

4-1-2020

Using Empirical Data to Investigate the Original Meaning of "Emolument" in the Constitution.

Clark D. Cunningham
Georgia State University College of Law, cdcunningham@gsu.edu

Jesse Egbert
Northern Arizona University, jesse.egbert@nau.edu

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Clark D. Cunningham & Jesse Egbert, *Using Empirical Data to Investigate the Original Meaning of "Emolument" in the Constitution.*, 36 GA. ST. U. L. REV. 465 (2020).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol36/iss5/6>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact gfowke@gsu.edu.

USING EMPIRICAL DATA TO INVESTIGATE THE ORIGINAL MEANING OF "EMOLUMENT" IN THE CONSTITUTION[†]

Clark D. Cunningham* & Jesse Egbert**

INTRODUCTION

The United States Constitution prohibits federal officials from receiving any “present, Emolument, Office or Title” from a foreign state without the consent of Congress.¹ In interpreting the Constitution’s text, we are to be guided “by the principle that ‘[t]he

[†] The authors thank the following for reading and commenting on prior drafts: Ted Afield, Douglas Biber, Erin Fuse Brown, Russell Covey, William Edmundson, Edward Finegan, Eric Friginal, Tammy Gales, Stefan Th. Gries, Neil Kinkopf, Paul Lombardo, Timothy Lytton, Craig Merritt, Caren Morrison, Julian Mortenson, Kris Niedringhaus, Eric Segall, Nirej Sekhon, Lawrence Solan, Kelly Timmons, Harold Weston, Patrick Wiseman, and Patricia Zettler. Expert research assistance was provided by reference law librarian Pamela Brannon, Noor Abbady (MA in applied linguistics), and Diana Ruth Coetzee (MA in applied linguistics). The research reported in this article was previously presented at the Fourth Annual Conference on Law & Corpus Linguistics on Friday, February 8, 2019, hosted by the J. Reuben Clark Law School at Brigham Young University, and the Workshop on Law & Linguistics, hosted by Georgia State University, Friday, October 18, 2019. The PowerPoint and video from the Georgia State presentation, including comments by Eric Friginal, are available at: <http://www.clarkcunningham.org/Workshop-Law-Linguistics.html>. The results of this research were submitted to the United States Courts of Appeals for the Fourth Circuit and District of Columbia Circuit in amicus briefs in support of neither party. Brief for Professor Clark D. Cunningham & Professor Jesse Egbert as Amici Curiae Supporting Neither Party, *In re Trump*, 928 F.3d 360 (4th Cir. 2019) (No. 18-2486), *reh’g en banc granted*, 780 F. App’x 36 (4th Cir. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334017 [hereinafter *In re Trump Amici Curiae Brief*]; Brief of Amici Curiae Professor Clark D. Cunningham and Professor Jesse Egbert in Support of Neither Party, *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020), <https://papers.ssrn.com/abstract=3475650> [<https://perma.cc/4M36-8GX8>] [hereinafter *Blumenthal v. Trump, Amici Curiae Brief*]; see also Aaron Blake, *A Big Trump Case Hinges on the Definition of ‘Emoluments.’ A New Study Has Bad News for Him.*, WASH. POST (Jan. 29, 2019, 2:58 PM), <https://www.washingtonpost.com/politics/2019/01/29/big-trump-case-hinges-definition-emoluments-new-study-has-bad-news-him/> [<https://perma.cc/5VB5-FWAN>]; Law Journal Advisory Board, *On Language, Lawyers and Judges Don’t Have All the Answers*, N.J. L.J. (Mar. 22, 2019, 9:45 PM), <https://www.law.com/njlawjournal/2019/03/22/on-language-lawyers-and-judges-dont-have-all-the-answers/> [<https://perma.cc/NTK5-FJ3M>].

* W. Lee Burge Chair in Law & Ethics, Georgia State University College of Law, cdcunningham@gsu.edu, www.clarkcunningham.org.

** Associate Professor, Applied Linguistics, Northern Arizona University, jesse.egbert@nau.edu, <http://oak.ucc.nau.edu/jae89/>.

1. U.S. CONST. art. II, § 1, cl. 7.

A search for either "emolument" or "emoluments" in the *Corpus of Historical American English (COHA)*, a digital database containing more than 400 million words of text from the 1810s–2000s,⁷ produced only four occurrences since 1990.⁸

In this article, we investigate the mysterious meaning of *emolument* by using computer-assisted search and analysis of a massive database of texts from the time of the Constitution and find strong patterns of usage that reveal how the word was used at the time the Constitution was drafted and ratified.

I. Why the Constitution Regulates Receipt of Emoluments

From the outset of the Revolution through the adoption of the Constitution, Americans greatly feared foreign interference in their newborn nation.⁹ Americans especially worried that their political leaders and government officials might be influenced and manipulated in subtle and hidden ways by the wealthy nations of Europe.¹⁰ Thus, while the Revolutionary War was still being waged, the Continental Congress included in the Articles of Confederation the following provision: "nor shall any person holding any office of profit or trust under the [U]nited [S]tates, or any of them, accept any present, emolument, office or title of any kind whatever from any king, prince or foreign state."¹¹

Early drafts of the Constitution considered by the Constitutional Convention in 1787 did not carry over from the Articles of

7. Overview, CORPUS HIST. AM. ENG., <https://www.english-corpora.org/coha/> (last visited Oct. 29, 2019).

8. For an online appendix containing data cited in this article, see *Using Empirical Data to Investigate the Original Meaning of "Emolument" in the Constitution*, www.clarkcunningham.org/MeaningOfEmolument.html. A screen capture of this search of COHA is posted in the appendix.

9. NORMAN L. EISEN ET AL., BROOKINGS INSTITUTION, EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 2 (2016), <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/> [<https://perma.cc/T3L8-MGZ5>].

