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## Understanding the Spirit of the Constitution on Corruption: Emoluments, Impeachment, and the Primacy of Political Virtue

Lea Mano

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# UNDERSTANDING THE SPIRIT OF THE CONSTITUTION ON CORRUPTION: EMOLUMENTS, IMPEACHMENT, AND THE PRIMACY OF POLITICAL VIRTUE

Lea Mano\*

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## INTRODUCTION

In a 2019 House Oversight and Reform Committee hearing, Representative Alexandria Ocasio-Cortez played a caustic “lightning-round game” of corruption.<sup>1</sup>

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\* JD Candidate, William & Mary Law School, 2020. Thank you to the *William & Mary Bill of Rights Journal* staff for its invaluable help throughout the publication process. Thank you to my parents, Aline and Jean-Luc, for their continuous encouragement. I would be nowhere without their endless love and support. En un mot: merci.

<sup>1</sup> *Voting Rights, Campaign Finance and Ethics Legislation*, C-SPAN (Feb. 6, 2019),

Posing as the “bad guy,” she described a series of hypothetical scenarios in which her elected position could allow her to neglect the interests of the American people for private gain with complete impunity.<sup>2</sup> “We have a system that is fundamentally broken,” she austerely summarized.<sup>3</sup> Broadening her chessboard to encompass the President, she further asked whether ethical regulations to curtail corrupt behavior of the Chief Executive had “more teeth” than those designed for the legislative branch.<sup>4</sup> Mr. Shaub, former head of the federal ethics office answered, “[T]here’s almost no laws at all that apply to the President.”<sup>5</sup> Relentlessly, Ocasio-Cortez went on: “It is already super legal . . . for me to be a pretty bad guy. [So] it is even easier for the President to be one, I would assume.”<sup>6</sup> Shaub sternly replied: “That’s right.”<sup>7</sup> Checkmate. Political corruption is legal in the United States.<sup>8</sup>

While it is undeniable that the President is scarcely subject to ethical regulations,<sup>9</sup> the Constitution narrates a different story. Imbued with republican ideals that feared corruption as the ultimate threat to democracy,<sup>10</sup> the Framers designed an Executive anti-corruption framework.<sup>11</sup> Indeed, the Constitution contains three clauses that were expressly drafted to shield the President from corruption: two Emoluments Clauses and the Impeachment Clause.<sup>12</sup> The Foreign Emoluments Clause essentially forbids the President from receiving any profit, advantage, gain, or benefit from foreign governments without Congress’s approval.<sup>13</sup> The Domestic Emoluments Clause further prevents the President from receiving emoluments, besides his salary, from the federal and state governments.<sup>14</sup> The Impeachment

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<https://www.c-span.org/video/?457611-1/voting-rights-campaign-finance-ethics-legislation> [<https://perma.cc/SLA5-A88P>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Tim Wyatt, *Alexandria Ocasio-Cortez Delivers Devastating Dissection of US Financial System and Political Corruption in Congress Speech*, INDEP. (Feb. 8, 2019, 11:57 AM), <https://www.independent.co.uk/news/world/americas/us-politics/alexandria-ocasio-cortez-congress-speech-campaign-finance-corruption-election-aoc-a8769381.html> [<https://perma.cc/6GFE-FYLJ>].

<sup>9</sup> See ELIZABETH HOLTZMAN, *THE CASE FOR IMPEACHING TRUMP* 85 (2018); LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* 32 (2018).

<sup>10</sup> See Deborah Samuel Hills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & POL’Y 63, 63–65 (2018).

<sup>11</sup> See generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009) (arguing that “[t]he Constitution carries within it an anti-corruption principle”).

<sup>12</sup> U.S. CONST. art. I, § 6, cl. 2; *id.* art. I, § 9, cl. 8; *id.* art. II, § 4.

<sup>13</sup> See *id.* art. I, § 9, cl. 8; John Mikhail, *The Definition of “Emolument” in English Language and Legal Dictionaries, 1523–1806*, at 1–2 (June 30, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2995693> [<https://perma.cc/6Q3A-QFYV>].

<sup>14</sup> U.S. CONST. art. I, § 6, cl. 2.

Clause completes this framework by allowing for the President's removal from office in case of "Treason, Bribery, or other high Crimes and Misdemeanors."<sup>15</sup>

In essence, this Note demonstrates that the Constitution contains an Executive anti-corruption framework, which was seen as the Republic's salvation against abuses of power—the paramount threat to democratic stability. It finds that the Framers' fear of foreign influences and distrust in human nature led them to design an extensively broad framework meant to withstand the test of time. After witnessing the deeply corrupted state of the European kingdoms,<sup>16</sup> they decided to encourage future leaders to always protect the nation's interests by requiring a different kind of virtue—that of an unprecedented allegiance to the law. This distrust of human nature steered the Framers towards the promotion of a political virtue instead of mere moral virtue, which infused the Constitution with a certain republican "spirit."

Part I explores the legal history of political corruption in an attempt to seek out the fundamental ideals that inspired the Framers. Part II discusses the foundations of the Executive anti-corruption framework by delving into the reasoning behind the Foreign and Domestic Emoluments Clauses and the Impeachment Clause. Part III dissects the constitutional text of the three clauses and comes to the conclusion that the Framers sought to establish a broad, potent, and adaptable framework against corruption. Part IV argues that this framework is rooted in republican ideals promoting political virtue and a duty of allegiance to the law. Finally, this Note concludes that a violation of the Emoluments Clauses, if proven, is grounds for impeachment.

## I. LEGAL HISTORY OF POLITICAL CORRUPTION

Throughout history, corruption has had many connotations and meanings, ranging from loss of physical form to societal infection.<sup>17</sup> While most would agree that certain acts such as bribery, favoritism, and nepotism indeed constitute corruption, there is little consensus on what corruption generally entails.<sup>18</sup> We certainly know that it is immoral, but we are not exactly sure what "it" truly is. In most instances, however, corruption has been intrinsically linked with ethical condemnation in the realm of politics.<sup>19</sup> Generally speaking, corruption can be seen as an act of selfishness compromising the common good.<sup>20</sup> Thus, this Part explores the history

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<sup>15</sup> *Id.* art. II, § 4.

<sup>16</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 30–33 (1969).

<sup>17</sup> See BRUCE BUCHAN & LISA HILL, *AN INTELLECTUAL HISTORY OF POLITICAL CORRUPTION* 9 (2014); Barry Hindess, *Introduction* to *CORRUPTION: EXPANDING THE FOCUS* 1–4 (Manuhua Barcham et al. eds., 2012).

<sup>18</sup> See Richard Mulgan, *Aristotle on Legality and Corruption*, in *CORRUPTION: EXPANDING THE FOCUS*, *supra* note 17, at 25.

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* at 27.

and concerns behind the infamous concept of corruption before examining the Framers' fear of, and proactive fight against, political corruption.

### *A. Corruption: A Classical View*

Philosophers of ancient Greece and Rome were often animated by questions of political systems and good governance, which inevitably led them to examine the effects of corruption on said questions. Plato, for instance, weighed ideal and inferior states using “decay” (*diaphthora*)—which translates to corruption—as one of the main balancing factors.<sup>21</sup> In his *Republic*, he argued that the ideal form of government is one where philosophers rule because they inherently do not have any desires to rule;<sup>22</sup> they are thus impervious to extrinsic desires and emotions that would surely pervert the ruling class, inevitably leading the city to decay.<sup>23</sup> Similarly, in *The Politics*, Aristotle designed his political ideal around outstandingly virtuous leaders.<sup>24</sup> He used “‘correct’ (*orthos*)” to define the ideal government and “‘perversions’ (*parekbaseis*)” for inferior systems.<sup>25</sup> Therefore, in both models, the key to a just government is the morality of its leaders—the more a leader desires and is subject to perversions, the more the city itself decays.<sup>26</sup>

Furthermore, both philosophers advanced the idea that these virtuous leaders are conduits to the ideal form of government because they rule with society’s common interest in mind.<sup>27</sup> Interestingly enough, this view that innately righteous leaders have the common interest at heart is similar to our modern conception of corruption. Current debates view corruption as the exploitation of public office for personal gain, or as the “illegitimate pursuit of self-interest” in preference to the common interest.<sup>28</sup>

These views further align around the idea that the most potent tool to curb corruption is the rule of law. For Plato, all political regimes are naturally corrupt since philosophers, the only ones fit to rule, “despise[] political offices.”<sup>29</sup> Philosophers would therefore never agree to rule and Plato’s ideal government is in fact unattainable.<sup>30</sup> However, a potential remedy to that essentially unattainable system does exist: the rule of law.<sup>31</sup> As such, this view of the rule of law closely resonates

<sup>21</sup> See *id.* at 29.

<sup>22</sup> See PLATO, *THE REPUBLIC OF PLATO* bk.VII, at 521a–b (Alan Bloom trans., 1968).

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

<sup>24</sup> See Mulgan, *supra* note 18, at 29.

<sup>25</sup> *Id.*

<sup>26</sup> See ARISTOTLE, *NICOMACHEAN ETHICS* bk.II, at 1104a5 (Terence Irwin trans., 1985) (c. 335 B.C.E.); PLATO, *supra* note 22, at 521a–b.

<sup>27</sup> See Mulgan, *supra* note 18, at 30.

<sup>28</sup> *Id.* at 31.

<sup>29</sup> PLATO, *supra* note 22, at 521b.

<sup>30</sup> See Dale Hall, *The Republic and the “Limits of Politics,”* 5 *POL. THEORY* 293, 293 (1977).

<sup>31</sup> Mulgan, *supra* note 18, at 32 (arguing that laws can “restrain the selfishness of the ordinary ruler”).

with the modern concept that corruption can often be curbed by stringent regulations that criminalize acts of corruption.

*B. Political Corruption at Common Law: From Gifts to Bribery to Impeachment*

Throughout the medieval times in England, the discussion regarding the ideal ruler first approached by Greek and Roman philosophers was central to the question of political corruption and intrinsically linked to the attainment of the common good.<sup>32</sup> John of Salisbury, for example, argued that the ideal ruler was a minister of the common good and the servant of equity.<sup>33</sup> Moreover, Salisbury seemed to see the rule of law as the defining line between a just and corrupt ruler, believing that “[i]f the king ruled in accord with the law, he was a just prince; however, if he broke the law, the ruler ceased to be a monarch, . . . with the rule of a tyrant seen as a corrupted form of monarchic rule.”<sup>34</sup>

Britain’s renewed interest in Roman law led to the revival of the classical view that the finest tool to fight corruption is the rule of law.<sup>35</sup> Anti-corruption laws thus began to be drafted.<sup>36</sup> In 1275, Edward I had several laws enacted in the First Statute of Westminster,<sup>37</sup> which provided that “no Sheriff, nor other the King’s officer, take any Reward to do his Office, but shall be paid of that which they take of the King; and he that so doth, shall yield twice as much, and shall be punished at the King’s Pleasure.”<sup>38</sup>

The development of public offices inevitably led to the emergence of corrupted officials in seventeenth century England.<sup>39</sup> One source of corruption was the preponderance of gifts used as a means of obtaining official favor.<sup>40</sup> Salisbury explained that “no-one ‘who governs is to accept a present or gift,’” but did not mention bribery *per se*.<sup>41</sup> By the early seventeenth century though, “‘bribery’ was clearly understood as a secret payment of money or *gifts* to public officers, whether judges, churchmen, lawyers or scholars.”<sup>42</sup> Given the proliferation of this practice, an effort began to

<sup>32</sup> Manuhua Barcham, *Rule by Natural Reason: Late Medieval and Early Renaissance Conceptions of Political Corruption*, in CORRUPTION: EXPANDING THE FOCUS, *supra* note 17, at 53, 55.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (citing John of Salisbury, 8 POLICRATUS 190 (1990) (c. 1159)).

<sup>35</sup> See BUCHAN & HILL, *supra* note 17, at 107, 118 (“Laws were the ‘meanys to bring man to the perfection of the cyvyle lyfe’, and without them humans ‘wylbe corrupt’ or ‘soone oppressyd & corrupt’ by unrestrained self-interests and affections.”).

<sup>36</sup> See RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 309–10 (5th prtg., 1974).

<sup>37</sup> James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 816, 844 (1988).

