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ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The  
**United States Court of Appeals**  
For The District of Columbia Circuit

**RICHARD BLUMENTHAL; RICHARD J. DURBIN; PATTY MURRAY;  
ELIZABETH WARREN; AMY KLOBUCHAR; BERNARD SANDERS; PATRICK  
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DEUTCH; KAREN BASS; CEDRIC L. RICHMOND; HAKEEM JEFFRIES;  
DAVID N. CICILLINE; ERIC SWALWELL; TED LIEU; JAMIE RASKIN,**

*Plaintiffs - Appellees,*

v.

**DONALD J. TRUMP, in his official capacity as  
President of the United States of America,**

*Defendant - Appellant.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**BRIEF OF *AMICI CURIAE* PROFESSOR CLARK D. CUNNINGHAM AND  
PROFESSOR JESSE EGBERT IN SUPPORT OF NEITHER PARTY**

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## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

Pursuant to Circuit Rule 28, *amici curiae* Clark D. Cunningham and Jesse Egbert certify:

### **Parties and Amici**

*Amici curiae* Clark D. Cunningham and Jesse Egbert did not appear before the district court. To the best of their knowledge, all parties, intervenors and amici appearing before the district court and in this court are listed in the Brief for the Appellant, filed October 1, 2019.

### **Rulings under Review**

References to the rulings at issue appear in the Brief for the Appellant, filed October 1, 2019.

### **Related Cases**

*Amici curiae* adopt the statement regarding related case provided in the Brief for the Appellant, filed October 1, 2019.

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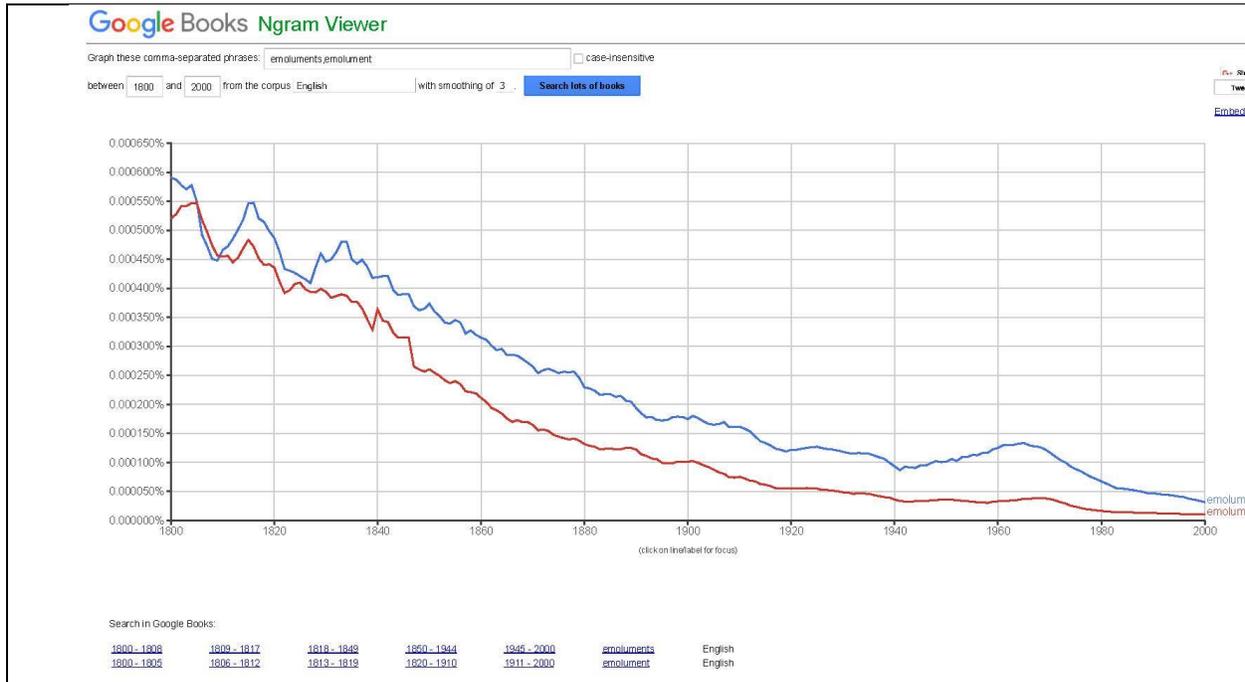
## INTRODUCTION AND SUMMARY OF ARGUMENT<sup>1</sup>

The United States Constitution prohibits a “person holding any Office of Profit or Trust under [the United States]” from receiving “any present, Emolument, Office or Title, of any kind whatever” from a foreign state without the consent of Congress. U.S. Const. art. I, § 9, cl. 8. In interpreting the Constitution’s text, courts are to be guided “by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning’.” *District of Columbia v Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). However, those trying to understand the “normal” meaning of *emolument* are confronted with a term that might as well be a foreign word from an unknown language.

