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## A More Perfect Union: The Emoluments Clause

Grant C. Rasak

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# A More Perfect Union: The Emoluments Clause

Grant C. Rasak\*

## *Abstract*

*America's Framers crafted the Emoluments Clause to preserve institutional integrity, mitigate undue influences, and best serve the American People. The Emoluments Clause influenced the course of the Constitutional Convention, as the Pennsylvania Delegation championed resolute reforms. Benjamin Franklin, working alongside James Wilson, advocated for strengthening domestic and international practices by crafting the Emoluments Clause. The Framers proposed a system of self-government which sought to establish public trust, mitigate corrupt practices, and promote institutional integrity. The Pennsylvania Delegation summoned Wilson, under the tutelage of Franklin, to champion the Emoluments Clause.*

*Wilson proposed a new notion of national unity by placing profound confidence in the American people. As the Framers established "a government of the people, by the people and for people," Wilson's advocacy for the Emoluments Clause renewed America's purpose to promote public confidence in America's institutions. The Emoluments Clause shaped the historic preservation of America's rich traditions and educational values. Thus, Wilson's words shaped the legacy of the Emoluments Clause and enriched America's history.*

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\* Dedicated to "We the People," with Special Recognition to Professor Pushaw, James Wilson Endowed Professor of Law.

Grant C. Rasak, Doctor of Jurisprudence & Straus Institute Candidate, Pepperdine University, Caruso School of Law; Bachelor of Arts with Honors & Distinction, University of California, Berkeley. Honors Thesis, Distinction of Merit. National Honor Society. Author's Note of Appreciation to family, friends and colleagues at Law Review. We proudly salute the courageous service of America's Heroes. Thank you all for your remarkable devotion and commitment to Freedom's Cause, the American Dream and the highest standards of the law. God bless you all.

*Through the generations, America's leaders have proudly stood at the Tomb of the Unknown Soldier to honor America's Heroes and the defense of America's Constitution, because a grateful nation expresses its sincere gratitude for service above and beyond the call of duty. The principles of the Emoluments Clause inspired the Pennsylvania Delegation to craft alliances among leaders in the rustic halls of Pennsylvania and to prominently place the Emoluments Clause in America's Constitution.*

*Thus, the Emoluments Clause significantly shaped the balance of power as America's Constitution established a system of checks and balances for "We the People."*

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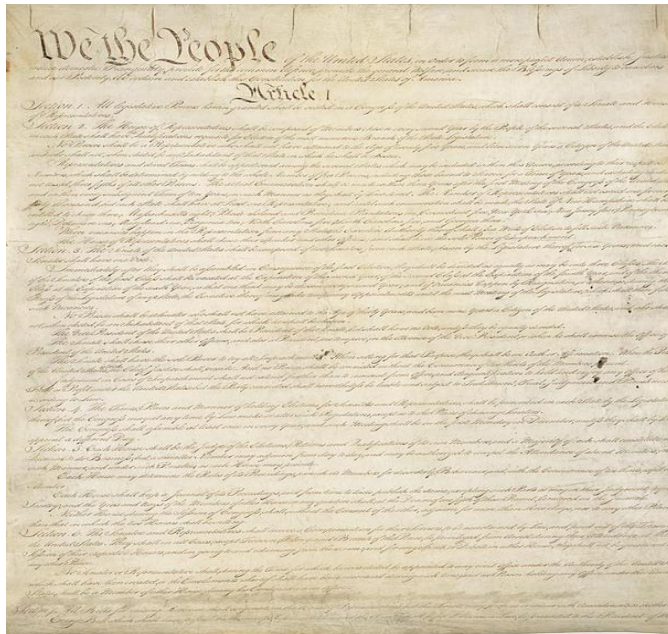
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This work is proudly dedicated to “We the People,” as these prolific words are prominently placed in America’s Constitution.<sup>1</sup>

## I. THE EMOLUMENTS CLAUSE: CONSTITUTIONAL PRINCIPLES

The Emoluments Clause is deeply rooted in America’s political and legal history. America’s Founders proposed a system of self-governance that would best serve the interests of the American people by seeking to mitigate corruption and inhibit undue influence in both foreign and domestic affairs. One way to achieve this goal was to ensure that federal officials, absent the “Consent of Congress,” did not receive emoluments that would enable them to unduly profit from public service.<sup>2</sup> The Foreign Emoluments Clause provides that, without the consent of Congress, federal officials shall not accept

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1. Constitution, U.S. NAT’L ARCHIVES, [https://www.archives.gov/files/founding-docs/constitution\\_1\\_of\\_4\\_630.jpg](https://www.archives.gov/files/founding-docs/constitution_1_of_4_630.jpg) (last visited May 31, 2020).

2. Michael A. Foster & Kevin J. Hickey, CONG. RESEARCH SERV., R45992, THE EMOLUMENTS CLAUSE AND THE PRESIDENCY: BACKGROUND AND RECENT DEVELOPMENTS 1 (2019).

an emolument from any King, Prince, or foreign State.<sup>3</sup> Furthermore, the Domestic Emoluments Clause conveys that, aside from federal compensation, the President shall not receive any other emolument from the United States.<sup>4</sup>

The Founders' commitment to preserving institutional integrity is reflected in their crafting of America's Constitution, which balances the interests of the citizenry, preserves core values of the democratic republic, and restores public confidence in self-governance. The Framers expressed that the Emoluments Clause would promote the engine of self-governance, empowering "We the People," because it would uphold institutional integrity, strengthen America's democratic values, and preserve individual liberties.<sup>5</sup>

Furthermore, in preserving a democratic republic, it is vital that elected officials act in the best interests of their constituents, free from corruption and personal enrichment because America's Framers established a government "of the people . . . by the people . . . and for the people."<sup>6</sup>

Fundamentally, this article proposes that because the Founders specifically enumerated that both foreign and domestic emoluments require the "Consent of Congress," they strived "To Form A More Perfect Union." Thus, the Emoluments Clause encourages a system of self-governance whereby Congress exercises broad discretion in consenting to emoluments which promote America's educational and historical values for generations.