<sup>38</sup> Statute of Westminster I, 3 Edw., ch. 26 (1275).

<sup>39</sup> See BUCHAN & HILL, *supra* note 17, at 110–13.

<sup>40</sup> See *id.* at 111.

<sup>41</sup> Bruce Buchan, *Changing Contours of Corruption in Western Political Thought, c. 1200–1700*, in CORRUPTION: EXPANDING THE FOCUS, *supra* note 17, at 73, 76.

<sup>42</sup> BUCHAN & HILL, *supra* note 17, at 112 (emphasis added).



stamp out corruption in public offices. Henry VIII was said to have ordered Thomas More “uprightly to minister indifferent justice to the people, without corruption or affection”<sup>43</sup> since “[i]t was by bribery that rulers were ‘corrupted, Justice perverted . . . [and] the whole state of government disjointed and disordered.’”<sup>44</sup>

Eventually, this wave of corruption scandals led to a series of impeachments.<sup>45</sup> Perhaps the most famous is the 1621 impeachment case for corruption of Lord Chancellor Sir Francis Bacon.<sup>46</sup> On March 15, 1621, a subcommittee inquiring into abuses in courts raised a bribery charge against Bacon,<sup>47</sup> which stemmed from his receiving of payments for favorable decisions, even though such payments were not always forthcoming.<sup>48</sup> Bacon argued that the gifts were received after he ruled on cases, claiming that it could not possibly amount to corruption.<sup>49</sup> His defense failed, however, since “the expectation of a gift before, during or after a case is bound to distort judgment and therefore . . . Bacon’s . . . gift-giving [is an] example[] of corruption.”<sup>50</sup>

Bacon also attempted to diminish the gravity of his actions by explaining that “he ‘was never noted for an avaricious man,’” and that the charges came all from misdemeanors, thus effectively trying to use the moral element of the Classical view.<sup>51</sup> Yet, after Bacon had made a full confession, the Lord Chancellor was impeached for legal corruption in May and sentenced to prison for a term “during the King’s pleasure.”<sup>52</sup> Essentially, Bacon’s impeachment highlights the growing shift from allowing gifts to penalizing bribery-like gifts as an inherent act of corruption.<sup>53</sup>

Moreover, this shift from gifts to bribery was further developed in eighteenth century England through the emergence of the belief that corruption would eventually lead to the erosion of trust in Parliament.<sup>54</sup> Andrew Fletcher, for instance, warned that “the corruption and ‘infection of bad manners’ . . . would lead even elected representatives to ‘artfully betray the nation . . . contrary to their known duty, and the important trust reposed in them.’”<sup>55</sup> Therefore, this fear of public trust erosion also conveyed England’s concerns about degenerative moral corruption and

<sup>43</sup> WILLIAM ROPER, *THE LIFE OF SIR THOMAS MORE* 219 (Richard S. Sylvester & Davis P. Harding eds., Yale Univ. Press 1966) (1555).

<sup>44</sup> BUCHAN & HILL, *supra* note 17, at 112.

<sup>45</sup> *See id.*

<sup>46</sup> Damian X. Powell, *Why Was Sir Francis Bacon Impeached? The Common Lawyers and the Chancery Revisited: 1621*, 81 *HIST.* 511, 512 (1996).

<sup>47</sup> *Id.* at 522.

<sup>48</sup> *See* BUCHAN & HILL, *supra* note 17, at 118.

<sup>49</sup> *Id.* at 119.

<sup>50</sup> *Id.*

<sup>51</sup> Buchan, *supra* note 41, at 85 (quoting J. R. TANNER, *TUDOR CONSTITUTIONAL DOCUMENTS AD 1485–1603 WITH AN HISTORICAL COMMENTARY* 332–33 (2d ed. 1951)).

<sup>52</sup> THOMAS-PITT TASWELL LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY: FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME* 354 (Theodore F. T. Plucknett ed., 11th ed. 1960).

<sup>53</sup> *See* BUCHAN & HILL, *supra* note 17, at 116–18.

<sup>54</sup> *See id.* at 131.

<sup>55</sup> *Id.*

the widespread decay of virtue.<sup>56</sup> Some even argued that corruption was a plague in England, a generalized disease that would lead society to decline just like in Rome.<sup>57</sup>

Algernon Sidney explained that the roots of such dangers were entrenched in the sovereign's vice—or lack thereof.<sup>58</sup> As such, Sidney's view of the menaces of corruption espoused the classical view that political corruption ultimately leads to societal degeneration and decay.<sup>59</sup> He did, however, expand this classical view by pinpointing the root causes of this danger: corruption of the highest public official, the King.<sup>60</sup> In the 1720s, political corruption became so prolific that *The Craftsman* published a list for the reader to “distinguish between a *bad Reign* and a *corrupt Administration*.”<sup>61</sup> This list included the use of methods of influence, an encouragement for luxury, and the corruption of the “learned Fathers of the Law” as marks of a corrupt administration.<sup>62</sup> Once again, corruption was seen as stemming mostly from politicians' hubris and self-interest, similar to the classical view.<sup>63</sup>

### C. The Framers: Influence of the Classical & Common Law Views

As the oldest written national constitution in the world, the United States Constitution was inherently experimental.<sup>64</sup> It is thus unsurprising that the Framers drew on established concepts of governance from classical and medieval views to design the ideal form of government.<sup>65</sup> Athenian concepts, in particular, were especially significant for the Framers given the confederate nature of the Grecian republics.<sup>66</sup> Forced to navigate unchartered territory, the Framers used the history of previous confederate states to draw out several republican concepts that would be embedded in the Constitution.<sup>67</sup> As common law lawyers, most Framers were also naturally attracted by the British concepts of governance and appraised the high level of corruption in the eighteenth century with alarm.<sup>68</sup> Hence, the Framers identified several key concepts

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<sup>56</sup> *Id.* at 131.

<sup>57</sup> Buchan, *supra* note 41, at 82, 87–88.

<sup>58</sup> ALGERNON SIDNEY, COURT MAXIMS 131–33 (Hans W. Blom et al. eds., Cambridge Univ. Press 1996) (c. 1665).

<sup>59</sup> Buchan, *supra* note 41, at 87.

<sup>60</sup> BUCHAN & HILL, *supra* note 17, at 137.

<sup>61</sup> *Id.* (quoting THE CRAFTSMAN, June 24, 1727).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 139.

<sup>64</sup> See Michael Kammen, *Introduction* to THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTED HISTORY, at vii, xviii (Michael Kammen ed., 1986).

<sup>65</sup> See R. A. Ames & H. C. Montgomery, *The Influence of Rome on the American Constitution*, 30 CLASSICAL J. 19, 19–23 (1934); Teachout, *supra* note 11, at 350.

<sup>66</sup> See THE FEDERALIST NO. 18 (Alexander Hamilton & James Madison).

<sup>67</sup> See THE FEDERALIST NO. 21 (Alexander Hamilton).

<sup>68</sup> See Teachout, *supra* note 11, at 349.



from classical and medieval views to be promoted, several of which were intrinsically linked to political corruption.<sup>69</sup>

First, the Framers espoused the classical view that political corruption ultimately leads to societal decay given its degenerative effect.<sup>70</sup> During the Constitutional Convention, George Mason voiced his concern that “if we do not provide against corruption, our government will soon be at an end.”<sup>71</sup> The Framers thus saw bribery and corruption as “defiling the fairest fabric that ever human nature reared,”<sup>72</sup> and envisioned Britain’s internally corrupt government as “the harbinger of doom.”<sup>73</sup> Secondly, the Framers adhered to the Greek view later developed in Enlightenment philosophy that there is an inherent “depravity in mankind,”<sup>74</sup> which leads rulers to make abstraction of the common good.<sup>75</sup> Madison indeed explained that there is always a possibility that “[m]en of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.”<sup>76</sup> Just like in the classical and common law views, the Framers thus thought that rulers’ self-interest had to be curbed to promote the common good.

Third, the Framers espoused the Classical and common law views that corruption could be curtailed by a rule of law.<sup>77</sup> Hamilton argued that one of the “palpable defect[s]” of the “disease” of previous failed confederate states was the absence of a rule of law.<sup>78</sup> He also directly linked the innate dangers of the absence of a federal rule of law with the possibility of corruption: “The United States as now composed have no power to exact obedience, or punish disobedience to their resolutions, either by pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional means.”<sup>79</sup> According to Hamilton, the remedy was to be “[a] guaranty by the national authority . . . against the usurpation of rulers . . . .”<sup>80</sup>

Fourth, and similar to the common law view, the Framers linked corruption to the erosion of the public trust.<sup>81</sup> Hamilton warned against the dangers of “[a]n

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<sup>69</sup> See generally THE FEDERALIST NOS. 18–20 (Alexander Hamilton & James Madison).

<sup>70</sup> See THE FEDERALIST NO. 19, at 129 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961); Teachout, *supra* note 11, at 350–51.

<sup>71</sup> Notes of Robert Yates (June 23, 1787), reprinted in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 392 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS].

<sup>72</sup> Teachout, *supra* note 11, at 349.

<sup>73</sup> *Id.*

<sup>74</sup> THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961); see also SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 36–38 (1981).

<sup>75</sup> See THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

<sup>76</sup> *Id.*

<sup>77</sup> See THE FEDERALIST NO. 21, at 138 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>78</sup> *See id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 140.

<sup>81</sup> See Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. 1, 30 (2017).

avaricious man [who] might be tempted to betray the interests of the state to the acquisition of wealth.”<sup>82</sup> If an individual is corrupt, he will necessarily serve his own ends, and thus betray the many.<sup>83</sup> And if that practice were to become widespread—as many believed that it would<sup>84</sup>—the public’s trust in government legitimacy would erode and failure of the system would ensue.<sup>85</sup>

Ultimately, it is important to note that the Framers not only used said views, but also espoused the common denominator of most historical approaches to political corruption: the idea that corruption is inseparable from a sense of moral obligation.<sup>86</sup> Yet, centuries of failed republican enterprises highlighted the need for a novel approach that would take into account the *de facto* corruptible nature of even the most virtuous men.<sup>87</sup> If even kings could be corrupted, how could they attempt to fight this seemingly unfightable human nature? The Constitution’s executive anti-corruption framework was to be the first piece of the puzzle. Making the Constitution itself demand allegiance to the law from its leaders was to be the second.<sup>88</sup>

## II. THE FRAMERS’ FRAMEWORK: A CORRUPT-FREE EXECUTIVE

Although it is an established view that the Framers were preoccupied with the inherent risks of political corruption on the durability and stability of the nascent republic, scholars disagree as to how concerned the Framers truly were about corruption.<sup>89</sup> What is certain, however, is that they had seen how political corruption could cause the fall of even some of the greatest empires in history.<sup>90</sup> During the

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<sup>82</sup> THE FEDERALIST NO. 75, at 451 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>83</sup> See Teachout, *supra* note 11, at 374.

<sup>84</sup> See, e.g., *id.*; see also *Four Letters on Interesting Subjects, Letter IV* (Philadelphia, 1776), in THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTED HISTORY, *supra* note 64, at 8.

<sup>85</sup> See James Madison, Notes on the Constitutional Convention (July 20, 1787), in 4 THE WRITINGS OF JAMES MADISON 12, 12–21 (Gaillard Hunt ed., 1903) (“Mr. Madison thought it indispensable that some provision should be made for defending the Community agst. the incapacity, negligence or perfidy of the chief Magistrate. . . . He might pervert his administration into a scheme of speculation or oppression. He might *betray his trust* to foreign powers.” (emphasis added)).

<sup>86</sup> Teachout, *supra* note 11, at 374; see also THE FEDERALIST NO. 55, *supra* note 74, at 345 (James Madison); Notes of James Madison (July 19, 1787), reprinted in 2 CONVENTION RECORDS, *supra* note 71, at 52, 55.

<sup>87</sup> See THE FEDERALIST NO. 75, *supra* note 82, at 451.

<sup>88</sup> See discussion *infra* Part IV.

<sup>89</sup> Compare Teachout, *supra* note 11, at 348 (adopting the claim that “[t]he Framers were *obsessed* with corruption” (emphasis added)), and Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. ONLINE 30, 50–51 (2012) (arguing for the recognition of a free-standing anti-corruption principle), with Seth Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1, 4–5, 8 (2012) (taking the opposite view that the Framers were not particularly concerned with corruption).