10. *Id.*

11. Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 GA. L. REV. 1, 26 (2017) (quoting ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1).

Confederation what has come to be known as “the Foreign Emoluments Clause.”¹² However, on August 23, Charles Pinckney of South Carolina successfully moved¹³ to add to the Constitution the following provision:

[N]o Person holding any Office of Profit or Trust under them [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.¹⁴

The Constitution as submitted to the states for ratification also included two other clauses using the term *emolument*.¹⁵ The “Domestic Emoluments Clause” provides:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be [i]ncreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.¹⁶

The “Congressional Emoluments Clause” states:

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; and no Person holding any

12. Deborah S. Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & POL’Y 63, 70 (2017).

13. Natelson, *supra* note 11, at 37.

14. U.S. CONST. art. I, § 9, cl. 8.

15. U.S. CONST. art. I, § 6, cl. 2; *id.* art. II, § 1, cl. 7.

16. U.S. CONST. art. II, § 1, cl. 7.

Office under the United States, shall be a Member of either House during his Continuance in Office.¹⁷

At Virginia's ratifying convention, Governor Edmund Randolph offered the most widely cited explanation of the Foreign Emoluments Clause:

[It] restrains any person in office from accepting of any present or emolument, title or office, from any foreign prince or state. . . . This restriction is provided to prevent corruption. . . .

[This] provision [is] against the danger . . . of the President receiving emoluments from foreign powers. If discovered, he may be impeached. . . . I consider, therefore, that he is restrained from receiving any present or emolument whatever. It is impossible to guard better against corruption.¹⁸

II. The Current Need to Understand How Emolument Was Used in the Founding Era

Virtually no judicial precedent exists explaining the meaning of *emolument* because there has been no significant court litigation over the Emoluments Clauses since the founding—that is until the presidency of Donald J. Trump.

There is little doubt that President Trump owns businesses that have received millions of dollars from foreign governments during his time

17. U.S. CONST. art. I, § 6, cl. 2.

18. The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 15, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 465, 486 (Jonathan Elliot ed., 2d ed. 1836) (remarks of Governor Randolph of Virginia). As a delegate from Virginia to the Constitutional Convention, Randolph introduced the "Virginia Plan," which was the initial template for the Constitution. JOHN R. VILE, THE MEN WHO MADE THE CONSTITUTION: LIVES OF THE DELEGATES TO THE CONSTITUTIONAL CONVENTION 179–86 (2013). He later served on the Committee of Detail, which converted the Virginia Plan into the existing articles of the Constitution. *Id.* He chaired the Virginia Ratifying Convention and later served as America's first Attorney General under President George Washington. *Id.*

in office, including revenue from the Trump International Hotel Washington, D.C., located a few blocks from the White House in the renovated Old Post Office building.¹⁹

Nine days before the inauguration of President Trump, a white paper was prepared for a January 11, 2017 press conference.²⁰ That white paper, attributed to the law firm of Morgan, Lewis & Bockius, LLP, took the position on behalf of the President that revenue generated from business conducted by foreign governments at the Trump International Hotel or similar enterprises owned by the Trump Organization were not *emoluments* within the meaning of the Foreign Emoluments Clause:

The scope of any constitutional provision is determined by the original public meaning of the Constitution's text. . . .

[A]n emolument was widely understood at the framing of the Constitution to mean any compensation or privilege associated with an *office* . . . a payment or other benefit received as a consequence of discharging the duties of an *office*. Emoluments did not encompass all payments of any kind from any source, and would not have included revenues from providing standard hotel services to guests, as these services do not amount to the performance of an office, and therefore do not occur as a consequence of discharging the duties of an office.²¹

19. See Karen Yourish & Larry Buchanan, *Trump Still Makes Money from His Properties*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/interactive/2018/12/17/us/politics/trump-emoluments-money.html> [https://perma.cc/5K9C-QN72]; see also David A. Fahrenthold & Jonathan O'Connell, *At President Trump's Hotel in New York, Revenue Went Up This Spring—Thanks to a Visit from Big-spending Saudis*, WASH. POST (Aug. 3, 2018, 1:00 PM), https://www.washingtonpost.com/politics/at-president-trumps-hotel-in-new-york-revenue-went-up-this-spring—thanks-to-a-visit-from-big-spending-saudis/2018/08/03/58755392-9112-11e8-bcd5-9d911c784c38_story.html [https://perma.cc/X6ZP-S29D].

20. Sheri Dillon et al., *White Paper: Conflicts of Interest and the President*, MORGAN, LEWIS & BOCKIUS LLP 1 (Jan. 11, 2017), <https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf> [https://perma.cc/N9Y7-THVB].

21. *Id.* at 4.

A. Three Federal Lawsuits

President Trump's refusal to seek congressional approval for his receipt of revenue from foreign governments through payments to businesses he owns was quickly challenged in three federal lawsuits brought by three very different groups of plaintiffs.²² In each case, the President filed a motion to dismiss challenging standing and for failure to state a claim because *emolument* did not include the kinds of business-based revenue about which the plaintiffs were complaining.²³

The motion to dismiss for lack of standing was granted by the New York district court in *Citizens for Responsibility and Ethics in Washington (CREW) v. Trump* without reaching the emolument question.²⁴ At the time of writing, the U.S. Court of Appeals for the Second Circuit had just issued a decision reversing the decision on standing.²⁵ If the President asks the U.S. Supreme Court to reverse this decision, the meaning of *emolument* will not be addressed in the *CREW* case, unless the Supreme Court denies certiorari or affirms the Second Circuit and remands to the district court.

