an argument, and it is not evidence. Plaintiffs cannot point to a single judicial decision holding that this language in the Foreign Emoluments Clause, or the similar and more expansive phrase, "Office … under the United States" used in other constitutional provisions, applies to the president. Rather, the text and history of the Constitution, and post-ratification practice during the early republic, strongly support the counterintuitive view: The president does not hold an "Office … under the United States."

One of us (Tillman) has consistently written for about a decade that elected federal officials, such as the president, do not hold "Office … under the United States." The other one (Blackman) was persuaded by this research some years ago, long before the notion of a President Trump was even conceivable. Prior to the election, William Baude wrote that "Professor Tillman's theory makes sense of patterns that most of us never saw. It brings order out of chaos." To that end, we have submitted amicus briefs to the District Courts for the Southern District of New York and the District of Columbia, advancing a position that the Justice Department has not: that the president is not subject to the Foreign Emoluments Clause. We are grateful for assistance on the briefs from Carrie Severino of the Judicial Education Project and Robert W. Ray and Brittney Edwards of Thompson & Knight LLP.
In this post, we will explain that under the Constitution's taxonomy, appointed — and not elected — officials hold office "Under … the United States."

The "Officers of the United States" Drafting Convention Refers to Appointed Positions in the Executive or Judicial Branches

In four clauses, the Constitution uses the drafting convention "Officers of the United States": the Appointments Clause, the Impeachment Clause, the Oaths Clause and the Commission Clause. According to Joseph Story's "Commentaries, "such positions "derived their appointment from, and under the national government" and not from "the people of the states." In other words, such officers are appointed, e.g., under the Appointments Clause, and are not elected. The text and history of the Constitution confirm that Story was correct: This important and frequently litigated category of positions is limited to executive-branch and judicial-branch appointed officers.

First, the Appointments Clause spells out with clarity that the president can nominate "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." Under the canon of ejusdem generis, "all other Officers of the United States" should be read to reference the same kind of executive and judicial branches officers that the clause expressly lists. All these officers are appointed, not elected.
Second, the Impeachment Clause expressly provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment. …" Story explained that the president and vice president's enumeration in the Impeachment Clause in addition to "all civil Officers of the United States" shows that the president and vice president are not deemed "officers of the United States" themselves. Otherwise, the Framers would have stated that "all other civil officers" were subject to impeachment.

Further, the oaths clause specifically enumerates that "Senators and Representatives, and the Members of the several State Legislatures," as well as "all executive and judicial Officers, both of the United States and of the several States of the United States" were required to be "bound by Oath or Affirmation to, support this Constitution." In contrast, the president — whose position is not listed in Article VI — recites a different oath provided in Article II, Section I. For other positions that are not covered by Article VI, including the secretary of the Senate and clerk of the House and their staff, Congress had to create oaths by statute based on the Rules of Proceeding Clause or other enumerated powers.

Finally, the commission clause provides that "all the officers of the United States" receive presidential commissions. All means all. This structure explains why appointed executive-branch and judicial-branch officers receive commissions, but there is no record of any elected official, whether a president, vice president or a member of Congress, ever receiving a commission. The reason is simple: Elected officials like the president are not "Officers of the United States."

"Office . . . under the United States" Refers to Appointed Positions in All Three Branches of Government

We have explained that the phrase "Officers of the United States" is a relatively narrow set of positions: appointed judicial branch and executive branch officers. By contrast, the Foreign Emoluments Clause uses the phrase "Office … under the United States," which refers to any federal appointed position that is created, regularized or defeasible by statute in any of the three branches of the federal government. "Office . . . under the United States" is a broader category than "Officers of the United States."

All "Officers of the United States" necessarily hold "Office . . . under the United States." We maintain, however, that not all who hold "Office . . . under the United States" are also "Officers of the United States." For example, the clerk of the House of Representatives holds an "Office . . . under the United States," but is not an "Officer of the United States." He is not nominated by the President, does not receive a commission and is not subject to impeachment, and his oath is not authorized by the Oaths Clause. Instead, he is chosen by the House of Representatives, and his emoluments are regularized by statute. Conversely, the secretary of state, an executive branch officer, is both an "Officer of the United States" and holds "Office . . . under the United States." He is nominated by the president, receives a commission, is subject to impeachment, and his oath is authorized by the Oaths Clause.

This understanding of the "Office . . . under the United States" drafting convention has its roots in the prior British statutory drafting practice using "Office under the Crown." For the last three centuries, "Office under the Crown," a phrase commonly used in British statutes, has not extended to elected positions. See, e.g., An Act for the Security of Her Majesty's Person and Government, 6 Ann. c. 7, § 25 (1707), available at bit.ly/2riHlG1 (disqualifying any person from holding a seat in the House of Commons if they hold a "new office or place of profit whatsoever under the [C]rown," that is, a position created after 1705); J.L. De Lolme, The Constitution of England 62 (1775), available at bit.ly/2sl1yeK (explaining that one holding a "new office under the Crown" is "incapable of being elected [a] Member[]" of the Commons). Mem. of the U.K. Att'y Gen., at 135–36 (May 1, 1941), available at bit.ly/2rjcw00 ("If the Crown [the Executive Government] has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is one under the Crown. … If the duties are duties under and controlled by the Government, then the office is, prima facie … an office under the Crown . . . ." (emphasis added)). To this day, Commonwealth courts distinguish between (1) officers who are appointed to a position "under the Crown" and (2) officials who "hold their position by virtue of their election by the people." This drafting convention reflects a self-evident aspect of government: Appointed officers are subject to removal and supervision in the normal course of their duties by higher governmental authority. By contrast, elected officials are not subject to such supervision and are answerable primarily through elections. This drafting convention was used in colonial practice, governments of the revolutionary era, the Articles of Confederation, and later by the Framers of the Constitution and the First Congress.

In four clauses, the Constitution invokes the drafting convention "Office . . . under the United States." First, the Incompatibility Clause provides that "no person holding any Office under the United States" may serve in either the House or Senate. This "Office . . . under the United States" language applies to federal appointed positions created, regularized or defeasible by statute in all three branches. The primary purpose of the Incompatibility Clause was to prevent the president from bribing members of Congress with appointed lucrative office, not to keep members of Congress from being president. The Framers saw the English constitution as corrupt because the king could bribe members of Parliament with lucrative office. But the king never bribed members of Parliament by making them king. Likewise, the president could bribe members of Congress with lucrative positions but could not make them president. The Incompatibility Clause was as an ethics provision, not a separation-of-powers provision.

Three other clauses in the Constitution use the "Office . . . under the United States" drafting convention, but with variants. First, the Disqualification Clause allows Congress to bar impeached officers from prospectively holding "any Office of honor, Trust or Profit under the United States." An office of profit refers to a position with a regular salary or other authorized emoluments (e.g., fees, commissions, etc.), and an office of trust refers to a position with regular, non-delegable duties (i.e., requiring the exercise of discretion). Finally an office of honor refers to a position without fixed emoluments (and perhaps absent regular duties). That Congress can impose separate disqualifications on those who hold "Office . . . under the United States" affirms the conclusion that the latter category was separate from elected officials.

Second, the Elector Incompatibility Clause prevents a "Senator or Representative, or person holding an Office of Trust or Profit under the United States" from serving as an Elector. Listing Senators and Representatives, alongside those who hold "Office . . . under the United

States," again reaffirms the conclusion that the "Office . . . under the United States" category was separate from elected officials.

Finally, the Foreign Emoluments Clause limits the receipt of foreign presents for a person "holding any Office of Profit or Trust under [the United States]." In his "Commentaries," Story explained that the president is not an "officer of the United States." In the very same passage, Story also indicated that the same interpretive position applied to the Constitution's "office . . . under the United States" language. In other words, the Constitution's general officer of the United States and office under the United States language does not reach the presidency. Only express constitutional language reaches the presidency.

"Office under the Authority of the United States" Refers to a Broader Category of Appointed Officials

Article I, Section 6, Clause 2, which includes both the Ineligibility and Incompatibly Clauses, provides, "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 whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." This provision illustrates how the Framers distinguished between an "Office under the United States," and "Office under the Authority of the United States." That the Framers used both phrases — using different office-language in the very same sentence — confirms that they had distinct meanings.

This broader category, i.e., "Office under the Authority of the United States," includes appointed positions in all three branches of our government — that is, it includes all "Offices . . . under the United States." It also includes positions that are not necessarily subject to regular federal supervision, nor were they necessarily created by federal statute. For example, if Congress issues a letter of marque and reprisal to a ship's captain on a civilian (privately owned) vessel, that officer would be an "Officer under the Authority of the United States." He would not be an "Officer of the United States" nor hold "Office . . . under the United States." Under the Ineligibility Clause, a member of Congress who votes to issue a letter of marque and reprisal would be ineligible from subsequently accepting that very letter. The same principle applies to the far more routine circumstances where a member of Congress, for example, seeks to serve in a position he voted to create, or for which he voted to increase the emoluments thereof. The Ineligibility Clause prohibits (for a limited amount of time) such second careers.

"Office or Public Trust" under the United States Includes All Appointed and Elected Federal Officials

The broadest category of positions within the federal government is reflected in the Religious Test Clause, which provides "no religious Test shall ever be required as a Qualification to any "Office or public Trust under the United States." The category "Office . . . under the United States" extends to all appointed federal officers, and the category "Office or public Trust under the United States" extends to all elected federal officials. Thus, this category includes all federal positions, both appointed and elected. Critically, all of the prior categories —"Officers of the United States," "Office . . . under the United States," and "Office under the Authority of the United States" — exclude elected positions. Specifically, they do not embrace positions that stand for election, such as representatives, senators, and — as most

relevant to this case — the president. However, these federal positions do fall within Article VI's grouping of "Office or public Trust under the United States."

Once again, it would be a mistake to presume that "Office or public Trust under the United States" is synonymous with the other variants discussed above. On Aug. 30, 1787, Charles Pinckney moved to insert what would become the Religious Test Clause into the Constitution. His proposal provided, "But no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States." Note that this draft included the additional language, "the authority of." Pinckney's motion was seconded by Gouverneur Morris, and after a brief debate, was passed unanimously. That provision, however, would soon be amended. The Committee of Style, which included Gouverneur Morris, removed "the authority of" from Pinckney's proposed language. In its place, the Committee reported the more precise version that would ultimately be ratified: "Office or public Trust under the United States." Yet, they struck it in the Religious Test Clause. The precise wording chosen by the Framers matters. Constructions that disregard this principle should be rejected; constructions that support this principle should be accepted. The Framers could have left this language unchanged. But they did not do so here. This is some indication that the precise wording the Framers chose mattered to them and to their public audience in 1788 and 1789. One virtue of the taxonomy proposed here is that it makes sense of the Constitution's variegated language.

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We concede that the taxonomy described in this post may feel unnatural, because most readers of the Constitution simply assume that the Framers employed "officers," "officers of" and "office under" interchangeably. For example, Professors Akhil Reed Amar and Vikram David Amar wrote that the different variants of officer language, "[a]s a textual matter . . . seemingly describes the same stations (apart from the civil/military distinction) — the modifying terms 'of,' 'under,' and 'under the Authority of' are essentially synonymous." This approach, however, fails to read the Constitution as a whole. As Asher Steinberg noted in a recent post, though he was "very skeptical" of our position at the outset, after reviewing the briefs, posts and articles, he "began to become convinced not only that there is a very serious textual argument for Tillman's position, but that it was difficult to see what an adequate textual rejoinder would look like." He added, "None, I believe, has yet been offered."

