



The emoluments clause is meaningless

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Who says that civics education is dead? From what I can see, so far from being ignorant of the basic workings of government, we have become an entire nation of Harvard Law professors. Remember two years ago when every other journalist was a scholar of the Logan Act? After that it was the scope and authority of the executive branch. Forget what that nacarat oaf in the Oval Office says. We're a very smart bunch.

And now we've moved on to something even more abstruse, the constitutional meaning of the foreign emoluments clause, upon which the people who are paid to pretend that they are seeking Donald Trump's impeachment have recently lighted. Those of you who do not spend your weekends in tricorn hats and woolen breeches handing out Cato Institute pocket Constitutions in a church parking lot — as I assume the average — can be forgiven for not having heard of it. It's the bit in Article 1, Section 9 in which the federal government is prohibited from issuing titles of nobility and certain persons from accepting them from foreign governments. Here is the full text:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Truft under them, shall, without the Consent of the Congrefs, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

No matter what services I perform on behalf of this glorious Republic, I shall never, alas, be made Duke of Lower Upper Rural Opioid Whiteshire. What a shame! But what's all this about a "Person holding any Office of Profit or Truft under" the United States. Does this mean members of Congress themselves? All two million federal employees? People serving in the military? George Washington clearly did not think it applied to him when he graciously accepted a number of lavish gifts from the Marquis de Lafayette and King Louis XIV. Martin van Buren and John Tyler both got presents from an imam of the House of Said, but they donated them to the Treasury. Some scholars have argued that "Office of Profit or Trust" only refers to those who are appointed — ambassadors, members of the president's cabinet, and so on.

The truth is that centuries later we still have no idea. Presidents receive hundreds of gifts each year and no one particularly cares. The clause has never given rise to any legal cases of note, and it has never been defined or even meaningfully addressed by the Supreme Court. Occasionally White House counsel will produce a memo like this ponderous one explaining why the president whose later mad bombing campaign in Libya would exacerbate arguably the worst refugee crisis

in modern history could still receive the Nobel Peace Prize. But practically speaking, foreign emoluments are, like much of our written constitution, a dead letter.

There is a good reason for this. Like any body of law, ours is full of things that have become irrelevant since its ratification. In some cases this is because it addressed a problem or institution — chattel slavery, for example — that no longer exists. In others it is because the language itself was so vague that no one could ever be seriously accused of violating it — see the aforementioned Logan Act, signed into law by John Adams in 1799.

In the case of foreign emoluments, it is a bit of both. The ban on titles of nobility was included to distinguish the United States philosophically from the European monarchies; the prohibition of their acceptance was more practical, a shrewd response to the historical problem of courts like that of King Charles II being filled with pensioners of the French government. How we prevent something like this from taking place now, when, in a very real sense, virtually every living American who owns stock is a Chinese pensioner, is difficult to say. But legally preventing them from being named Duhu of the Western Regions is probably not the most pressing issue.

Which brings us back to the absurd claim that, because he owns hotels at which, among many thousands of other paying guests, foreign businessmen and diplomats have been known to stay, Trump has violated this all-important constitutional dictum. What in the world have his businesses got to do with the foreign emoluments clause? So far as I am aware, Russian oligarchs at Mar-a-Lago present their credit cards, not offers of baronetcy or a Russian Social Insurance card or forms to register as a candidate for the next Duma election. An "emolument" is "any perquisite, advantage, profit, or gain arising from the possession of an office." Any profits arising from guests staying at Trump's properties arises, one would think, not from the fact that he has held the office of the presidency for three years but from the rather longer standing one that he owns luxury hotels. (Bill Clinton on the other hand was somewhat newer to the hospitality business when he allowed his most generous financial supporters to rent out the Lincoln Bedroom.) The argument is risible on its face.

This is why a panel of three judges on the United States Court of Appeal for the Fourth Circuit recently dismissed a lawsuit brought against Trump by the state of Maryland and the District of Columbia with such thinly veiled contempt: "The District and Maryland's interest in enforcing the emoluments clauses is so attenuated and abstract that their prosecution of this case readily provokes the question of whether this action against the president is an appropriate use of the courts, which were created to resolve real cases and controversies," they wrote. This is the first and only time a court has ever ruled on the meaning of foreign emoluments; the case to which they were responding reads more like a draft law review article than a serious filing in federal court.

If this is how a foreign emoluments case fares in court, how can anyone possibly take it seriously as grounds for the president's impeachment? Does anyone really believe that Trump is guilty under the terms of a 231-year-old law that has apparently never once been broken in all of American history, one that probably does not even apply to elected as opposed to appointed officials? Of course not. They just want him out of office. It doesn't take a Harvard Law degree to figure that out.