## II. AMERICAN EXPERIENCE: A NEW BIRTH OF FREEDOM

This paper will explore the constitutional principles of the Emoluments Clause that are deeply rooted in America's Constitution. The development of the Emoluments Clause and its implementation is traced through four unique eras in American history: (1) *Pre-Emoluments Era* (Pre-Ratification Era), (2) *Early Emoluments Era* (1788-1860), (3) *New Era Emoluments* (1861-1936), and (4) *Modern Emoluments Era* (1937-Present). The Framers distinguished emoluments for personal enrichment from bargained-for exchanges between parties and provided Congress discretion to consent to

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3. U.S. Const. art. I § 9, cl. 8.

4. U.S. Const. art. II § 1, cl. 7.

5. See, e.g., Bianca Spinoso, *Interpreting Emoluments Today: The Framers' Intent and the "Present" Problem*, 78 MD. L. REV. 998, 1002 (2019).

6. See SEAN CONANT, *THE GETTYSBURG ADDRESS: PERSPECTIVES ON LINCOLN'S GREATEST SPEECH* 53 (2015).

emoluments.<sup>7</sup>

Moreover, this work examines the differences between the occupant and the elected office. Legal historians have drawn nuanced distinctions between an individual acting in an official federal capacity and one acting in an individual capacity, “separate and apart” from the federally elected office.<sup>8</sup>

Historically, Congress is likely to consent to an emolument when it is readily accessible to the American populous, thereby preserving institutional integrity and promoting inherent educational value for America’s rich history.<sup>9</sup> Congressional discretion in consenting to emoluments in both practice and custom preserves the balance of power and promotes a system of checks and balances.

Thus, the Emoluments Clause requires the “Consent of Congress” because the Framers expressed that unchecked power could lead to corruption, erode institutional integrity, and compromise the democratic republic.<sup>10</sup> On balance, it is essential to preserve artifacts of historical and educational value because they enrich the traditions of the democratic republic, provide for open discourse, and restore public confidence in the institutions of government.

The narrowly tailored Emoluments Clause promotes both customary gift-giving practices between nations and a system of transparency.<sup>11</sup> Furthermore, Congress has consistently honored the tradition of preserving the Emoluments Clause.<sup>12</sup> Thus, the Emoluments Clause and its four unique eras are deeply rooted in preserving America’s democratic values and providing an appreciation for treasured American artifacts.

### III. ENDURING VISION: DEMOCRATIC VALUES

Benjamin Franklin and James Wilson remained persuasive advocates for the Emoluments Clause. As part of the Constitution’s system of checks and

7. Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 692 (2017).

8. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1982 (2011).

9. Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1107 (2004).

10. Seth Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. 180, 187 (2013).

11. See JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 651 (1940).

12. See Tillman, *supra* note 10, at 180–88.

balances, Franklin proposed that Congress should be able to examine respective emoluments for all federal officials, and provided an additional provision for America's President.<sup>13</sup>

Thus, the express aim of the Emoluments Clause was to ensure a merit-based system whereby a government "of the people . . . by the people . . . and, for the people" would serve the interests of all Americans and not provide a platform for personal enrichment.<sup>14</sup> The Framers expressly crafted measures aimed at eradicating corrupt practices because they strived to maintain public confidence and preserve institutional integrity throughout America's three branches of government.

The Founders' commitment to restoring the values of public confidence reflected their understanding that corruption would compromise self-governance and the ability to preserve, protect and defend America's Constitution.<sup>15</sup> The Framers' notion of self-governance is reflected in the words of James Madison: "If all men were Angels, [then] no Government would be necessary."<sup>16</sup> These words demonstrate that the Framers were acutely aware that a government, left unchecked, could be susceptible to corruption and needed enforceable constitutional provisions to mitigate corrupt practices and to maintain institutional integrity.

Therefore, the Framers articulated that the Emoluments Clause remained a balanced measure because it provides provisions requiring federal officials to gain the "Consent of Congress" for all emoluments. The Framers recognized there remain diplomatic interests in promoting gift-giving practices to advance customary and cultural relations between nations.<sup>17</sup>

Additionally, because the Founders never specifically enumerated the details pertaining to the "Consent of Congress," Congress has broadly interpreted its discretionary authority as allowing for formal votes by the entire Congress, approval by a congressional sub-committee, or individualized dis-

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13. See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 20-21 (2014).

14. John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 117 (1995).

15. Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1709 (2012).