In our next post, we will show that the practices of President George Washington and other Founders who succeeded him as president during the early republic confirm that they understood that the president was not subject to the Foreign Emoluments Clause; likewise, the drafting practices of the First Congress and the writings of Alexander Hamilton lend further support to this position.

PART 2

Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 2: The Practices of the early presidents, the first Congress and Alexander Hamilton*, WASHINGTON POST—THE VOLOKH CONSPIRACY (Sept. 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/26/the-emoluments-clauses-litigation-part-2-the-practices-of-the-early-presidents-the-first-congress-and-alexander-hamilton/?utm_term=.57a8ae2776f6; 2017 WLNR 29588764, http://ssrn.com/abstract=3311758.

The Foreign Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." In our first post, we showed that the drafting convention "Office … under the United States" covers appointed, and not elected, positions within the federal government. As a result, the President is not subject to the Foreign Emoluments Clause.

This post, based on amicus briefs we submitted to the District Courts for the Southern District of New York and the District of Columbia, will explain how the practices of presidents during the early republic, the first Congress, and Alexander Hamilton, while serving as America's first secretary of the treasury, confirm that they understood that the president was not subject to the Foreign Emoluments Clause and its "Office … under the United States" language.

Washington and his Successors During the Early Republic Openly Accepted Foreign Presents Without Seeking Congressional Consent

In 1791, President George Washington received, accepted, and kept a diplomatic gift — a framed full-length portrait of King Louis XVI from the French ambassador to the United States. There is no evidence that Washington ever sought or received congressional consent to keep this valuable gift. In addition to the portrait, Washington also received the main key to the Bastille accompanied with a picture of that fortress, from the Marquis de Lafayette, who at the time was a French government official. Lest anyone mistakenly believe that the key was merely a private gift from Lafayette to his friend Washington, this gift was discussed in a diplomatic communication from the French government's representative in the United States to his superiors in the French ministry of foreign affairs.

Both of these items were prominently displayed in the federal capital. The portrait and valuable ornate frame, which included the Washington family crest and the monogram of the French king to "embod[y] … amicable Franco-American relations," hung in Washington's principal room. To this day, the key is on public display at Mount Vernon. The foreign provenance of these gifts from foreign governments would have been immediately recognizable to anyone who saw them. Indeed, the provenance of the key was widely reported in contemporaneous newspapers. If the Foreign Emoluments Clause applies to presidents, then the president is precluded from accepting not just "emoluments," but also "any present … of any kind whatever" from foreign states absent congressional consent. Yet, there is no record of Washington seeking or receiving congressional consent. Nor is there any evidence of any dissent — dissent in Congress among anti-administration members, dissent in newspapers or any dissent in any private correspondence. Washington's accepting these

items and his doing so without any recorded contemporaneous objections or any objections among subsequent scholars are strong evidence that no one thought he had done anything wrong (i.e., violated the Constitution's Foreign Emoluments Clause) — until plaintiffs in the Emoluments Clauses cases determined that Presidents Trump and Washington (by implication) were not merely corrupt, but obviously corrupt.

Washington's conduct, particularly his public acts, is entitled to special solicitude when construing the Constitution. Parties bear a heavy burden in asserting that Washington did not understand the Constitution he helped define. As Professor Akhil Reed Amar observed, "Washington defined the archetypical presidential role," and as "America's first 'first man,' [he] set precedents from his earliest moments on the job." Given that plaintiffs and their amici are effectively alleging that Washington publicly violated the Constitution absent any noticeable opposition, the burden on them is even heavier.

Moreover, Washington was not the lone president to accept foreign gifts. For example, President Thomas Jefferson received a bust of Czar Alexander I, a diplomatic gift, from the Russian government. Jefferson received, accepted and kept this diplomatic gift. Jefferson's "particular esteem" for Alexander "convinced him to break his [personal] rule of not accepting gifts while in public office." There is no indication that Jefferson felt his decision was controlled by the Foreign Emoluments Clause. As with Washington, there is no evidence Jefferson ever sought or received congressional consent to keep the bust.

Jefferson also received presents from Indian tribes, which he considered "diplomatic gifts" from foreign nations. During their great trek, Meriwether Lewis and William Clark exchanged many gifts with the Indian tribes in "diplomatic and social contexts." Lewis and Clark ultimately delivered many of these gifts to Jefferson. Jefferson did not seek or receive congressional consent to keep the gifts. He put them on public display at Monticello, where they remain on display today. What all these presents from foreign states had in common was that the presidential recipients believed (as best as we can tell) that keeping the presents had no constitutional implications under the Foreign Emoluments Clause. Further, unlike Washington, who had a close personal friendship with Lafayette, Jefferson kept diplomatic gifts from the czar and from foreign Indian leaders: all people he had never met. Further, unlike Washington, who was unanimously elected twice by the electoral college, Jefferson had active political opponents who would report and object to malfeasance.

The First Congress Used the "Office … Under the United States" Drafting Convention to Include Only Appointed Positions

In a 1790 anti-bribery statute, Congress declared that a defendant convicted of bribing a federal judge "shall forever be disqualified to hold any office of honor, trust, or profit under the United States." This statute's language closely tracks the language in the Foreign Emoluments Clause. If per the Constitution's Foreign Emoluments Clause, the president holds an "Office of Profit or Trust under [the United States]," then this 1790 statute, enacted one year after the Constitution went into force, would be deeply problematic.

Congress does not have the power to add, by statute, new qualifications for federal elected positions. In Federalist No. 60, Alexander Hamilton wrote that qualifications for membership in Congress are "defined and fixed in the Constitution, and are unalterable by the [national] legislature." Likewise, a statute that required the president to "attain[] the Age" of 40, instead of 35, would be plainly unconstitutional.

If the plaintiffs are correct, i.e., if elected positions, such as the president, hold an "Office … under the United States," then this 1790 statute would also be plainly unconstitutional. The better view is that plaintiffs' intuition is incorrect. Courts should avoid an interpretation of "Office … under the United States" under which the first Congress unconstitutionally added qualifications for the presidency and other elected positions. Rather, the more reasonable interpretation is that members of that body (which included many framers and ratifiers) understood that "Office … under the United States" did not extend to elected positions. The preference for this latter construction, which raises no constitutional doubts and comports with longstanding "Office … under the United States" drafting conventions, is further bolstered by the special solicitude that is afforded to the first Congress.

It is certainly true that early Congresses took actions that were later disapproved of by the courts. But such disputes concerned highly controversial legislation, such as the Sedition Act, or in the case of the Judiciary Act of 1789, implementation of a new, complex statutory system. There is no record indicating that the 1790 act's "Office … under the United States" provision was hotly debated in Congress or by the public. And, unlike the Judiciary Act of 1789, which essentially built a new and complex structural constitution for the judiciary, the 1790 Act made use of long-standing principles and policies, and most importantly, language. Indeed, the phrase at issue here — "Office … under the United States" — had a long-established pedigree. There is every good reason to conclude that, because "office … under the United States" in the 1790 Act (and in other subsequent federal statutes) could not have reached elected officials, the same language in the Constitution does not reach elected officials, such as the president.

Alexander Hamilton Used the "Office … Under the United States" Drafting Convention to Include Only Appointed Positions

In 1792, the Senate directed Washington's secretary of the treasury, Alexander Hamilton, to draft a financial statement listing the "emoluments" of "every person holding any civil office or employment under the United States." As Adam Liptak recently observed in the New York Times , this "language tracks but is a little broader than what is in the [Foreign] [E]moluments [C]lause." Hamilton took more than nine months to draft and submit a response, which spanned some 90 manuscript-sized pages. The report included appointed or administrative personnel in each of the three branches of the federal government, including the legislative branch (e.g., the secretary of the Senate and clerk of the House and their staffs) and the clerks of the federal courts. But Hamilton's carefully worded response did not include the president, vice president, senators or representatives. The editors of the "Papers of Alexander Hamilton" marked this document "DS," meaning "document signed," which indicates that this document was signed by Hamilton.

The Senate asked for a list of "every person holding any civil office or employment under the United States," and that is precisely what Hamilton delivered — to the exclusion of any elected official. If the Constitution's "office … under the United States" language reached elected officials, then quite plainly Hamilton misunderstood the meaning of the Constitution's language, which used language which he helped draft and ratify. It is counterintuitive to suggest that Hamilton misunderstood this frequently used language. The better reading is that Hamilton accurately responded to the Senate's precise request: Elected officials do not hold office under the United States, and so they were not listed.

Plaintiffs and their amici have cited a scrivener's copy of Hamilton's report. That scrivener's copy, drafted by an unknown Senate functionary, lists the president and vice president, but this document was not signed by Hamilton, and it was drafted after Hamilton's death. (Our position in regard to the authenticity of these two documents — the Hamilton-signed document and the subsequent scrivener's copy — is supported by Kenneth R. Bowling, John P. Kaminski and other experts.)

Whatever value this latter report has, it should not be accorded the same weight as the actual document signed by Hamilton and transmitted to the Senate as an official executive branch communication. Indeed, courts should accord the Hamilton list (i.e., the Hamilton signed list) at least the same weight as a modern-day comptroller general's memorandum.

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Plaintiffs' position, notwithstanding its intuitive appeal, must be rejected. Good history trumps modern linguistic intuitions. Washington and other founders who succeeded him as president did not act lawlessly, and if any of them had done so, surely there would be some record, somewhere recording some objection or dissent. But there is no such record (at least none which we or the plaintiffs or their amici have produced). The first Congress should not be understood to have enacted a patently unconstitutional statute. Alexander Hamilton, a meticulous lawyer, should not be presumed to have misunderstood the Constitution and its language which he helped draft and ratify. Rather, the text and history of the Constitution, and probative post-ratification practice during the early republic, strongly support the counterintuitive view: The president does not hold an "Office … under the United States."
In our third post, we will address certain implications of the Constitution's taxonomy of "offices" and "officers," including whether the president can concurrently serve in the House or Senate.

PART 3

Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 3: So what if the president does not hold 'Office … under the United States,'?* WASHINGTON POST—THE VOLOKH CONSPIRACY (Sept. 28, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/28/the-emoluments-clauses-litigation-part-3-so-what-if-the-president-does-not-hold-office-under-the-united-states/?utm_term=.847b995fd071; 2017 WLNR 29870667, http://ssrn.com/abstract=3311758.

The foreign emoluments clause provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." In our first post, we showed that the drafting convention "Office … under the United States" covers appointed officers, and not elected officials within the federal government. As a result, the president is not subject to the foreign emoluments clause. Our second post explained how the practices of presidents during the early republic, the first Congress and Alexander Hamilton, while serving as America's first treasury secretary, confirm that they understood that the president was not subject to the foreign emoluments clause and its "Office … under the United States" language. Both posts were based on amicus briefs we submitted to the District Courts for the Southern District of New York and the District of Columbia.

This post will offer an FAQ of what happens if the president does not hold "Office … under the United States." Here we respond to several questions advanced by the plaintiffs and their amici, as well as others raised in the Volokh Conspiracy comment thread. For full length treatments of these queries, see Tillman's many publications on this subject.

1. Does the incompatibility clause bar the president from concurrently serving in the House or Senate?

The incompatibility clause states that "no person holding any Office under the United States" may serve in either the House or Senate. Professor Steven G. Calabresi and now-Justice Joan L. Larsen explained decades ago that this clause was an ethics provision, not a "general separation-of-powers provision." As illustrated in Federalist No. 76, the framers saw the English Constitution as corrupt because the king could bribe members of parliament (MPs) with lucrative office. But the king never bribed MPs by making them king. Likewise, the president could bribe members of Congress with lucrative positions, but the president could not make members of Congress president. Simply put, the primary purpose of the incompatibility clause had nothing to do with barring the president from concurrently serving in the House or Senate.

