
RECORD NO. 18-2486

In The
United States Court of Appeals
For The Fourth Circuit

**In Re: DONALD J. TRUMP, President of the
United States of America, in his official capacity and
in his individual capacity,**

Petitioner.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT**

**BRIEF OF *AMICI CURIAE*
PROFESSOR CLARK D. CUNNINGHAM AND
PROFESSOR JESSE EGBERT
ON BEHALF OF NEITHER PARTY**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 18-2486 Caption: In re Donald J. Trump

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(name of party/amicus)

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1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Craig Thomas Merritt

Date: 1/24/2019

Counsel for: Clark D. Cunningham

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No. 18-2486 Caption: In re Donald J. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Professor Jesse A. Egbert
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
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Date: 1/24/2019

Counsel for: Jesse A. Egbert

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INTRODUCTION AND SUMMARY OF ARGUMENT

When interpreting the Constitution’s text, courts “are 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)). The question presented in this case is “whether the two Emoluments Clauses provide plaintiffs with a cause of action.” This necessitates assessment of the original public meaning of the word *emolument*. The District Court determined that meaning based on definitions found in a variety of dictionaries available in the 18th century and sixteen sentences using *emolument* taken from a handful of 18th century texts. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 889-95 (D. Md. 2018).¹

Professors Clark Cunningham and Jesse Egbert (collectively the “researchers”) submit this brief in support of neither party to present a different, scientifically-grounded approach for researching the original public meaning of *emolument*. The researchers applied the tools of linguistic analysis to newly available “big data” collections encompassing written language in common usage at the time of ratification. This data is accessible on the public website of the

¹ Seven of the sixteen sentences were written by the same person, William Blackstone, author of COMMENTARIES ON THE LAWS OF ENGLAND (1765, 1769). See 315 F. Supp. 3d at 892.

Corpus of Founding Era American English (COFEA), which contains in digital form over 95,000 texts created between 1760 and 1799, totaling more than 138,800,000 words.²

Petitioner posits that the term “emolument” had two distinct meanings in the founding era – a “narrow” sense limited to “profit arising from an office or employ” and a “broad” sense meaning “benefit, advantage or profit” – and that *emolument* in the Constitution only referred to the narrow meaning. See Memorandum in Support of Defendant’s Motion to Dismiss at 32-38, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018). Petitioner primarily relies on a dictionary authored by an English clergyman in 1774³ which defined *emolument* as: “profit arising from an office or employ; gain or advantage” *Id.* at 32, 34.

The researchers accessed every text in *COFEA* in which *emolument* appeared – over 2500 examples of actual usage – and analyzed all of these texts using three different computerized search methods. The researchers found no

² *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://lawnc1.byu.edu/>.

³ James Barclay, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN (1st. ed. 1774), reproduced in 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>.

evidence that *emolument* had a distinct narrow meaning of “profit arising from an office or employ.” All three analyses indicated just the opposite: *emolument* was consistently used and understood as a general and inclusive term.

When they embarked on this project, the researchers had no expectation that the results would favor any particular party to this case.⁴ Professors Cunningham and Egbert take no position on the merits of the Petition for Mandamus, and offer no view on the affirmance or reversal of the District Court’s decision denying Petitioner’s Motion to Dismiss.⁵

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

⁴ The impetus for this research is an article designed to inform lawyers, judges and legal academics about best practices for applying corpus linguistics to the interpretation of legal texts. A working paper version has been accepted for presentation at the Fourth Annual Conference on Corpus Linguistics. It is available as *Scientific Methods for Analyzing Original Meaning: Corpus Linguistics and the Emoluments Clauses* at: <http://www.clarkcunningham.org/ScientificMethods.html>. The researchers chose the task of exploring the meaning of *emolument* to illustrate the use of scientific methods to analyze original public meaning because the meaning of *emolument* is of topical interest and is particularly well suited for research based on actual texts from the Founding Era – *emolument* has passed out of common usage in American English and is now an archaic word, even for lawyers and judges. When they chose to analyze *emolument*, the researchers were not aware that this Court had decided to address the issue.

⁵ Original public meaning may be only one of many factors taken into account when applying a constitutional text to a current issue. For example, the District Court also considered what it termed “constitutional purpose” and executive branch precedent and practice. 315 F. Supp. 3d at 895-904.