16. See M. WALTER DUNNE, THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 354 (1901).

17. See MONSIEUR DE WICQUEFORT, THE EMBASSADOR AND HIS FUNCTIONS 292 (John Digby trans., 2010).



cussions among congressional leadership in reviewing respective emoluments.<sup>18</sup>

#### IV. PRE-EMOLUMENTS ERA (PRE-RATIFICATION): CRAFTING AMERICA'S CONSTITUTION

Franklin's advocacy for the Emoluments Clause largely shaped the course of the Constitutional Convention because Franklin provided the Framers with the insight to preserve institutional integrity, challenge corrupt practices, and promote public confidence.<sup>19</sup> In drafting the Emoluments Clause, the Framers never specifically enumerated the methods by which Congress may grant consent to particular emoluments.<sup>20</sup> Thus, the Framers crafted a system of governance whereby Congress could exercise its discretionary authority in granting the emoluments of all federal officials based upon both implicit and explicit practices.<sup>21</sup>

##### *A. Franklin's Passion: Composed in Constitutional Fashion*

The Framers, respecting the practice of contractual relations, afforded federal officials the opportunity to engage in bargained-for exchanges because such relations would not lead to undue influences and would not promote corrupt practices. Moreover, the Framers explicitly indicated that federal officials could not accept emoluments without the "Consent of Congress."

The nuanced distinction between accepting gifts and exchanging gifts shows that the Framers were acutely aware that bargained-for exchanges between parties were customary practices of gift-giving between nations, promoting enhanced diplomacy and strengthening foreign relations.<sup>22</sup>

On balance, Franklin's steadfast devotion to the Emoluments Clause changed the course of American history because it reinforced the structure of America's Constitution by shaping a system of self-governance, established

18. See, e.g., Grewal note 7, at 654.

19. Doyle W. Buckwalter, *Constitutional Conventions and State Legislators*, 48 CHI. KENT L. REV. 20, 22 (1971).

20. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707 (1975).

21. *Id.* at 707.

22. See Marissa L. Kibler, *The Foreign Emoluments Clause: Tracing the Framers' Fears About Foreign Influence Over the President*, 74 N.Y.U. ANN. SURV. AM. L. 449, 456-71 (2019).

by “We the People.”<sup>23</sup>

### B. *Franklin in France: America’s New Chance*

Before the Constitution’s ratification, Benjamin Franklin served as America’s Ambassador to France. King Louis XVI had personally presented Franklin with a unique gold-plated French jewelry box containing over four hundred rare diamonds.<sup>24</sup> Franklin preserved the customized gold-plated gift because of its inherent customary and diplomatic value.<sup>25</sup> Franklin’s historic preservation of the custom-made gift exemplified the value of the gift-giving culture in diplomatic relations between nations.

Moreover, Franklin advocated that, by constitutionally obtaining the “Consent of Congress,” federal officials would avoid even the appearance of impropriety if they formally received foreign emoluments.<sup>26</sup> Franklin also asserted that all American Presidents should be subject to an additional constitutional check by Congress: obtaining the “Consent of Congress” in receiving either a foreign or a domestic emolument.<sup>27</sup>

Principally, because the Founders specifically enumerated both foreign and domestic Emolument Clause provisions in the Constitution, they had unique interests in mitigating all forms of undue influence, which promoted public confidence and civic engagement throughout America’s institutions.<sup>28</sup>

## V. EARLY EMOLUMENTS ERA (1788-1860): A NEWLY FORMED REPUBLIC

The Early Emoluments Era was a period of strong congressional authority when Congress sparingly granted federal officials the opportunity to accept emoluments because Congressional leaders expressed their intent to promote dedicated public servants.<sup>29</sup> The notable exception was George Washington, the “Father of His Country.” Congress consented to Washington accepting a broad range of emoluments, given his impeccable integrity

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23. See WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* 65 (2004).

24. See Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. 30, 35 (2012).

25. See ISAACSON, *supra* note 23.

26. See RONALD CLARK, *BENJAMIN FRANKLIN: A BIOGRAPHY* 396 (1983).

27. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 620 (2008).

28. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3–4 (1934).

29. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1122 (2013).

and acclaim as a revered public figure, America's First President.<sup>30</sup>

Washington, unanimously elected by the American people and Inaugurated at Federal Hall, earned titles of great distinction, and preferred to simply be called, "Mr. President."<sup>31</sup> Congress, keenly aware of Washington's standing as an American statesman, provided Washington with increased flexibility in formally conducting domestic and international diplomatic relations.<sup>32</sup>

Washington pledged to faithfully fulfill his Oath of Office with words shaped in the hearts of the American people, "So help me God." Aside from Washington, Congress exercised broad authority and remained rigorous and more deliberative in its criteria in granting federal officials the opportunity to accept emoluments.<sup>33</sup> Thus, the Early Emoluments Era consisted of comprehensive congressional standards for the historic emoluments granted during this era.

#### A. *Washington's Art: A Nation's Fresh Start*

Washington received a personal gift from Marquis de Lafayette without the formal "Consent of Congress" and was further afforded a portrait and frame of King Louis XIV.<sup>34</sup> Washington asserted that the Emoluments Clause did not apply in these circumstances because the artwork was personally gifted by Marquis de Lafayette, a French military officer who served in the Revolutionary War, and these were not gifts from "any King, Prince, or foreign State."<sup>35</sup>

Moreover, Washington contended that the gifts were not emoluments from a foreign State or the United States, because Marquis de Lafayette was a French citizen.<sup>36</sup> Therefore, the Emoluments Clause did not apply.<sup>37</sup> Thus, Congress also implicitly consented to these exchanges since Washington prominently displayed these works of art in Mount Vernon, preserving the

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30. See RON CHERNOW, *WASHINGTON: A LIFE* 207 (2011).