There are many bad consequences the Constitution does not expressly preclude. The (federal) Constitution does not expressly bar a person from concurrently holding two state positions. Nor does it expressly bar a person from concurrently holding an appointed Judicial Branch position and an appointed Executive Branch position (John Marshall served as both chief justice and secretary of state during the Adams administration). Nor does the Constitution expressly bar a person from concurrently holding two House seats, or two Senate seats, or a House and Senate seat. All these results are (arguably) bad. But the fact that a result is bad does not mean it is addressed by the Constitution's incompatibility clause and its "Office under the United States" language.

Of course, some of the bad joint office holdings described above, just like joint presidential-congressional officeholding, might be barred on structural grounds. For example, Professor Akhil Reed Amar has written that even though, as a textual matter, the vice president should preside at his own impeachment trial, other constitutional principles would bar such a conflicted proceeding. Perhaps, similar structural constraints might bar a president from concurrently serving in the House or the Senate. But even if such an implied structural constitutional bar exists, that limitation against concurrent officeholding is not rooted in the text of the incompatibility clause and its "Office under the United States" language.

2. Under the disqualification clause, can Congress prospectively bar an impeached officer from being elected to Congress or to the presidency?

If the House impeaches a president, vice president or officer of the United States, then that defendant is tried by the Senate. If the Senate tries and convicts (by a two-thirds vote), then the convicted party (if still in office) is removed. The Senate may also impose a second punishment on the convicted party. Under the disqualification clause, Congress may bar the convicted party from prospectively holding "any Office of honor, Trust or Profit under the United States." This provision grants Congress the power to prevent a convicted party from being appointed to a federal position, but does nothing to prevent a convicted party from being elected to the House, Senate or the presidency.

Congress has disqualified only three impeached officers (all federal judges) from holding future office, and none have subsequently run for elected federal positions. As a result, we have no substantial law here and little commentary. We have already explained that Justice Joseph Story indicated that elected officials did not fall under the scope of the Constitution's general "officer of the United States "and "Office … under the United States" language. This latter language is at least as wide as the disqualification clause's "Office of honor, Trust or Profit under the United States" language. Story's position is also supported by Hamilton's roll of officers. Of course, we also believe the practice of George Washington and other founders who succeeded him as president confirms that the "Office … under the United States" language in the foreign emoluments clause does not reach the presidency. The same result should apply here. An impeached, tried, convicted, removed and disqualified defendant is barred from being an appointed federal officer, and not barred from being an elected official.

We also think that our position is the one that is normatively sound. The impeachment process is a political process that allows Congress to cleanse the government between elections: when there is no time to wait for an appeal to the people. But the impeachment process is a political process. The people doing the impeaching may not only be wrong, but they also might be the wrongdoers. Our position in regard to the scope of disqualification allows the voters, not Congress, to have the last word. If the voters return a disqualified defendant to elective office it is because where in doubt, it is the voters, not their agents in Congress, who should have the last word.

3. Does the elector incompatibility clause bar the president from serving as an elector?

The elector incompatibility clause provides: "No Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." The president is not expressly mentioned. Our position is that the president and vice president

can serve as electors, even if they are standing as candidates. Again, we look to Hamilton for support. In Federalist No. 68, Hamilton stated:

[The framers] have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes … . And they have excluded from eligibility to this trust [as federal elector], all those who from [their] situation might be suspected of too great devotion to the President in office. No senator, representative, or other person holding a place of trust or profit under the United States, can be of the numbers of the electors. Thus without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias.
Hamilton's exposition of the elector incompatibility clause was wholly concerned with decisional independence, not pre-commitment bias.

Statutory officers appointed by the president are excluded from serving as electors precisely because the president (or his immediate subordinates) appointed them, because the president is in a position to remove them, and because the president may appoint or promote them to additional or higher offices. By contrast, the president and vice president (and their successors) are not subject to presidential appointment, removal or supervision in the ordinary course of business. As such they are not "officers … under the United States," and there is no danger in allowing them to serve as electors per Hamilton's analysis.

To put it another way, if pre-commitment bias arising from self-interest were the rationale for the elector incompatibility clause, then candidates who are not incumbents would be precluded from acting as electors, and electors would be precluded from voting for themselves (and for family members, and perhaps even for fellow party members). But the Constitution does no such thing.

4. Is the president subject to the religious test clause?

The religious test clause provides "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Our position is that "Office … under the United States" extends to all appointed officers, and that "public Trust … under the United States" extends to all elected officials. Thus the religious test clause covers all federal positions, appointed and elected, including the president.

What are the competing views? Those who have taken the position that the Constitution's "Office under the United States" language extends to all federal positions, appointed and elected, are left arguing that the religious test clause's "public Trust under the United States" language is pure surplusage. Those who argue that "Office under the United States" extends to appointed officers and the president and vice president have made no effort to explain the scope of the religious test clause's "public Trust under the United States" language, much less what to make of the contrary evidence arising in connection with presidential practice, the First Congress, Story's "Commentaries," and Hamilton's roll of officers. The virtue of the argument put forward here is that our position accounts for the Constitution's varying text, drafting history, and post-ratification practice. The competing theories can only appeal to modern good governance norms and modern linguistic intuitions.

5. What about George Mason and Edmund Randolph?

During the Virginia ratifying convention, George Mason and Edmund Randolph took the position that the foreign emoluments clause applies to the president. Randolph opined that the president "may be impeached" for violating the foreign emoluments clause. (If Randolph is correct that impeachment is the proper remedy for the president's violating the foreign emoluments clause — and he is not — then plaintiffs' grievances are being litigated in the wrong court.)

Randolph's and Mason's positions are problematic because they also thought that members of Congress could be impeached. Specifically, they believed that the Constitution's general office-language (that is, "Officers of the United States" as used in the impeachment clause) extends to representatives and senators. Randolph and Mason's positions on the impeachment and foreign emoluments clauses are not independent, separate or distinguishable: Both positions arise from their view that the scope of the Constitution's general office-language extends to elected officials. Their view in regard to the impeachment clause's office-language was contemporaneously rejected by James Monroe, ratifier and future president, and ultimately by the Senate sitting as a court of impeachment. There is no principled way to rely on their closely related view in regard to the scope of the foreign emoluments clause's office-language.

6. What about Presidents Jackson, Van Buren, Tyler and Lincoln?

Plaintiffs and their amici contend that the actions of Presidents Andrew Jackson, Martin Van Buren, John Tyler and Abraham Lincoln suggest that they acted under the assumption that the foreign emoluments clause applies to the president. However, these antebellum presidents never asked for consent to keep foreign gifts. Rather, each simply asked Congress to dispose of those gifts. Jackson said "our Constitution forbids the acceptance of presents from a foreign State," and "placed [the medal] at the disposal of Congress." Van Buren wrote "I deem it my duty to lay the proposition before Congress, for such disposition as they may think fit to make of it." Tyler wrote that foreign gifts "will be disposed of in such manner as Congress may think proper to direct." The House resolved that gifts received by Lincoln from the King of Siam would be "deposited in the collection of curiosities at the Department of the Interior," but there was no request for him to keep it. In May 1861, President Lincoln deposited with the State Department a diploma of citizenship he received from San Marino. Because the gift was addressed to President James Buchanan, a century later the Office of Legal Counsel concluded that that Lincoln treated the diploma as a "gift[] to the United States, rather than as personal gift[]." The House and Senate were fully able to consent to these foreign gifts — and indeed consented to other foreign gifts at the time — but the presidents never asked for such consent.

To the extent that these presidents operated under the assumption they were bound by the foreign emoluments clause, such practices would have represented a sharp break with the traditions of President Washington other founders who succeeded him as president during the early republic. There is no indication that any of these antebellum presidents were aware of the earlier precedents established by their predecessors — including actors who took an active hand in framing the Constitution, ratifying it and putting it into practice. This later-in-time evidence, in which presidents never actually asked to keep foreign gifts, is less probative.

7. What about the 2009 Office of Legal Counsel opinion?

In 2009 the Office of Legal Counsel (OLC) affirmed in a memorandum that "the President surely 'hold[s] an[] Office of Profit or Trust' … ." (emphasis added). The OLC offered no evidence whatsoever to support this conclusion, and did not reference the "Office … under" drafting convention, the precedents established by Washington other founders who succeeded him as president during the early republic, or the practices of the First Congress, or Hamilton's roll of officers. The OLC's mere unexamined assumption is entitled to little weight. The glib word "surely," by itself, does not prove the argument.

While the OLC has not revisited its unsupported conclusion, the Congressional Research Service (CRS), an institution with a reputation for probity and quality analysis, has changed course. As recently as 2012, the CRS concluded that "The President and all federal officials are restricted by the Constitution, at Article I, Section 9, clause 8 … ." However, more recently, after becoming aware of the research presented in Tillman's scholarship, the CRS modified its position. Now the service hedges, noting that foreign emoluments clause "might technically apply to the President." This change is not without significance.

To date, the Justice Department has declined to argue that the president is not covered by the foreign emoluments clause — simply assuming the answer — though the agency has, as is its practice, carefully avoided taking an explicit position on this constitutional question. Having convinced amici that the Condensed Report is not an authentic Hamilton-signed document, we believe we will also convince the OLC in the not too distant future. Much like the taxing-power argument in the Obamacare litigation, which was basically ignored in the lower-court litigation, the "Office … under the United States" argument is a silver-bullet that can save the case on appeal.

8. Isn't there a difference between foreign-government gifts given to President Washington and foreign-government transactions made with President Trump's businesses?

The presidential emoluments clause provides "The President … shall not receive within that Period any other Emolument from the United States, or any of them." This clause concerns only the receipt of an "Emolument" from the United States, or one of the states in the Union. In contrast, the scope of the foreign emoluments clause is far broader. It applies to the "accept[ance] of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Unlike the Seventh Amendment, which guarantees a jury trial where the "value in controversy shall exceed twenty dollars," the foreign emoluments clause applies to a mere "present," regardless of its value. If the president were subject to the foreign emoluments clause — and he is not — then there is no obvious constitutional difference between President Washington accepting an ornately framed portrait from the French government and President Trump accepting hotel receipts from the French government. The former is a "present," and the latter (at least under the plaintiffs' flawed reading) is an "emolument." Both would be equally prohibited. However, neither is prohibited because the president is not subject to the foreign emoluments clause. And further, as we will discuss in our fourth post, an "emolument" is limited to "compensation or pecuniary profit derived from a discharge of the duties of the office."

9. How can you be right if the framers were "obsessed" with corruption?

The previous questions ultimately boil down to a final intuition: These arguments can not possibly be right because the framers drafted the foreign emoluments clause to eliminate corruption. Indeed, as Professor Zephyr Teachout has written throughout her impressive body

of scholarship, the framers were "obsessed" with corruption. We do not mean to criticize Teachout, who, unlike so many of the Johnny-come-latelies, actually wrote about the foreign emoluments clause prior to the 2016 election. But we think that this an untethered purposivist argument is not enough to trump the body of textual and historical evidence we have provided. As Will Baude noted in 2016, Tillman's arguments have "shifted the burden of proof" to those who claim that the president is subject to the foreign emoluments clause. Citing a general purpose behind the Constitution is not enough.

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Our next post will turn to the meaning of "emoluments" as used in the presidential emoluments clause and the foreign emoluments clause.