In the case filed in Maryland, *District of Columbia v. Trump*, the district court decided both the standing and emolument issues against the President, but the U.S. Court of Appeals for the Fourth Circuit reversed on the standing issue only and ordered that the case be dismissed.²⁶ A petition by Maryland and the District of Columbia for

22. *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018), *rev'd sub nom. In re Trump*, 928 F.3d 360 (4th Cir. 2019), *and reh'g en banc granted*, 780 F. App'x 36 (4th Cir. 2019); *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 180 (S.D.N.Y. 2017), *vacated*, 939 F.3d 131 (2d Cir. 2019); *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 50 (D.D.C. 2018), *rev'd*, 949 F.3d 14 (D.C. Cir. 2020). *In re Trump* was brought by the State of Maryland and the District of Columbia. 928 F.3d 360. In *Blumenthal*, the plaintiffs were 201 members of the Senate and House of Representatives. 335 F. Supp. 3d 45.

23. Memorandum in Support of Defendant's Motion to Dismiss at 3, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (No. 8:17-cv-1596-PJM); Statement of Points and Authorities in Support of Defendant's Motion to Dismiss at 2–3, *Blumenthal*, 335 F. Supp. 3d 45 (No. 17-cv-1154-EGS); Memorandum of Law in Support of Defendant's Motion to Dismiss at 2–3, *Citizens for Responsibility*, 276 F. Supp. 3d 174 (No. 17 Civ. 458 (RA)).

24. *Citizens for Responsibility*, 276 F. Supp. 3d at 174.

25. *Citizens for Responsibility*, 939 F.3d 131.

26. *In re Trump*, 928 F.3d at 364. On January 29, 2019, the authors filed an amicus curiae brief in support of neither party in the Fourth Circuit presenting the research results reported in this article. *In re Trump* Amici Curiae Brief, *supra* note †.

en banc review was granted, and oral argument was held December 12, 2019, before the full Fourth Circuit.²⁷

The U.S. District Court for the District of Columbia in *Blumenthal v. Trump* decided both the standing²⁸ and emolument²⁹ issues against the President. The President's motion for interlocutory appeal on both issues was granted,³⁰ and, on February 7, 2020, a panel of the U.S. Court of Appeals for the D.C. Circuit reversed on the grounds that the congressional plaintiffs lacked standing, without addressing the meaning of *emolument*.³¹

B. *The Possibility of Impeachment*

From the moment of inauguration through the time of writing, the House Oversight and Reform Committee has actively conducted “oversight to protect against violations of the Emoluments Clause” by President Trump.³² House Democrats even took preliminary steps to draft an article of impeachment based on violation of the Foreign and Domestic Emolument Clauses, but that initiative was put on hold in Fall 2019 when House leadership decided that impeachment efforts at that time should focus only on allegations that President Trump attempted to pressure the government of Ukraine to interfere with the 2020 presidential election by announcing an investigation of a leading Democratic candidate for President, former Vice President Joseph Biden.³³

We designed our investigation of the original meaning of *emolument* with the current controversy over President Trump's

27. *In re Trump*, 780 Fed. App'x 36 (4th Cir. Oct. 15, 2019) (mem.) (order granting petition for en banc review).

28. *Blumenthal*, 335 F. Supp. 3d at 54–72.

29. *Blumenthal*, 373 F. Supp. 3d at 195–208.

30. *In re Trump*, 781 Fed. App'x 1 (D.C. Cir. July 19, 2019) (order holding that denial of motion to certify for interlocutory appeal was abuse of discretion).

31. *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020). On October 8, 2019, the authors filed an amicus curiae brief in support of neither party in the D.C. Circuit presenting the research results reported in this article. *Blumenthal v. Trump*, Amici Curiae Brief, *supra* note ¶.

32. *Oversight Reform: Emoluments Clause*, COMMITTEE ON OVERSIGHT & REFORM, <https://oversight.house.gov/investigations/emoluments-clause> [<https://perma.cc/B3KU-XADQ>] (last visited Dec. 14, 2019).

33. Anita Kumar, *Cut out of Impeachment, Emoluments Crusaders Plot Plan B*, POLITICO (Dec. 6, 2019, 5:07 AM), <https://www.politico.com/news/2019/12/06/emoluments-trump-impeachment-congress-076715> [<https://perma.cc/E7U9-K5UJ>].

continued ownership of the Trump International Hotel in mind. The following research question thus guided our work: "Is there evidence that Americans in the Founding Era could have used the word *emolument* to describe revenue derived from ownership of a hotel?" Our research results produced several different findings, each of which provided evidence that Founding Era Americans could have used *emolument* to describe revenue derived from ownership of a hotel. Using the word in such a way would have been consistent with what we discovered was the broad meaning and wide usage of *emolument*. Further, our research revealed actual examples where *emolument* was specifically used to refer to revenue from ownership interest in a business.

III. Linguistics Provides Reliable Clues to Usage

The science of linguistics has made dramatic progress in the past thirty years due to developments in computer technology making it possible to acquire, store, and process large amounts of digitized data representing actual language use. Such a data set is called a "corpus" (plural: "corpora"). Corpora have been used widely in linguistics to document and describe patterns of natural language use at every linguistic level, including morphology (word parts), lexis (words), phraseology (multiword units), grammar (sentences and sentence structure), discourse (texts and text parts), and pragmatics (context and meaning).³⁴ Research analyzing corpora is also used for applied purposes in areas such as second-language teaching and learning, translation, computational linguistics, language testing, and forensic linguistics (i.e., the use of linguistics to solve crime), just to name a few.³⁵ In nearly every case, these applications of corpus analysis have proven to be fruitful, providing researchers with unprecedented insights into the ways language is actually used and abundant opportunities to use this new information to solve real-world problems.

34. See THE CAMBRIDGE HANDBOOK OF ENGLISH CORPUS LINGUISTICS (Douglas Biber & Randi Reppen eds., 2015) for a complete introduction to corpus linguistic research.