<sup>90</sup> See WOOD, *supra* note 16, at 35–36.

Constitution-drafting process, recent corruption cases that had led to impeachments in England also necessarily pressed the Framers to carefully consider the question of political corruption.<sup>91</sup> Consequently, they attempted to entrench anti-corruption safeguards in the Constitution that would define corruption more broadly than what had been done before.<sup>92</sup> Within this framework, three provisions were specifically constitutionalized to prevent a corrupt executive.

#### *A. The Foreign Emoluments Clause*

The first anti-corruption provision is the Foreign Emoluments Clause (FEC).<sup>93</sup> While much of the Articles of Confederation were modified during the Constitutional Convention, the Framers decided to keep the portion that was to become the FEC.<sup>94</sup> While the initial draft of the Constitution debated in the summer of 1787 solely prohibited titles of nobility, Charles Pinkney successfully argued for “the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence.”<sup>95</sup> Indeed, the finally adopted FEC included restrictions on the receiving of gifts as it states 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.”<sup>96</sup> The only change from the Articles of Confederation was that exceptions could be allowed if approved by Congress.<sup>97</sup>

Why then did the Framers include the FEC as “one of the more strongly worded prohibitions in the Constitution?”<sup>98</sup> The first reason stemmed from the Framers’ concern about a specific kind of corruption: political gifts.<sup>99</sup> Gift-giving was indeed a widespread diplomatic practice of that time, especially in Europe.<sup>100</sup> In 1785, King Louis XVI of France bestowed on Benjamin Franklin a remarkable portrait of himself surrounded by 408 diamonds, and encompassed in a golden snuff box.<sup>101</sup> When

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<sup>91</sup> See Patrick Henry, *Speech on the Expediency of Adopting the Federal Constitution (June 7, 1788)*, in 1 ELOQUENCE OF THE UNITED STATES 178, at 223 (E. B. Williston ed., 1827) (“Look at Britain; see there the bolts and bars of power; see bribery and corruption defiling the fairest fabric that ever human nature reared.”).

<sup>92</sup> See, e.g., DAVID ROBERTSON, *DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA* 330, 330–31 (Richmond, Enquirer-Press 2d ed. 1805).

<sup>93</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>94</sup> See ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* 26–27 (2014).

<sup>95</sup> *Id.* at 27.

<sup>96</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>97</sup> See TEACHOUT, *supra* note 94, at 27.

<sup>98</sup> See *id.* at 26–27.

<sup>99</sup> Natelson, *supra* note 81, at 43–45.

<sup>100</sup> *Id.*

<sup>101</sup> See TEACHOUT, *supra* note 94, at 1.

Franklin returned to the United States, the snuff box became a symbol of Europe's corruption.<sup>102</sup> It also led to a raging debate on the latent risks of such practices.<sup>103</sup> The main argument against diplomatic gift-receiving was that such ostentatious gifts could come to interfere with public officials' obligation to promote the common good of the nation, since receiving such treasures could cause allegiances to shift.<sup>104</sup>

The second, interrelated reason arose from the more general fear that corruption was perhaps the greatest threat to democracy. The Framers knew that the United States was a young nation surrounded by wealthy longstanding kingdoms.<sup>105</sup> As such, while they loosened the prior clause of the Articles of Confederation, they ultimately expanded the scope of the FEC considerably when they added the striking modifier "of any kind whatsoever."<sup>106</sup> As Edmund Randolph explained, the FEC was in fact "a protection against corruption."<sup>107</sup>

### *B. The Domestic Emoluments Clause*

The second anti-corruption safeguard, the Domestic Emoluments Clause (DEC),<sup>108</sup> was drafted to limit the President's salary and dependency on Congress's resources. The DEC mainly stems from the Framers' belief that "man in his deepest nature was selfish and corrupt; that blind ambition most often overcomes even the most clear-eyed rationality; and that the lust for power was so overwhelming that no one should ever be entrusted with unqualified authority."<sup>109</sup> As such, they thought to provide the Legislature with a means to "tempt [the president] by largesses, to surrender at discretion his judgment to their inclinations," since "power over a man's support is . . . power over his will."<sup>110</sup>

In essence, the Framers had sought to build an executive more akin to a monarchy because they believed that "[t]he advantage of a monarch is this—he is above corruption—he must always intend, in respect to foreign nations, the true interest and glory of the people."<sup>111</sup> Yet, they recognized that the president could "have no

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<sup>102</sup> See *id.* at 1–3.

<sup>103</sup> See *id.*

<sup>104</sup> See *id.* at 2–3.

<sup>105</sup> See Teachout, *supra* note 11, at 361.

<sup>106</sup> U.S. CONST. art. I, § 9, cl. 8; see discussion *infra* Section III.A.2.

<sup>107</sup> Natelson, *supra* note 81, at 39.

<sup>108</sup> U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased 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.").

<sup>109</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 368 (enlarged ed. 1992).

<sup>110</sup> THE FEDERALIST NO. 73, at 441 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>111</sup> Notes of Alexander Hamilton (June 18, 1787), *reprinted in* 1 CONVENTION RECORDS, *supra* note 71, at 304, 310.

pecuniary inducement to renounce or desert the independence intended for him by the Constitution.”<sup>112</sup>

### C. *The Impeachment Clause*

The third clause that entraps the anti-corruption framework is the infamous Impeachment Clause.<sup>113</sup> It is also the clause that could very well be the anti-corruption framework’s salvation.<sup>114</sup> The clause has rarely been used to impeach presidents and is often seen as a last remedy.<sup>115</sup> The Framers indeed saw this mechanism as promoting fear of punishment in the Chief Executive, which should motivate “good behavior.”<sup>116</sup> More importantly, however, they argued that constitutionalizing a power of presidential impeachment was indispensable to prevent abuses of the public trust.<sup>117</sup> Madison warned that without an Impeachment Clause, the President could “pervert his administration into a scheme of speculation and oppression. He might betray his trust to foreign powers.”<sup>118</sup> Once again, the Framers were concerned with protecting the legitimacy of the Magistrate who could be easily subject to corruption, especially by foreign governments.<sup>119</sup>

In fact, one of the drafts of the Impeachment Clause put before the Convention in May 1787 included “corruption” as well as “treason” and “bribery.”<sup>120</sup> Nevertheless, “corruption” was subsequently removed without much explanation,<sup>121</sup> and replaced

<sup>112</sup> THE FEDERALIST NO. 73, *supra* note 110, at 442; *see also* *Debate in the South Carolina Legislature*, Jan. 16, 1788, *reprinted in* 3 CONVENTION RECORDS, *supra* note 71, at 251 [hereinafter *South Carolina Debate*] (“Hence kings are less liable to foreign bribery and corruption than any other set of men, because no bribe that could be given them could compensate the loss they must necessarily sustain for injuring their dominions . . .”).

<sup>113</sup> U.S. CONST. art. II, § 4.

<sup>114</sup> *See* discussion *infra* Section III.B.

<sup>115</sup> *See generally, e.g.*, Scott S. Barker, *An Overview of Presidential Impeachment*, 47 COLO. LAW. 30 (2018).

<sup>116</sup> THE FEDERALIST NO. 64, at 396 (John Jay) (Clinton Rossiter ed., 1961).

<sup>117</sup> Notes of James Madison (July 20, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra* note 71, at 65–66.

<sup>118</sup> *Id.*

<sup>119</sup> THE FEDERALIST NO. 73, *supra* note 110, at 441–43 (specifying that the Executive “shall not receive . . . emolument from the United States, or any of them,” and imposing limitations on the legislature in changing the structure of compensation).

<sup>120</sup> Debates in the Federal Convention Of 1787, May 28, 1787, *in* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 131 (Jonathan Elliot ed., 2d ed. 1941) [hereinafter ELLIOT’S DEBATES] (“[The President] shall be removed from his office on impeachment by the House of Delegates, and conviction, in the supreme court, of treason, bribery, or corruption.”).

<sup>121</sup> *See* Gary L. McDowell, “*High Crimes and Misdemeanors*”: *Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 633–34 (1999); Teachout, *supra* note 11, at 367



by “maladministration.”<sup>122</sup> Although “corruption” and “maladministration” certainly represent different concepts, George Mason meant to include “maladministration” to encompass as impeachable “attempts to subvert the Constitution” that would otherwise not fit under treason or bribery.<sup>123</sup> “Maladministration” was thus similar to “corruption” in that it could limit conduct involving abuses of power.<sup>124</sup> However, Madison feared that “maladministration” was “so vague a term [that it would] be equivalent to a tenure during pleasure of the Senate.”<sup>125</sup>

Believing that holding elections every four years would effectively serve as a fence against maladministration,<sup>126</sup> the Framers instead decided to finalize the Impeachment Clause by adding “other crimes & misdeme[a]nors” to the list of offences.<sup>127</sup> Born out of the British common law, “high crimes and misdemeanors” was repeatedly used during the seventeenth century for parliamentary impeachments.<sup>128</sup> In sum, “high crimes and misdemeanors” together with “treason” and “bribery” constituted “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”<sup>129</sup>

As such, the Framers’ Executive anti-corruption framework seems to have emerged from the very fear associated with the risks of gift-giving. More generally, it also stemmed from the fear that corruption was perhaps the supreme menace to the blossoming democracy. As George Mason warned during the Constitutional Convention: “if [you did] not provide against corruption, [your] government will soon be at an end.”<sup>130</sup>

### III. INTERPRETING THE FRAMEWORK

#### A. *The Emoluments Clauses*

Since President Trump’s election in 2016, three lawsuits have been filed against him alleging violations of the Foreign and Domestic Emoluments Clauses in light

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(arguing that a committee on style or form removed “corruption” since the Framers simply took it out without further explanation).

<sup>122</sup> McDowell, *supra* note 121, at 633.

<sup>123</sup> Notes of James Madison (Sept. 8, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra* note 71, at 550.

<sup>124</sup> Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”*: *Basic Principles*, 67 GEO. WASH. L. REV. 712, 719 (1999).

<sup>125</sup> Madison, *supra* note 85, at 407.

<sup>126</sup> *Id.* (“Mr. Govr. Morris, it will not be put in force & can do no harm. An election of every four years will prevent maladministration.”).

<sup>127</sup> *Id.* (“Col. Mason withdrew ‘maladministration’ & substitutes ‘other high crimes & misdemeanors’ agst the State.”).

<sup>128</sup> See McDowell, *supra* note 121, at 638–39.

<sup>129</sup> THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>130</sup> Notes of Robert Yates (June 23, 1787), *reprinted in* 1 CONVENTION RECORDS, *supra* note 71, at 392.



of his private business ownerships.<sup>131</sup> While *Citizens for Responsibility and Ethics in Washington v. Trump* was recently remanded back to the district court after the case was dismissed for lack of standing,<sup>132</sup> two other cases are currently ongoing.<sup>133</sup> For these two cases, three questions are examined in relation with the Emoluments Clauses: (1) Does the FEC apply to the office of the President?<sup>134</sup> (2) What is the definition of “emolument” and what does it encompass?<sup>135</sup> And finally, (3) does the President in fact need congressional approval to receive emoluments?<sup>136</sup> This Section examines these three questions in light of the Framers’ original anti-corruption framework and corresponding constitutional interpretation doctrines.

### 1. Office of Profit or Trust Under the United States

The first challenge arising under the utilization of the Emoluments Clauses is whether the FEC even applies to the Chief Executive.<sup>137</sup> Given the location of the clause in the Constitution,<sup>138</sup> the fact that there is a separate clause to regulate the President’s salary (and other emoluments),<sup>139</sup> and the Framers’ differentiation between Federal offices,<sup>140</sup> some have argued that the FEC does not apply to the President because he does not hold an “Office of Profit or Trust under [the United States].”<sup>141</sup> As the argument goes, since the President is elected, only the DEC could limit his receiving of emoluments, but not the FEC.<sup>142</sup>

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<sup>131</sup> *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131 (2d Cir. 2019); *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018) (alleging that Trump “has a financial interest in vast business holdings around the world that engage in dealings with foreign governments and receive benefits from those governments,” which violates the FEC (quoting Second Amended Complaint at 20, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17-01154))); *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (alleging that President Trump is in violation of the FEC and DEC given his ongoing connection with the Trump Organization’s ownership of the Trump International Hotel in Washington, D.C.).