Association of American Law Schools (AALS) annual scholarly paper award for his application of linguistic theory to interpreting the meaning of “search” in the Fourth Amendment.⁶ In 1994 he collaborated with three academic linguists to analyze the meaning of statutory provisions that were the subject of United States Supreme Court decisions that year.⁷ He is currently teaching for the second time 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.⁸ He is the chair-elect of the AALS Section on Law and Interpretation.⁹

Jesse A. Egbert received his Ph.D. in Applied Linguistics with distinction at Northern Arizona University, where his dissertation chair was the world’s leading expert on corpus linguistics, Professor Douglas Biber. He currently serves as a linguistics professor at Northern Arizona University. He is founder and General Editor of the international scholarly journal *Register Studies*. He has authored more than 60 peer reviewed publications and has authored or co-edited three books. He

⁶ See *A Linguistic Analysis of the Meanings of ‘Search’ in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988).

⁷ Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994).

⁸ 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/>.

⁹ A complete Cunningham CV is available at: <http://www.clarkcunningham.org/Resume-Cunningham.htm>

recently co-authored a law review article on the application of corpus linguistic methods to legal interpretation research.¹⁰

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. The scientific methods of corpus linguistics and a description of relevant resources

In the field of linguistics, *corpus* (plural: *corpora*) refers to a large sample of texts produced by language users in natural settings. Corpus linguistic analysis usually relies on both quantitative and qualitative research methods. As a scientific discipline, corpus linguistics has 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.

¹⁰ James C. Phillips & Jesse Egbert, *Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content Analysis Methodologies to Improve Corpus Design and Analysis*, 2017 BYU L. REV. 1589 (2017). A complete Egbert CV is available at: <http://oak.ucc.nau.edu/jae89/Current%20CV.pdf>

When properly executed, corpus linguistic research results meet the scientific standards of *generalizability*, *reliability*, and *validity*.

A properly collected corpus is sufficiently large and varied that it represents the entire population to be studied. There is no scientific basis for using a handful of definitions written by individual, idiosyncratic dictionary authors and evaluating sixteen sentences, as the District Court did, in order to prove common usage by the population of late 18th century America. By contrast, conclusions drawn from analyzing the 138,800,000 words in *COFEA* can be *generalized* as representing common usage by American writers in the period 1760 - 1799.

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. The results presented in this brief can be replicated by anyone with access to the internet.

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. For example, the multiple-choice Multistate Bar Examination has been shown to be a

reliable test, but there is widespread doubt whether it provides a valid measure of a law graduate's competence to practice.¹¹

A common validity problem with existing scholarship about the meaning of *emolument* is the tendency to begin with the unquestioned assumption that there were two distinct meanings for *emolument* in 18th century America, then to frame the analysis narrowly to determine which of the two meanings was understood at the time to apply to the Emolument Clauses.¹² However, this assumption – which frames the arguments of the parties in this case – has no scientific basis and, indeed, is disproved by the linguistic research reported in this brief.

¹¹ See, e.g., Deborah Jones Merritt, *Validity, Competence and the Bar Exam*, AALS NEWS (Spring 2017), <https://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/>.

¹² See, e.g., 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, 217 (2017) (“most scholars, as well as founding-era dictionaries, indicate there are two senses of the word “emolument” ... we coded just whether the use of “emolument” fell into one of the two main senses: broad or narrow”). Cf. Norman L. Eisen, Richard Painter & Laurence H. Tribe, *THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 11*, Brookings Institution Dec. 16, 2016, available at <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/> (arguing that broad meaning applies); Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639 (2017) (arguing for narrow meaning); Mikhail, *supra* note 3 (broad); Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. 1 (2017) (arguing there were two narrow and two broad meanings and that one of two narrower meanings applies). Although Phillips & White subtitle their article “A Corpus Linguistic Analysis,” none of their conclusions about the 18th century meaning of *emolument* are based on the scientific methods used for the research reported in this brief.