35. *Current LINGUIST Subfields*, LINGUIST LIST, <https://www.linguistlist.org/LL/LingSubfields.cfm> [<https://perma.cc/Q2TK-EUYQ>] (last visited Oct. 29, 2019).

Until recently, however, the tools of corpus-based linguistic analysis for interpreting the original Constitution and Bill of Rights were limited because corpora of American English did not reach back into the eighteenth century. But then in Fall 2018, the *Corpus of Founding Era American English (COFEA)* website was launched.³⁶ *COFEA* contains in digital form over 126,000 texts created between 1760 and 1799, totaling more than 136,800,000 words.³⁷

When properly executed, corpus linguistic research results meet the scientific standards of “generalizability,” “reliability,” and “validity.” To meet the standard of generalizability, a corpus must be sufficiently large and varied that it represents the entire population to be studied—for our purposes, the literate, English-speaking residents of the thirteen states at the time of ratification.³⁸ *COFEA* meets this standard. The texts in *COFEA* come from six sources: the National Archive Founders Online; HeinOnline; Evans Early American Imprints from the Text Creation Partnership; Elliot–The Debates in the State Conventions on the Adoption of the Federal Constitution; Farrand–Records of the Federal Constitutional Convention of 1787; and the U.S. Statutes at Large from the first five Congresses.³⁹ The sample of Evans Early American Imprints included in *COFEA* contains over 3,000 books, pamphlets, and other written materials published in America between 1760 and 1799.⁴⁰ Founders Online is a free online resource maintained by the National Archives providing digital copies of over 90,000 records found in the papers of six major figures of the founding era:

36. Stephanie Francis Ward, *New Web Platform Helps Users Research Meanings of Words Used in Constitution, Supreme Court Opinions*, A.B.A. J. (Sept. 17, 2018, 8:00 AM), http://www.abajournal.com/news/article/new_web_platform_helps_users_research_meanings_of_words_used_in_constitutio [https://perma.cc/KY9T-E7GE].

37. *Id.* *COFEA* was created by the J. Reuben Clark Law School at Brigham Young University. *Corpus of Founding Era American English (COFEA)*, BYU L.: L. & CORPUS LINGUISTICS, <https://lcl.byu.edu/projects/cofea/> [https://perma.cc/WB8L-TZNJ] (last visited Jan. 9, 2020) [hereinafter *COFEA Database*]. Both the data in *COFEA* and basic online search tools are freely available at <https://lawcorpus.byu.edu/>. *Id.* Access to *COFEA* may require registration using a Google or Gmail account to guard against hacking. *Id.*

38. Jesse Egbert, *Corpus Design and Representativeness*, in *MULTI-DIMENSIONAL ANALYSIS* (Tony Berber Sardinha & Marcia Veirano Pinto eds., 2019).

39. *COFEA Database*, *supra* note 37.

40. *Id.*

George Washington, Benjamin Franklin, John Adams, Thomas Jefferson, Alexander Hamilton, and James Madison.⁴¹ Founders Online contains official documents, diaries, and personal letters written by and to these six persons.⁴² Hein contains over 300 legal materials published during the founding era, primarily federal and state statutes, executive department reports, and legal treatises.⁴³

Reliability is defined as the degree to which a method produces consistent results, allowing a different researcher applying the same method to duplicate the outcome. The use of computers to analyze corpus data provides reliability in the form of stable and consistent results that can be replicated. Thus, the results presented in this article can be replicated by anyone with access to the *COFEA* database and the same analytic tools.⁴⁴

Validity refers to how well a method measures results defined by a well-formed research question and how well those results reflect real-world patterns. We aimed for validity by beginning with observations of systemic features of real language use in the Founding Era, seeking to discover patterns and develop theories from the ground up, with no preconceptions.⁴⁵ At each step, we then developed hypotheses from these observations about the ways *emolument* was used and understood that could then be subjected to empirical testing.

41. *Correspondence and Other Writings of Six Major Shapers of the United States*, FOUNDERS ONLINE, <https://founders.archives.gov/> [<https://perma.cc/TVE5-4BYV>] (last visited Oct. 29, 2019). Founders Online contains 27,639,683 words, distributed as follows: Washington Papers 12,044,694; Adams Papers 7,274,489; Hamilton Papers 3,895,699; Franklin Papers 2,578,518; Jefferson Papers 1,726,603; and Madison Papers 119,680. *Id.* About 70% of the words in *Founders* come from either the Washington Papers (44%) or the Adams Papers (26%). *Id.*

42. *Id.*

43. *COFEA Database*, *supra* note 37.

44. We supplemented use of *COFEA*'s online searches by downloading all instances of *emolument* from *COFEA* to perform manual analysis and more detailed computerized searches. We provide guidance by way of footnotes for using the online *COFEA* database and *COFEA* search tools to approximate our research and indicate where, at any point, there may be slight variations in results between our analysis of the offline database versus what readers may find using *COFEA* online.

45. Our research approach thus resembled what is called the "Grounded Theory Method." See EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 396 (12th ed. 2010).

IV. Empirical Data About the Original Meaning of Emolument

A number of legal scholars have written about the original meaning of *emolument* in the Constitution.⁴⁶ All of these legal scholars have started with the assumption that *emolument* had two or more discrete meanings in the Founding Era and have taken as their task determining which of those meanings provides the appropriate interpretation for application of the Emoluments Clauses of the Constitution.⁴⁷ This same assumption framed the federal litigation. For example, in the Maryland case, District Court Judge Peter Messitte began his analysis of “Original Public Meaning” by saying “the parties apparently agree that the term ‘emolument’ had at least two meanings at the time of the Constitutional Convention.”⁴⁸

We started with a very different approach, sometimes referred to as “grounded theory”: an approach that “begins with observations rather than hypotheses and seeks to discover patterns and develop theories from the ground up, with no preconceptions.”⁴⁹ We also framed our work with a specific research question prompted by the current controversies over President Trump’s business activities: “Is there evidence that Americans in the Founding Era could have used the word *emolument* to describe revenue derived from ownership of a hotel?” This research question did not require us to try and develop a general definition of *emolument* but only directed our research to looking for evidence of how *emolument* was used in the Founding Era.