<sup>132</sup> See generally 939 F.3d 131.

<sup>133</sup> *Blumenthal*, 335 F. Supp. 3d at 51; *District of Columbia*, 315 F. Supp. 3d at 878.

<sup>134</sup> *District of Columbia*, 315 F. Supp. 3d at 877–78.

<sup>135</sup> *Id.*

<sup>136</sup> *Blumenthal*, 335 F. Supp. 3d at 50.

<sup>137</sup> *District of Columbia*, 315 F. Supp. 3d at 882–83.

<sup>138</sup> See Brief for Scholar Seth Barrett Tillman & the Judicial Education Project as Amici Curiae in Support of the Defendant at 4–5, *District of Columbia*, 315 F. Supp. 3d 875 (No. 17-1596) [hereinafter Tillman Brief]. But see Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL’Y 35, 35 (2009) (arguing that “[t]he President occupies an ‘Office under the United States’”).

<sup>139</sup> See U.S. CONST. art. I, § 6, cl. 2.

<sup>140</sup> See generally *id.* arts. I–II.

<sup>141</sup> *District of Columbia*, 315 F. Supp. 3d at 882–83; Tillman Brief, *supra* note 138, at 2, 4.

<sup>142</sup> See *District of Columbia*, 315 F. Supp. 3d at 895–96; Tillman Brief, *supra* note 138, at 2, 4.

Beginning with a textual analysis of the FEC, the court in *District of Columbia v. Trump* ultimately found that the President does indeed hold an “Office of Profit or Trust” under the United States for several reasons.<sup>143</sup> First, the court found that the Plaintiffs were right to argue that the Constitution regularly refers to the President as holding an “office.”<sup>144</sup> Article 2, for instance, states that “[the President] shall hold his Office during the Term of four Years.”<sup>145</sup> Perhaps more convincingly, Clause 8 of that same Article requires that the President take an oath to “faithfully execute the *Office of President* of the United States.”<sup>146</sup>

Second, the court drew from *United States v. Sprague*, which dictates that “[the Constitution’s] ‘words and phrases were used in their normal and ordinary’ . . . meaning,”<sup>147</sup> to argue that the “Office of the President” is undeniably one of both profit and trust.<sup>148</sup> Since the President “receives compensation for his services (profit) and is entrusted with the welfare of the American people (trust),” the President receives both profit through his salary and trust through his status of elected official.<sup>149</sup> Finally, the court drew from the rest of the constitutional text to infer that the President’s “Office of Profit or Trust” is one “under the United States.”<sup>150</sup> Since in the DEC, for instance, “United States” is used to differentiate between Federal and State governments, and since the president is a federal officer, he thus holds his office “[u]nder the United States.”<sup>151</sup>

The court also found that the original meaning and purpose component of constitutional interpretation points to the FEC applying to the Executive.<sup>152</sup> For one, the *Federalist Papers* refer several times to the President as occupying an office.<sup>153</sup> Past Executive Branch’s practices also suggest that the President does hold an Office under the United States.<sup>154</sup> In 2009, for example, the Office of Legal Counsel (OLC) stated that “[t]he President surely ‘hold[s] an[ ] Office of Profit or Trust[.]’”<sup>155</sup> Furthermore, the fact that previous presidents have always sought to obtain Congress’s approval before accepting any sort of gift or other emolument shows, in itself, that past practices

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<sup>143</sup> 315 F. Supp. 3d at 883.

<sup>144</sup> *Id.*

<sup>145</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>146</sup> *Id.* art. II, § 1, cl. 8 (emphasis added); *see also District of Columbia*, 315 F. Supp. 3d at 883.

<sup>147</sup> *District of Columbia*, 315 F. Supp. 3d at 883 (quoting *United States v. Sprague*, 282 U.S. 716, 731–32 (1931)).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 884.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 885.

<sup>154</sup> *See id.*

<sup>155</sup> *Id.* (alteration in original) (quoting *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 4 (2009)).

have always assumed that the FEC does apply to the President.<sup>156</sup> Those opposed to such arguments could admittedly maintain that past presidents were careful and thus sought congressional approval even if they did not necessarily need to do so.<sup>157</sup>

But another argument can be made to defend the more than likely theory that the FEC applies to the President: that the Framers' feared corruption and foreign influences in general.<sup>158</sup> The court did touch on that piece of history, but it did not dwell on it.<sup>159</sup> In fact, given the numerous archives that demonstrate the Framers' fear of corruption, and of corruption at the highest levels of government, it would be extremely hard to argue that some very minute language embedded in the Constitution sets the office of the President aside.<sup>160</sup>

Finally, if the FEC did not apply to the Office of the President, it would mean that the Chief Executive is inherently free to accept any gifts, emoluments, title, or office from foreign governments. Given the Framers' concern over the possibility of corruption through foreign government influences, it would seem very inconsistent with their views to argue that they *meant* to exclude the Office of the President from the FEC's anti-corruption safeguard.<sup>161</sup> Charles Pinckney, for one, broadly emphasized "the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence."<sup>162</sup>

In sum, since the Framers gave the President a lot of leeway and power when it comes to international relations and diplomacy,<sup>163</sup> it is highly unlikely that they would have also excluded this specific office from the only safeguard that would effectively preclude undue influences from the world of international relations and diplomacy.

## 2. Emoluments

The word "emolument" appears twice in the Articles of Confederation<sup>164</sup> and thrice in the Constitution.<sup>165</sup> It was employed countless times throughout the Constitution-drafting process.<sup>166</sup> At present, two potential definitions are being

<sup>156</sup> See, e.g., TEACHOUT, *supra* note 94, at 2, 30.

<sup>157</sup> See *id.* at 27, 29.

<sup>158</sup> See *id.* at 2, 5–6.

<sup>159</sup> See *District of Columbia*, 315 F. Supp. 3d at 885.

<sup>160</sup> See, e.g., TEACHOUT, *supra* note 94, at 2, 5–6.

<sup>161</sup> See, e.g., *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F. Supp. 3d 131, 141 (2d Cir. 2009).

<sup>162</sup> *District of Columbia*, 315 F. Supp. at 897 (citing 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1789, at 389 (Max Farrand ed., Yale Univ. Press 1911)).

<sup>163</sup> See U.S. CONST. art. II, § 2, cl. 1–2.

<sup>164</sup> ARTICLES OF CONFEDERATION of 1781, art. V, para. 2; *id.* art VI, para. 1.

<sup>165</sup> U.S. CONST. art. I, § 6, cl. 2; *id.* art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 7.

<sup>166</sup> See generally John Mikhail, *A Note on the Original Meaning of "Emolument,"*

advocated for. If adopted, the DOJ's definition would qualify "emolument" as "profit arising from an office or employ."<sup>167</sup> By contrast, the Plaintiffs' advocates suggest a broader definition that would encompass "profit," "advantage," "gain," and "benefit."<sup>168</sup> What, then, did the Framers truly intend to prevent those who would be holding "any Office or Profit of Trust" from receiving? Indeed, "emolument" was consistently used in different ways and held various meanings at the time of the Constitution's drafting.<sup>169</sup>

When faced with such uncertainty typical of constitutional interpretation, the Court has held that "[t]he meaning of a Constitutional provision 'begin[s] with its text.'"<sup>170</sup> A close examination of the actual texts of the FEC and DEC is thus warranted. First, the FEC includes four crucial modifiers: "And no Person holding *any* Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of *any* present, Emolument, Office, or Title, of *any kind whatever*, from *any* King, Prince, or foreign State."<sup>171</sup> Putting aside the dilemma of defining emoluments, the FEC is striking because it does not leave any room for exceptions.<sup>172</sup> Indeed, the repetition of these modifiers—and specifically of "*any* present, Emolument . . ." and of "*any kind whatever*" taken together—suggests, on its face, that it was drafted using such strong language to convey the most potent prohibition.<sup>173</sup> Secondly, in 1787, the penultimate draft of the Constitution presented two versions; one contained no comma after "Title," while the second one did.<sup>174</sup> The fact that the adopted FEC does contain a comma suggests that the Framers in fact intended for "any kind whatever" not only to modify "Title," but "present," "Emolument," and "Office."<sup>175</sup>

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BALKINIZATION (Jan. 18, 2017), <https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html> [<https://perma.cc/TY83-EUVG>] (listing a variety of examples where the Framers employed the term "emolument").

<sup>167</sup> Memorandum in Support of Defendant's Motion to Dismiss at 32, *District of Columbia*, 315 F. Supp. 3d 875 (No. 17-1596) (quoting *Barclay's A Complete English Dictionary on a New Plan* (1774)).

<sup>168</sup> Brief of Amici Curiae by Certain Legal Historians on Behalf of Plaintiffs at 3–4, 12, *District of Columbia*, 315 F. Supp. 3d 875 (No. 17-1596) (citing John Mikhail, *The Definition of "Emolument" in English Language Dictionaries, 1523–1806*, SSRN, June 30, 2017).

<sup>169</sup> Natelson, *supra* note 81, at 12.

<sup>170</sup> *District of Columbia*, 315 F. Supp. 3d at 881 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)); *see also* *Brown v. Maryland*, 12 U.S. 419, 437 (1827).

<sup>171</sup> U.S. CONST. art. I, § 9, cl. 8 (emphasis added). Besides the FEC, only one other clause contains the word "any" four times. *See id.* § 10, cl. 1.

<sup>172</sup> *See* TEACHOUT, *supra* note 94, at 28.

<sup>173</sup> *See District of Columbia*, 315 F. Supp. 3d at 887–88; TEACHOUT, *supra* note 94, at 28; *see also* Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 130 n.137 (2018).

<sup>174</sup> Natelson, *supra* note 81, at 38. *Compare Proceedings of Convention Referred to the Committee of Style and Arrangement*, reprinted in 2 CONVENTION RECORDS, *supra* note 71, at 572 (containing no comma after "Title"), *with id.* at 596 (containing a comma after "Title").

<sup>175</sup> *District of Columbia*, 315 F. Supp. 3d at 887–88; Natelson, *supra* note 81, at 38.

Third, the DEC also contains a crucial modifier as it prevents the President from receiving “*any other* Emolument” “for his Services” besides a “compensation.”<sup>176</sup> In *District of Columbia v. Trump*, however, the President suggested a potential interpretation of the DEC where he argued that “‘compensation’ is qualified by ‘for his services,’” meaning that “‘any other Emolument’ must also be qualified by ‘for his services.’”<sup>177</sup> Yet, as the Plaintiffs’ *Amicus Curiae* noted—which the court ultimately agreed with—the use of the modifier “any other,” used before “Emolument,” suggests, once again, that the constitutional text does not “qualify ‘emolument’ by the words ‘for his services.’”<sup>178</sup>

Finally, the wording of the Incompatibility Clause,<sup>179</sup> which restricts increases in the compensation of Congress,<sup>180</sup> also sheds some light on the breadth of both the FEC and DEC. Indeed, the Incompatibility Clause provides that “[n]o 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 increased during such time . . . .”<sup>181</sup> Once more, “emoluments” finds itself accompanied by a modifier—but a more restrictive one this time.<sup>182</sup> In this instance, the modifier “whereof” effectively refers to emoluments tied to “an expressly referenced office.”<sup>183</sup> In *District of Columbia v. Trump*, the court agreed with Plaintiffs that the use of such modifier is proof that the text was meant to impose some limitations on the Incompatibility Clause—in sharp contrast with the broader FEC and DEC.<sup>184</sup> In sum, through the use of modifiers, the Framers “ensur[ed] a broad and expansive reach” of the FEC and DEC.<sup>185</sup> This analysis thus suggests that, at least textually, “emolument” should be broadly interpreted.<sup>186</sup>

As stated in *District of Columbia v. Trump*, constitutional interpretation must also be “guided by the principle that ‘[t]he Constitution was written to be understood by the voters[.]’”<sup>187</sup> Hence, in attempting to understand the very meaning of emoluments as used in the Constitution, “technical meaning” must be left aside to seek out the

<sup>176</sup> *District of Columbia*, 315 F. Supp. 3d at 887–88.

<sup>177</sup> *Id.* at 887.