In 2016 Utah Supreme Court Justice Thomas R. Lee published with two co-authors an article in the YALE LAW JOURNAL FORUM urging the use of the *Corpus of Historical American English (COHA)*¹³ to make research into original meaning more empirical.¹⁴ Justice Lee noted, however, that *COHA* was of limited value for researching the original public meaning of the Constitution as adopted and the Bill of Rights because the *COHA* data base only extends back to 1810.¹⁵ That gap has since been filled by *COFEA*, which covers the founding era and contains a wide range of relevant registers.¹⁶ The texts in *COFEA* come from the following 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

¹³ <https://corpus.byu.edu/coha/> *COHA* was created and is maintained by Mark Davies, Professor of Linguistics at Brigham Young University. <https://corpus.byu.edu/overview.asp>. *COHA* is an open access web-based resource consisting of over 400 million words. The website contains both the data base and free on-line search tools.

¹⁴ James C. Phillips, Daniel M. Ortner, & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J. F. 21 (2016), <https://www.yalelawjournal.org/forum/corpus-linguistics-original-public-meaning>. See also Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J. F. 57 (2016), <http://www.yalelawjournal.org/forum/can-corpus-linguistics-help-make-originalism-scientific>.

¹⁵ *Id.* at 31.

¹⁶ <https://lawncf.byu.edu/> Like *COHA*, *COFEA* is a free, web-based resource; however, it requires registration using a Google or Gmail account to guard against hacking.

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, Andrew Hamilton, and James Madison.¹⁷ 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.¹⁸

II. Findings of the researchers concerning the meaning of *emolument*.

Linguists generally consider dictionaries an unreliable source for scientific research of actual usage. In the researchers' view, if the full universe of possibilities is limited *a priori* by the lexicographer(s) who created a particular dictionary, the subsequent research is likely be biased from start to finish. This is a

¹⁷ <https://founders.archives.gov/about> *Founders* contains 27,639,683 words, distributed as follows: Washington Papers 12,044,694; Adams Papers 7,274,489; Hamilton Papers 3,895,699; Franklin Papers 2,578,518; Jefferson Papers 1,726,603; and Madison Papers 119,680. About 70% of the words in *Founders* come from either the Washington Papers (44%) or the Adams Papers (26%).

¹⁸ <https://lcl.byu.edu/projects/cofea/>

particularly serious risk when relying on 18th century dictionaries. Definitions found in dictionaries available during America’s Founding Era – even in the most respected and widely used version, Samuel Johnson’s *DICTIONARY OF THE ENGLISH LANGUAGE* published in 1755 – generally reflected the ideas of a single author¹⁹ or were simply copied from other dictionaries.²⁰ The 18th century dictionaries contain no information on the relative frequencies of use for different word senses and thus provide no basis for determining whether a meaning was ordinary or typical, on the one hand, or rare and unusual, on the other.

The researchers proceeded directly with their corpus-based study of the word, without allowing their research to be framed by assumptions – from dictionaries or any other source – about the possible meaning or meanings of *emolument* in the Founding Era. They used computer-based quantitative methods of linguistic analysis, combined with qualitative review of actual texts, to develop

¹⁹ “Characteristic of most early dictionaries, Johnson’s [dictionary] predominantly was the work of the author himself.” Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 *BUFF. L. REV.* 227, 234 (1999) (quoting description of Johnson as “incompletely educated ... an obscure scribbler from an impoverished provincial background”).

²⁰ “The history of English lexicography usually consists of a recital of successive and often successful acts of piracy.” Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 *BYU L. REV.* 1915, 1943 (quoting Sidney I. Landau, *DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY* 43 (2d ed. 2001)).

hypotheses about the ways *emolument* was used and understood that could be subjected to empirical testing.

They began by finding all uses of the word *emolument* in *COFEA*. They then conducted three independent, computerized linguistic analyses of the retrieved texts to determine where *emolument* was (1) modified or described by a preceding adjective or a subsequent prepositional phrase, (2) included in a coordinated list, especially when preceded by the word ‘other’ and (3) modified when it is the object of the verbs *receive* and *accept* (the verbs used in the Domestic Emoluments Clause and Foreign Emoluments Clause, respectively).