PART 4

Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 4: An Emolument is the "profit derived from a discharge of the duties of the office,"* THE WASHINGTON POST—THE VOLOKH CONSPIRACY (Sept. 29, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/29/the-emoluments-clauses-litigation-part-4-an-emolument-is-the-profit-derived-from-a-discharge-of-the-duties-of-the-office/?utm_term=.1cfd0d5fd6d6; 2017 WLNR 29940753, http://ssrn.com/abstract=3311758.

A President's business transactions with third parties (the federal government, a state government, or a foreign government), cannot be constitutionally proscribed emoluments.

Our first, second and third posts, based on briefs we submitted to the District Courts for the Southern District of New York and the District of Columbia, explained that because the president does not hold an "Office . . . under the United States," he or she is not subject to the foreign emoluments clause. This drafting convention refers to appointed officers, not elected federal officials. The president, however, is subject to the presidential emoluments clause, also known as the compensation clause or the domestic emoluments clause. Art. II, § 1, cl. 7 provides "The President . . . shall not receive within that Period any other Emolument from the United States, or any of them." The presidential emoluments clause expressly bars the president from receiving an "emolument" from the United States or any state in the Union. Indeed there is a certain symmetry in that the Constitution has three separate emoluments clauses: one for Congress (sinecure or ineligibility clause — Art. I, § 6, cl. 2), one for the president (presidential emoluments clause — Art. II, § 1, cl. 7), and one for appointed officers (foreign emoluments clause — Art. I, § 9, cl. 8).

The plaintiffs in the current litigation assert that President Trump has violated and continues to violate the presidential emoluments clause by receiving profits derived from business transactions with state governments. They have defined an "emolument" to consist of "anything of value," whether "monetary or non-monetary." This post will analyze the meaning of the word "emolument" in the presidential emoluments clause, as well as in the foreign emoluments.

"Emoluments" Refer to "Compensation" Derived from the "Discharge of the Duties of the Office."

Although the term "emoluments" is now somewhat archaic, it has long had a settled meaning. As the Supreme Court explained in Hoyt v. United States (1850), the term "emoluments" "embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of the office." To put it in its simplest terms, an "emolument" is the lawfully authorized compensation that flows from holding an office or employment. See State ex rel. Anaya v. McBride, 539 P.2d 1006, 1012 (N.M. 1975); State ex rel. Benson v. Schmahl, 145 N.W. 794, 795 (Minn. 1914); State ex rel. Todd v. Reeves, 82 P.2d 173, 176 (Wash. 1938) (Blake, J., dissenting) (citing Hoyt, 51 U.S. (10 How.) 109 (1850)).

The presidential emoluments clause does not bar presidents from holding a second federal office, or even a state office. However, they cannot accept any compensation, that is, emoluments, from that second office. They can only receive the emoluments associated with

the presidency. In other words, a president can hold a second government (domestic) position (there is no incompatibility), but he or she cannot take the compensation associated with that second position.

To put it another way, "emoluments" should be understood as the compensation which is to be fixed by law by the body that creates the office or position under discussion, or by the body charged with fixing the office's or position's regular compensation. Pursuant to Article II, Section I, clause 7, the emoluments for the presidency are established by Congress. Congress, and only Congress, has the power to determine the emoluments of each and every federal position and office, including the presidency. Voluntary actions by third parties, or even by the president, cannot change a position's emoluments. With or without the cooperation of the president, a state government, or a foreign power for that matter, cannot change the "emoluments" of the presidency: only Congress can do that.

Further, accepting plaintiffs' contrary position leads to bizarre structural consequences. The ineligibility clause provides: "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 whereof shall have been [i]ncreased during such time." Under this provision, the president is barred from appointing a senator to a Cabinet position, if that Cabinet post's "emoluments" were increased during his or her Senate term.

Imagine if a state legislature purports to raise the "emoluments" of a Cabinet position by $100 per year by state statute. Have the emoluments been increased? Under the ineligibility clause if its "emoluments" have been increased, a senator cannot take the position, even if the person refrains from accepting the increase. If plaintiffs are correct, and third-parties (like states) can change a federal position's emoluments, then the emoluments have been increased, and the president cannot make the appointment. Plaintiffs' position would give every single state (and every foreign government) a veto power over presidential appointments. Plaintiffs' ahistorical position makes no structural sense. Such bizarre consequences go far to establish that the president's emoluments are compensation as determined by Congress, and only by Congress. A president's business transactions with third parties (the federal government, a state government, or a foreign government), cannot be constitutionally proscribed emoluments.

If there were any doubt that the Hoyt Court's narrow definition of "emoluments" applies to the presidential emoluments clause, one need only consider that President Washington's conduct set the standard.

Benefits from President Washington's "Public Sale of Lots" were not "Emoluments"

On Sept. 18, 1793, President George Washington crossed the Potomac. He was greeted with two brass bands, which escorted him on the first parade that was held in the federal capital district. He traveled from the future site of the White House to the future site of the Capitol. The Columbian Gazetteer, a New York newspaper, reported that upon his arrival, the master of ceremonies "deposited" the Capitol's cornerstone, adding that "the presence of Washington, gave magnificence to the scene, and brilliancy to the performance." Similar accounts were published in newspapers in Boston and South Carolina.

That very same day, historian James Thomas Flexner recounts, "there was to be an auction of lots," which had been actively advertised in newspapers as far away as Philadelphia six months earlier. The auction would be supervised by three commissioners that Washington had appointed in 1791: David Stuart, Daniel Carroll, and Thomas Johnson. These prominent figures played important roles in the early years of our Republic. Stuart was a member of the Virginia convention that ratified the Federal Constitution. Daniel Carroll was a member of the Federal Convention that drafted the Constitution and served in the First Congress. Thomas Johnson was the first governor of Maryland following independence, a member of the Maryland convention that ratified the federal Constitution, and served as an associate justice of the Supreme Court during his tenure as a commissioner.

As the lots in the new federal capital were put up for sale by the auctioneer's chants, Flexner wrote, "there were few raised hands, few shouting voices." One account, according to historian Bob Arnebeck, recalled that some eighteen buyers were present at the public auction. Washington, who had "hoped [this auction] would be more successful than its predecessors . . . leaned forward in suspense," Flexner recounted. And then, he "br[oke] the silence to buy four lots on the East Branch." The certificates for the purchase of lots 5, 12, 13, and 14, preserved in Washington's papers, were recorded as the "Public Sale of Lots."

George Washington received valuable plots of land (i.e., purported "emoluments") from the federal government. To the plaintiffs and their Amici, our first president, under the watchful eye of three prominent members of our founding generation and in full public view in the new federal capital, willfully violated the Constitution. Washington, a trained surveyor of land, would have known that his purchases would be publicly recorded for all to see. This is not the model of a diabolical schemer, attempting to evade his constitutional duties through subterfuge. There was none: it was all done in public. Washington was acutely aware of how his every action would be scrutinized. In a letter to his nephew, and future Supreme Court Justice, Bushrod Washington, the president explained that "my political conduct . . . must be exceedingly circumspect and proof against just criticism, for the Eyes of Argus [the all-seeing, many-eyed giant of Greek mythology] are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relations."

It is only now, more than two centuries after Philadelphia, that certain legal historians are making the ahistorical claim that President Washington's business dealings with the federal government is and was prohibited by the presidential emoluments clause. Are we really to believe that not only did the commissioners willingly, openly, and notoriously participate in a conspiracy to aid and abet the president in violating the Constitution's presidential emoluments clause, but that they also left — for themselves and their posterity — a complete and signed documentary trail of their wrongdoing?

Finally, we know of no contemporary opposition to Washington's participation in the land auction, even though he appointed and had supervisory power over the commissioners who presided over the auction. Even at that time, anti-administration officials could have seized upon any maladministration or unethical conduct. In 1793, there were some 13 anti-administration Senators and some 40 anti-administration Representatives.

That no opposition was registered strengthens the inference that Washington's bids were not perceived by the public as anything other than perfectly legal and perfectly fair. Indeed, just as Washington's contemporaries failed to object to his doing business with the federal government, later commentators who had access to these historical records also failed to

discuss any such potential objections based on the presidential emoluments clause in regard to Washington's Sept. 18, 1793 land purchases. The one historian (i.e., the one historian not connected to current litigation) to address the scope of the term "emoluments" and its applicability to business transactions has squarely rejected this argument. Attempts to paint Washington as a grossly negligent, if not a crooked dealer, are contrary to the overwhelming weight of evidence. Likewise, efforts to tar the reputation of the commissioners, who were respected officials in the Early Republic, are unsupported by any evidence. The far simpler answer is that business transactions are beyond the scope of the phrase "emoluments" in both the presidential and foreign emoluments clause. Plaintiffs' attempt to redefine these provisions should fail as a matter of law.

A Corpus Linguistics Analysis of "Emoluments"

The Supreme Court's decision in Hoyt and President Washington's practices go far to demonstrate that the word "emoluments" in the presidential emoluments clause cannot mean "anything of value," whether "monetary or non-monetary." This position is bolstered by a new analysis performed by James C. Phillips and Sara White, titled The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English, 1760-1799. Phillips and White presented their paper at the recent South Texas Law Review symposium on the foreign emoluments clause, and their paper will be published later next year.

Here is an excerpt of the abstract of this cutting-edge analysis, which Professor Larry Solum said was "Highly recommended. Download it while it ' s hot!":

…This paper tackles the meaning of emolument(s) in the founding era using the first (that we can find) full-blown corpus linguistic analysis of constitutional text in American legal scholarship….

We constructed three corpora for our analysis that covered 1760-1799: one of books, pamphlets and broadsides from a mix of ordinary and elite authors (53.4 million words), one correspondence of six major "Founders" (43.9 million words), and one of legal materials (48.6 million words). From each we sampled about 250 instances of the use of the term emolument (and read over 150,000 words of context–the equivalent of a Harry Potter novel). We found that the broad, general sense of emolument was the most common compared to the narrow, office/public employment sense in the "ordinary" corpus (54.6% to 34.1%, 11.2% ambiguous), but that the general sense was less common than the narrow sense in the "elite" corpus (29.3% to 64.8%, 5.9% ambiguous) and the "legal" corpus (25.6% and 68.7%, 5.7% ambiguous). When just looking at instances in our sample where the recipient is an office, we found the narrow sense dominated: "ordinary" corpus (84.2%), "elite" corpus (88.0%), "legal" corpus (94.2%). And the narrow sense was even more common when looking in the context of emoluments from government: "ordinary" corpus (86.7%), "elite" corpus (92.6%), and "legal" corpus (97.3%).

This paper concludes that the congressional and presidential emoluments clauses would have most likely been understood to contain a narrow, office or public-employment sense of emolument. But the foreign emoluments clause is more ambiguous given its modifying language "of any kind whatever." Further research into that phrase is needed.

Here is a video of Phillips and White presenting their paper:

https://youtube.com/watch?v=o6KUPzL4HBM%3Flist%3DPLMIM2V8Vm4Yp9iiTdiAcrKTda6y_Pvyc2

The Justice Department has cited Phillips and White's position at some length.

The Word "Emolument" in the Presidential Emoluments Clause Is Narrower than its Usage in the Foreign Emoluments Clause

It is worth stressing that the word "emoluments" in the presidential emoluments clause is arguably even narrower than its usage in the foreign emoluments clause. The latter refers to "any present, Emolument, Office, or Title, of any kind whatever." Though this issue has never been addressed by any court, we submit that the clause's "any kind whatever" language does not turn a non-emolument (e.g., a business transaction) into an emolument. Rather, this provision is best read to extend the force of the foreign emolument clause's emoluments-language to ambiguous cases. To illustrate this principle, courts have long divided on whether pensions and other perquisites accruing to former officeholders are "emoluments," and on whether reimbursing an officeholder's expenses are "emoluments." See 5 A.L.R.2d 1182, § 1-4. The "of any kind whatever" language in the foreign emoluments clause resolves this lingering question.

