United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

August 6, 2007
DO-07-024

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: New OLC Opinion on the Emoluments Clause and Service on Advisory Boards

The Office of Legal Counsel (OLC) at the Department of Justice has just posted a recent opinion on its web page providing further guidance on the applicability of the Emoluments Clause of the United States Constitution to service on advisory boards. The Emoluments Clause, Article I, § 9, clause 8 of the Constitution, prohibits persons who "hold offices of profit or trust" in the Federal Government from having any position in or receiving any payment from a foreign government, except with the consent of Congress. OLC has now opined in Re: Application of the Emoluments Clause to a Member of the Federal Bureau of Investigation Director's Advisory Board (June 15, 2007) available at http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/fbi_advisory_board_opinion_061507_0.pdf that where members of an advisory board are given access to classified information solely to help them perform their advisory function, this access alone does not constitute a delegation of Governmental, sovereign authority that would result in their advisory board service falling under the restrictions of the Emoluments Clause. This OLC opinion clarifies the issue of access to classified information that was left open in the earlier OLC opinion of Re: Application of the Emoluments Clause to a Member of the President's Council on Bioethics (March 9, 2005) available at http://www.justice.gov/sites/default/files/olc/opinions/2005/03/31/050309_emoluments_clause_0.pdf.

APPLICATION OF THE EMOLUMENTS CLAUSE TO A MEMBER OF THE FEDERAL BUREAU OF INVESTIGATION DIRECTOR'S ADVISORY BOARD

A member of the Federal Bureau of Investigation Director's Advisory Board does not hold an "Office of Profit or Trust" under the Emoluments Clause of the Constitution.

June 15, 2007

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

You have asked whether a member of the Federal Bureau of Investigation ("FBI") Director's Advisory Board (the "Board") holds an "Office of Profit or Trust" under the Emoluments Clause of the Constitution. *See* U.S. Const. art. I, § 9, cl. 8. We conclude that he does not.

I.

The Board is charged with advising the Director of the FBI ("Director") on how the FBI can more effectively exploit and apply science and technology to improve its operations, particularly its priorities of preventing terrorist attacks, countering foreign intelligence operations, combating cyber-based attacks, and strengthening the FBI's collaboration with other federal law enforcement agencies. *See* Press Release, FBI, *FBI Director Renames and Announces Additions to Advisory Board* (Oct. 6, 2005), *available at http://www.fbi.gov/pressrel/pressrel05/advisory_board.htm*; *see also* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 109, 117 Stat. 11, 67 ("[The Board] shall not be considered to be a Federal advisory committee for purposes of the Federal Advisory Committee Act."). Board members serve, without terms, at the pleasure of the Director. The Board is scheduled to meet four times per year, unless the Director calls additional ad hoc meetings. Although Board members are entitled to travel reimbursements and are classified as special government employees, they receive no other compensation. *See* 18 U.S.C. § 202(a) (2000).

The sole role of the Board is to advise the Director, who is free to adopt, modify, or ignore its recommendations. Board members have no decisional or enforcement authority, and they exercise no supervisory responsibilities over other persons or employees as a result of their positions on the Board. Board members cannot bind the United States or direct the expenditure of appropriated or non-appropriated funds. In addition, Board members do not represent or act on behalf of the Director or the FBI in any particular matter. Board members hold Top Secret security clearances and may receive access to classified information pursuant to their service on the Board, although they do not possess any authority to access, remove, disseminate, declassify, publish, modify, change, manipulate, originate, or otherwise regulate or oversee the government's handling of classified information. Members of the Board sign nondisclosure agreements in which they agree not to disclose classified information they receive.

You have indicated that several Board members wish to travel overseas at the invitation of foreign governments in connection with their non-FBI interests and wish to be reimbursed by those governments for their travel expenses. Travel reimbursements by foreign governments

may constitute emoluments under the Emoluments Clause. *See, e.g.*, Memorandum for John G. Gaine, General Counsel, Commodity Futures Trading Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Expense Reimbursement in Connection with Chairman Stone's Trip to Indonesia* at 2 n.2 (Aug. 11, 1980).[1] The question before us is whether membership on the Board is an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause. We conclude that it is not.