The search for every text in which the word *emolument* appeared in either singular or plural form²¹ resulted in over 2,500 examples (or “hits”) across all six sources, divided approximately 60%-40% between plural and singular. The researchers then determined how many times *emolument* occurred in each source. The term 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

²¹ The researchers’ search can be approximately replicated by entering “emolument*” in the initial search box that appears after logging into *COFEA*. The use of the asterisk produces every word containing the string of letters that precede the asterisk. The researchers corrected the raw results of their *COFEA* search by looking for and adding texts that contained variant spellings or typographical errors that were missed by the initial search and also deleted identical texts, for example texts that appeared in two different source materials.

documents and personal correspondence. The total number of texts and the distribution across various genres, shown in the table below, gave the researchers confidence that *COFEA* could produce a sufficiently large and representative sample for meaningful analysis.

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

A. Analysis One: *emolument* with a pre-modifying adjective or a post-modifying prepositional phrase

The researchers found that *emolument* was post-modified by a prepositional phrase (such as “emolument for” or “emolument of”) for over 29% of all occurrences of *emolument* in *COFEA*, compared with 16% for other nouns. Pre-modifying attributive adjectives were used for 30% of all occurrences of *emolument* in *COFEA*,²² compared with 15% for other nouns. These percentages reveal that *emolument* was modified with additional information, in the form of adjectives and prepositional phrases, approximately twice as often as the average noun. These results indicated to the researchers that *emolument* had a broad meaning that frequently relied upon modification to constrain or specify that meaning.

²² Replicate this search by putting “*/j emolument*” in the *COFEA* search box.

Further, 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). These adjectives include references to official emoluments (e.g. *official, federal, public*) as well as emoluments that are personal in nature (e.g. *private, personal, individual*), both of which were frequent in the corpus. The presence of a large number of references to *emolument* that were private or personal in nature tends to refute the theory that *emolument* was understood as “profit arising from an official’s services rendered pursuant to an office or employ.” Memorandum in Support of Defendant’s Motion to Dismiss at 36.

The frequent modification of *emolument* with the adjective “official” also was evidence tending to refute this theory. 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.”

The researchers found examples such as these:

- (1) “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.”²³
- (2) “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”²⁴
- (3) “it shall be the duty of the respective collectors, naval officers, and surveyors, to keep accurate accounts of all fees and official emoluments received by them”²⁵

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

If “profit arising from office” was the prototype of *emolument*, the researchers

²³ *Alexander Hamilton to John Davidson*, 13 April 1793. 14 THE PAPERS OF ALEXANDER HAMILTON 315 (Harold C. Syrett 1969) <https://founders.archives.gov/documents/Hamilton/01-14-02-0208>. Images of the original texts from which this and following examples are taken can be found in the appendix to the researchers’ working paper, *Scientific Methods*, *supra* note 4.

²⁴ History of Congress, 8 Annals of Cong. 1569-1570 (1798-1799).

²⁵ Appendix to the History of the Fifth Congress, 9 Annals of Cong. 3914 (1798-1799).

concluded they should not have found “metal fork” expressions like “official emoluments.”

B. Analysis Two: coordinated noun phrases

The researchers noted that *emolument* seemed to appear frequently along with one or more other nouns conjoined by either *and* or *or*, a linguistic structure known as a coordinated noun phrase. This prompted Analysis Two, in which search tools were used to find all the texts containing such noun phrases. It was discovered that coordinated noun phrases accounted for about 35% of all occurrences of *emolument*.²⁶

One common coordinated noun phrase combined *emolument* with *profit*. In particular, the researchers found many examples regarding public officials where *emolument* was used in addition to *profit*, a finding that is inconsistent with the theory that when *emolument* is used in reference to a public official it “has the natural meaning of the narrower definition of profit arising from an official’s services rendered pursuant to an office or employ.” Memorandum in Support of Defendant’s Motion to Dismiss at 36. If this theory is accurate, then it should be possible to replace *emolument(s)* with *profit(s)* in texts relating to public officials. However, in the actual texts found by the researchers such a modification would

²⁶ Although the researchers used specialized search tools, the result can be approximately replicated by searching for “and emolument*” and then for “or emolument*” and combining the results.

produce an apparent redundancy, as illustrated by the following examples (with replacement indicated in brackets):