31. See HARLOW GILES UNGER, "MR. PRESIDENT:" GEORGE WASHINGTON AND THE MAKING OF THE NATION'S HIGHEST OFFICE 7 (2013).

32. See, e.g., Foster & Hickey, *supra* note 2, at 6.

33. See MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* 402 (1970).

34. See MOORE, *supra* note 11, at 582.

35. *Id.*

36. *Id.*

37. *Id.*

historic paintings for the American public.<sup>38</sup>

*B. Congressional Discretion: Constitutional Expression*

Following Washington's presidency, Congress enacted more rigorous standards and promoted heightened discretionary authority in granting emoluments. Simón Bolívar, a foreign leader, gifted Andrew Jackson a gold-plated Victory Medal. Congress denied Jackson the opportunity to personally retain the emolument.<sup>39</sup>

Congress reasoned that the specially designed gold-plated Victory Medal should be preserved for its rich educational and historical value. Jackson later donated the medal to the Department of State.<sup>40</sup>

The Imam of Muscat, a foreign leader, gifted Martin Van Buren horses, collectible pearls, Persian rugs, shawls, and a custom-made sword. Exercising its discretionary authority, Congress directed Van Buren to divide the assets between the Department of State and the Department of Treasury to historically preserve the artifacts and prized possessions for the benefit of the American public.<sup>41</sup>

The Imam also gifted John Tyler two prized horses. Congress similarly directed Tyler to formally auction the horses for sale and return all proceeds to the Department of Treasury to avoid unjust enrichment and the appearance of impropriety from foreign influence.<sup>42</sup>

On balance, the Early Emoluments Era was a period whereby Congress exercised significant discretion when granting congressional consent to emoluments because America was a newly formed nation, conceived in liberty, and Congress sought to mitigate corrupt influences on federal officials.<sup>43</sup> Throughout this era, Congressional customary practices strengthened public confidence.

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38. See CHERNOW, *supra* note 30, at 282.

39. Norman L. Eisen, Richard Painter, & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS INST. 2, 9–11 (2016).

40. See Eisen, Painter & Tribe, *supra* note 39, at 9–10.

41. See MOORE, *supra* note 11, at 583.

42. *Id.* at 585.

43. Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 GA. L. REV. 1, 7 (2017).

## VI. NEW ERA EMOLUMENTS (1861-1936): A REFLECTIVE ANALYSIS

The New Era Emoluments remains one of the most transformational periods in American history. During this era, treasured emoluments, gifted by nations across the globe were offered to the American people to promote enhanced foreign policy relations.<sup>44</sup>

Congress exercised broad discretionary authority and allowed the gifting of emoluments that enriched the nation's interests and promoted significant civic, historic, and educational value to American life.<sup>45</sup>

During this expansive era, Congress expanded its discretionary authority and consented to granting several historic emoluments because it deemed that emoluments serving the "public good," the best interests of the American populous, were valuable in strengthening the vibrancy of the American experience.

In granting approval and consent to emoluments during the New Era Emoluments, Congress exercised discretion in consenting to emoluments in both formal and informal sessions.<sup>46</sup> During this era, the exchanging of gifts between the governing bodies of the United States and other nations improved diplomatic relations.<sup>47</sup> Congress valued relations with strong allies and remained extraordinarily flexible in providing its consent to the granting of both foreign and domestic emoluments.

This defining era produced unprecedented expansions in Congress' legislative duties because its members granted approval to perhaps the most valuable and historic emoluments in American history. Because of the instrumental influence of the Emoluments Clause, these treasured American artifacts are historically preserved for "We the People."

Thus, the New Era Emoluments substantially shaped Congress' constitutional authority and significant discretion in consenting to particular emoluments.<sup>48</sup>

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44. Keith E. Whittington, *Clothed with the Legitimate Authority of the People*, 91 VA. L. REV. 2023, 2025 (2005).

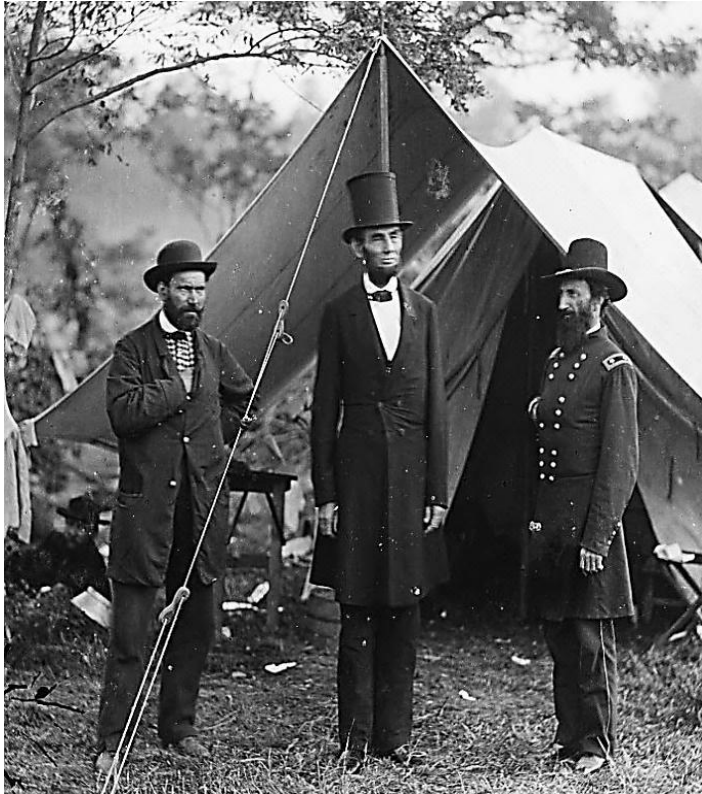
45. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1370 (1997).

46. See O'Connor, *supra* note 14, at 117.

47. James Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English, from 1760-1799*, 59 TEX. L. REV. 181, 185 (2017).

48. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1901 (2013).