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<sup>1</sup> This brief is based on Clark D. Cunningham & Jesse Egbert, *Using Empirical Data to Investigate the Original Meaning of “Emolument” in the Constitution*, 36 Ga. St. L. Rev. \_\_\_ (forthcoming January 2020) and published on the Social Science Research Network at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3460735](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460735). The current version of this article is also available at [www.clarkcunningham.org/MeaningOfEmolument.html](http://www.clarkcunningham.org/MeaningOfEmolument.html) (hereafter “*Meaning of Emolument Website*”). *Amici curiae* thank the following for their comments: Ted Afield, Douglas Biber, Erin Fuse Brown, Russell Covey, Robert Dinerstein, William Edmundson, Edward Finegan, Tammy Gales, Stefan Th. Gries, Neil Kinkopf, Paul Lombardo, Timothy Lytton, Craig Merritt, Caren Morrison, Kris Niedringhaus, Eric Segal, Nirej Sekhon, Lawrence Solan, Kelly Timmons, Harold Weston, Patrick Wiseman, and Patricia Zettler. Expert research assistance was provided by reference law librarian Pamela Brannon, Noor Abbady (MA in applied linguistics), and Diana Coetzee (MA in applied linguistics).

The word *emolument* has virtually vanished from contemporary American English. The Google Books Ngram viewer<sup>2</sup> shows a steep decline in usage from the 1800s to 2000:



A search for either *emolument* or *emoluments* in the Corpus of Historical American English (COHA), a digital database containing more than 400 million words of text from the 1810s-2000s,<sup>3</sup> produced only four occurrences since 1990.<sup>4</sup>

Professors Clark Cunningham and Jesse Egbert (collectively “the researchers”) have investigated the original meaning of *emolument* by applying the

<sup>2</sup> *What does the Ngram Viewer do?* <https://books.google.com/ngrams/info#>

<sup>3</sup> *Overview*, <https://www.english-corpora.org/coha/>

<sup>4</sup> The *Meaning of Emolument Website* includes an online appendix to the Cunningham & Egbert law review article. A screen capture of this search of COHA is posted in that appendix.

tools of linguistic analysis to newly available “big data” about how written language was used at the time of ratification. This data can be found on the public website of the *Corpus of Founding Era American English (COFEA)*, which contains in digital form over 126,000 texts created between 1760 and 1799, totaling more than 136,800,000 words.<sup>5</sup> The researchers have found strong patterns of usage that reveal how the word *emolument* was used at the time the Constitution was drafted and ratified.

In January 2019 the researchers presented their research results in an *amicus curiae* brief supporting neither party, filed in the U.S. Court of Appeals for the Fourth Circuit, in another case claiming that Appellant has violated the Foreign Emolument clause. *Brief of Amici Curiae Professor Clark D. Cunningham and Professor Jesse Egbert on Behalf of Neither Party* (4th Cir. Jan. 29, 2019), *In re Trump*, 928 F.3d 360 (4th Cir. 2019) (petition for rehearing *en banc* pending).

The Fourth Circuit dismissed that lawsuit against Appellant for lack of standing without addressing the issue of whether *emolument* in the Constitution applied to Appellant’s alleged conduct. Therefore, the Fourth Circuit had no occasion to cite or discuss the researchers’ brief. However, a concurring opinion in

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<sup>5</sup> *COFEA* was created by the J. Reuben Law School at Brigham Young University. Stephanie Frances Ward, *New web platform helps users research meanings of words used in Constitution, Supreme Court Opinions*, ABA JOURNAL (Sep. 17, 2018). Both the data and search tools are freely available at: <https://lawcorpus.byu.edu/>.

a recent decision from the U.S. Court of Appeals for the Sixth Circuit cited the researchers' brief and described it as the work of "qualified experts." *Wilson v Safelite Group, Inc.*, 930 F.3d 429, 447 (6th Cir. July 10, 2019) (concurring opinion by Judge Jane B. Stranch).