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Our final post will address certain jurisdictional and pleading issues in the emoluments clause litigation.

PART 5

Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 5: Problems with the Complaints in CREW v. Trump*, THE WASHINGTON POST—THE VOLOKH CONSPIRACY (Oct. 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/01/the-emoluments-clauses-litigation-part-5-problems-with-the-complaints-in-crew-v-trump/?utm_term=.fa9685cda3f6; 2017 WLNR 30117748, http://ssrn.com/abstract=3311758.

Days after President Trump's inauguration in January 2017, Citizens for Responsibility and Ethics in Washington (CREW) brought suit against the president under the foreign emoluments clause. One of us criticized CREW's initial theory of standing — premised on the organization's diversion of resources to investigate Trump's business transactions — as a self-inflicted injury. If CREW had standing, then so did the respondents in Clapper v. Amnesty International USA. To remedy this defect, in April, CREW filed its first amended complaint. The amended complaint added two parties: Restaurant Opportunities Centers United (ROC), an organization with members who are restaurant employees, and Jill Phaneuf, who "seeks to book embassy functions" and other events involving foreign governments in the District of Columbia. Both new plaintiffs claimed an injury based on a competitor theory of standing. In May — without any noted objection by the government — CREW filed a second amended complaint, adding yet another party: Eric Goode. Beyond standing and justiciability problems, the complaints do not demonstrate that either ROC or Goode are authorized to bring this litigation.

Eric Goode: Is he the "owner" of hotels and restaurants?

According to the second amended complaint:

Plaintiff Eric Goode resides in New York, New York. Mr. Goode is the owner of several celebrated hotels, restaurants, bars, and event spaces in New York. These include the Maritime Hotel located in Chelsea; the Bowery Hotel and Ludlow Hotel, both in the Lower East Side; and the Jane Hotel in the Meatpacking District. Among the restaurants that Mr. Goode owns — several of which are located in hotels — are the Park, Waverly Inn, and Gemma, the last of which is located in the Bowery Hotel. Mr. Goode's hotels and restaurants have attracted multiple foreign government clients and events, and have also hosted U.S. government officials and state officials traveling on official business and thus paying with government funds …

Plaintiff Eric Goode is an individual resident of New York, New York. Mr. Goode is the owner of several celebrated hotels, restaurants, bars, and event spaces in New York. These include the Maritime Hotel located in Chelsea; the Bowery Hotel and Ludlow Hotel, both in the Lower East Side; and the Jane Hotel in the Meatpacking District. Among the restaurants that Mr. Goode owns are the Park, Waverly Inn, and Gemma, the last of which is located in the Bowery Hotel.

We have emphasized "the owner" and "owns," because these statements are true only in the colloquial sense of the terms. For example, if you own a minority of shares of a publicly traded company, you can describe yourself as "an owner" of that entity, but you are not "the owner," nor do you "own" the company. The distinction of whether Goode is "an owner" or

"the owner," as opposed to a part-owner, is not semantic. Under well-established case law, individual members of commercial entities, such as a limited liability company, generally cannot bring suit on behalf of the organization, unless they are duly authorized to do so. The U.S. Court of Appeals for the 7th Circuit recently explained this doctrine:

> Here, the district court granted Texor's motion for summary judgment because Rawoof ran afoul of a particular subset of third-party standing doctrine known as the shareholder-standing rule. This rule holds that a shareholder generally cannot sue for indirect harm he suffers as a result of an injury to the corporation… The rule does not apply if the corporation's management has refused to pursue the action for reasons unrelated to good-faith business judgment…. Another exception to the prohibition on shareholder suits allows a shareholder to pursue an action originating from an injury to the corporation if he has suffered a direct, personal injury independent of the derivative injury common to all shareholders…. Finally, a shareholder may sue to vindicate an injury even where the corporation may bring the action if "a special contractual duty exists between the wrongdoer and the shareholder." Rawoof acknowledges the rule against shareholder standing but argues he is nonetheless entitled to bring this suit in his own name. He makes no effort, however, to bring himself within any of the recognized exceptions we have just listed. Instead, he invokes the agency doctrine applicable to liability issues when an agent acts for an undisclosed principal.

Based on publicly available records, it appears Goode is only a part-owner of the various hospitality establishments described in the second amended complaint. For example, the Observer reported that Sean MacPherson partnered with Goode to open the Ludlow Hotel as well as the Park restaurant. The New York Times noted that MacPherson and Goode are "behind the revamped Waverly Inn," as well as the Bowery Hotel. Likewise, New York magazine observed that Goode and MacPherson are behind the Jane hotel, the Maritime Hotel and the Lafayette House. Eater magazine boasted that the Gemma restaurant is "run by Eric Goode and Sean MacPherson of, among others …" Based on these reports, it would appear that all of the hotels and restaurants mentioned in the second amended complaint are not owned solely by Goode but are joint enterprises with his business partner, MacPherson.

Further, in Campos v. Goode, a class of workers at the Gemma restaurant brought a laborp suit in the Southern District of New York against Goode, MacPherson and a series of LLCs. The second amended class-action complaint in Campos v. Goode — drafted and redrafted after extensive research into the corporate structure — explains that "Defendants Eric Goode, Sean MacPherson, Garden Café Associates LLC, Sulcata Corp, Bowery F&B LLC, Bowery Hotel LLC, and BD Stanhope, LLC operate as part of a single integrated enterprise" (paragraph 30). In her opinion, Magistrate Judge Debra Freeman observed that Gemma and other "restaurants are owned and operated by Defendants Eric Goode, Sean MacPherson, and several corporate entities, including Defendants Garden Café Associates LLC, Sulcata Corp., Bowery F & B LLC, Bowery Hotel LLC, and BD Stanhope LLC." Campos v. Goode, No. 10 CIV. 0224 DF, 2011 WL 9530385, at *1 (S.D.N.Y. Mar. 4, 2011). Campos v. Goode is recent authority within the Southern District of New York that the plaintiffs have to account for.

These facts were not difficult to find. Indeed, the Post story that announced the second amended complaint, in three places referred to Goode as "part-owner" of New York hotels and restaurants. Pulitzer Prize winner David A. Fahrenthold was careful enough not to state that Goode was the sole "owner" of these hotels. The second amended complaint, however, does not make this critical distinction.

If Goode were the sole owner of any of these entities, he could direct the entities to bring these suits, albeit in the name of the entities. But according to readily available records, it appears that he is only a part-owner of the entities that actually own these establishments. There is absolutely nothing in the second amended complaint indicating that he was authorized to bring suit on behalf of these commercial entities or that the claim is a derivative one rather than a direct one. It is not enough that Goode (purportedly) suffers an injury from reduced profits and distributions from the commercial entity involved because of alleged competitive injury with Trump businesses. The suits, if they can be brought at all (and they can't), must be filed by the commercial entity actually suffering the alleged competitive harm.

ROC: Is it the owner of the Colors restaurant?

There are additional problems with CREW's pleading. ROC asserts an injury on behalf of "'COLORS' restaurant," which, according to the second amended complaint, "competes with restaurants owned by Defendant." Here, too, it isn't clear that ROC is the real party in interest. A search of the New York State Liquor Authority's database for "Colors Restaurant" lists seven principals: Fekkah Mamdouh, Sarumathi Jayaraman, Sarita Gupta, Jennifer Herman, Morgan Simon, Imar Hutchins and finally, Restaurant Opp Cntr United. The New York Department of State also lists an entry for Colors NY Restaurant LLC. The second amended complaint in CREW v. Trump simply states that "ROC United also owns and operates the restaurant COLORS in New York City." The second amended complaint does not specify the ownership stakes of any other reported principals or entities, nor does it explain the relationship between the (purported) injury suffered by Colors restaurant and ROC United.

* * *

The Justice Department failed to raise these arguments under Rule 17. No matter. One court, equating the shareholder-standing doctrine to a "nonconstitutional lack of standing," concluded that a judge "can notice an error and reverse on the basis of it even though no party has noticed." During oral arguments on Oct. 18, the district court should inquire about alleged injuries to ROC United and Goode.

PART 6

Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 6: Are the Claims Against the President in his Official or Individual Capacity?*, REASON—THE VOLOKH CONSPIRACY (Feb. 6, 2018, 11:30 AM), http://reason.com/volokh/2018/02/06/the-emoluments-clauses-litigation-part-6, http://ssrn.com/abstract=3311758.

Throughout the Emoluments Clauses litigation (See Parts 1, 2, 3, 4, and 5), we have made three primary arguments in amicus briefs filed with federal district courts in New York, the District of Columbia, and Maryland. First, we've written (following Supreme Court case law) that an "emolument" is the "profit derived from a discharge of the duties of the office," and not "anything of value." The Department of Justice ("DOJ") has made a similar argument in their briefs.

Second, citing text and history, we've contended that because the President does not hold "office . . . under [the United States]," he is not subject to the Foreign Emoluments Clause (which extends only to those who hold "office . . . under [the United States]"). DOJ has not affirmatively argued this position, but in a letter to the Southern District of New York, DOJ lawyers stated that "[t]he Government has not conceded that the President is subject to the Foreign Emoluments Clause." The DOJ's letter represents a shift from a 2009 Office of Legal Counsel ("OLC") opinion, which stated, without any analysis or explanation, that the Foreign Emoluments Clause "surely" applies to the President.

There is a third argument we have raised that the Government has been unwilling to advance: the three complaints were each filed against the President exclusively in his "official" capacity, but the conduct plaintiffs are complaining about is not "official" conduct. As such, the complaints were each improperly pleaded. UNC Law Professor Andy Hessick pithily tweeted about the issue back in June:

Andy Grewal@AndyGrewal

· Jun 12, 2017

Replying to @derektmuller and 2 others

Not a civ pro guy and don't know how remedies fit into naming of Def., but the alleged underlying violation occurs in Presidential capacity

Andy Hessick@AndyHessick

should be personal, I think. Not like his successor will have to defend it. Common mistake

6:15 PM - Jun 12, 2017
Twitter Ads info and privacy

The Supreme Court recently explained that a suit against a Plaintiff in his individual capacity "to recover for his personal actions . . . 'will not require action by the sovereign or disturb the sovereign's property.'" *Lewis v. Clarke* (2017) (quoting *Larson v. Domestic and Foreign Commerce Corp.* (1949)). In other words, when an officer engages in purported illegal conduct, and such conduct does not involve government policy, then that conduct is personal in nature. Like in *Lewis v. Clarke*, an injured plaintiff can challenge this personal conduct by suing that officer for damages in his individual capacity. Such a suit could not be filed against the officer in his official capacity, because, the plaintiff's prayer for relief would "not require action by the sovereign."

Unlike the meaning of "emoluments" and the scope of the Foreign Emoluments Clause's *Office*-language, the principles involved here—distinguishing between official and individual capacity lawsuits—are long settled by Supreme Court case law. The principles are basic. What are those principles? First, suits against federal officers for their official conduct are, in fact, suits against the sovereign; the relief sought for such a suit must include (at least) declaratory relief or injunctive relief, in order to change the government policy at issue. Second, suits against federal officers for their individual conduct are not suits against the sovereign; the relief sought typically includes damages, as there is no government policy that could be declared unlawful or enjoined. In the former situation, i.e., an official capacity lawsuit, the purpose of injunctive relief (i.e., the typical relief sought in an official capacity suit, and the relief sought by plaintiffs in these cases) is to stop (alleged) ongoing illegality which is set as government policy. In the latter situation, i.e., an individual capacity lawsuit, the purpose of monetary damages is to compensate the plaintiff for his injury caused by the wrongdoer's personal conduct, i.e., conduct which was not performed pursuant to any government policy.