*A. Lincoln's Top Hat: Mobile Briefcase*



President Abraham Lincoln honored America's Heroes with his iconic top hat, his mobile briefcase. America's military leaders often stated, "Lincoln, the man with the top hat . . . [was at the top of his game]."<sup>49</sup>

J.Y. Davis, a Washington D.C. hat maker, crafted Lincoln's iconic top hat collection. Historians contend that Davis would often provide Lincoln with complimentary services for political events in exchange for Lincoln's

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49. *Lincoln on the Battlefield of Antietam, Maryland*, J. PAUL GETTY MUSEUM (2007), [https://www.getty.edu/education/teachers/classroom\\_resources/curricula/exploring\\_photographs/downloads/lincoln.pdf](https://www.getty.edu/education/teachers/classroom_resources/curricula/exploring_photographs/downloads/lincoln.pdf) (highlighting the above photograph taken by Alexander Gardner on October 2, 1862).

legal advice.<sup>50</sup> Because these agreements constituted bargained-for exchanges between the parties, Lincoln's legal advice in exchange for apparel, Congress implicitly consented to the granting of Lincoln's top hat as a domestic emolument.<sup>51</sup>

Lincoln's top hat maintained great historical significance as Lincoln frequently placed speeches in the inner lining of his top hat, his mobile briefcase. Lincoln would often pay tribute to America's Armed Forces by removing his top hat to honor their courageous service.<sup>52</sup>

As Lincoln customarily removed his top hat to honor America's Heroes, he would place his speeches in his coat pocket which contained folds, consistent with the practice of placing a speech in his coat pocket and then unfolding the speech to recite.<sup>53</sup> The actual folds on the Gettysburg Address are consistent with Lincoln's practice of placing speeches in his coat pocket.

Lincoln's top hat is symbolic of his revered stature and thoughtful nature as America's President.<sup>54</sup> Thus, the origins of Lincoln's top hat are deeply rooted in the Emoluments Clause, as it embodies Lincoln's humble and dignified presence.

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50. See Harry R. Rubenstein, *A Closer look at President Lincoln's Silk Hat*, (April 13, 2015), <https://americanhistory.si.edu/blog/closer-look-president-lincolns-silk-hat>.

51. Tanya Pai, *The Things He Carried: Abraham Lincoln's op Hat and Other Artifacts Go on Display at Ford's Theatre*, WASHINGTONIAN (Oct. 7, 2014), <https://www.washingtonian.com/2014/10/07/abraham-lincoln-artifacts-go-on-display-at-fords-theatre-ph/>.

52. *Id.*

53. See MARTHA F. BRENNER, ABE LINCOLN'S HAT 7 (1994).

54. *Id.*

*B. Statue of Liberty: Beacon of Freedom*



The Statue of Liberty shines as a beacon of freedom. Poetic words engraved and shielded by Lady Liberty inspire Freedom's Cause, as "I lift my lamp beside the golden door!"<sup>55</sup>

The Statue of Liberty, gifted by France and standing atop Liberty Island, pays tribute to America's history.<sup>56</sup> French sculptor Frédéric Bartholdi gifted the Statue of Liberty to the American people as tribute to America's Independence Day.<sup>57</sup> As President, Grover Cleveland presided over the

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55. Pixabay, *New York Statue of Liberty*, PEXELS, <https://www.pexels.com/photo/new-york-statue-of-liberty-usa-monument-64271/> (last visited May 31, 2020).

56. See ELIZABETH MITCHELL, *LIBERTY'S TORCH: THE GREAT ADVENTURE TO BUILD THE STATUE OF LIBERTY* 76 (2015).

57. Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 307 (1991).



dedication ceremony of the Statue of Liberty. Cleveland advocated for the Statue's placement in his beloved state of New York. This customary practice of gift-giving between American and French leaders was consented to by Congress because it symbolized America's rich history and strengthened diplomatic relations.<sup>58</sup>

Preceding Congress' formal consent to the gifting of the Statue of Liberty, as marked by the formal dedication ceremony, Bartholdi extended his appreciation to Congress by personally crafting a specially designed cast-iron fountain. The Bartholdi Fountain is prominently displayed in Washington D.C.<sup>59</sup>

The Statue of Liberty remains among the most treasured emoluments in American history because it symbolizes America's liberty, enriches public confidence in strong diplomatic relations, and heightens America's historic and educational values.

### C. *Resolute Desk: The President's Desk*

The Resolute desk, crafted from rare English oak timbers aboard the HMS Resolute, was gifted by Queen Victoria to Rutherford B. Hayes in 1880.<sup>60</sup> Hayes, noting that the customized desk symbolizes the American Presidency, historically preserved the Resolute desk for his successors. Congress implicitly consented to the granting of the emolument because it serves as a symbol of the American Presidency.<sup>61</sup>

Congress exercised greater discretionary authority in implicitly consenting to historic emoluments which promote great educational value and increase public confidence. FDR's White House preserved the Resolute desk in the Oval Office and personally engraved a customized panel, showcasing the Presidential Seal.<sup>62</sup> America's Presidents have customarily signed historic legislation from the Resolute desk, adding to its historic value.

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58. See LARRIE D. FERREIRO, *BROTHERS AT ARMS: AMERICAN INDEPENDENCE AND THE MEN OF FRANCE AND SPAIN WHO SAVED IT* 101 (2016).