<sup>178</sup> *Id.* at 887–88. *But see* Nourse, *supra* note 173, at 30 n.137 (arguing that in the DEC “‘[e]molument from the United States,’ implies that the emolument comes from an ‘office,’” but that in the FEC “the term ‘Emolument’ is explicitly modified by a term suggesting ‘office’”).

<sup>179</sup> U.S. CONST. art. I, § 6, cl. 2.

<sup>180</sup> *See id.*; Natelson, *supra* note 81, at 32–33.

<sup>181</sup> U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

<sup>182</sup> *See District of Columbia*, 315 F. Supp. 3d at 888.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.* *But see* Nourse, *supra* note 173, at 130 n.137.

<sup>186</sup> *See District of Columbia*, 315 F. Supp. 3d at 887–88. *But see* Amandeep S. Grewal, *The Purposes of the Foreign Emoluments Clause*, 59 S. TEX. L. REV. 167, 169 (2017) (arguing that the clause refers to compensation for services alone).

<sup>187</sup> *District of Columbia*, 315 F. Supp. 3d at 882 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)).



“original public meaning” of the word.<sup>188</sup> In an attempt to do just that, Professor Mikhail compiled an impressive study examining the definition of emoluments in ten legal dictionaries and in forty English language dictionaries from the Sixteenth to the eighteenth century.<sup>189</sup> The study came to one staggering conclusion—and dealt a brutal blow to President Trump’s defense.<sup>190</sup> It indeed found that in *every* English language dictionary published between 1604 and 1806, “emolument” is defined using on or more of the following elements: profit, advantage, gain, or benefit.<sup>191</sup> In fact, Mikhail found that in “92% of these dictionaries define ‘emolument’ *exclusively* in these terms, with no reference to ‘office’ or ‘employment.’”<sup>192</sup> Alternatively, “profit arising from an office or employ”—or DOJ’s favored definition—only “appears in less than 8% of these dictionaries.”<sup>193</sup>

While this evidence undeniably weighs in favor of a broader definition of “emoluments,” historical records of discourses leading up to the Constitution do not indicate such a clear-cut answer. This hesitation stems from the fact that the meaning of certain references to “emoluments” in the convention records cannot be asserted with certainty, although most appear tied to public office.<sup>194</sup> For instance, Luther Martin stated in November 1787 that no Senators could “leave their private concerns and their Homes for such a period and consent to such a service, but those who place their future views on the *emoluments* flowing from the General Government.”<sup>195</sup> Benjamin Franklin is also reported as having claimed that the President “should receive no salary, stipend or emolument for the devotion of his time to the public services, but that his expenses should be paid.”<sup>196</sup> In his first inaugural address, George Washington also mentioned “emoluments” in connection with his elected position:

I must decline as inapplicable to myself any share in the personal *emoluments*, which may be indispensably included in a permanent provision for the Executive Department; and must accordingly pray that the pecuniary estimates for the Station in which I am placed, may, during my continuance in it, be limited

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<sup>188</sup> *Id.* at 882 (citing *Heller*, 554 U.S. at 576); see also Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 362–63 (2014).

<sup>189</sup> See generally Mikhail, *supra* note 13; Natelson, *supra* note 81.

<sup>190</sup> See *District of Columbia*, 315 F. Supp. 3d at 890–91.

<sup>191</sup> Mikhail, *supra* note 13, at A-2 to A-4 tbl. 1.

<sup>192</sup> *Id.* at 8.

<sup>193</sup> *Id.*

<sup>194</sup> Natelson, *supra* note 81, at 31–34.

<sup>195</sup> *Luther Martin Before the Maryland House of Representatives*, Nov. 29, 1787, reprinted in 3 CONVENTION RECORDS, *supra* note 71, at 155.

<sup>196</sup> Notes of Robert Yates (June 2, 1787), in 1 CONVENTION RECORDS, *supra* note 71, at 89 (emphasis omitted).



to such actual expenditures as the public good may be thought to require.<sup>197</sup>

In *District of Columbia v. Trump*, the court instead focused on historical sources that would support, once again, a broader definition of “emoluments.”<sup>198</sup> It quoted George Walton’s statement that “[t]he Indian trade is of no essential service to any Colony . . . . The *emoluments* of the trade are not a compensation for the expense of donations.”<sup>199</sup> The court also pointed out that when the Framers specifically intended “‘emolument’ to refer only to an official salary or payments tied to holding public office, they did so expressly.”<sup>200</sup> In support of this argument, it quoted both Madison and Hamilton referring to “emoluments *of office*.”<sup>201</sup> Another example provided by the court is a correspondence from Washington to Joseph Jones, where reference to “emoluments *of office*” is made.<sup>202</sup> Ultimately, the court found that “the decisive weight of historical evidence supports the conclusion that the common understanding of the term ‘emolument’ during the founding era was that it covered any profit, gain, or advantage, including profits from private transactions.”<sup>203</sup> While this conclusion fails to take into account certain specific historical records that suggest a potentially narrower definition of “emolument,” the consolidated weight of evidence does lend support to viewing the FEC and DEC as essentially encompassing “anything of value”<sup>204</sup>—regardless of whether such emolument arises from office or employ.

Perhaps the most crucial—and most intricate—element to consider in any exercise of constitutional interpretation is the deciphering of the Framers’ actual *intent*.<sup>205</sup> Before delving into the relevant evidence, it is crucial to understand the crux of the dilemma. The difficulty with a narrow interpretation rests with the fact that it would effectively reduce the FEC and DEC to a prohibition of bribery.<sup>206</sup> Indeed, this narrow

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<sup>197</sup> President George Washington, Inaugural Address of 1789 (Apr. 30, 1787) (emphasis added), [https://www.archives.gov/exhibits/american\\_originals/inaugt.txt.html](https://www.archives.gov/exhibits/american_originals/inaugt.txt.html) [<https://perma.cc/BXV7-69CK>].

<sup>198</sup> See 315 F. Supp. 3d 875, 875 (2018).

<sup>199</sup> *Id.* at 893–94 (emphasis added) (quoting “[July 1776],” *Founders Online*, NAT’L ARCHIVES (last modified Apr. 12, 2018), <http://founders.archives.gov/documents/Adams/01-02-02-0006-0008> [<https://perma.cc/8VQF-8HVM>]).

<sup>200</sup> *Id.* at 894.

<sup>201</sup> *Id.* (emphasis added).

<sup>202</sup> *Id.* (emphasis added) (quoting Letter from George Washington to Joseph Jones (Dec. 14, 1782), <https://www.loc.gov/resource/mgw3h.002/?sp=388&st=text> [<https://perma.cc/V65L-FGGM>]).

<sup>203</sup> *Id.* at 894–95.

<sup>204</sup> See *id.* at 895.

<sup>205</sup> See William Anderson, *The Intention of the Framers: A Note on Constitutional Interpretation*, 49 AM. POL. SCI. REV. 340, 349 (1955); see also *District of Columbia*, 315 F. Supp. 3d at 895.

<sup>206</sup> See *District of Columbia*, 315 F. Supp. 3d at 895; Erwin Chemerinsky et al., *We’re the Lawyers Suing President Trump: His Business Dealings Violate the Constitution*, VOX (Jan. 31,

view suggests not only that a violation of the Emoluments Clauses would arise if the President accepted emoluments arising from office or employ, but that the President would thus have to in fact *accept* such emoluments in exchange for a *service*.<sup>207</sup> By contrast, a broader interpretation would prohibit the President from accepting any emoluments regardless of whether a service is provided in exchange.<sup>208</sup> Such interpretation could have drastic consequences.<sup>209</sup> For instance, it could mean that under the FEC, no public official can sell goods that might be purchased by a foreign government.<sup>210</sup>

During the summer of 1787, the debate around corruption took center stage.<sup>211</sup> Hamilton, for instance, feared that the Republic would be “liable to foreign influence and corruption” since “[m]en of little character, acquiring great power, become easily the tools of intermeddling neighbors.”<sup>212</sup> More precisely, the Framers seemed to fear the possibility of a corrupted Executive above all else. Madison indeed noted that the president “would not possess those great emoluments from his station, nor that permanent stake in the public interest, which would place him out of the reach of foreign corruption.”<sup>213</sup> In essence, the FEC was specifically adopted after Charles Pinkey “urged the necessity of preserving foreign Ministers & other officers of the U. S. independent of external influence.”<sup>214</sup> The FEC was thus adopted to protect against “foreign influence of every sort.”<sup>215</sup>

Moreover, the Framers also feared corruption as a result of domestic emoluments. Hamilton worried that state government or its officials would be “able to tempt the President and cause him ‘to surrender’ his ‘judgment to their inclinations,’ while forcing states to compete with each other to ‘appeal[] to his avarice.’”<sup>216</sup> Thus the purpose of the DEC was simple: “[The President] can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.”<sup>217</sup> Once again, the evidence suggests that the Framers’ intent was to imperatively curb corruption, which warrants a broad definition of “emolument.”

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2017, 8:30 AM), <https://www.vox.com/the-big-idea/2017/1/31/14446106/trump-business-corruption-emoluments> [<https://perma.cc/GM8P-KC8Y>].

<sup>207</sup> See *District of Columbia*, 315 F. Supp. 3d at 895; Chemerinsky et al., *supra* note 206, at 2.

<sup>208</sup> See Chemerinsky et al., *supra* note 206, at 2.

<sup>209</sup> See Memorandum in Support of Defendant’s Motion to Dismiss at 32–33, *District of Columbia*, 315 F. Supp. 3d 875 (No. 17-1596) [hereinafter Memorandum in Support].

<sup>210</sup> See Natelson, *supra* note 81, at 52; see also Memorandum in Support, *supra* note 209, at 32–33.

<sup>211</sup> See TEACHOUT, *supra* note 94, at 57.

<sup>212</sup> *Debates in the Federal Convention of 1787, June 18, 1787*, in 5 ELLIOT’S DEBATES, *supra* note 120, at 203.

<sup>213</sup> *Id.* at 164.

<sup>214</sup> James Madison, Notes on the Constitutional Convention (Aug. 23, 1787), in 4 THE WRITINGS OF JAMES MADISON, *supra* note 85, at 278, 284.

<sup>215</sup> 3 JOSEPH STORY, COMMENTARIES OF THE CONSTITUTION 215–16 (1833).

<sup>216</sup> *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 895 (D. Md. 2018) (alteration in original) (quoting THE FEDERALIST NO. 73 (Alexander Hamilton)).

<sup>217</sup> THE FEDERALIST NO. 73, *supra* note 110, at 442.

### 3. Congressional Approval

The modern debate surrounding the Emoluments Clauses also hinges on whether the president needs to obtain congressional approval before accepting emoluments from foreign governments under the FEC. In 2017, 30 Senators and 171 Representatives filed a complaint for alleged violations of the FEC.<sup>218</sup> At the root of their complaint lays the idea that members of Congress are being denied their constitutional prerogative to accept (or deny) foreign emoluments received by the President.<sup>219</sup>

Surprisingly, however, the constitutional text on this requirement is quite unambiguous. Indeed, the FEC states that no public officer of the U.S. “shall, *without the Consent of the Congress*,” accept any emoluments from foreign governments.<sup>220</sup> As such, the language of the FEC “is both sweeping and unqualified.”<sup>221</sup> From a purely textual approach, the FEC effectively bars acceptance of emoluments and only allows exceptions through congressional approval.<sup>222</sup> By contrast, the DEC does not allow for exceptions as the President is simply barred from receiving “any other Emolument from the United States, or any of them.”<sup>223</sup> Looking at the two Emoluments Clauses together, it would thus appear that the FEC effectively mandates congressional approval for the receipt of foreign emoluments, while the DEC completely bars the President for receiving emoluments and does not allow for any leeway.<sup>224</sup>

Just as unambiguous as the text of the Constitution is the intent of the Framers on the congressional approval requirement. First, the FEC derived from an earlier clause drafted in the Articles of Confederation, and passed without much debate.<sup>225</sup> The only major distinction between the two clauses is the requirement incorporated in the FEC that Congress shall give its consent for the acceptance of foreign emoluments.<sup>226</sup> James Madison in fact plainly explained to David Humphreys that “the Constitution of the United States has *left with Congress the exclusive authority* to permit the acceptance of presents from foreign Governments by persons holding Offices under the United States.”<sup>227</sup>

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<sup>218</sup> *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 50 (D.D.C. 2018).