Aware of the controversy over Appellant's continued ownership of The Trump International Hotel Washington, D.C., which was the focus of the Fourth Circuit litigation (and an issue in this case), Professors Cunningham and Egbert decided to illustrate their methodology by framing the following research question: "Is there evidence that Americans in the Founding Era could have used the word "emolument" to describe revenue derived from ownership of a hotel?" Their research results, as reported in this brief, produced several different findings, each of which provided evidence that Founding Era Americans could have used *emolument* to describe revenue derived from ownership of a hotel. Using the word in such a way would have been consistent with what the researchers discovered was the broad meaning and wide usage of *emolument*. Further, their research revealed actual examples where *emolument* was specifically used to refer to revenue from ownership interest in a business.

When embarking on this project, the researchers had neither the intent nor the expectation that the results would favor one party over the other in any

particular case, including this one.<sup>6</sup> Professors Cunningham and Egbert take no position as to whether the District Court judgment denying Appellant’s Motion to Dismiss should be reversed.<sup>7</sup> Counsel for both Appellant and Appellees have consented to the timely filing of this *amicus curiae* brief.

### **IDENTITY AND INTEREST OF *AMICI CURIAE***

Clark D. Cunningham is Professor of Law and the W. Lee Burge Chair in Law & Ethics at the Georgia State University College of Law. He received the Association of American Law Schools (AALS) annual scholarly paper award for his application of linguistic theory to interpreting the meaning of “search” in the

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<sup>6</sup> The impetus for this research is an article the researchers began writing in the fall of 2018, to inform lawyers, judges and legal academics about best practices for applying corpus linguistics to the interpretation of legal texts. Because *emolument* is now an archaic word, even for lawyers and judges, the researchers thought it presented a compelling case for the value of a systemic, computerized examination of texts from the Founding Era. Although the researchers were aware at the time that the meaning of *emolument* was also of topical interest, they did not know that the issue would reach an appellate court as quickly as took place in the Fourth Circuit. An early draft of the article was presented at the Fourth Annual Conference on Corpus Linguistics. The researchers will be presenting the final version of this article on October 18, 2019, at a workshop on Law & Linguistics hosted by Georgia State: <http://www.clarkcunningham.org/Workshop-Law-Linguistics.html>.

<sup>7</sup> Original public meaning may be only one of many factors taken into account when applying a constitutional text to a current issue. For example, in denying the motion to dismiss, the District Court also considered “the purpose of the clause” and executive branch precedent and practice. *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 203-207 (D.D.C. 2019).

Fourth Amendment.<sup>8</sup> In 1994 he collaborated with three academic linguists to analyze the meaning of statutory provisions that were the subject of U.S. Supreme Court decisions that year.<sup>9</sup> He teaches a research seminar at Georgia State on applying linguistic and historical analysis to research the original public meaning of the Constitution and Bill of Rights.<sup>10</sup> He is the chair-elect of the AALS Section on Law and Interpretation.<sup>11</sup>

Jesse A. Egbert received his Ph.D. in Applied Linguistics with distinction at Northern Arizona University. He currently serves as a linguistics professor at Northern Arizona University, specializing in research methods for corpus linguistics. He is founder and General Editor of the international scholarly journal *Register Studies*. He is the Technical Strand Editor for the Cambridge University Press series *Elements in Corpus Linguistics*. He has written more than 60 peer-reviewed publications and has authored or co-edited three books.<sup>12</sup>

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<sup>8</sup> See *A Linguistic Analysis of the Meanings of 'Search' in the Fourth Amendment: A Search for Common Sense*, 73 IOWA LAW REVIEW 541 (1988).

<sup>9</sup> Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994).

<sup>10</sup> See Meredith Hobbs, *Big Data Meets the Constitution in New Originalism Project*. DAILY REPORT May 1, 2018, <https://www.law.com/dailyreportonline/2018/05/01/big-data-meets-the-constitution-in-new-originalism-project/>.

<sup>11</sup> A complete Cunningham CV is available at: <http://www.clarkcunningham.org/Resume-Cunningham.htm>.