Lewis and *Larson* illustrate why the three Emoluments Clauses lawsuits are improperly pleaded. The plaintiffs complain about conduct that uniformly involves private commercial entities owned, in whole or in part, by the President. These entities predate Trump's becoming President; these entities have transacted business with foreign entities before Trump became President; and, Trump received or accepted distributions from these entities before becoming President. These commercial entities do not make federal government policy, and when Trump or the entities themselves receive or accept distributions or payments (including contractual consideration) from foreign entities, the receipt or acceptance of such benefits is not pursuant to any federal government policy.

In short, the gravamen of plaintiffs' complaints is not that the federal government is acting illegally, pursuant to any government policy, but that the President, *qua* individual, is acting unconstitutionally (by purportedly accepting illegal emoluments). In other words, these suits are individual or personal capacity suits. Indeed, as explained above, in a typical individual capacity suit, damages are sought, not an injunction. Plaintiffs in these three cases have not sought damages. They have sought injunctions and declarations, but their seeking this type of relief makes no sense: No federal government policy is at issue, at least none connected to the

President or the entities he owns, in whole or in part, receiving or accepting distributions or payments. Even if the plaintiffs' prayers for relief are granted, under *Lewis* and *Larson*, such a judgment would "not require action by the sovereign" nor would such a judgment require any change in federal government policy. Thus, all three lawsuits are not "official capacity" lawsuits: each has been improperly pleaded from the day they were first filed.

Tillman discussed this issue on an online law journal in August 2017, and we raised it in each of the three amicus briefs which we filed. Our primary motive here was to alert (each) court and all parties that these three cases should not proceed in their current form. Perhaps sensitive to the oddity of Plaintiffs' complaint, the District of Maryland judge invited *all parties and amici* to file additional briefs. As Professor Rick Hasen indicated, such orders are virtually unheard of: courts rarely give amici an opportunity to respond to other amici.

Rick Hasen
✔@rickhasen

· Sep 19, 2017

he @sethbtillman/ @jedshug battle over Hamilton on emoluments/officers is not over.Motion to respond to amicus brief https://drive.google.com/file/d/0B6pbwibK31LaN1k4aWw1WEJ0REk/view …

2017-09-19-Motion-for-Leave-Response-to-Historians.pdf
drive.google.com

Rick Hasen
✔@rickhasen

To be honest, I've never seen a motion for one amicus to respond to another amicus in a case.

1
11:13 PM - Sep 19, 2017

We were the only party/amicus to take up the Court's offer to file a clarifying responsive brief. Our response brief spent its first six pages, in a free-standing section, discussing why the Maryland suit was not properly pleaded against the President in his official capacity. Yet, the Justice Department did not advance this argument in any of its briefs before the Maryland Court (or any other court). Likewise, our briefs put the Plaintiffs in the Maryland action on

fair notice that their complaint was defective. Plaintiffs (and *Amici* supporting Plaintiffs) did not reply to our responsive brief (which they were permitted to do), nor, at that juncture, did Plaintiffs seek to amend the Maryland complaint.

On January 25, 2018, Judge Messitte held oral arguments in Greenbelt, Maryland. Blackman attended. The very first question from the bench referenced our amicus briefs, and asked the parties to address whether the Maryland Complaint concerns actions taken in the President's official or individual capacity. Over the course of nearly five hours of argument time, counsel for the State of Maryland and the District of Columbia maintained that Trump's receipt of (purported) emoluments concerned his official capacity. But once confronted by skeptical questions from the bench, Plaintiffs volunteered to amend their complaint to bring claims against the President in his individual capacity.

Judge Messitte did not order the Plaintiffs to amend their complaint, but during the hearing, counsel for Plaintiffs represented that they would do so in due course, presumably through a Rule 15 motion. At the hearing, the Justice Department did not indicate that it would oppose such a motion—rather, the Government suggested that it would file a new motion to dismiss. In short, the Maryland action, which had been set either to be dismissed or to proceed onto discovery, now sits in limbo awaiting a Rule 15 motion to amend, a new round of briefing on a motion to dismiss (and possibly in regard to the Rule 15 motion too), and, presumably, a new oral argument on the revised motion to dismiss (and, perhaps, also in regard to the Rule 15 motion). Moreover, all Plaintiffs have to do, to move the litigation into its new "path," the obvious direction it should always have been in, is to change the Complaint's caption and the 1-page prayer for relief; yet, it is now more than a week later, and still no amended complaint has been filed.

But for the official/individual capacity argument raised in our amicus brief, the Court seemed inclined to let the case go forward to discovery. That the Government refused to engage this argument, both in light of our briefing, and after the Judge's pointed questions from the bench, is somewhat perplexing. Because the DOJ has remained silent, we submitted a letter to Judge Messitte as a friend of the Court. Our letter notes that the expected Rule 15 motion and amended complaint, shifting Plaintiffs' Complaint from official capacity claims to individual capacity claims, will transform every aspect of this lawsuit, including what defenses the Defendant can put forward. (We had hoped to raise these concerns during oral argument, but our motion for leave to be heard at argument was denied.) The Government may end up opposing Plaintiffs' expected Rule 15 motion along lines similar to those which we outlined in our letter to the Court, but even if the Government does not oppose the motion, we have asked leave for *Amici* on both sides to respond.

Our next post will discuss how both parties' position, advanced in the briefs and at oral arguments, fundamentally confuses how our constitutional structure applies to the official and individual (or personal) conduct of federal officers.

PART 7

Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 7: The President's Acceptance or Receipt of Profits is not "Executive Action,"* REASON—THE VOLOKH CONSPIRACY (Feb. 7, 2018, 11:26 AM), http://reason.com/volokh/2018/02/07/the-emoluments-clauses-litigation-part-7, http://ssrn.com/abstract=3311758.

Throughout the Emoluments Clauses litigation (See Parts 1, 2, 3, 4, and 5), we have made three primary arguments in amicus briefs filed with federal district courts in New York, the District of Columbia, and Maryland: (i) that the payments at issue are not "emoluments"; (ii) that the President is not bound by the Foreign Emoluments Clause and its "Office . . . under [the United States]" language; and (iii) the complaints were each filed against the President exclusively in his "official" capacity, but the conduct plaintiffs are complaining about is not "official" conduct. As such, the complaints were each improperly pleaded.

As we noted in the sixth part of this series, the Department of Justice ("DOJ"), which is defending the President, has failed to argue that the complaint was improperly pleaded. To the contrary, DOJ has maintained that this case is properly pleaded as an official capacity suit.

In the oral argument in the Maryland action, the government lawyer insisted that the President's acceptance of emoluments constituted "executive action." (Just to be clear: neither the DOJ nor we have conceded that payments involving business transactions for value constitute constitutionally forbidden "emoluments;" likewise, we have argued that the presidency is not encompassed by the Foreign Emoluments Clause's *office … under the United States* language.) Judge Messitte, like everyone else in the court room, other than those sitting at defense counsels' table, seemed very confused by Plaintiffs' position and the DOJ's (apparent) concession: i.e., that the President's purported illegal conduct is properly pleaded as an "official capacity" action. We do not (yet) have a transcript available, but the Court's questions suggested that Trump's business transactions, i.e., his accepting or receiving purported emoluments, actions which do not involve any federal government policy, could not be meaningfully characterized as "executive action." We agree. Indeed, even amici *supporting Plaintiffs* (at 12) acknowledged this very point.

When Trump (or a commercial entity Trump owns, in whole or in part) receives or accepts profits or payments, Trump's receiving or accepting those profits or payments do not involve "executive actions" or government policy. In other words, Trump is not acting in an "official capacity" when accepting these disputed profits. The parties' position fundamentally misunderstands how our constitutional structure applies to federal officers in their official capacity, as opposed to federal officers in their individual or personal capacity.

Two decades ago, Professor Laurence H. Tribe observed in *Constitutional Commentary* that there are "two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution." First, she can "enslave somebody, a suitably hellish act." Why? Because the Thirteenth Amendment, which broadly provides that "slavery" shall not "exist within the United States," applies to private conduct. That is, if a federal officer enslaves a person under a government policy, he is violating the Thirteenth Amendment in his *official* capacity. Likewise, if a federal officer enslaves a person without regard to any government policy, he is still violating

the Thirteenth Amendment, but in his *individual* capacity. The Thirteenth Amendment operates in both fashions. In an *official capacity* action, the government is the actual defendant, notwithstanding the fact that the complaint names a government officer as the nominal defendant. The relief sought is typically a declaration or injunction: an order to stop ongoing government illegality. By contrast, in an *individual capacity* action, the government is not the actual defendant. The defendant is a named officer, and the typical relief sought is damages. In the Maryland action, the Plaintiffs' allegations involving purported violations of the Foreign and Domestic Emoluments Clauses related to private conduct, not official conduct, much less official conduct taken to pursuant to any government policy.

The second way for private conduct to violate the Constitution, Tribe writes, "is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws." Why? Because under Section 2 of the Twenty-First Amendment, "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." That is, a violation of a state's prohibition laws is in fact a violation of the Constitution. Consider a scenario where New Jersey prohibits the importation of intoxicating liquors into the state. If the Mayor of New York City distills alcohol in City Hall, and, pursuant to a municipal policy and using municipal cars, ships the liquor from New York into New Jersey, he is violating the Twenty-First Amendment in his official capacity. If the Mayor of Albany, by contrast, brews beer in his bathtub at home, and transports it into New Jersey in his private vehicle, he is violating the Twenty-First Amendment in his individual capacity. Both actions are unconstitutional. But only the prior case would be properly pleaded as an official capacity action.

Though Tribe identified "only" two ways in which private conduct can run afoul of the Constitution, the Emoluments Clauses are (in our view) a third and fourth way.

Consider the the Foreign Emoluments Clause. It provides that those holding "office . . . under the [United States]" cannot "accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" "without the Consent of the Congress." (Because, in our view, the President is not covered by this clause and its *Office*-language, we will consider the Secretary of State, who, all agree, is so bound.) First, if the Secretary of State publicly "accept[s]" gifts from a foreign state pursuant to a government policy, or if the Secretary uses federal government property in order to accept the gift, he violates the Foreign Emoluments Clause in his official capacity. Second, if the Secretary, however, privately "accept[s]" gifts from a foreign state without regard to any government policy, and without using federal government property in the process of accepting the gift—that is, as a purely personal gift—then he violates the Foreign Emoluments Clause in his individual capacity. This conclusion is not changed if the gift was motivated by the fact that the Secretary is an officeholder. (Such a gift could also constitute "[b]ribery" for purposes of the Impeachment Clause.) Both courses of conduct by the Secretary are unconstitutional, but only one is properly pleaded as an official capacity suit.

Conceptual clarity is key here. The Twenty-First Amendment prohibits "transport[ing] or import[ing] . . . intoxicating liquor[]" into a state in violation of that state's law. The unconstitutional conduct is the unlawful "transporting or importing." As an evidentiary matter, it may be relevant whether the wrongdoer is paid for the alcohol, or whether the payor is motivated to buy that particular brand of alcohol in order to curry favor with that government officer. But these facts are *irrelevant* to the determination of whether the conduct

is unconstitutional. Nor is the analysis changed one iota because a payor might pay a premium hoping to extract good will in a future deal with that officer or with the government he works for. (Again, above-market-price payments could also constitute "[b]ribery" for purposes of the Impeachment Clause.)