<sup>219</sup> First Amended Complaint at 19–20, *Blumenthal*, 335 F. Supp. 3d 45 (No. 17-1154).

<sup>220</sup> U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

<sup>221</sup> Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114, 121 (1993).

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

<sup>223</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>224</sup> Compare *id.* art. I, § 9, cl. 8, with *id.* art. II, § 1, cl. 7.

<sup>225</sup> ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1; see Hills, *supra* note 10, at 71.

<sup>226</sup> See also Teachout, *supra* note 11, at 362. Compare U.S. CONST. art. I, § 9, cl. 8, with ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

<sup>227</sup> Letter from James Madison to David Humphreys, 5 January 1803, FOUNDERS ONLINE (emphasis added), <https://founders.archives.gov/documents/Madison/02-04-02-0275#> [<https://perma.cc/5U96-656M>].

Second, historical evidence suggests that the Framers clearly intended for congressional approval to be mandatory and not a mere encouraged tradition. One example is the widespread culture of diplomatic gift-giving that was so preponderant during that era. In fact, it appears that the clause in the Articles of Confederation that preceded the FEC was largely ignored, as American diplomats kept accepting foreign gifts throughout the 1980s.<sup>228</sup> Silas Deane, for instance, had been intensely criticized by Arthur Lee for accepting a jeweled snuff box given to him by Louis XVI in 1770.<sup>229</sup>

As fate would have it, Lee himself accepted a similar gift only ten years later.<sup>230</sup> Confronted with diplomatic standards that would equate refusing a king's gift to offending one of the most powerful foreign governments, but knowing that accepting such gift would violate the Articles of Confederation, Lee seemingly started the practice of seeking congressional approval as to whether he could keep the snuffbox or not.<sup>231</sup> When Benjamin Franklin was offered yet again a similarly ostentatious gift, he followed Lee's lead by giving the infamous portrait of Louis XVI encrusted with diamonds to Congress and sought its approval to keep it, which he was allowed to do in 1786.<sup>232</sup> Three years later, Edmund Randolph, in advocating for the FEC to be constitutionalized, referred to Franklin's gift and sought to "prohibit any one in office from receiving or holding any emoluments from foreign states."<sup>233</sup> The congressional approval requirement for foreign emoluments was thus born out of a tradition that stemmed from the fear of foreign influence, and was made into law during the Federal Convention.

Third, it is undeniable that the Framers' efforts were widely motivated by their desire to provide the people with a legitimate and accountable government.<sup>234</sup>

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<sup>228</sup> See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 78–79 (2013); TEACHOUT, *supra* note 94, at 23–24.

<sup>229</sup> TEACHOUT, *supra* note 94, at 23–24.

<sup>230</sup> LOUIS W. POTTS, ARTHUR LEE, *VIRTUOUS REVOLUTIONARY* 241 (1981); TEACHOUT, *supra* note 94, at 23–24.

<sup>231</sup> See TEACHOUT, *supra* note 94, at 23–24.

<sup>232</sup> *Id.* at 26.

<sup>233</sup> Edmund Randolph, *Remarks at the Convention Debates*, in DAVID ROBERTSON, *DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA OF 1788*, at 330 (Richmond, Enquirer-Press 1805).

<sup>234</sup> See THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."); THE FEDERALIST NO. 27, at 174 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("I believe it may be laid down as a general rule, that [the people's] confidence in and obedience to a government, will commonly be proportioned to the goodness or badness of its administration."); Letter from James Madison to W. T. Barry (Aug. 4, 1822), [https://www.loc.gov/resource/mjm.20\\_0155\\_0159/?sp=1&st=text](https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text) [<https://perma.cc/EWJ3-LV9L>] ("A popular Government, without popular information, or the means of acquiring

Indeed, by requiring public officials to seek congressional approval before accepting foreign emoluments, the FEC not only curbed corruption but also allowed the citizen-body to hold its elected officials accountable.<sup>235</sup> In essence, the FEC's aim was to increase transparency.<sup>236</sup>

This discussion on the FEC and DEC supports three intrinsic conclusions. For one, the FEC necessarily applies to the Chief Executive. Besides the textual arguments supporting this position, the Framers' very fear of corruption—and of a corrupt Chief Executive in particular—critically suggests that their intent was for the president to be as much bound by the FEC as other public officials.<sup>237</sup> Moreover, because the Framers also provided the Executive with the most powers over foreign affairs, the President was *de facto* to be subjected more to these dangerous foreign influences than perhaps any other members of the government.<sup>238</sup> After all, it was the fear of foreign influences, epitomized in the diplomatic gift-giving tradition, that led Madison, Pinkney, and Randolph to argue for a potent FEC.<sup>239</sup>

Second, the majority of the evidence examined suggests that the Framers intended for “emoluments” to mean any profit, advantage, gain, or benefit, rather than “profit arising from an office or employ.”<sup>240</sup> Once again, the Framers' apprehension of corruption lends support to the theory that the Emoluments Clauses were meant to constitute the most potent safeguards against corruption.<sup>241</sup> A narrower view of “emoluments” would instead reduce both Clauses to only preventing bribery. An arguably stronger safeguard against bribery *per se*, however, is already protected by the Impeachment Clause.<sup>242</sup> Historical evidence indeed suggests that the FEC and DEC were meant to prevent any temptations that could lead public officials to surrender to their human nature and prioritize their own interests over the common good.<sup>243</sup>

Third, the FEC forbids public officials from accepting emoluments without Congress's approval.<sup>244</sup> The events that led to the constitutionalization of the FEC indeed demonstrate how a mere tradition became black letter law.<sup>245</sup> Even if the recipients of diplomatic gifts only sought to obtain Congress's consent to maintain a virtuous and

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it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”).

<sup>235</sup> TEACHOUT, *supra* note 94, at 36; Hills, *supra* note 10, at 101–02.

<sup>236</sup> Hills, *supra* note 10, at 101–02.

<sup>237</sup> See *supra* notes 211–17 and accompanying text.

<sup>238</sup> See *supra* notes 211–17 and accompanying text.

<sup>239</sup> See, e.g., *supra* note 227 and accompanying text.

<sup>240</sup> Memorandum in Support, *supra* note 209, at 32.

<sup>241</sup> See *supra* notes 207–10 and accompanying text.

<sup>242</sup> See U.S. CONST. art. II, § 4.

<sup>243</sup> See *supra* notes 234–36 and accompanying text.

<sup>244</sup> See *supra* notes 225–29 and accompanying text.

<sup>245</sup> See *supra* notes 228–33 and accompanying text.



corrupt-free political image, the result is the same—the Framers modified the Articles of Confederation to promote transparency and accountability through the FEC.<sup>246</sup>

Taking these three conclusions together supports a broad reading of the Emoluments Clauses. Thus, as applied to the President’s receiving of emoluments, the FEC should read as such: The Chief Magistrate shall not, without the Consent of the Congress, accept of any profit, advantage, gain, or benefit of any kind whatever, from any King, Prince, or foreign State. Similarly, the DEC should read as follows: The President shall not receive within his mandate any other Emolument profit, advantage, gain, or benefit from the United States, or any of the States.

### *B. The Impeachment Clause*

The Impeachment Clause presents an interesting dichotomy: both feared and revered, it constitutes the epitome of the checks and balances system,<sup>247</sup> but the political nature of any impeachment makes the process dangerous and laden with controversies.<sup>248</sup> While the Impeachment Clause itself appears straightforward, defining “high Crimes and Misdemeanors” simply is not.<sup>249</sup> Furthermore, impeachment and criminal laws clash on what truly constitutes “bribery.”<sup>250</sup>

#### 1. Bribery

Much like corruption, bribery is a well-known offense that retains a certain form of obscurity. Indeed, unlike treason, it is never defined in the Constitution.<sup>251</sup> In fact, an actual definition of bribery only made its first federal law appearance in 1853.<sup>252</sup> Why, then, did the Framers include “bribery” in the Impeachment Clause? Records from the Constitution-drafting period contain little information explaining how bribery made it in to the Impeachment Clause.<sup>253</sup> Much like treason, it was almost always included and little debate arose around the question of bribery.<sup>254</sup> There is, however, one plausible

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<sup>246</sup> See *supra* note 236 and accompanying text.

<sup>247</sup> See Tribe, *supra* note 124, at 716.

<sup>248</sup> See *id.* at 713; see also McDowell, *supra* note 121, at 628–29.

<sup>249</sup> See U.S. CONST. art. II, § 4; Tribe, *supra* note 124, at 716.

<sup>250</sup> See *infra* notes 277–85 and accompanying text.

<sup>251</sup> See HOLTZMAN, *supra* note 9, at 85.

<sup>252</sup> See Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 *FORDHAM L. REV.* 463, 466 (2015).

<sup>253</sup> See Notes of William Paterson (June 30, 1787), reprinted in 1 *CONVENTION RECORDS*, *supra* note 71, at 506–07; Notes of James Madison (July 20, 1787), reprinted in 2 *CONVENTION RECORDS*, *supra* note 71, at 68; Notes of James Madison (Aug. 13, 1787), reprinted in 2 *CONVENTION RECORDS*, *supra* note 71, at 269; Notes of James Madison (Sept. 8, 1787), reprinted in 2 *CONVENTION RECORDS*, *supra* note 71, at 550; *South Carolina Debate*, *supra* note 112, at 251.

<sup>254</sup> See 4 *ELLIOT’S DEBATES*, *supra* note 120, at 49; 5 *ELLIOT’S DEBATES*, *supra* note 120, at 131, 380, 507, 528, 563.



explanation for this unexpected absence of controversies: that the fear of bribery itself was, along with treason, the very reason behind the crafting of the Impeachment Clause.<sup>255</sup>

On July 20, 1787, the Convention discussed a version of the Clause stating that the President was “[t]o be removable on impeachment and conviction of malpractice or neglect of duty.”<sup>256</sup> At that point, uncertainty remained as to whether there was to even be a presidential impeachment mechanism in the Constitution.<sup>257</sup> The fear of foreign bribery, however, anchored the case for establishing an impeachment mechanism.<sup>258</sup> Gouverneur Morris, who was originally opposed to an Impeachment Clause, eventually explained that:

[The President] may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him. One would think the King of England well secured agst bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV.<sup>259</sup>

Morris’s reference to the two European monarchs is quite telling.<sup>260</sup> In 1670, Louis XIV and Charles II secretly signed the infamous Treaty of Dover, in which Louis agreed to pay an annual subsidy of 3,000,000 livres in exchange for Charles’s help in France’s war efforts against the Dutch Republic.<sup>261</sup> Charles was also to receive 2,000,000 livres for his restoring the Roman Catholic religion.<sup>262</sup> In 1678, Charles II further negotiated with Louis XIV to receive “six millions of livres, yearly for three years” in exchange for England’s neutrality in the religion-driven wars of the time.<sup>263</sup>

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<sup>255</sup> See TRIBE & MATZ, *supra* note 9, at 6.

<sup>256</sup> Notes of James Madison (July 20, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra* note 71, at 61.

<sup>257</sup> *See id.*

<sup>258</sup> *See id.* at 66, 69; *South Carolina Debate*, *supra* note 112, at 251.

<sup>259</sup> Notes of James Madison (July 20, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra* note 71, at 68–69.

<sup>260</sup> *See also South Carolina Debate*, *supra* note 112, at 251 (“Hence kings are less liable to foreign bribery and corruption than any other set of men, . . . indeed, he did not at present recollect any instance of a king who had received a bribe from a foreign power, except Charles II., who sold Dunkirk to Louis XIV.”).

<sup>261</sup> See Clyde L. Grose, *Louis XIV’s Financial Relations with Charles II and the English Parliament*, 1 J. MOD. HIST. 177, 179–80 (1929).

<sup>262</sup> *See id.* at 180.