<sup>12</sup> A complete Egbert CV is available at: <http://oak.ucc.nau.edu/jae89/Current%20CV.pdf>.

## **STATEMENT REQUIRED BY RULE 29(A)(4)(E)**

This brief was entirely authored by *amici curiae* with the assistance of their counsel of record. No other party or their counsel played any role in its preparation, nor did any party or other person contribute money intended to fund the preparation and submission of this brief.

## **ARGUMENT**

### **I. Linguistics Provides Reliable Clues to Usage**

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

actually used and abundant opportunities to use this new information to solve real-world problems.

## **II. Findings of the researchers about usage of *emolument* in the Founding Era**

### **A. Preliminary Research Steps**

When properly executed, corpus linguistic research results meet the scientific standards of *generalizability*, *reliability*, and *validity*. To meet the standard of generalizability, a corpus must be sufficiently large and varied that it represents the entire population to be studied – for the researchers’ purposes, the literate, English-speaking residents of the thirteen states at the time of ratification. The *Corpus of Founding Era American English (COFEA)* meets this standard. The texts in *COFEA* come from the six sources: the National Archive Founders Online; HeinOnline; Evans Early American Imprints from the Text Creation Partnership; Elliot - The Debates in the State Conventions on the Adoption of the Federal Constitution; Farrand – Records of the Federal Constitutional Convention of 1787; and the U.S. Statutes-at-Large from the first five Congresses. The sample of Evans Early American Imprints included in *COFEA* contains over 3000 books, pamphlets, and other written materials published in America between 1760 and 1799. Founders Online is a free on-line resource maintained by the National Archives providing digital copies of over 90,000 records found in the papers of six major figures of the founding era: George Washington, Benjamin Franklin, John

Adams, Thomas Jefferson, Alexander Hamilton, and James Madison. Founders Online contains official documents, diaries and personal letters written by and to these six persons. *Hein* contains over 300 legal materials published during the founding era, primarily federal and state statutes, executive department reports, and legal treatises.<sup>13</sup>

*Reliability* is defined as the degree to which a method produces consistent results, allowing a different researcher applying the same method to duplicate the outcome. The use of computers to analyze corpus data provides reliability in the form of stable and consistent results that can be replicated. Thus, the results presented in this article can be replicated by anyone with access to the COFEA database and the same analytic tools.<sup>14</sup>

*Validity* refers to how well a method measures results defined by a well-formed research question and how well those results reflect real-world patterns. The researchers aimed for validity by beginning with observations of systemic features of real language use in the Founding Era, seeking to discover patterns and develop theories from the ground up, with no preconceptions. At each step the researchers then developed hypotheses from these observations about the ways

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<sup>13</sup> *Corpus of Founding Era American English* (BYU Law Law & Corpus Linguistics), <https://lawcorpus.byu.edu>.

<sup>14</sup> Detailed charts presenting full research results as well as original texts from the Founding Era cited herein can be found on the *Meaning of Emolument Website* in the online appendix to the researchers' forthcoming article.

*emolument* was used and understood that could then be subjected to empirical testing.

A number of legal scholars have written about the original meaning of “emolument” in the Constitution.<sup>15</sup> All of these legal scholars have started with the assumption that *emolument* had two or more discrete meanings in the Founding Era and have taken as their task determining which of those meanings provides the appropriate interpretation for application of the emoluments clauses of the Constitution. This same assumption framed litigation in the district court. *See, e.g., Blumenthal v. Trump*, 373 F. Supp. 3d 191, 199, 201 (D.D.C. 2019).

The researchers started with a very different approach, sometimes referred to as “grounded theory”: “an approach [that] begins with observations rather than hypotheses and seeks to discover patterns and develop theories from the ground up, with no preconceptions.”<sup>16</sup>

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<sup>15</sup> *See* Norman L. Eisen, Richard Painter & Laurence H. Tribe, THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP, Brookings Institution Dec. 16, 2016, available at <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/>; Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639 (2017); John Mikhail, *The Definition of ‘Emolument’ in English Language and Legal Dictionaries, 1523-1806* A 8, A 68-69 (June 30, 2017), available at SSRN: <https://ssrn.com/abstract=2995693>; Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. 1, 26 (2017); James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English, 1760-1799*, 59 S. TEX. L. REV. 181 (2017).