- (4) “The Commonwealth of Virginia To _____ Esquire,
greeting: ... you are, by these Presents, constituted and appointed
Deputy Attorney for the County of _____. ...[Y]ou are
empowered to hold and enjoy all Profits and Emoluments [all Profits
and *Profits??*] which unto the same may of Right belong.
Witness Patrick Henry, Esq; Governour”²⁷
- (5) On American Representation in Parliament. “I am persuaded that will
never be done, as every ministry has already difficulty enough to
satisfy those, who think they have a right to divide, or to recommend
the division of all posts, profits and emoluments; [all posts, profits and
profits??] and those who think they have such right, will never agree
to increase their own number, by which the chance in favour of each
would be diminished”²⁸

²⁷ *Form of Commission to Deputy Attorney Generals* (1779) 3 THE PAPERS OF THOMAS JEFFERSON 21 (Julian P. Boyd ed. 1951) <https://founders.archives.gov/documents/Jefferson/01-03-02-0025>.

²⁸ *Reply to Vindex Patriae on American Representation in Parliament*, THE GAZETTEER (Jan 29, 1776), 13 THE PAPERS OF BENJAMIN FRANKLIN 63-66 (Leonard W. Labaree ed. 1969) (attributed to Benjamin Franklin) <https://founders.archives.gov/documents/Franklin/01-13-02-0022>.

- (6) “... for several years previous to the late War, he enjoyed the Office of Deputy Marshall of the Court of Vice Admiralty for the then Colony of Rhode Island the emoluments and profits of which [the *profits* and profits of which??] he was deprived of by the Revolution ... He therefore most humbly solicits your Excellency ... to grant him some Office or Employment under the new Constitution”²⁹

This second analysis also examined coordinated noun phrases consisting of lists that ended “and emoluments,” suggesting that *emolument* was being used as an inclusive, “catch-all” term, as in these examples:

- (7) “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.”³⁰

²⁹ *To George Washington from William Mumford, 9 May 1789*, May 9th, 1789, 2 THE PAPERS OF GEORGE WASHINGTON 240-242 (Dorothy Twohig ed. 1987) <https://founders.archives.gov/documents/Washington/05-02-02-0179>. The appendix to *Scientific Methods*, *supra* note 4, contains a chart listing 24 further examples from *COFEA* of coordinated noun phrases in the form of profit and/or emolument from a variety of sources ranging from 1769 to 1794.

³⁰ 20 JOURNALS OF THE CONTINENTAL CONGRESS 735 (1781).

- (8) “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 an Ensign in the Battalion in which the said Recruits shall be incorporated.”³¹

The researchers tested this hypothesis about the use of *emolument* as an inclusive term by searching for all examples in which the term was preceded by “other.” This search produced 69 uses of *emolument* in coordinated noun phrases in which the term appeared at the end of a list, preceded by “other” – “[list] other emolument”.³² Approximately one out of every 40 cases of *emolument* occurs in this structure. The researchers investigated whether “[list] other [noun]” was a common or unusual structure in *COFEA* and found that it is very unusual. On average, nouns in *COFEA* appear in this structure in only one out of 1250 texts.

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

³¹ 9 JOURNALS OF THE CONTINENTAL CONGRESS 986-987 (1777).

“birds, cats, and other dogs” because the meaning of the word following “other” must include the preceding nouns in the coordinated noun phrase. The researchers found a wide variety of nouns conjoined with “other emolument(s),” as shown in these examples:

- (9) “A motion was made by Mr. [Elbridge] Gerry, seconded by Mr. [Roger] Sherman ... Resolved, That Congress will not appoint any member thereof during the time of his sitting, or within six months after he shall have been in Congress, to any office under the said states for which he or any other for his benefit may receive any salary, fees or other emolument”³²
- (10) “having Receiv’d a wound in the month of October 1779 which has renderd him incapable of doing duty with his Regiment ever since— and being much Embarrass’d by not having receiv’d any pay, Cloathing or other Emoluments granted to the Officers of your State, Since July 1779— ... woud be much oblidge to you if convenient that he Cou’d have Some money Advanced”³³

³² 15 JOURNALS OF THE CONTINENTAL CONGRESS 1307 (1779).

³³ *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), <https://founders.archives.gov/documents/Madison/01-03-02-0085>.