<sup>263</sup> 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS: FROM THE EARLIEST PERIOD TO THE PRESENT TIME 603, 608, 724 (T.B. Howell comp., London, T.C. Hansard 1816) [hereinafter HOWELL’S

Yet, only five days earlier, a Protestant-friendly British parliament had voted an appropriation act to support a war against Catholic France.<sup>264</sup>

The neutrality agreement, directly negotiated by Thomas Osborne, Earl of Danby and Charles's Lord High Treasurer, thus led to a tremendous uproar on the British side.<sup>265</sup> While Charles II had ordered his Treasurer to negotiate this agreement,<sup>266</sup> the House of Lords began impeachment proceedings against Danby.<sup>267</sup> Charles even admitted to the House that Danby had been acting under his orders.<sup>268</sup> However, since the British king "was beyond their reach, they exercised a constitutional right in the impeachment of his responsible minister."<sup>269</sup> Charles II was effectively untouchable, and Danby was ultimately pardoned by the monarch.<sup>270</sup>

Charles's acts first proved that even kings, thought to be "above corruption,"<sup>271</sup> could be bribed and influenced. Morris's reference to Louis XIV's bribing Charles II in the very discussion of the Impeachment Clause thus shows that the Framers were motivated by European history to create a potent impeachment mechanism that could be used to stop a corrupt executive.<sup>272</sup> George Mason expressed this necessity for an Impeachment Clause to apply to the Chief Magistrate when he explained: "[n]o point is of more importance than that the right of impeachment could be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?"<sup>273</sup> The British parliament's failure to hold Charles accountable for high treason, in the form of bribery, would have been known to the Framers,<sup>274</sup> which directly supports the assumption that the dreaded effects of presidential bribery played an important role in arguing for the necessity of an Impeachment Clause. Believing that the British Constitution was "rotten to the

STATE TRIALS]; see 2 HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II* 409 (London, John Murray & Albemarle Street, new ed., 1884).

<sup>264</sup> See 11 HOWELL'S STATE TRIALS, *supra* note 263, at 604.

<sup>265</sup> See BERGER, *supra* note 36, at 44; 2 HALLAM, *supra* note 263, at 410; see also 11 HOWELL'S STATE TRIALS, *supra* note 263, at 724–25.

<sup>266</sup> See 2 HALLAM, *supra* note 263, at 410.

<sup>267</sup> See 11 HOWELL'S STATE TRIALS, *supra* note 263, at 725.

<sup>268</sup> See *id.*

<sup>269</sup> 2 HALLAM, *supra* note 263, at 410.

<sup>270</sup> See 11 HOWELL'S STATE TRIALS, *supra* note 263, at 725.

<sup>271</sup> Notes of Alexander Hamilton (June 18, 1787), in 1 CONVENTION RECORDS, *supra* note 71, at 304, 310.

<sup>272</sup> See THE FEDERALIST NO. 8 (Alexander Hamilton); THE FEDERALIST NO. 22, *supra* note 234, at 149–50 ("Hence it is that history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments. How much this contributed to the ruin of the ancient commonwealths has been already disclosed.")

<sup>273</sup> Notes of James Madison (July 20, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra* note 71, at 65.

<sup>274</sup> See TRIBE & MATZ, *supra* note 9, at 5.

very core” “under the hands of bribery and corruption,”<sup>275</sup> the Bribery Clause was a direct response by the Framers to avoid a similar fate for the republic.<sup>276</sup>

Today, 18 U.S.C. § 201(b) mandates the imprisonment of a public official who “directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act.”<sup>277</sup> In 2016, the Court adopted a narrow interpretation of “official act” in a case involving a former Virginia governor.<sup>278</sup> The decision established two requirements for corroborating an official act. First, “‘a question, matter, cause, suit, proceeding or controversy’ involving the formal exercise of governmental power” must be identified.<sup>279</sup> Second, “the public official must make a decision or take an action *on* that question or matter or agree to do so.”<sup>280</sup> In essence, this narrow interpretation of the bribery statutes made “buying ‘access and ingratiation’” legal under federal law.<sup>281</sup>

Notwithstanding this interpretation, it is crucial to note that impeachment law remains distinct from criminal law.<sup>282</sup> As Elizabeth Holtzman (a member of the House Judiciary Committee who voted to impeach Nixon) has noted, impeachment law “is about protecting our nation and our Constitution from grievous injury at the hands of a corrupt officeholder. No individuals go to prison as a result of impeachment, but they do get removed from office.”<sup>283</sup> The Court’s decision in *McDonnell* was spurred by the fear that a broader interpretation of bribery statutes would enable federal agents to “cast a pall of potential prosecution” over public officials and their constituents, which would ultimately reduce political accountability.<sup>284</sup> Yet, this concern does not apply to impeachment law, for which “there’s no shortage of political accountability.”<sup>285</sup> As such, impeachable bribery must focus on what the Framers sought to avoid at all costs: a president who would forego the common good for his own personal gains.

## 2. High Crimes & Misdemeanors

The term “high crimes and misdemeanors” habitually connotes a certain degree of severity. We know that such offenses were seen by the Framers as deplorable

<sup>275</sup> WOOD, *supra* note 16, at 12.

<sup>276</sup> See Notes of James Madison (July 20, 1787), *reprinted in* 2 CONVENTION RECORDS, *supra* note 71, at 66, 68–69.

<sup>277</sup> 18 U.S.C. § 201(b) (2012); *see also id.* § 1951 (2012).

<sup>278</sup> See *McDonnell v. United States*, 136 S. Ct. 2355, 2374–75 (2016); HOLTZMAN, *supra* note 9, at 85; Christopher Murphy, *McDonnell v. United States—Defining “Official Action” in Public Corruption Law*, 12 DUKE J. CONST. L. & PUB. POL’Y 269, 281–82 (2017).

<sup>279</sup> *McDonnell*, 136 S. Ct. at 2374 (internal quotation marks omitted).

<sup>280</sup> *Id.* at 2370.

<sup>281</sup> HOLTZMAN, *supra* note 9, at 85.

<sup>282</sup> *Id.*; *see also* TRIBE & MATZ, *supra* note 9, at 32.

<sup>283</sup> HOLTZMAN, *supra* note 9, at 85.

<sup>284</sup> See *McDonnell*, 136 S. Ct. at 2372.

<sup>285</sup> TRIBE & MATZ, *supra* note 9, at 32.

enough to warrant impeachment, which constitutes the immense power “to doom to honor or to infamy the most confidential and the most distinguished characters of the community.”<sup>286</sup> Nonetheless, “high crimes and misdemeanors” remains a technical term that is not easily defined.<sup>287</sup>

Two reasons behind the Framers’ choice of adding “high crimes and misdemeanors” to the Impeachment Clause are discernable. In the first place, this term of art had been repeatedly used in impeachment trials by the British since the fourteenth century.<sup>288</sup> “High crimes and misdemeanors” was first used to impeach Michael de la Pole, the Earl of Suffolk, in 1386.<sup>289</sup> His descendant, William de la Pole, was also impeached in 1450 for high crimes and misdemeanors and treason.<sup>290</sup> Therefore, even the first British impeachable offenses were specifically designed to curb abuses of power,<sup>291</sup> which further explains the Framers’ choice of language. The trial of Lord Bacon, charged with bribery and corruption for receiving gifts (even after the completion of the trial), clearly demonstrates that British common law viewed corruption as exactly the type of offense that would constitute abuses of power and ultimately hurt the common good.<sup>292</sup> In talking about eighteenth century impeachment trials, one author explained that “misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution.”<sup>293</sup>

While the Framers extensively discussed which branch of government should try impeachments, there was little debate as to what should actually constitute an impeachable offense.<sup>294</sup> To include “high crimes and misdemeanors” was seemingly agreed upon precisely because it was thought to comprise the offenses that would injure the common good.<sup>295</sup> The fact that “high crimes and misdemeanors” ultimately brought consensus shows that the Framers chose to build an Impeachment Clause that was to be as vigorous as possible.<sup>296</sup> As Justice Story has argued, the power of the

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<sup>286</sup> THE FEDERALIST NO. 65, *supra* note 129, at 398.

<sup>287</sup> *See* United States v. Burr, 25 F. Cas. 55, 155 (C.C.D. Va. 1807) (No. 14,693). *See generally* Tribe, *supra* note 124.

<sup>288</sup> McDowell, *supra* note 121, at 639; *see also* ALEX SIMPSON, A TREATISE ON FEDERAL IMPEACHMENTS 86–90 (1916); Barker, *supra* note 115, at 31; Tribe, *supra* note 124, at 716.

<sup>289</sup> SIMPSON, *supra* note 288, at 86–87; McDowell, *supra* note 121, at 637.

<sup>290</sup> McDowell, *supra* note 121, at 637.

<sup>291</sup> *See id.*

<sup>292</sup> *See* discussion *supra* Section I.B.

<sup>293</sup> 2 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 601 (London 1792).

<sup>294</sup> *See* *Debates in the Legislature and in Convention of the State of South Carolina, In the Adoption of the Federal Constitution*, January 16, 1788, in 4 ELLIOT’S DEBATES, *supra* note 120, at 263–66.

<sup>295</sup> *See* BERGER, *supra* note 36, at 61.

<sup>296</sup> *See* TRIBE & MATZ, *supra* note 9, at 37–38.

Senate to impeach extends beyond “crimes of a strictly legal character” and “reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office.”<sup>297</sup>

It is important to note, however, that the Impeachment Clause was not meant to confer upon the Senate a power to try virtually any offense that could harm the common good. The very text of the Clause indicates that impeachment proceedings should be reserved for offenses as grave as treason and bribery that would inherently lead to abuses of power and inflict injury on the United States.<sup>298</sup> Three distinct pieces of evidence support this reasoning. First, the offenses of treason and bribery are linked to high crimes and misdemeanors by the modifier “other.”<sup>299</sup> The Framers had originally thought to include the phrase “high misdemeanor,” but eventually decided to replace it with “other crimes.”<sup>300</sup> In discussing the impeachment of Judge Samuel Chase in 1805, Joseph Hopkinson seemed to draw this very parallel when he argued: “Observe, sir the crimes with which these ‘*other high crimes*’ are classed in the Constitution, and we may learn something of their character. They stand in connection with ‘*bribery and corruption*’—tried in the same manner, and subject to the same penalties.”<sup>301</sup> In other words, the term “high crimes and misdemeanors” seems to include severe offenses that would be tantamount in gravity to bribery and treason.<sup>302</sup>

Second, the use of the adjective “high” before “crimes and misdemeanors” also suggests that the Framers adopted the common law view that impeachable offenses effectively entail grave abuses of official power.<sup>303</sup> Blackstone, for instance, explained that “high” in the context of treason did not only refer to the gravity of the offense but served as a means of distinguishing “petit” crimes against private citizens from injuries to the crown.<sup>304</sup> Such a reading of the Clause would align with the Framers’ view that the very aim of the presidential impeachment process is to curb abuses of power.

Third, the antepenultimate draft of the Impeachment Clause specified that treason, bribery, and other high crimes and misdemeanors *against the state* were impeachable offenses.<sup>305</sup> “[S]tate” was in turn replaced by “United States” to remove any

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<sup>297</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 532 (Boston, Charles C. Little & James Brown eds., 2d ed. 1851).

<sup>298</sup> See TRIBE & MATZ, *supra* note 9, at 38–39.

<sup>299</sup> U.S. CONST. art. II, § 4.

<sup>300</sup> Tribe, *supra* note 124, at 717.

<sup>301</sup> Joseph Hopkinson, On the Impeachment of Judge Chase, in 4 ELLIOT’S DEBATES, *supra* note 120, at 452–53 (emphasis added).

<sup>302</sup> See Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 283 (1998).

<sup>303</sup> See Tribe, *supra* note 124, at 720.

<sup>304</sup> *Id.*; see also TRIBE & MATZ, *supra* note 9, at 40.

<sup>305</sup> Notes of James Madison (Sept. 8, 1787), reprinted in 2 CONVENTION RECORDS, *supra* note 71, at 550.



ambiguity.<sup>306</sup> Ultimately, “against the United States” was entirely removed once again without explanation.<sup>307</sup> Yet, the fact that the Framers even sought to include this distinction suggests that they viewed impeachable offenses as crimes committed against the nation—crimes that would hurt the common good.<sup>308</sup>

From a textual standpoint, one can invoke the theory of *ejusdem generis* to understand this constitutional link between impeachable offenses.<sup>309</sup> *Ejusdem generis* indicates that a catchall phrase (such as “and other high crimes and misdemeanors”) following a series of items (such as “treason, bribery”) necessarily implies the catchall phrase to solely refer to “things similar to the items that precede it.”<sup>310</sup> This interpretation would suggest that “‘high Crimes and Misdemeanors’ are offenses of the same general type as treason and bribery.”<sup>311</sup> Indeed, “[t]reason causes the gravest possible injury to the nation . . . Bribery is the ultimate corruption of office—an exercise of power for private benefit, not public good. Both offenses drastically subvert the Constitution and involve an unforgivable abuse of the presidency.”<sup>312</sup> It thus follows that other impeachable offenses should share these traits: namely injury to the nation and unforgivable abuse of the presidency.