<sup>16</sup> Earl Babbie, THE PRACTICE OF SOCIAL SCIENCE RESEARCH 396 (12<sup>th</sup> ed. 2010).

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

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

The researchers then used computerized linguistic analyses to identify common syntactic (i.e. grammatical) relationships between *emolument* and other words in this retrieved data set. This focus on syntax enabled them to use an objective

feature of language that can be defined and measured, and that reveals meaning relationships among words, providing both reliability and validity.

**B. *Emolument* used as a general term of inclusion**

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

“to William Palfrey, Esquire, Greeting. We, reposing special trust and confidence in your abilities and integrity, do by these presents constitute you our consul in France, during our pleasure, to exercise the functions, and to enjoy all the honours, authorities, pre-eminences, privileges, exemptions, rights and emoluments to the said office appertaining.”<sup>17</sup>

“That the stile [style] of said Battalion be the French Legion - and that those who may inlist in it be entitled to the same Pay, Bounties and Emoluments which are allowed to other Soldiers in the Continental Service. ... [and] any reputable Inhabitant of Canada, who shall in like Manner, recruit and deliver 15 able bodied Recruits who shall pass Muster, shall be entitled to the Rank Pay and Emoluments of a Ensign in the Battalion in which the said Recruits shall be incorporated.”<sup>18</sup>

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<sup>17</sup> 20 JOURNALS OF THE CONTINENTAL CONGRESS 735 (1781) (emphasis added).

<sup>18</sup> 9 JOURNALS OF THE CONTINENTAL CONGRESS 986-987 (1777) (emphasis added).

Examples like these suggested to the researchers that *emolument* was being systematically used as an inclusive, “catch-all” term. To test this theory the researchers used a modified computer search to retrieve every occurrence of the phrase *and/or other emolument*. This search produced 70 uses of *emolument* in coordinated noun phrases in which the term appeared at the end of a list, preceded by *other*, e.g. “[a, b, c] and other emoluments.”<sup>19</sup> Approximately one out of every 40 cases of *emolument* in *COFEA* occurs in this structure, which the researchers found to be substantially higher than other nouns in the *COFEA* data base, which appear in such a structure at a frequency of only one out of 1250 occurrences.

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

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<sup>19</sup> See *Meaning of Emolument Website* for a chart listing all these uses.

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

“having Received a wound in the month of October 1779 which has rendered him incapable of doing duty with his Regiment ever since— and being much Embarrassed by not having received any pay, Clothing or other Emoluments granted to the Officers of your State, Since July 1779— ...would be much obliged to you if convenient that he could have some money Advanced”<sup>20</sup>

This text reveals two important features of *emolument* in the Founding Era: (1) *pay* was a kind of emolument,<sup>21</sup> (2) there were also other kinds of *emolument* than just *pay*. Thus, for Cooper, *emolument* also included “clothing” (to which he was apparently entitled as a soldier in the Continental Army).

The researchers’ data set also included this resolution from the Continental Congress (which appears to be a predecessor of the emoluments clause in Article I, Section 6), which showed that both *salary* and *fees*<sup>22</sup> were also understood to be types of *emolument* but again that *emoluments* had a still broader meaning:

“A motion was made by Mr. [Elbridge] Gerry, seconded by Mr. [Roger] Sherman ... Resolved, That Congress will not appoint any member thereof

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<sup>20</sup> Leonard Cooper to Virginia Delegates, 22 June 1781, 3 THE PAPERS OF JAMES MADISON 166-167 (William T. Hutchinson & William M. E. Rachal eds. 1963) (emphasis added), <https://founders.archives.gov/documents/Madison/01-03-02-0085>.

<sup>21</sup> In the researchers’ data set of 70 *other emolument* texts, the coordinated noun phrase included *pay* 39 times.

<sup>22</sup> In the researchers’ data set the coordinated noun phrase included *salary* seven times and *fees* five times.

during the time of his sitting, or within six months after he shall have been in Congress, to any office under the said states for which he or any other for his benefit may receive any salary, fees or other emolument<sup>23</sup>

This list uncovered an extraordinary range of nouns that were included in the meaning of *emolument*. For example, a translation of a famous German treatise on international law described *navigation* and *fishing* as emoluments:

“Rivers and lakes are useful for navigation or for fishing, or for other emoluments arising from their possession.”<sup>24</sup>

The researchers’ computerized search produced a total of 25 nouns that writers in the Founding Era described as types of *emolument*:

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

<sup>23</sup> 15 JOURNALS OF THE CONTINENTAL CONGRESS 1307 (1779) (emphasis added).