59. Eric Grundhauser, *The Secrets of All Six Oval Office Desks*, SLATE (May 10, 2016), <https://slate.com/human-interest/2016/05/from-roosevelt-to-resolute-the-secrets-of-all-six-oval-office-desks.html>.

60. *Id.*

61. See SHAUN MICALLEF, *THE PRESIDENT'S DESK: AN ALT-HISTORY OF THE UNITED STATES* 27 (2015).

62. *Id.* at 82.

*D. National Parks: America's Landmarks*



America's National Parks remain iconic American Landmarks. Legal historians contend that Theodore Roosevelt's presidential proclamation inspired "We the People" as he humbly declared that "God's grace has [truly blessed the Land of the Free and the Home of the Brave]."<sup>63</sup>

Theodore Roosevelt, pledging to fulfill sweeping domestic reforms, presided over the establishment and expansion of the National Park Service. Roosevelt's deep and abiding faith in preserving National Monuments was shaped by Congress' explicit consent to affording the President authority in designating particular state lands as protected National Monuments.<sup>64</sup>

Prior to the Antiquities Act of 1906, which provided Presidential authority in proclaiming the establishment of National Parks, historians contend that representatives from the state of Wyoming personally pledged to temporarily gift Bear Lodge Butte to Roosevelt to remain under the temporary

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63. Robby McCullough, *Rocky Mountain*, PEXELS, <https://www.pexels.com/photo/rocky-mountain-1867601/> (last visited May 31, 2020).

64. 16 U.S.C. §§ 431–33 (1906).

control of the President's Office until formal passage of bipartisan legislation.

Fundamentally, the gifting of state lands to the President's Office constituted a domestic emolument and Congress explicitly consented by the formal passage of the Antiquities Act of 1906.<sup>65</sup> Thus, these customary practices provided for the establishment of the National Parks.

On balance, Congress exercised broad discretionary authority throughout the New Era Emoluments as this era produced some of the most consequential historic artifacts in history.<sup>66</sup>

#### VII. MODERN EMOLUMENTS ERA (1937-PRESENT): EVOLVING ERA

The Modern Emoluments Era remains one of the most momentous periods in America's history because Congress continues to exercise new standards, both formally and informally, in consenting to particular emoluments.<sup>67</sup> Congress' customary practices and discretionary authority reflect the Founders' faith in preserving institutional integrity and self-governance because each branch of government provides a constitutional check.

During this evolving era, discussions pertaining to emoluments have entered public discourse. The emerging trends of technology and media have provided constituents with unprecedented access to elected officials which shaped Congress' practices in granting emoluments.<sup>68</sup> The influence of America's citizenry, "We the People," has promoted a system of greater accountability and expanded transparency.<sup>69</sup>

Because the Modern Emoluments Era is still evolving, it continues to shape America's path to promoting public confidence in America's institutions and preserves democratic values. Thus, the Modern Emoluments Era is shaped by the practices of Congress and the expanding role of America's Republic, a nation conceived in liberty and forged by rich traditions and history.

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65. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 487 (2003).

66. Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1411 (2012).

67. Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013).

68. See Michael Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1772 (2009).

69. Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1007 (2011).

A. *FDR's Cigars: World War II Diplomacy*

Franklin D. Roosevelt and Winston Churchill developed a strategic alliance, forged by a custom of exchanging cigars. Although Roosevelt personally preferred strategizing with military leaders while enjoying a classic pipe, he honored the timeless tradition of exchanging cigars in a smoke-filled room with Churchill.

These bargained-for exchanges between Roosevelt and Churchill strengthened diplomatic relations between nations as these revered national leaders developed a comprehensive plan for victory in World War II.<sup>70</sup> Thus, Congress implicitly consented to the Roosevelt-Churchill cigar tradition, as elected officials recognized the inherent value of strengthened diplomacy and strategic alliances at the height of World War II.<sup>71</sup>

B. *Eisenhower's Era: "I Like Ike"*

Dwight D. Eisenhower, an American hero, was knighted by Denmark, a foreign State. Denmark's ceremony paid tribute to Eisenhower's valiant efforts as General of the Army in World War II.<sup>72</sup> Eisenhower was honored by Denmark's ceremony; however, he did not formally accept the foreign title, as he conveyed that his greatest honor remained as a citizen of the United States.

Congress did not exercise any actions under the Emoluments Clause because Eisenhower never formally accepted Denmark's Knighthood, a foreign title.<sup>73</sup> The Emoluments Clause only applies to federal officials formally accepting a title or emolument.

"I Like Ike," Eisenhower's iconic Presidential slogan, remained a sentiment in American life as the President was re-elected and conveyed his firm belief in the "future of the United States of America."<sup>74</sup>

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70. Erick Trickey, *In the Darkest Days of World War II, Winston Churchill's Visit to the White House Brought Hope to Washington*, SMITHSONIAN (Jan. 13, 2017), <https://www.smithsonianmag.com/history/darkest-days-world-war-ii-winston-churchills-visit-white-house-brought-hope-washington-180961798/>.

71. *Id.*

72. Britanni Barger, *"I like Ike!" President Dwight D. Eisenhower and Royal Orders*, ROYAL CENTRAL (2019), <https://royalcentral.co.uk/interests/state/i-like-ike-president-dwight-d-eisenhower-and-royal-orders-125244/>.