We began without any preconceived assumption that *emolument* had two or more distinct meanings in the Founding Era, and in the end

46. See EISEN ET AL., *supra* note 9, at 7–13; Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 678 (2017); Natelson, *supra* note 11; James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English, 1760-1799*, 59 S. TEX. L. REV. 181, 191–92 (2017); John Mikhail, *The Definition of ‘Emolument’ in English Language and Legal Dictionaries, 1523-1806*, 68–69 (June 30, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693 [<https://perma.cc/AD7R-XX5X>].

47. See *supra* sources cited in note 46.

48. District of Columbia v. Trump, 315 F. Supp. 3d 875, 889 (D. Md. 2018).

49. BABBIE, *supra* note 45.

found extensive evidence that *emolument* had a very broad meaning rather than identifiable discrete different meanings.

Our project of developing empirical data to interpret the Emolument Clauses began by finding all uses of the word *emolument* in *COFEA*. In contrast to modern English, the data showed that the word was commonly used in the Founding Era. The search for every instance in which the word *emolument* appeared in either singular or plural form⁵⁰ resulted in over 2,800 examples (or "hits") across all six sources, divided approximately 60%–40% between plural and singular. The word was also used by a wide variety of persons in many different contexts. We verified that the word was not concentrated in any one source but occurred in comparable numbers in legal texts (Hein and Statutes), primarily nonlegal publications (Evans), and in the Founders' papers, which represent a mixture of official documents and personal correspondence. The total number of occurrences and the distribution across various genres, shown in the table below, gave us confidence that *COFEA* could produce a sufficiently large and representative sample for meaningful analysis.

Founders' Papers	Evans Texts	Convention Debates	State Ratification Debates	Hein	Statutes
37%	25.9%	2.7%	2.6%	29.6%	2.2%

We then used computerized linguistic analyses to identify common syntactic (i.e., grammatical) relationships between *emolument* and other words in this retrieved data set. This focus on syntax enabled us to use an objective feature of language that can be defined and

50. *COFEA Database*, *supra* note 37. The researchers' search can be approximately replicated by entering "emolument*" in the initial search box that appears after logging into *COFEA*. *Id.* The use of the asterisk produces every word containing the string of letters that precede the asterisk. *Id.* This *COFEA* search will produce 2,789 cases when singular and plural are combined. *Id.* In producing the offline database for their research, the authors corrected the raw results of this *COFEA* search by looking for and adding texts that contained variant spellings or errors in typography or optical character recognition (OCR) that were missed by the initial search. *See id.* The number of instances in the authors' data set download is higher (2,824) as a result of these corrections. *Id.*

measured, and that reveals meaningful relationships among words, providing both reliability and validity.

One syntactic feature that emerged from an initial data review was that *emolument* often appeared as part of a list of nouns, specifically in a linguistic structure known as a “coordinated noun phrase.” Employment of comprehensive search tools revealed that coordinated noun phrases accounted for about 35% of all occurrences of *emolument*.⁵¹ Close examination of these noun phrases showed that *emolument* overwhelmingly appeared as the last noun in the list, as in these examples:

[T]o Thomas Barclay, Esquire, Greeting.

We, reposing special trust and confidence in your abilities and integrity, do by these presents constitute you our vice consul in France, during the absence of William Palfrey, esquire, our consul, from that kingdom, or during the pleasure of Congress, to exercise the functions and to enjoy all the honors, authorities, pre-eminences, privileges, exemptions, rights, and emoluments to the said office appertaining.⁵²

That the st[y]le of said Battalion be the French Legion—and that those who may [e]nlist in it be entitled to the same Pay, Bounties[,] and Emoluments which are allowed to other Soldiers in the Continental Service. . . .

[And] any reputable Inhabitant of Canada, who shall in like Manner, recruit and deliver [fifteen] able bodied Recruits who shall pass Muster, shall be entitled to the

51. *COFEA Database*, *supra* note 37. Though readers can approximately replicate these results by searching for “and emolument*” and then for “or emolument*,” it should be noted that these searches will only capture cases where *emolument** occurs at the end of a list preceded by *and/or*. *Id.* Such an online *COFEA* search will produce a lower percentage, 28%, than the authors’ results. *Id.* The authors coded results manually to ensure that they captured all instances where *emolument** occurred anywhere within a coordinated noun phrase. *Id.*

52. 20 LIBRARY OF CONG., JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 735 (Gaillard Hunt ed., 1912) (1781) (emphasis added).

Rank[.] Pay[.] and Emoluments of an Ensign in the Battalion
in which the said Recruits shall be incorporated.⁵³

Examples like these suggested to us that *emolument* was being systematically used as an inclusive, “catch-all” term. To test this theory we used a modified computer search to retrieve every occurrence of the phrase *and/or other emolument*. This search produced seventy uses of *emolument* in coordinated noun phrases in which the term appeared at the end of a list preceded by *other*, e.g., “[a, b, c] and other emoluments.”⁵⁴ Approximately one out of every forty cases of *emolument* in *COFEA* occurs in this structure, which we found to be substantially higher than other nouns in the *COFEA* database, which appear in such a structure at a frequency of only one out of 1,250 occurrences.