<sup>24</sup> George Friedrich von Martens, SUMMARY OF THE LAW OF NATIONS (tr. from the French by William Cobbett) (Philadelphia 1795) (emphasis added).

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

### C. *Emolument* frequently used with modifiers

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

The researchers’ computerized searches revealed that *emolument* was post-modified by a prepositional phrase (such as “emolument for” or “emolument of”) for over 29% of all occurrences of *emolument*, compared with 16% for other nouns. In 30% of all occurrences of *emolument*, it was preceded by a pre-modifying attributive adjective, which was twice as often as for nouns generally in

the *COFEA* database. The attributive adjectives that modify *emolument* in the corpus were diverse and not merely limited to modifiers of degree (e.g. *small emolument*, *sufficient emolument*).

### **III. Relevance of the researchers' findings to this appeal**

#### **A. Contention that “profit arising from an official’s service” was the natural meaning of *emolument***

Motions to dismiss both in this case and the Fourth Circuit case argued that *emolument* in the Founding Era had “the natural meaning” of “profit arising from an official’s services.” See, e.g., *Statement of Points and Authorities in Support of Defendant’s Motion to Dismiss 23* (D.D.C. Sep. 15, 2017), *Blumenthal v. Trump*.

In response to this argument, the researchers have considered the possibility that the primary or prototypical meaning of *emolument* is “profit arising from office.” They concluded that this suggestion was contradicted by the frequent use of modifiers to distinguish whether an emolument was “official” or “personal.”

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

If Appellant's statement -- "*emolument* in the Founding Era had the natural meaning of profit arising from an official's services" -- was a correct description of language use in the Founding Era, one would not expect to find texts like the following:

"I shall regret your final determination to resign at the same time, that I should be wanting in candour were I to hold out to you the probability of any material increase of your present official emoluments."<sup>25</sup>

"the committee to whom this bill is referred be instructed to inquire into the annual official emoluments received by marshals, clerks, and district attorneys, distinguishing between fees paid by individuals and what is paid by the United States"<sup>26</sup>

In each of these examples, *emoluments* clearly arise from holding an office.

If "profit arising from office" was the prototype of *emolument*, "official emoluments" should have been as inappropriate as "metal fork."

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

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<sup>25</sup> *Alexander Hamilton to John Davidson, 13 April 1793*. 14 THE PAPERS OF ALEXANDER HAMILTON 315 (Harold C. Syrett 1969) (emphasis added), original texts available <https://founders.archives.gov/documents/Hamilton/01-14-02-0208>. Images of on *Meaning of Emolument Website*.

<sup>26</sup> *History of Congress, 8 Annals of Cong. 1569-1570 (1798-1799)* (emphasis added).

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

To test this hypothesis, the researchers searched for all cases of *emolument* within six words on either side of the words *receive* and *accept*. (These are the verbs used in the Domestic and Foreign Emolument Clauses, respectively.) This produced 137 cases using *receive* and 12 cases using *accept* in reference to *emolument*.

The data failed to support the hypothesis that *emolument* would be commonly used without other explanatory words to communicate that something had been received or accepted “arising from an official’s services.” The data showed just the opposite: 93% of the cases of *receive emolument* and 77% of the cases of *accept emolument* were pre-modified or post-modified by a linguistic structure that served to further specify the meaning of *emolument*.<sup>27</sup> Many of these texts specifically referred to receiving or accepting an emolument for “services rendered pursuant to an office” and yet added words to *emolument* to so indicate.

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<sup>27</sup> See *Meaning of Emolument Website* for a chart listing all 149 cases.