73. See STEPHEN E. AMBROSE, *EISENHOWER: SOLDIER AND PRESIDENT* 65 (1991).

74. See JEAN EDWARD SMITH, *EISENHOWER IN WAR AND PEACE* 188 (2013).

C. *Kennedy's Collection: Cigar Aficionado*



President John F. Kennedy summoned America to “A Time For Greatness.”<sup>75</sup>

John F. Kennedy, America’s youngest elected President, enjoyed hand-rolled cigars. The day before signing the Cuban Embargo, Kennedy directed his Press Secretary, Pierre Salinger, to order freshly imported Cuban cigars.<sup>76</sup> In a bargained-for exchange, Kennedy compensated Salinger fair market value in exchange for the Cuban cigars. Once Kennedy’s cigar collection arrived, the President signed the Cuban Embargo.<sup>77</sup>

Congress implicitly consented to this customary practice and it was not deemed a domestic emolument because it was a bargained-for exchange between Kennedy and Salinger.<sup>78</sup> In fact, Kennedy would often host legislators at the White House and they would enjoy hand-rolled cigars while discussing legislative affairs.<sup>79</sup>

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75. *John F. Kennedy*, BOS. MAG., <https://cdn10.bostonmagazine.com/wp-content/uploads/sites/2/2017/02/jfk-1.jpg> (last visited May 31, 2020).

76. Pierre Salinger, *Great Moments: Kennedy, Cuba and Cigars*, Cigar Aficionado Premier Issue (1992), <https://www.cigaraficionado.com/article/great-moments-kennedy-cuba-and-cigars-7840>.

77. Paul A. Shneyer & Virginia Barta, *The Legality of the U.S. Economic Blockade of Cuba under International Law*, 13 CASE W. RES. J. INT’L L. 451, 452 (1981).

78. Francisco Valdes, *Diaspora and Deadlock, Miami and Havana: Coming to Terms With Dreams and Dogmas*, 55 FLA. L. REV. 283, 290 (2003).

79. Marvin R. Shanken, *JFK: America’s Legendary Cigar Aficionado*, Cigar Aficionado (1996), <https://www.cigaraficionado.com/article/jfk-americas-legendary-cigar-aficionado-7125>.

*D. Reagan's Jelly Beans: Sweet Diplomacy*



President Ronald Reagan's cheerful optimism and classic Jelly Belly Collection inspired the American People to "Win One for the Gipper."<sup>80</sup>

Ronald Reagan, "The Great Communicator," maintained a great appreciation for classic jelly beans.<sup>81</sup> Reagan often stored his prized jelly beans in a customized Tiffany crystal jar and would share jelly beans with family members, colleagues and world leaders. The President, whose favorite flavor remained black licorice, would often exchange gift-wrapped Jelly Belly packages with foreign leaders and diplomats.<sup>82</sup>

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80. Dan Hurley, *Reliving Ronald Reagan's Three Days in Moscow*, CIN. PUB. RADIO (2018), <https://www.wvxu.org/post/reliving-ronald-reagans-three-days-moscow#stream/0> (photograph courtesy of the Ronald Reagan Presidential Library).

81. See PETE SOUZA, *IMAGES OF GREATNESS: AN INTIMATE LOOK AT THE PRESIDENCY OF RONALD REAGAN* 7 (2004).

82. Shelby Pope, *Why the Jelly Belly Factory Has a Shrine to Ronald Reagan*, ATLAS OBSCURA (2017), <https://www.atlasobscura.com/articles/jelly-belly-ronald-reagan>.

Reagan's gift-giving exchange was a customary practice, as world leaders would delight at the notion of trading Jelly Belly boxes with the President. This customary gift-giving practice strengthened national relations as Herman Goelitz, the Jelly Belly producer, crafted over three tons of red, white and blue jelly beans for Reagan's White House ceremonies.<sup>83</sup> Reagan's practice of exchanging jelly beans complied with the Emoluments Clause, as the President engaged in bargained-for exchanges and strengthened diplomatic relations.

#### *E. Advice and Consent: Congressional Ascent*

Congress has exercised broad discretionary authority throughout the Modern Emoluments Era. Congress, examining both foreign and domestic relations, has formally drawn distinctions between bargained-for exchanges between parties and emoluments.

Bulgaria's President Georgi Parvanov gifted George W. Bush a Bulgarian Shepherd.<sup>84</sup> In a bargained-for exchange between the two parties, Bush compensated Parvanov the fair market value for the Bulgarian puppy, named "Balkan." Here, the Bush-Parvanov agreement was a bargained-for exchange and did not require Congress' consent under the Emoluments Clause. Thus, this bargained-for exchange between Parvanov and Bush enhanced diplomatic relations and strengthened the bond between the two nations.

Saudi Arabia's royal family formally presented Barack Obama with a rare ruby and diamond jewelry set.<sup>85</sup> Upon the formal presentation of the rare jewelry set, Obama expressed his sincere appreciation and pledged his commitment to preserve these historic emoluments at the United States National Archives. Here, because Obama proactively preserved these rare jewels, Congress implicitly consented to the President placing these foreign emoluments in the United States National Archives for historic preservation.

Currently, Congress is examining Donald J. Trump's hospitality business in relation to the Emoluments Clause.<sup>86</sup> Foreign and domestic leaders

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83. Jelly Belly, *Fun Facts About Jelly Belly*, (2017), <https://www.jellybelly.com/fun-facts>.

84. Associated Press, *Leaders Gifting Live Animals Uncommon, But Not Unheard Of*, AP ARCHIVES (2017), <https://apnews.com/1b2adec255de4a93801bb04413983886/Leaders-gifting-live-animals-uncommon,-but-not-unheard-of>.

85. Rachel Dicker, *The King of Saudi Arabia Gave More Than \$1.3M in Gifts to the Obamas Last Year*, U.S. NEWS (2015), <https://www.usnews.com/news/blogs/data-mine/2015/12/02/the-king-of-saudi-arabia-gave-over-13m-in-gifts-to-the-obamas-last-year>.