These linguistic expressions clearly indicate that the meaning of the word *emolument* includes the preceding words in the list, but is also not limited to those words. For example, it is possible to say “dogs, cats, and other animals” but not “birds, cats, and other dogs” because the meaning of the word following “other” must include the preceding nouns in the coordinated noun phrase. These *and other emolument* phrases provided clear insights into examples of things that were considered emoluments in the Founding Era.

Take for example this excerpt from a letter written in 1781 by Leonard Cooper, a wounded soldier, to the members of the Virginia delegation to the Continental Congress:

[H]aving Receiv'd a wound in the month of October 1779
which has renderd him uncapable of doing duty with his
Regiment ever since—and being much Embarrass'd by not
having receiv'd any pay, Cloathing or other Emoluments

53. 8 LIBRARY OF CONG., JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 986–87 (Worthington Chauncey Ford ed., 1907) (1777) (emphasis added).

54. *COFEA Database*, *supra* note 37. The online appendix contains a chart listing all these uses. *Id.* Comparable results can be obtained by searching *COFEA* for “and other emolument*” and “or other emolument*.” *Id.*

granted to the Officers of your State, Since July 1779— . . . woud be much oblided to you if convenient that he Cou'd have Some money Advanced⁵⁵

This text reveals two important features of *emolument* in the Founding Era: (1) *pay* was a kind of emolument⁵⁶ and (2) there were also other kinds of *emolument* than just *pay*. Thus, for Cooper, emolument also included “cloathing” (to which he was apparently entitled as a soldier in the Continental Army).

Our data set also included this resolution from the Continental Congress (which appears to be a predecessor of the Emoluments Clause in Article I, Section Six), which showed that both *salary* and *fees*⁵⁷ were also understood to be types of *emolument* but again that emoluments had a still broader meaning:

A motion was made by Mr. [Elbridge] Gerry, seconded by Mr. [Roger] Sherman

. . . .
Resolved, That Congress will not appoint any member thereof during the time of his sitting, or within six months after he shall have been in Congress, to any office under the said states for which he or any other for his benefit may receive any salary, fees or other emolument.⁵⁸

This list uncovered an extraordinary range of nouns that were included in the meaning of *emolument*. For example, a translation of a

55. Letter from Leonard Cooper, Captain Invalid Regiment, to Virginia Delegates (June 22, 1781), in 3 THE PAPERS OF JAMES MADISON 166, 166 (William T. Hutchinson & William M. E. Rachal eds., 1963) (emphasis added), <https://founders.archives.gov/documents/Madison/01-03-02-0085> [<https://perma.cc/8U63-VQ9U>].

56. *Id.* In our data set of seventy *other emolument* texts, the coordinated noun phrase included *pay* thirty-nine times. *COFEA Database*, *supra* note 37.

57. *COFEA Database*, *supra* note 37. In our data set, the coordinated noun phrase included *salary* seven times and *fees* five times. *Id.*

58. 15 LIBRARY OF CONG., JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1307 (Worthington Chauncey Ford ed., 1909) (1779) (emphasis added).

famous German treatise on international law described *navigation* and *fishing* as emoluments:

Rivers and lakes are useful for navigation or for fishing, or for other emoluments arising from their possession⁵⁹

Our computerized search produced a total of twenty-five nouns that writers in the Founding Era described as types of emolument:

Bounties	Gratuity	Privileges
Clothing [Cloathing]	Lands	Rank
Command	Liberty	Rations
Commissions	Navigation	Subsistence
Commutation	Offices	Sum
Contracts	Pay	Tithes
Fees	Pensions	Toll
Fishing	Perquisites	
Forage	Places	

We found notable not only the number of nouns but their variety. *Emolument* could include very abstract nouns, such as *command*, *liberty*, *rank*, and *privileges*, as well as very concrete nouns like *clothing*, *forage*, and *rations*.

We obtained further empirical data showing that *emolument* had a very broad meaning in the Founding Era by measuring how often *emolument* appeared with either a preceding modifier or a post-modifying prepositional phrase that constrained or specified its meaning. Frequent use of modifiers can indicate that a word has a broad or general meaning. For example, the following question can be readily answered without adding modifiers to the word *robin*: "Did you see a robin yesterday?" In comparison, use of a word with a broad meaning ("did you see an animal yesterday?") will prompt the listener to ask for further information ("what animal are you talking about?")

59. GEORGE FRIEDRICH VON MARTENS, THE LAW OF NATIONS 165 (London, William Cobbett trans., 4th ed. 1829) (1795) (emphasis added).

that can be provided by modifiers (“did you see an animal in your basement yesterday?”).

Our computerized searches revealed that *emolument* was post-modified by a prepositional phrase (such as “emolument for” or “emolument of”) for over 29% of all occurrences of *emolument*, compared with 16% for other nouns. In 30% of all occurrences of *emolument*, it was preceded by a pre-modifying attributive adjective, which was twice as often as for nouns generally in the *COFEA* database. The attributive adjectives that modify *emolument* in the corpus were diverse and not merely limited to modifiers of degree (e.g., *small emolument*, *sufficient emolument*).

Motions to dismiss both in the *Blumenthal* case and the Maryland case argued that *emolument* in the Founding Era had “the natural meaning” of “profit arising from an official’s services.”⁶⁰ In recognition of this argument, we considered the possibility that the primary or prototypical meaning of *emolument* is “profit arising from office.” We concluded that this suggestion was contradicted by the frequent use of modifiers to distinguish whether an emolument was “official” or “personal.”

In linguistics, a “prototype” is a good example of, or a central member of, a semantic category.⁶¹ If a word has a prototypical use, then the word should not require modification to communicate the essence of the prototype. The prototype of *fork* is the metallic table utensil. Therefore, “metal fork” sounds strange outside of unusual contexts where, say, people are eating with plastic forks. In ordinary situations, it is only when *fork* refers to something different than the prototype that modification is appropriate: for example “plastic fork” or “wooden fork.”

60. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 23, at 36; Statement of Points and Authorities in Support of Defendant’s Motion to Dismiss, *supra* note 23, at 23.

61. *Prototype*, *SIL Glossary of Linguistic Terms*, SIL INT’L, <https://glossary.sil.org/term/prototype> [<https://perma.cc/V27K-CJVM>] (last visited Oct. 29, 2019).

If the primary or prototypical meaning of *emolument* in the Founding Era was “profit arising from office,”⁶² one would not expect to find texts like the following:

I shall regret your final determination to resign at the same time, that I should be wanting in candour were I to hold out to you the probability of any material increase of your present official emoluments.⁶³

[T]he committee to whom this bill is referred be instructed to inquire into the annual official emoluments received by marshals, clerks, and district attorneys, distinguishing between fees paid by individuals and what is paid by the United States.⁶⁴

[I]t shall be the duty of the respective collectors, naval officers[,] and surveyors, to keep accurate accounts of all fees and official emoluments received by them⁶⁵

In each of these examples, emoluments clearly arise from holding an office. If “profit arising from office” was the prototype of emolument, “official emoluments” should have been as inappropriate as “metal fork.”

To further test this “natural meaning” theory, we developed the hypothesis that, if the theory is correct, *COFEA* would contain numerous texts in which the writer used *emolument* without modification because the text described a situation in which the emolument related to an official’s services.

62. Statement of Points and Authorities in Support of Defendant’s Motion to Dismiss, *supra* note 23, at 23.

63. Letter from Alexander Hamilton, Sec’y of the Treasury, to John Davidson (Apr. 13, 1793), in *THE PAPERS OF ALEXANDER HAMILTON* 315, 315 (Harold C. Syrett ed., 1969) (emphasis added), <https://founders.archives.gov/documents/Hamilton/01-14-02-0208> [<https://perma.cc/8U3L-595C>]. Images of the original texts from which this and the following examples are taken can be found in the online appendix.

64. 8 ANNALS OF CONG. 1569–70 (1798) (emphasis added).

65. 9 ANNALS OF CONG. 3914 (1799) (emphasis added).

The idea behind the hypothesis was that if the “natural” meaning of *emolument* necessarily implied the performance of an official service, there would have been no need to modify the word when it was used in its natural way. This is a necessary implication of President Trump’s position, because *emolument* does not appear in either the Domestic or Foreign Emolument Clauses with any modification limiting its meaning to “arising from an official’s service.”

To test this hypothesis, we searched for all cases of *emolument* within six words on either side of the words *receive* and *accept*—the verbs used in the Domestic and Foreign Emolument Clauses, respectively. This produced 137 cases using *receive* and twelve cases using *accept* in reference to *emolument*.

The data failed to support the hypothesis that *emolument* would be commonly used without other explanatory words to communicate that something had been received or accepted “arising from an official’s services.” The data showed just the opposite: 93% of the cases of *receive emolument* and 77% of the cases of *accept emolument* were pre-modified or post-modified by a linguistic structure that served to further specify the meaning of *emolument*.⁶⁶ Many of these texts specifically referred to receiving or accepting an emolument for “services rendered pursuant to an office” and yet added words to *emolument* to so indicate. Typical examples of modified *emolument* are these:

- (1) “I have finally determined to accept the Commission of Commander in Chief of the Armies of the United States I must decline . . . that I can receive any emoluments annexed to the appointment”⁶⁷
- (2) “[M]any instances may be produced of many needless offices being created, and many inferior

66. For a chart listing all 149 cases, see *Meaning of Emolument*, CLARKCUNNINGHAM.ORG, <http://www.clarkcunningham.org/MeaningOfEmolument.html> [https://perma.cc/N4CY-QRHG] (last visited Nov. 14, 2019).

67. Letter from George Washington to John Adams (July 13, 1798), in 2 THE PAPERS OF GEORGE WASHINGTON, RETIREMENT SERIES 402, 402–04 (W. W. Abbot ed., 1998) (emphasis added), <http://founders.archives.gov/documents/Washington/06-02-02-0314> [https://perma.cc/6JWJ-DA7M].

- officers, who receive far greater emoluments of office than the first President of the State."⁶⁸
- (3) "[W]ill not justify to my scruples the receiving any future emoluments from my commission. I therefore renounce from this time all claim to the compensations attached to my military station during the war or after it. . . . [However,] I shall accordingly retain my rank"⁶⁹

The many counterexamples where *emolument* was modified to indicate that the emolument "arose from official service" were sufficient to disconfirm the hypothesis.

Still we determined to examine all eleven cases (out of a total of 149) in which *emolument* was associated with *receive* or *accept* but without any modification. Original underlying sources were accessed for all eleven cases to provide maximum context for each case.

This inquiry further disconfirmed the hypothesis. In at least five of these eleven cases, when the writer failed to modify *emolument*, the writer was describing something *not* related to an official's services. In two cases *emolument* was used without a limiting modification to refer to obtaining a financial benefit from the activities of a private company.

- (4) "The following scheme for the organisation of the Company . . . No Director shall receive any emolument unless the same shall have been allowed by the Stockholders at a General meeting."⁷⁰

68. PELATIAH WEBSTER, Remarks on the Address of Sixteen Members of the Assembly of Pennsylvania, to their Constituents, in *POLITICAL ESSAYS ON THE NATURE AND OPERATION OF MONEY, PUBLIC FINANCES AND OTHER SUBJECTS* 403, 404 (Philadelphia, Joseph Cruikshank 1971) (emphasis added), <https://oll.libertyfund.org/titles/webster-political-essays-on-the-nature-and-operation-of-money> [<https://perma.cc/Y5UF-PYND>].