Typical examples of modified *emolument* are these:

- (1) “I have finally determined to accept the Commission of Commander in Chief of the Armies of the United States ... I must decline ... that I can receive any emoluments annexed to the appointment”<sup>28</sup>
- (2) “many instances may be produced of many needless offices being created, and many inferior officers, who receive far greater emoluments of office than the first President of the State”<sup>29</sup>
- (3) “will not justify to my scruples the receiving any future emoluments from my commission. I therefore renounce from this time all claim to the compensations attached to my military station during the war or after it ... [however] I shall accordingly retain my rank”<sup>30</sup>
- (4) “That a salary of dollars pr annum be allowed for the Agent of Marine and that he receive no other fee or emolument whatever for his services in that office”<sup>31</sup>

The many counter-examples where *emolument* was modified to indicate that the emolument “arose from official service” were sufficient to disconfirm the hypothesis. Still the researchers determined to examine all 11 cases (out of a total of 149) in which *emolument* was associated with *receive* or *accept* but without any

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<sup>28</sup> From George Washington to John Adams, July 13, 1798, 2 THE PAPERS OF GEORGE WASHINGTON, RETIREMENT SERIES 402-404 (W. W. Abbot ed. 1998) (emphasis added), <https://founders.archives.gov/documents/Washington/06-02-02-0314>.

<sup>29</sup> Pelatiah Webster, POLITICAL ESSAYS ON THE NATURE AND OPERATION OF MONEY, PUBLIC FINANCES, AND OTHER SUBJECTS: PUBLISHED DURING THE AMERICAN WAR, AND CONTINUED UP TO THE PRESENT YEAR, 1791 (emphasis added).

<sup>30</sup> To George Washington from Alexander Hamilton, March 1, 1782, 3 THE PAPERS OF ALEXANDER HAMILTON 5-6 (Harold C. Syrett ed. 1962) (emphasis added), <https://founders.archives.gov/documents/Hamilton/01-03-02-0006>.

<sup>31</sup> 20 JOURNALS OF THE CONTINENTAL CONGRESS 766 (1781) (emphasis added).

modification. Original underlying sources were accessed for all 11 cases to provide maximum context for each case.

This inquiry further disconfirmed the hypothesis. In at least five of these 11 cases, when the writer failed to modify *emolument* the writer was describing something *not* related to an official's services. In two cases *emolument* was used without a limiting modification to refer to obtaining a financial benefit from the activities of a private company.

- (5) “The following scheme for the organization of the Company ... No Director shall receive any emolument unless the same shall have been allowed by the Stockholders at a General meeting.”<sup>32</sup>
- (6) “the House of Hunter, Banks and Company, contracted to supply us . . . . I never held any commercial connection with this Company, other than what concerned the public, either directly or indirectly, or ever received one farthing profit or emolument, or the promise of any from them”<sup>33</sup>

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<sup>32</sup> Prospectus of the Society for Establishing Useful Manufactures (Philadelphia, Aug. 1791), 9 THE PAPERS OF ALEXANDER HAMILTON 144-53 (Harold C. Syrett, ed., 1965) (emphasis added), <https://founders.archives.gov/documents/Hamilton/01-09-02-0114>.

<sup>33</sup> [General] Nathanael Greene to His Excellency The President of Congress (Newport, Aug. 22, 1785), 10 THE PAPERS OF ALEXANDER HAMILTON 421-28 (Harold C. Syrett, ed., 1966) (emphasis added), <https://founders.archives.gov/documents/Hamilton/01-10-02-0060-0002>. See *Meaning of Emolument Website* for a chart showing all eleven cases and images of original texts.

**B. Contention that if *emolument* means “any profit, gain or advantage” *Present* is redundant with *Emolument* in the Foreign Emolument Clause**

The District Court adopted the plaintiffs’ position that *emolument* should be “defined broadly as any profit, gain or advantage.” 373 F. Supp. 3d at 207-8.

According to Appellant’s brief, in the Founding Era “present” meant “a gift or something given which a person could not claim” and, he argues, since a “gift” can be considered a type of “gain,” *present* would be redundant in the Foreign Emoluments Clause under the definition stated by the District Court. *Brief* at 40-41.

The researchers’ investigation was not directed at predicting every way that *emolument* in the Constitution could be applied. However, their research results are relevant to this point of contention, in particular the patterned use of “and/or other emoluments” which produced an extensive list of nouns that were all considered types of *emoluments*.

The researchers noted that one of the nouns that appeared before “or other emolument” was the word “gratuity,” which in modern usage does have the connotation of a gift, such as tip given to a waiter at the end of a meal. However, the particular occurrence shows that the type of gratuity contemplated was something to which a person could be entitled, though in this particular case (military promotion by brevet) entitlement to any “pecuniary gratuity” was denied.