Where a wrongdoer violating the Twenty-First Amendment is a federal officer, his conduct might be challenged in an official capacity lawsuit or an individual capacity lawsuit. What capacity he is sued under does not hinge: (i) on whether his buyers are private individuals or state or municipal officers; (ii) on whether his buyers pay him with state or municipal money or property; or (iii) on whether his buyers are hoping to buy good will involving future transactions with that federal officer or the federal government. It is not the payor's conduct or motivation which determines whether the wrongdoing federal officer should be sued in an official or individual capacity. Rather, it is the conduct of the transporter or importer. If the transporter is a federal officer acting pursuant to an established federal policy or uses federal government property to "transport[] or import[]" the liquor, then it is an official capacity suit. Otherwise, it is an individual capacity suit.

Now consider the Foreign Emoluments Clause. A covered federal officer violates the clause by "accept[ing]" emoluments, gifts, etc., absent congressional consent. Here too, the donor/payor's motive might be relevant to establishing evidence of the federal officer's unconstitutional conduct. The unconstitutional conduct, however, is the recipient's conduct, that is "accept[ance]" of the emolument or gift. In terms of determining whether the federal officer's conduct is unconstitutional, nothing hinges on whether a foreign prince or government officer gave his own private money or his government's money as a gift, and nothing hinges on whether the motive of the gift was to enjoy future goodwill from the federal officer. If the "accept[ance]" by the federal officer falls under the scope of the clause, and Congress has not consented, it is unconstitutional. Here too, the fact that such conduct is unconstitutional does not tell us whether the covered officer should be sued in an official or individual capacity. If the federal officer accepted the purported illegal gifts or emoluments pursuant to some formal or informal, Executive Branch policy, but absent congressional consent, then the federal officer should be sued in an official capacity. Likewise, if the *act of accepting* the purported illegal gift or emolument made use of federal government property, that is, the sovereign's property, then the federal officer should also be sued in an official capacity. Otherwise, the federal officer should be sued in an individual capacity. These principles are basic. We think these are settled, well established principles, repeatedly announced by the Supreme Court and other federal courts.

The same analysis applies to the Domestic Emoluments Clause, which prohibits official and individual conduct by the President. In the Maryland case, the alleged unconstitutional conduct—Trump's (or his Trump-affiliated entities) "recei[pt]" of proscribed emoluments—is quintessentially private conduct, not official conduct. It is not official conduct because the *conduct related to receiving* the purportedly proscribed emoluments does not involve any "executive action," any federal government policy, or make use of any government (that is, the sovereign's) property. Hence, these actions cannot be properly pleaded as "official capacity" suits.

During oral arguments in the District of Maryland, counsel for the Plaintiffs represented that they would amend their complaint to include claims against the President in his individual capacity. (They have not done so yet.)

At this stage, we do not know if Plaintiffs amended complaint will bring their claims in the alternative (i.e., official and individual capacity claims) or exclusively as individual capacity claims. There is always the possibility that Plaintiffs will reconsider the position they took at oral argument—perhaps after consulting with their *amici* federal courts scholars—and choose to proceed with their current complaint, absent any amendment adding individual capacity claims.

Our next post will explain why a complaint against the President in his individual capacity is not likely to succeed: There is no cause of action (implied or otherwise) under which the Plaintiffs can sue.

PART 8

Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 8: There is no cause of action for a suit against the President in his individual capacity for purported violations of the Emoluments Clauses*, REASON—THE VOLOKH CONSPIRACY (Feb. 8, 2018, 3: 04 PM), http://reason.com/volokh/2018/02/08/the-emoluments-clauses-litigation-part-8, http://ssrn.com/abstract=3311758.

Throughout the Emoluments Clauses litigation (See Parts 1, 2, 3, 4, and 5), we have argued in amicus briefs filed with federal district courts in New York, the District of Columbia, and Maryland: that the complaints were each filed against the President exclusively in his "official" capacity, but the conduct plaintiffs are complaining about is not "official" conduct. As we noted in Part 6 of this series, the Department of Justice ("DOJ"), which is defending the President, has failed to argue that the Maryland complaint (where the issue was discussed during oral argument) or any of the other two complaints were improperly pleaded. To the contrary, DOJ has maintained that the Maryland case is properly pleaded as an official capacity suit. Part 7 explained why the President's acceptance or receipt of purported profits and purported emoluments are not, as DOJ argued, "executive action."

This eighth installment will address an essential follow-up question. Even if the Plaintiffs (in the Maryland case) amend their complaint to enjoin conduct taken by the President in his individual capacity, they still will have failed to state claim on which relief can be granted. Why? Because there is no express or implied constitutional cause of action under which the Plaintiffs can bring such an individual capacity suit.

As a general matter, federal officers can be sued in their *official* capacity for purported violations of the Constitution. We have already addressed (in parts 6 and 7) why the allegations made against President Trump do not amount to an *official* capacity suit. (Likewise, we set aside for a moment whether a federal court has the power to issue an injunction against the sitting President, in light of *Mississippi v. Johnson*.) On the other hand, in order for such officers to be sued in their *individual* capacity, the Plaintiffs must identify a relevant cause of action. No cause of action exists to allow a suit against the sitting President in his individual capacity for violating the Constitution's Foreign and Domestic Emoluments Clauses. Causes of action come in two types: express and implied.

Express Causes of Action. Unlike the traditional congressionally-enacted action brought under 42 U.S.C. § 1983—which allows suits against *state* officers in their official and individual capacities—Congress has never seen fit to create by statute an express cause of action against *federal*officers, much less a cause of action against federal officers based on the Emoluments Clauses. (That Congress could have enacted such a statute, and have not done so, should provide courts some pause to resolve these matters.)

Implied Causes of Action Based on the Constitution. The Supreme Court has created implied constitutional causes of action under the Fourth, Fifth, and Eighth Amendments pursuant to the doctrine announced in *Bivens v. Six Unknown Named Agents*. 403 U.S. 388 (1971). However, the Supreme Court has not seen fit to imply a constitutional cause of action against federal officers with respect to any other rights-conferring provisions of the Bill of Rights. *See generally*Erwin Chemerinsky, Federal Jurisdiction § 9.2 (7th ed. 2016). Indeed, the Supreme Court's recent plurality decision in *Ziglar v. Abbasi* casts serious doubt on

extending this doctrine to any "new *Bivens* context" with respect to the Fourth Amendment. 137 S. Ct. 1843, 1860 (2017).

This rule would apply with even greater force to structural provisions (as opposed to rights-conferring provisions) of the Constitution, such as the Foreign Emoluments Clause and the Domestic Emoluments Clause. These two structural provisions have never been the basis for an implied cause of action. The plaintiffs in the Maryland litigation have cited *Bond v. United States*(2011) for the proposition that claims based on structural provisions of the Constitution are justiciable. Plaintiffs' claim is a stretch. In *Bond*, the defendant raised the Tenth Amendment as a defense against a criminal prosecution. The usual rules of justiciability are very different in the civil and criminal context. In any event, because of the ongoing prosecution, the defendant in *Bond* did not need to rely either on an implied or an express cause of action. *Bond* therefore does not speak, one way or the other, to whether a new and novel judicially-created implied constitutional cause of action should be implied from the Foreign Emoluments Clause or the Domestic Emoluments Clause.

Furthermore, under *Ziglar*, courts should hesitate before creating a new judicially-created implied constitutional cause of action based on provisions of the Constitution that have never been interpreted by the Supreme Court at all. Finally, although we have questioned whether the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342(a)(1)(E) is premised on the Foreign Emoluments Clause, (Response at 18–19), to the extent that the former statute is authorized by the latter constitutional provision, the case for an implied constitutional cause of action becomes even weaker because Congress's statute occupies the field. That a federal statute occupies the field, counsels against a court crafting a novel judicially-created implied constitutional cause of action.

A federal officer could violate the Foreign Emoluments Clause in either his official or individual capacity—that is, such a constitutional violation may or may not involve government policy. While both types of constitutional violations are unlawful, the manner in which the clause is violated matters for purposes of litigation. Here, for example, a lawsuit to prevent a federal officer from accepting unlawful emoluments in his official capacity would seek declaratory or injunctive relief to halt the government policy that authorizes or orders him to receive the (purported) emoluments. The Supreme Court recently explained that such an official capacity suit would "require action by the sovereign or disturb the sovereign's property.'" *Lewis v. Clarke* (2017) (quoting *Larson v. Domestic and Foreign Commerce Corp.* (1949)). If the suit were successful, the court would enjoin the policy that permits or mandates the receipt or acceptance of the (purported) prohibited emoluments.

In contrast, if a federal officer received or accepted (purported) prohibited emoluments in his individual capacity—that is, not pursuant to any government policy—the prayer for relief would look very different. In this latter situation, the prayer for relief, if successful, would not "require action by the sovereign," because the sovereign took no action in the first place to enable receipt or acceptance of emoluments.

The federal courts can hear the former type of lawsuit, i.e., an official capacity lawsuit, brought against an officer in his official capacity for constitutional violations, by virtue of the Constitution standing alone, without any federal statute. Individual capacity suits are entirely different. The latter type of suit, i.e., an individual capacity lawsuit, is theoretically possible, so long as a cause of action exists. Unlike an official capacity suit (which can be based on the Constitution standing alone), an individual capacity must be supported either by a federal

statute or by a judicially-created implied constitutional cause of action. There is no express cause of action based on any applicable federal statute, and for the reasons discussed above, the weight of Supreme Court precedent would indicate (we think) that such a cause of action should and cannot be implied.

Indeed, we speculate that the reason these three lawsuits have not been argued in the alternative from the day each lawsuit was first filed, is because every step in the analysis above was entirely understood by (at least some of) plaintiffs' attorneys. After all, the principles laid out here are basic: bread-and-butter principles taught in first-year civil procedure and third-year federal courts classes.

Admittedly, many aspects of this case are unsettled and novel. For example, the Supreme Court has never passed on whether the Foreign Emoluments Clause applies to the President, nor has it opined on whether such suits are justiciable. We do not purport to predict how the Court or any federal court will rule on such issues of first impression. However, the distinction between official and individual capacity suits is well-settled. Likewise, the Court's jurisprudence has evinced a strong hesitancy to extend implied causes of action beyond the Fourth, Fifth, and Eighth Amendments. Even if the Maryland Plaintiffs establish standing, and show that the case is justiciable, the absence of an express (that is, a statutory) cause of action or an implied constitutional cause of action, and cases like *Ziglar*, provide the courts with an easy way to dispose of these cases.

There is, in fact, a distinct risk for the Maryland Plaintiffs in pressing the suit against the President in his individual capacity. In *Ziglar*, there was only a four-member majority, due to Justice Scalia's passing. The Emoluments Clauses litigation could provide a five-member majority with an opportunity to slam the door shut, permanently, on implying new judicially-created causes of action (and perhaps terminating the doctrine entirely). This entire doctrine is largely a vestige of the Warren Court that has been fluttering on life support for two decades or so. The Emoluments Clauses cases, ironically enough, could put an end to this doctrine, altogether. We suspect several of the scholars who are closely affiliated with this litigation, as well as their amici, would not want to take this risk—which may explain why an amended complaint still has yet to be filed.

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The ninth part in this series will discuss additional follow-up questions concerning individual capacity suits.