69. Letter from Alexander Hamilton to George Washington (Mar. 1, 1782), in 3 *THE PAPERS OF ALEXANDER HAMILTON* 5, 5–6 (Harold C. Syrett ed., 1962) (emphasis added), <https://founders.archives.gov/documents/Hamilton/01-03-02-0006> [<https://perma.cc/7YXX-N9FG>].

70. *Prospectus of the Society for Establishing Useful Manufactures* (Aug. 1791), in 9 *THE PAPERS OF ALEXANDER HAMILTON* 144, 148–49 (Harold C. Syrett, ed., 1965) (emphasis added),

- (5) “[T]he House of Hunter, Banks and Company, contracted to supply us . . . I never held any commercial connection with this Company, other than what concerned the public, either directly or indirectly, or ever received one farthing profit or emolument, or the promise of any from them”⁷¹

CONCLUSION

Our research question was “Is there evidence that Americans in the Founding Era could have used the word *emolument* to describe revenue derived from ownership of a hotel?” The research findings discussed above do provide evidence that Founding Era Americans could have used *emolument* to describe revenue derived from ownership of a hotel. Using the word in such a way would have been consistent with what has been shown to be the broad meaning and wide usage of *emolument*. Indeed, research into the *COFEA* database revealed actual examples where *emolument* was specifically used to refer to revenue from ownership interest in a business.⁷²

Our research was not directed at predicting every way that *emolument* in the Constitution could be applied. Unlike some others who have written about the Founding Era meaning of *emolument*, we have not attempted to catalog usages into different distinct senses.⁷³

<https://founders.archives.gov/documents/Hamilton/01-09-02-0114> [<https://perma.cc/7562-QJWL>].

71. Letter from Nathanael Greene, Major Gen., Cont’l Army, to Richard Henry Lee, President, Cont’l Congress (Aug. 22, 1785), in 10 THE PAPERS OF ALEXANDER HAMILTON 421, 421–22 (Harold C. Syrett, ed., 1966) (emphasis added), <https://founders.archives.gov/documents/Hamilton/01-10-02-0060-0002> [<https://perma.cc/Y6NQ-2SU3>]. See *Meaning of Emolument*, *supra* note 66 for a chart showing all eleven cases and images of original texts.

72. See *supra* sources cited in note 71.

73. See, e.g., Natelson, *supra* note 11, at 13–19 (proposing four different senses of *emolument* in 18th century discourse); Phillips & White, *supra* note 46, at 217–19 (proposing ten different subsenses of *emolument*). Phillips and White conclude that their review of 784 instances of *emolument* did not “satisfactorily answer the question of which sense of ‘emolument’ is the one founding-era Americans would have understood to be used in the Constitution.” Phillips & White, *supra* note 46, at 222. Although our research findings show a broad, inclusive meaning for *emolument* rather than many distinct senses of the kind that Phillips and White try to classify, many of the other research results reported by Phillips and White, however, do converge with our findings. *Id.* In particular, their analysis of word clusters finding that *emolument* almost always appears at the end of a recurring word group adds additional data to our

President Trump claims in current litigation that the particular example of something received from a government for performance of official duty or employment is the exclusive meaning dictated by the Constitutional context. However, it seems fairly obvious that all three clauses in the Constitution refer to emoluments that are *not* received for performing an official duty.

What is called the Domestic Emolument Clause actually uses the "other emolument" formula to make this point:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be [i]ncreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.⁷⁴

The "other emoluments" the President is prohibited from receiving are explicitly distinguished from the official compensation he receives "for his services."⁷⁵

The emoluments mentioned by the Congressional Emoluments Clause refer not to what members of Congress receive for performing their official duties as legislators but to emoluments they might receive from other federal entities if those emoluments have been increased during their term of office:

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

discovery of *and/or other emolument* coordinated noun phrases. *Id.* at 213–17. Phillips and White both played important roles in developing *COFEA* at Brigham Young. *Id.* White has an MA in linguistics and Phillips has coauthored a number of articles on the application of corpus linguistics to legal interpretation. *E.g.*, James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 *YALE L.J. F.* 21 (2016).

74. U.S. CONST. art. II, § 1, cl. 7.

75. Our findings, therefore, disagree with the conclusion by Phillips and White that "the most likely understanding of founding-era Americans . . . of the Presidential Emoluments Clause to be that the clause refers to financial compensation or benefits of value stemming from his service as President of the United States." Phillips & White, *supra* note 46, at 224–25.

created, or the Emoluments whereof shall have been [i]ncreased 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.⁷⁶

It may be true that the Foreign Emoluments Clause superficially resembles a common usage of *emolument* in that the source of the emolument is a government (i.e., “King, Prince, or foreign State”) and the recipient is defined as someone as a public official, specially a “person holding any office of Profit or Trust”:

[N]o Person holding any Office of Profit or Trust under them [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.⁷⁷

However, it certainly does not seem that the emolument contemplated by this clause is something the office holder is entitled to receive from a foreign state for performing his or her “Office of Profit or Trust.” Rather, the clear implication is the foreign state expects some benefit to itself in return for the officeholder’s acceptance of the emolument.

The common theme of all three clauses is to guard against federal officials receiving emoluments that are separate and outside of the compensation they are properly entitled to receive for performing their office. And although emolument is no longer in the vocabulary of modern Americans, it appears that it was a very useful word in the Founding Era: useful indeed precisely in the ways it was used in the Constitution. If the drafters and ratifiers of the Constitution were concerned that foreign states could be endlessly ingenious in

76. U.S. CONST. art. I, § 6, cl. 2.

77. U.S. CONST. art. I, § 9, cl. 8.

2020] **THE ORIGINAL MEANING OF "EMOLUMENT"** 489

conceiving ways to corrupt federal officials, then there was wisdom in using a term of general inclusion like *emolument*.