This discussion of the Emoluments and Impeachment Clauses has demonstrated that the Executive anti-corruption framework was specifically designed to create broad, potent safeguards. One reason behind such a broad framework is the idea that the Constitution was meant to withstand the test of time.<sup>313</sup> In essence, the inclusion of “high Crimes and Misdemeanors,” instead of limiting the Impeachment Clause to a specific list of offenses, was agreed upon to establish a flexible standard as “it would be impossible to anticipate every act that might someday require impeachment.”<sup>314</sup> The FEC was similarly broadly worded to effectively encompass all foreign influences, even those that might not have been foreseen at the time. Once again, the Framers’ fear of corruption—and of foreign influences in general—led them to create a broad and adaptable framework, which would not only protect the Republic from abuses of power but also ensure the durability of the Constitution itself. Because “a well-written constitution cannot ‘partake to the prolixity of a legal code,’”<sup>315</sup> the Framers designed a flexible framework that could evolve as needed.

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<sup>306</sup> *Id.* at 551.

<sup>307</sup> *See id.*

<sup>308</sup> *See* McDowell, *supra* note 121, at 633–34; Sunstein, *supra* note 302, at 288–89. *But see* Tribe, *supra* note 124, at 719–20 (arguing that “against the United States” was only removed to avoid redundancy).

<sup>309</sup> *See* TRIBE & MATZ, *supra* note 9, at 38.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *See* THE FEDERALIST NO. 65, *supra* note 129, at 346.

<sup>314</sup> *See* TRIBE & MATZ, *supra* note 9, at 27.

<sup>315</sup> *Id.*



IV. APPLYING THE FRAMEWORK: PRIMACY OF POLITICAL  
VIRTUE AS ALLEGIANCE TO THE LAW

Montesquieu, whose republican ideals greatly influenced the Framers,<sup>316</sup> believed that “[l]aws, in their most general signification, are the necessary relations arising from the nature of things.”<sup>317</sup> “These relations . . . together constitute . . . Spirit of the Laws.”<sup>318</sup> Hence, “only by appreciating the ‘spirit’ of laws can their letter be enforced.”<sup>319</sup> In essence, attempting to enforce the anti-corruption framework demands this same appreciation. In doing so, one must note the crucial distinction between moral virtue and what Montesquieu called “political virtue.”<sup>320</sup>

*A. Political Virtue*

For Montesquieu, political virtue is “the love of one’s country, and of equality.”<sup>321</sup> “It is not a moral, nor a Christian, but a political virtue; and it is the spring which sets the republican government in motion . . . .”<sup>322</sup> This distinction is essential because it sheds light on what the Framers attempted to accomplish in creating constitutional anti-corruption safeguards. Classical views advocated moral virtue as the indispensable component for successful governments, suggesting that only those who did not have any desire to rule would be virtuous leaders.<sup>323</sup> At common law, this same virtuous morality, borne out of religious precepts, was seen as a crucial element if one was to put the common good ahead of personal interests.<sup>324</sup>

The Framers, however, took a different route. While these ideals undeniably influenced the “spirit” of the Constitution, there is one main divergence between the Framers and the common law (as inspired by the Classical view) on the ideal ruler. This divergence stems from the Framers’ belief in “energy in government”—the idea that government must be effective and thus attract the best possible leaders, a concept embedded in the Incompatibility Clause.<sup>325</sup> Some argued that stricter standards of corruption would deter capable individuals from public service, while other maintained

<sup>316</sup> See generally Matthew P. Bergman, *Montesquieu’s Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1 (1990).

<sup>317</sup> 1 CHARLES DE SECONDAT BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 18 (Thomas Nugent trans., Batoche Books 2001) (1749).

<sup>318</sup> *Id.* at 23.

<sup>319</sup> Bergman, *supra* note 316, at 8.

<sup>320</sup> See MONTESQUIEU, *supra* note 317, at 16–17.

<sup>321</sup> *Id.* at 16.

<sup>322</sup> *Id.* at 17.

<sup>323</sup> See discussion *supra* Section I.A.

<sup>324</sup> See discussion *supra* Section I.B.

<sup>325</sup> See U.S. CONST. art. I, § 6, cl. 2; Natelson, *supra* note 81, at 31.

the necessity of rigorous standards.<sup>326</sup> Madison spearheaded the debate for the laxer standard camp, and Wilson is said to have defended his proposal: “The members of the Legislature have perhaps the hardest & least profitable task of any who engage in the service of the state. Ought this merit to be made a disqualification?”<sup>327</sup> Ultimately, Madison’s proposal became part of the Constitution,<sup>328</sup> which prevents Congress from enriching the Legislature, while allowing ambition by enabling members to be appointed to other offices.<sup>329</sup> This Clause exemplifies the Framers’ struggle between encouraging the best people to hold office and guarding the democracy against abuses.<sup>330</sup> In doing so, the Framers practically thought that they were preserving the common good by allowing the most qualified individuals to lead.<sup>331</sup>

Once it had been determined that ambition—even if it could potentially lead to more corruption—was desirable, an anti-corruption system still had to be implemented. Indeed, both the Emoluments Clauses and the Impeachment Clause were largely designed to curb future leaders’ greed and inherent abuses of power. The Emoluments Clauses served as a means to encourage the president’s political virtue by promoting the public interest.<sup>332</sup> If such virtue was to be lacking, however, the menace of the Impeachment Clause would serve as a deterrent—and as a potential escape clause.<sup>333</sup>

### *B. Allegiance to the Law*

This analysis of the Emoluments and Impeachment Clauses has demonstrated that the fear of a corrupt Executive largely sprung from the Framers’ lack of trust in human nature.<sup>334</sup> Foreign gifts and other emoluments could be tempting enough to corrupt the most virtuous leaders. Betting the stability of the nascent democracy on future leaders’ uncertain moral virtue was inherently unconceivable.<sup>335</sup> The answer was thus to be found in promoting political virtue, instead of relying on mere moral virtue.

Going back to Montesquieu, one gains political virtue through allegiance to the laws. Indeed, “the honest man . . . is not the Christian, but the political honest man, . . . He is the man who loves the laws of his country, and who is actuated by the love of

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<sup>326</sup> Natelson, *supra* note 81, at 33; *see also* Notes of Robert Yates (June 23, 1787), *reprinted in* 1 CONVENTION RECORDS, *supra* note 71, at 392.

<sup>327</sup> Notes of James Madison (June 23, 1787), *reprinted in* 1 CONVENTION RECORDS, *supra* note 71, at 387.

<sup>328</sup> U.S. CONST. art. I, § 6, cl. 2.

<sup>329</sup> Natelson, *supra* note 81, at 34.

<sup>330</sup> *Id.* at 39–41.

<sup>331</sup> *See* Teachout, *supra* note 11, at 375, 380.

<sup>332</sup> *See id.* at 374.

<sup>333</sup> *See* THE FEDERALIST NO. 64, *supra* note 116, at 396.

<sup>334</sup> *See generally* THE FEDERALIST NO. 51 (James Madison).

<sup>335</sup> *See* James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 177–78 (1994).

those laws.”<sup>336</sup> The Framers essentially adopted a similar view by requiring absolute allegiance to the Supreme Law of the land.<sup>337</sup> The Constitution itself conveys this attempt to render allegiance to the law the ultimate safeguard against corruption. Indeed, two constitutional clauses create an absolute presidential duty to respect and obey the law: the Take Care Clause and the Presidential Oath Clause.<sup>338</sup> Through the Take Care Clause, the President was expected to encourage faithful execution of the laws,<sup>339</sup> and the Presidential Oath Clause obliged the President to “preserve, protect and defend the Constitution.”<sup>340</sup> In fact, the Presidential Oath Clause was seen “as one of the ‘great checks’ in the [Constitution] against abuse of power.”<sup>341</sup>

Hamilton further believed that “the sanctity of an oath” would bound public officials to the “SUPREME LAW of the land.”<sup>342</sup> As the “Chief Magistrate,” the President is “the principal officer who must obey and properly carry out the law.”<sup>343</sup> Oath-taking had been an established practice in England and in the American colonies, and was seen as a sacred moment.<sup>344</sup> As such, the Framers believed that “a President who publicly promises to defend the Constitution is more likely to do so.”<sup>345</sup> Therefore, the Presidential Oath Clause does appeal to the President’s virtue, but also serves as a deterrent if virtue comes to be lacking. In sum, the very “spirit” of the Constitution promotes political virtue through its core plea for future leaders’ unconditional allegiance to the law.

#### CONCLUSION

“There is another provision against the danger . . . of the President receiving emoluments from foreign powers. If discovered he may be impeached,” explained Randolph during the Virginia Convention.<sup>346</sup> Randolph’s statement exemplifies the very structure of the Executive anti-corruption framework applicable to the President. Indeed, the Framers created constitutional anti-corruption clauses that, together,

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<sup>336</sup> MONTESQUIEU, *supra* note 317, at 17.

<sup>337</sup> See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 81 (2009). See generally Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

<sup>338</sup> See Driesen, *supra* note 337, at 83.

<sup>339</sup> U.S. CONST. art. II, § 3.

<sup>340</sup> *Id.* § 1, cl. 8.

<sup>341</sup> Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2112, 2129 (2019).

<sup>342</sup> THE FEDERALIST NO. 27, *supra* note 234, at 177.

<sup>343</sup> Driesen, *supra* note 337, at 82.

<sup>344</sup> See, e.g., Jonathan L. Rudd, *Our Oath of Office: A Solemn Promise*, 78 FBI L. ENFORCEMENT BULL. Sept. 2009, at 23–24.

<sup>345</sup> See Driesen, *supra* note 337, at 84; Kent et al., *supra* note 341, at 2128.

<sup>346</sup> *The Virginia Convention, Tuesday, 17 June 1788*, in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1367 (John P. Kaminski et al. eds., 1993).

would establish a broad, potent framework. If the President were to violate the Emoluments Clauses, he could be impeached because the receiving of emoluments is *de facto* corruption.

The very text of the Emoluments Clauses shows that the Framers intended to create a broad framework to encompass all acts of corruption that could endanger the common good. While “corruption” was removed from the original draft of the Impeachment Clause, the inclusion of both “bribery” and “high crimes and misdemeanors” effectively renders corruption impeachable in any case. Once again, the fact that “bribery” was almost always included, and that “corruption” was replaced by the broader “high crimes and misdemeanors,” demonstrates the Framers’ intent to design a broad framework. Moreover, the Faithful Execution Clauses demand political virtue from the Chief Executive and are designed to protect against corruption.<sup>347</sup> Taken together, this framework imposes a duty on the President to adhere to the law by promoting political virtue. The Emoluments Clauses and the Impeachment Clause further ensure that the nation’s interests remain protected.

When impeachment proceedings began against Richard Nixon, an article of impeachment was proposed for the President’s alleged violation of the Emoluments Clauses.<sup>348</sup> While said article was defeated (16–12), “nobody on the Judiciary Committee questioned whether a president *could* be impeached for violating the emoluments clause.”<sup>349</sup> In essence, the Framers specifically designed a loose framework devised to withstand the test of time. The Impeachment Clause was seen as a last remedy and is thus neither meant to be used on a whim nor to further political agendas. Yet, when political virtue comes to be lacking, as is the case for latent violations of the Emoluments Clauses, the Impeachment Clause provides for a sharp remedy that can shield the people “from the abuse or violation of some public trust.”<sup>350</sup>

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<sup>347</sup> See Ryan S. Killian, *Faithfully Interpreting ‘Faithfully’* (manuscript at 14), <https://papers.ssrn.com/abstract=2226297>.

<sup>348</sup> HOLTZMAN, *supra* note 9, at 88.

<sup>349</sup> *Id.*

<sup>350</sup> THE FEDERALIST NO. 65, *supra* note 129, at 346.