- (11) “when I accepted of my appointment as Commissioner of the war office, I expressly stipulated ... that I shou’d retain my commission, and with it, every right and privilege belonging to it, the current pay, rations, forage and other lucrative emoluments only excepted”³⁴
- (12) “the memorial of William Finnie late Deputy Quarter Master General in the southern department, praying that the donation of lands and other emoluments appertaining to the rank of a Colonel in the line of the late continental army may be extended to him.”³⁵
- (13) “Rivers and lakes are useful for navigation or for fishing, or for other emoluments arising from their possession.”³⁶

Lists ending with *emolument* preceded by *other* produced the following 23 nouns that writers of these texts considered to be types of *emolument*:

Bounties	Commutation	Lands
Clothing	Contracts	Liberty
Command	Fees	Offices
Commissions	Forage	Pay

³⁴ *To Thomas Jefferson from George Muter*, 6 March 1781, 5 THE PAPERS OF THOMAS JEFFERSON 78-80 (Julian P. Boyd ed. 1952), <https://founders.archives.gov/documents/Jefferson/01-05-02-0103>.

³⁵ 29 JOURNALS OF THE CONTINENTAL CONGRESS 635 (1785).

³⁶ George Friedrich von Martens, SUMMARY OF THE LAW OF NATIONS (tr. from the French by William Cobbett) (Philadelphia 1795).

Gratuity	Privileges	Sum
Pensions	Rank	Tithes
Perquisites	Rations	Toll
Places	Subsistence	

This is a very wide variety of terms, which includes both concrete and abstract nouns.

C. Applying the first and second analyses to the Constitutional text

The Domestic Emoluments Clause exemplifies the pattern discovered by the researchers in the second analysis of using a concluding “any other emolument” phrase to show general inclusion:

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 clause clearly means that the President shall receive for his services compensation but not any other *emolument*, whether from the United States or any individual state. The use of “any other” and the concluding placement of “any other Emolument” indicates that “a Compensation” is a type of *emolument* but that *emolument* also refers to other things than compensation.

The researchers' first analysis indicated that *emolument* typically appears in a modified form. The Foreign Emoluments Clause states:

. . . 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. Two prepositional phrases modify *emolument* in this clause. The final seven words indicate *emolument* is restricted to something accepted “from any King, Prince, or foreign State.” However, the other prepositional phrase does not restrict the reference of *emolument* in any way; instead, in the most explicit way possible, the phrase “of any kind whatever” signals that *emolument* should be given the widest possible meaning.³⁷

D. Analysis Three: *emolument* with *receive* or *accept*

Although the application of findings from the first two analyses to the Domestic and Foreign Emoluments clauses seemed clearly to indicate a broad meaning for *emolument*, the researchers undertook a third analysis specifically designed to locate data supporting the theory that *emolument* in the founding era had “the natural meaning” of “profit arising from an official’s services.”

³⁷ The use of commas to frame the prepositional phrase is a clear signal that the phrase modifies all four nouns that precede it, and not just “Title.” The researchers do not express an opinion whether “any” also modifies “Emolument” rather than just the immediately following word, “present.”

Memorandum in Support of Defendant’s Motion to Dismiss at 36. The researchers developed the hypothesis that, if that 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. 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 Petitioner’s position 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 *COFEA* 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.) The researchers then eliminated duplicate results from these two lists, and also removed instances where *emolument* was not the direct object of *receive* or *accept*. This produced 137 texts using *receive* and 12 texts 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*.³⁸ Many of these texts specifically referred to receiving or accepting an emolument for “services rendered pursuant to an office” and yet added words to *emolument* to so indicate. Typical examples of modified *emolument* are these:

- (14) “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”³⁹
- (15) “many instances may be produced of many needless offices being created, and many inferior officers, who receive far

³⁸ The modifying linguistic structures accounted for in this analysis were: prepositional phrases, relative clauses, adverbials, attributive adjectives, complement clauses, ‘other’ in coordinated noun phrases, and semi-determiners. The appendix to *Scientific Methods*, *supra* note 4, contains a chart listing all 149 cases.