86. See Spinoso, *supra* note 5, at 999.

often visit the Trump International Hotels as guests, and Congress is examining whether the President is promoting bargained-for exchanges or accepting emoluments from foreign and domestic parties.<sup>87</sup> Congress is weighing the merits of Trump's diplomatic relations and is considering similar examples of President's involved in the hospitality industry.

Richard Nixon, a former investor who divested holdings in the hospitality business, engaged in bargained-for exchanges, and acted in accordance with the Emoluments Clause.<sup>88</sup> Nixon's brother, Donald Nixon, served as Vice President of the Marriott Corporation. During his political career, Nixon hosted numerous gatherings at various Marriott locations. J. Willard Marriott, Founder of the Marriott Corporation, was a Nixon supporter and personal friend.<sup>89</sup>

Upon his election in 1968, Nixon personally sold many stock and bond holdings and divested business interests to avoid even the appearance of impropriety and to promote a standard of good faith and fair dealing, mitigating potential conflicts of interests.<sup>90</sup> On January 19, 2017, the day preceding the President's Inauguration, Trump formally resigned from The Trump Organization and transferred company control to his relatives.<sup>91</sup>

Trump, the former Chairman of The Trump Organization, had a distinguishable role from Nixon because the Trump logo is prominently placed on Trump's business holdings and Trump served as the company's leader. Congress is examining these distinguishing facts under the Emoluments Clause. The hospitality business promotes bargained-for exchanges between a guest and a host, exchanging compensation for hospitality services.

Congress, weighing the merits of various constitutional interpretations, shall maintain a measured and comprehensive approach in exercising its discretionary authority and customary practices. America's Presidents have typically divested interests in business holdings to avoid even the appearance of impropriety and to promote institutional integrity.

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87. *Id.*

88. Zephyr Teachout, *Love, Equality, and Corruption*, 84 *FORDHAM L. REV.* 453, 455 (2015).

89. See Ann Crittenden, *At Marriott, Volume Has Yielded to Profit*, *N.Y. TIMES* (Aug. 6, 1978), <https://www.nytimes.com/1978/08/06/archives/at-marriott-volume-has-yielded-to-profit-at-marriott-a-new-emphasis.html>.

90. John Dean, *Why Trump Must Completely Give Up His Company*, *NEWSWEEK* (2016), <https://www.newsweek.com/john-dean-why-trump-must-completely-give-his-company-533020>.

91. Jackie Northam, *Trump Files Documents to Shift Management of Businesses to His Sons*, *NPR* (2017), <https://www.npr.org/sections/thetwo/way/2017/01/23/511273522/trump-files-documents-to-shift-management-of-businesses-to-his-sons>.



America's Founders placed profound confidence in "We the People." The Modern Emoluments Era continues to evolve and is ultimately shaped by the practices of Congress. The Emoluments Clause has helped shape America's commitment to the inherent values of self-government because it promotes institutional integrity, educational value and civic engagement.

#### VIII. MANTLE OF LIBERTY: PRESERVING THE REPUBLIC

The Emoluments Clause maintains great historical significance as it is deeply rooted in American history and vital to renewing America's enduring legacy as a nation conceived in liberty.<sup>92</sup> The Framers' intent and rationale for the Emoluments Clause is as relevant today as it was at America's Founding because it mitigates corruption by providing a congressional check on federal officials, thereby reducing the likelihood of undue foreign and domestic influences.<sup>93</sup>

America's Founders envisioned that the fabric of the American Republic would be shaped by the words of the Constitution. Franklin declared before the American people that the newly formed nation would remain, "A Republic, If You Can Keep It." Franklin's advocacy for the Emoluments Clause shaped the course of American history because it placed confidence in the principles of self-governance and strived to promote the notion that public officials would instill public trust and not seek to promote their personal interests.<sup>94</sup>

The Emoluments Clause has produced the preservation of numerous historic artifacts which promote open discourse, inherent educational value and strengthen the vibrancy of the democratic republic.<sup>95</sup> Elected officials are distinguishable from the offices they hold, and occupants maintain a liberty interest, conferred by the Constitution, in preserving historic artifacts for the public.<sup>96</sup> "We the People" all have an interest in ensuring that these treasured

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92. Bobby Burchfield, *Ethics in the Executive Branch: The Constitutional, Statutory, and Ethical Issue Faced by the Ethics Advisor to a President Holding Immense Wealth*, 22 TEX. REV. L. & POL. 265, 274 (2018).

93. Jack M. Balkin, *History, Rights, and the Moral Reading*, 96 B.U. L. REV. 1425, 1433 (2016).

94. Matthew Spalding, "A Republic If You Can Keep It," HERITAGE FOUNDATION (2002), <https://www.heritage.org/political-process/commentary/ed070302b-republic-if-you-can-keep-it>.

95. Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 404 (2012).

96. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997).

American artifacts are preserved and protected for educational and historical purposes.

Fundamentally, the Framers envisioned America as a “Shining City Upon a Hill.” Congressional practices preserve the balance of power and promote a system whereby checks and balances restore public confidence in America’s institutions.

Thus, the Emoluments Clause serves to balance the interest of restoring public confidence in America’s federally elected officials and the mitigation of corruption in institutions of government.<sup>97</sup> On balance, the Emoluments Clause embodies the framework of America’s Constitution because it preserves public confidence in self-governance, “We the People.”

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97. Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 792 (2018).