But where rank by brevet is conferred, the act of Congress directing the appointment should express that it is by brevet, and it may now be resolved that in future where commissions by brevet are issued they shall not be considered as granting, or entitling to any pecuniary gratuity or other emolument than rank in the army of the United States.<sup>34</sup>

Once the sentence using *gratuity* is explicated, the suggestion that *emolument* can be used to refer to a “present” or a similar word meaning “something given which a person could not claim” is not consistent with the usage information provided by the “other emolument” examples. Rather, verbs used together with *emolument* in these examples communicate that the emolument is not a gift but rather something to which the recipient is entitled.

In addition to the gratuity example, 21 other occurrences used some version of “entitled” to describe the relationship between the recipient and the emolument(s). Thirteen examples use the verb “allow” in a way to indicate a person is entitled to the emolument. Five examples use the verb “grant,” two examples refer to what is “due,” and one example refers to a “**claim** of pay and other emoluments.” And in the intriguing example mentioned above that describes “fishing” and “navigation” as types of emolument, it is the *possession* of a river or lake that gives rise to these “useful” emoluments:

“Rivers and lakes are useful for navigation or for fishing, or for other emoluments arising from their possession.”

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<sup>34</sup> *War Office Report* (Aug. 30, 1783), JOURNALS OF THE CONTINENTAL CONGRESS 533-34 (1783), original image available on *Meaning of Emolument Website*.

**C. Contention that *emolument* is ambiguous as between a “narrow” and “broad” meaning**

The District Court analysis assumed there is “some ambiguity” in the meaning of *emolument* in the Constitution because the defendant “does not dispute” that a “broader definition” of *emolument* “existed” at the time the Constitution was ratified, and plaintiffs “acknowledge that a narrow definition existed at the time.” 373 F. Supp. 3d at 199. As mentioned above, articles by legal scholars also start with the assumption that there were distinct meanings for *emolument*.<sup>35</sup> See also *Brief for the Appellant* 39-40 (Oct. 1, 2019). The idea that there were two or more distinct meanings of *emolument* in the Founding Era is not supported by the empirical data analyzed by the researchers. The evidence described above indicates instead that (1) *emolument* had a broad meaning that included, but was certainly not limited to, pay received for holding or performing

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<sup>35</sup> See, e.g., Natelson, *supra* note 15, at 13-19 (proposing four different senses of *emolument* in 18<sup>th</sup> century discourse); Phillips & White, *supra* note 15, at 217-219 (proposing 10 different sub-senses of *emolument*). Phillips & White conclude that their review of 784 instances of *emolument* did not “satisfactorily answer the question of which sense of “emolument” is the one founding-era Americans would have understood to be used in the Constitution,” *id.* at 222. Although the researchers’ findings show a broad, inclusive meaning for *emolument* rather than many distinct senses of the kind that Phillips & White try to classify, many of the other research results reported by Phillips & White do converge with the researchers’ findings. In particular, their analysis of word clusters finding that *emolument* almost always appears at the end of a recurring word group, *id.* at 213-17, adds additional data to the researchers’ discovery of *and/or other emolument* coordinated noun phrases.

the duties of an office, and (2) *emolument* was not an ambiguous term with multiple senses. Rather it had a single, broad meaning that typically required further qualification or modification in order to fully specify its intended meaning.

Building on the assumption *emolument* was potentially ambiguous, Appellant's brief to this court argues that the context of each of the three emolument clauses selects the "narrow" meaning. *Brief for the Appellant* 41-42. However, all three clauses in the Constitution can be read instead as using the non-ambiguous general meaning of the word to refer to emoluments that are not received for performing an official duty.

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

"The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased 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." U.S. Const. art. II, § 1, cl. 7.

The "other emoluments" the President are prohibited from receiving are explicitly distinguished from the official compensation he receives "for his services."<sup>36</sup>

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<sup>36</sup> The researchers' findings, therefore, disagree with the conclusion in Phillips & White that "the most likely understanding of founding-era Americans ... of the Presidential Emoluments Clause to be that the clause refers to financial compensation or benefits of value stemming from his service as President of the United States." Phillips & White, *supra* note 15, at 224-25.

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

“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time” U.S. Const. art. I, § 6, cl. 2.

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

“no Person holding any Office of Profit or Trust under them [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” U.S. Const. art. I, § 9, cl. 8

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

## CONCLUSION

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

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

Respectfully Submitted,

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