³⁹ *From George Washington to John Adams*, July 13, 1798, 2 THE PAPERS OF GEORGE WASHINGTON, RETIREMENT SERIES 402-404 (W. W. Abbot ed. 1998), <https://founders.archives.gov/documents/Washington/06-02-02-0314>. Images of the original texts from which this and following examples are taken can be found in the appendix to *Scientific Methods*, *supra* note 4.

greater emoluments of office than the first President of the State⁴⁰

- (16) “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 rank⁴¹
- (17) “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”⁴²
- (18) “I mentioned there was no prospect, that the nett income of my Office in the succeeding six months, would be much encreased. By comparing that with the inclosed Statement it will appear that my opinion was well founded; and it is not probable that the emoluments of my office will be augmented this year.”⁴³

⁴⁰ 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.

⁴¹ *To George Washington from Alexander Hamilton*, March 1, 1782, 3 THE PAPERS OF ALEXANDER HAMILTON 5-6 (Harold C. Syrett ed. 1962), <https://founders.archives.gov/documents/Hamilton/01-03-02-0006>.

⁴² 20 JOURNALS OF THE CONTINENTAL CONGRESS 766 (1781).

⁴³ *To Alexander Hamilton from William Ellery*, July 18, 1791, 8 THE PAPERS OF ALEXANDER HAMILTON 553-554 (Harold C. Syrett ed. 1965), <https://founders.archives.gov/documents/Hamilton/01-08-02-0501>.

- (19) “public Ministers who are receiving the Emoluments of Office ... may be under the necessity of Living with a Splendor ill suited to the Genius of rising Republics”⁴⁴
- (20) “if the officers are men of sense, they must know, that being in possession of the letter of appointment ... they will receive from the date of their letter of acceptance, the pay & emoluments of their office”⁴⁵

The many counter-examples where *emolument* was modified to indicate that the emolument “arose from official service” were sufficient to disprove 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 modification. Original underlying sources were accessed for all 11 cases to provide maximum context for each case. This inquiry further disproved 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

⁴⁴ *James Smith to the Commissioners*, August 24, 1778, 6 THE ADAMS PAPERS, PAPERS OF JOHN ADAMS 389-392 (Robert J. Taylor ed. 1983), <https://founders.archives.gov/documents/Adams/06-06-02-0299>.

⁴⁵ *To George Washington from James McHenry*, March 31, 1799, 3 THE PAPERS OF GEORGE WASHINGTON, RETIREMENT SERIES 453-458 (W. W. Abbot and Edward G. Lengel. eds. 1999), <https://founders.archives.gov/documents/Washington/06-03-02-0345>.

emolument was used without a limiting modification to refer to obtaining a financial benefit from the activities of a private company.

- (21) “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.”⁴⁶
- (22) “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”⁴⁷

The results of the third analysis did not undermine but affirmed the conclusions developed from the first two, namely that (1) *emolument* had a broad meaning that included, but was certainly not limited to, profits related to an official

⁴⁶ *Prospectus of the Society for Establishing Useful Manufactures* (Philadelphia, Aug. 1791), 9 THE PAPERS OF ALEXANDER HAMILTON 144-53 (Harold C. Syrett, ed., 1965), <https://founders.archives.gov/documents/Hamilton/01-09-02-0114>.

⁴⁷ [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), <https://founders.archives.gov/documents/Hamilton/01-10-02-0060-0002>. Three other cases also clearly did not describe duties of a public official; these texts applied an unmodified version of *emolument* to the work of a midwife, to the charitable activities of a Quaker merchant, and to serving as the librarian to a private organization. A chart showing all eleven cases and images of original texts can be found in the appendix to *Scientific Methods*, *supra* note 4.

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.

CONCLUSION

Taking no position on the ultimate resolution of the issues before the Court, *amicus curiae* respectfully submit that scientific investigation of common usage during the Founding Era does not support the theory that the word *emolument* had a distinct, narrow meaning limited to “profit arising from an office or employ.”

Respectfully Submitted,

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Dated: January 29, 2019

/s/ Craig Thomas Merritt
Counsel for Amici Curiae

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I hereby certify that on this 29th day of January, 2019, I caused this Brief of *Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all counsel as registered CM/ECF users.

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Counsel for Amici Curiae