PART 9

Josh Blackman & Seth Barrett Tillman, *Who was right about the Emoluments Clauses? Judge Messitte or President Washington?*, REASON—VOLOKH CONSPIRACY (Aug. 3, 2018, 3:17 PM), https://reason.com/volokh/2018/08/03/who-was-right-about-the-emoluments-claus, https://ssrn.com/abstract=3225939, http://ssrn.com/abstract=3311758.

In a series of writings and briefs, we have maintained that President Washington's practices refute the legal claims that President Trump has violated the Foreign and Domestic Emoluments Clauses. President Washington received valuable gifts from foreign governments without seeking congressional consent. Furthermore, he purchased land from the federal government in a public auction. Based on our understanding of the Foreign and Domestic Emoluments Clauses, these acts were perfectly lawful. However, under the constructions put forward in ongoing litigation, President Washington publicly violated both provisions. Those opposing President Trump respond that President Washington was either mistaken or he brazenly violated the Constitution he helped to define. These litigation positions are contrary to a weight of bona fide authority.

Time and again, the Supreme Court has looked to Washington's decisions and practice when interpreting the text and structure of the Constitution. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter fittingly "derive[d] consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington." Washington's public acts such as accepting diplomatic gifts, are entitled to special solicitude when construing the Constitution. In *America's Unwritten Constitution*, Akhil Reed Amar wrote "Washington defined the archetypical presidential role," and "[a]s America's first 'first man,' [he] set precedents from his earliest moments on the job."

Until recently, no court had opined on the validity of Washington's practices with respect to the Emoluments Clauses. The Honorable George B. Daniels of the U.S. District Court for the Southern District of New York concluded that the case was not justiciable. Therefore, in December 2017, he granted the government's motion to dismiss. (That case is currently on appeal to the Second Circuit.) However, on July 25, 2018, the Honorable Peter J. Messitte of the U.S. District Court for the District of Maryland denied the government's motion to dismiss. And in doing so, Judge Messitte devoted nearly five pages to the arguments we raised in our briefs.

Though he rejected each and every one of our positions, we are grateful to the Court for shining a light on these important historical issues. Judge Messitte put on notice the Fourth Circuit, and all other courts, that any ruling for the Plaintiffs ought to address our arguments. Stated differently, if President Washington was correct, then President Trump should prevail. In order for the Plaintiffs to prevail, the courts must demonstrate that President Washington was wrong. In July 2016, Professor Will Baude wrote that the Tillman has "singlehandedly shifted the burden of proof." In any event, in ordinary civil litigation, the burden of persuasion rests with Plaintiffs. Because Judge Messitte's opinion is marred by plain historical errors, the Plaintiffs have not carried that burden.

Washington's Completed Land Transactions

In its opening brief, DOJ explained that President Washington bought four lots of land (lots nos. 5, 12, 13, and 14 in square 667) at an auction in the new federal capital. That land was purchased on September 18, 1793. According to the Plaintiffs' definition of "emolument," President Washington received something of value from the federal government, beyond his salary--that is, he received the land. Therefore, he would have violated the Domestic Emoluments Clause. Judge Messitte rejected the relevance of this evidence. Why? He asserted that "the surrounding facts [of the auction] . . . are seriously incomplete." Specifically, he posed a series of questions: "What sort of public auction was held? How was it advertised? How many bidders were involved?" Slip op. at 45–46.

Judge Messitte poses these questions as if they were unknowable. Yet, our Amicus Brief*expressly* answered each of these questions, and more. We showed that the auction was an open auction with oral bids. We showed that it was advertised six months prior to the auction in a newspaper in Philadelphia—then America's commercial capital and its former national capital. We showed that there were some eighteen bidders. Blackman-Tillman Br. at 28–29. These conclusions were well supported by primary documents and good secondary authorities.

President Washington's Prospective Land Transactions

Subsequent to that initial purchase of the four lots in September 1793, President Washington expressed an interest in purchasing further land in the federal capital. DOJ Memo at 43. In March 1794, he wrote to the Commissioners for the District of Columbia about a second proposed purchase (not in square 667, but in square 21). Washington stated: "I should be glad to know what my prospect is." He added, "I am as ready to *relinquish*, as I was to imbibe the *idea*, of this purchase." (emphasis added). In this letter, he suggested he would "relinquish" the "idea" of buying the land.

Yet, Plaintiffs conflate the completed and proposed transactions. They argued that Washington was "ready to relinquish" the property which he had already purchased in 1793. Pl.'s Opp'n at 45. They insinuated that Washington expressed doubt about the validity or finality of the 1793 purchase. This mischaracterization of the record confuses a straightforward primary source. DOJ did not concede this point in its reply. Rather, the government responded that even if Plaintiffs' characterization were correct, then the first and only actual completed transaction still illustrates that Washington benefited from doing business with the federal government. Furthermore, his commissioners (including a Supreme Court Justice) facilitated the purchase. Reply at 25–26. Indeed, Washington made the purchase in full view of the public at an advertised auction. DOJ's characterization of two transactions—a completed one and a proposed one—was entirely correct.

Judge Messitte squarely adopted Plaintiffs' characterization of the contested facts surrounding these transactions. He likewise conflated the two transactions: the completed one and the proposed one. Judge Messitte wrote: "*as Plaintiffs note*, Washington later made *clear* that [Washington] was 'ready to relinquish' the property if necessary, which itself calls into question the actual relevance of this transaction." Slip op. at 46 (emphasis added). The Court erred here. Washington was not talking about relinquishing the property he had already purchased in 1793, but instead was referring to a prospective land transaction. Unfortunately, Judge Messitte relied on the Plaintiffs' plain factual error to obscure how President Washington understood his own constitutional authority. Moreover, Messitte's characterization also obscures how the commissioners, as well as their contemporaries,

understood the actions of the President. Even worse, the Court stated that the Plaintiffs' position was "clear." Yet, Judge Messitte offered no explanation why he rejected the DOJ's contrary, and correct, position.

It is common enough for a Court to make an error with regard to its use of a historical document. Judges make mistakes, as do we all. Rather, the point here is that Judge Messitte's opinion was announced in the context of an early Rule 12(b) motion, rather than after an evidentiary hearing, e.g., in the context of a Rule 56 motion; in effect, he took judicial notice of a key disputed historical fact. Judge Messitte should not have adopted an incorrect interpretation of a contested document, nor should he have then characterized his announced position as "clear." The far better course would have been to provide a reasoned explanation for his conclusion, following an adversarial hearing. *See Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1086 (2d Cir. 1982) (explaining that "when facts or opinions found in historical materials or secondary sources are disputed, it is error to accept the data (however authentic) as evidence" and that the "better course is to conduct an evidentiary hearing").

If Judge Messitte's interpretation of the Domestic Emoluments Clause and its "emoluments"-language were correct, then Washington violated the clause, and his three commissioners conspired to help him do so in full light of day. The choice before us is a simple one: either: (1) President Washington and his three commissioners (including a Supreme Court Justice) were right, and Judge Messitte is wrong; or (2) Judge Messitte is correct, and President Washington and his three commissioners were wrong. But that is the choice before us. Judge Messitte's opinion obfuscates that choice by characterizing this straight forward event—President Washington's 1793 land purchases—as a "purported" and "potential" violation: it was either a violation or it was not. Future proceedings can correct this error: the 1793 Washington land purchase—at an advertised, public auction—serves as an on point Executive Branch precedent that the President is permitted to derive benefits from doing business with the federal government, notwithstanding the "emoluments" language in the Domestic Emoluments Clause.

Despite the presence of this evidence in the record, Judge Messitte still characterized the land auction as a "purported potential Domestic Emoluments Clause violation by President Washington." Judge Messitte implied that he, and not President Washington, is the more faithful arbiter of the Constitution. Parties bear a heavy burden in asserting that "President Washington did not understand" the Constitution that his precedents helped define. Judge Messitte's conclusion that the Constitution's "emoluments"-language reaches business transactions was based upon Plaintiffs' characterization of Washington's 1793 land transaction, but that analysis was marred by plain historical error. Judge Messitte, in effect, concludes that Washington violated the Domestic Emoluments Clause by transacting business with the federal government. Judge Messitte's analysis leaves unanswered the obvious question: Why are Plaintiffs and the Court unable to point to any one of Washington's contemporaries, any opposition in Congress, or in the press, any contemporaneous or subsequent legal scholar or historian—who noticed this illegality prior to the election of President Trump? The most likely explanation is simple: they did not notice any illegality because they did not think there was any illegality to notice.

The Weight of President Washington's Practices

Finally, Judge Messitte reasoned in the alternative. Even if the "single" land transaction supported the Defendant, that evidence must be weighed against other "historical evidence,

textual support, and executive branch precedent to the contrary." Slip op. at 46. Judge Messitte is correct that he must weigh the competing streams of authority. Alas, his scale is one-sided: he considers the Washington land transaction as the only evidence in support of the Defendant. (This evidence was put forward by the DOJ.) But there was other evidence—lots of it.

The Blackman-Tillman brief dedicated *an entire free-standing brief section* describing evidence of diplomatic gifts given to George Washington and to his successors, i.e., other Presidents during the Federalist Era and Early Republic. Washington and his successors received, accepted, and kept these diplomatic gifts—all absent congressional consent. The public knew about these gifts, and they were discussed in contemporaneous diplomatic communications. Until this litigation, no historian or contemporaneous or subsequent legal scholar (as far as we know) ever suggested that Washington or his successors violated the Foreign Emoluments Clause. Nor can one find a trace of protest in congressional debate or in the press. Why not? We posit that there was no protest, because presidents were not understood to be bound by the Foreign Emoluments Clause.

Moreover, the Court concluded that *de minimis* gifts and transactions were beyond the scope of the Constitution's "emoluments"-language. We do not take issue with that conclusion here. (However, Professor Andy Grewal noted that "no dictionary has ever defined an emolument as 'anything of value but with some *de minimis* exceptions where potential of corruption does not exist.'") Rather, here, we point out that Plaintiffs and their many supporting amici put *nothing* in the record from which Judge Messitte might reasonably conclude that the value of these diplomatic gifts had *de minimis* value. To the contrary, we have long anticipated this sort of argument. In our brief, we describe the "framed full-length portrait of King Louis XVI" as a "*valuable* gift," and the portrait was mounted inside a "*valuable* ornate frame." These were not *de minimis* gifts. We are (again) ready to put forward experts to support our position. Judge Messitte was perfectly correct to engage in balancing or weighing the competing streams of authority. However, he discounted Washington's 1793 land transaction based on plain error. Furthermore, he failed to consider the many diplomatic gifts given to President Washington and his successors in the Early Republic. The Court only considered the evidence on one side of the scales: this approach cannot be described as balancing in any meaningful sense.

There are other problems with Judge Messitte's opinion, which we will discuss in due course. For example, he defines "officers of the United States" and "office . . . under the United States" as interchangeable. He indicates that both terms refer to *all* federal officers in our government, whether elected or appointed: "As the Domestic Emoluments Clause illustrates, the term 'United States' is used in the Constitution to distinguish between the federal and state governments." Slip op. at 12. The Court makes no effort to explain why this is the case: why does the Constitution use divergent language (i.e., "office under the United States" and "officers of the United States") to express the same concepts? Nor does his opinion grapple with the severe structural problems this approach creates. Asher Steinberg—who agrees with some, but not all of our arguments—ably points out these issues.

For now, it is enough that we point out that the District of Maryland's five-page rebuke of our brief rests on plain historical error. Moreover, that error was enabled by errors in the Plaintiffs' briefs. On appeal, the burden remains on the Plaintiffs to show that the District of Maryland, and not President Washington, is the more faithful arbiter of the Emoluments Clauses.

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