II.

The Emoluments Clause provides, in relevant part, that "no Person holding *any Office of Profit or Trust under [the United States],* shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8 (emphasis added). "[I]n order to qualify as an 'Office of Profit or Trust under [the United States],' a position must, first and foremost, be an 'Office under the United States.'" Memorandum Opinion for the Associate Counsel to the President from Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Emoluments Clause to a Member of the President's Council on Bioethics* at 2 (Mar. 9, 2005), *available at* www.usdoj.gov/olc/2005/050309_emoluments_clause.pdf ("*2005 Opinion*") (second alteration in original). In the *2005 Opinion*, we concluded that a member of the President's Council on Bioethics, an advisory board, did not hold an "Office under the United States" and therefore was not subject to the Emoluments Clause. As we stated there:

> The text of the Emoluments Clause suggests that an "Office of Profit or Trust under [the United States]" must be an "Office under the United States." . . . [T]o the extent that the phrase "of Profit or Trust" is relevant, it may serve to narrow an "Office . . . under [the United States]" to those that are "of Profit or Trust," or an "Office of Profit or Trust" may be synonymous with an "Office . . . under [the United States]," but it is clear that the words "of Profit or Trust" do not expand coverage of the Emoluments Clause beyond what would otherwise qualify as an "Office . . . under [the United States]."

2005 Opinion at 2 (first ellipsis and first and second brackets added). The threshold question, therefore, in determining whether a member of the Board holds an "Office of Profit or Trust

[1] Congress has already granted its consent under the Emoluments Clause for officials to receive reimbursement from foreign governments for certain foreign travel expenses. The Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2000), allows employees, with the approval of their agencies, to receive payment of appropriate travel expenses for travel taking place entirely outside the United States. *See id.* § 7342(c)(1)(B)(ii). But that statute does not address what is often the most significant single expense incurred in foreign travel, the cost of the flight to and from the United States. We assume, for purposes of this opinion, that the travel reimbursement received by Board members constitutes compensation for services, and therefore is not prohibited under section 7342(b). *See, e.g.*, *Application of the Emoluments Clause of the Constitution & the Foreign Gifts & Decorations Act*, 6 Op. O.L.C. 156, 157 (1982) ("It seems clear that [the Foreign Gifts and Decorations Act] only addresses itself to gratuities, rather than compensation for services actually performed . . . .").

under [the United States]" is whether a position on the Board is an "Office under the United States."

In the *2005 Opinion*, we concluded that a purely advisory position is not an "Office under the United States." Our analysis emphasized that persons holding advisory positions of the sort at issue there did not exercise governmental authority. *Id.* at 9-10. After reviewing two centuries of caselaw, authoritative commentaries, and numerous opinions of this Office, we observed that "[i]nnumerable . . . authorities . . . make clear that an indispensable element of a public 'office' is the exercise of some portion of delegated sovereign authority." *Id.* at 13. *See generally* Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Officers of the United States Within the Meaning of the Appointments Clause* at 12 (Apr. 16, 2007) ("*Appointments Clause Opinion*") ("As a general matter, . . . one could define delegated sovereign authority as power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit. . . . [S]uch authority primarily involves the authority to administer, execute, or interpret the law."). We therefore concluded: "To be an 'office,' a position must at least involve some exercise of governmental authority, and an advisory position does not." *2005 Opinion* at 10; *id.* at 16 ("As the Supreme Court made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976), . . . an 'officer of the United States' exercises '*significant authority* pursuant to the laws of the United States,' *id.* at 126 (emphasis added)."); *accord Appointments Clause Opinion* at 4, 10, 21.

The only relevant distinction between the advisory position at issue in the *2005 Opinion* and membership on the Board is that a Board member may receive access to classified information in connection with his official duties.[2] To conclude that membership on the Board is an "Office of Profit or Trust" within the meaning of the Emoluments Clause, therefore, we would necessarily have to conclude that, by receiving access to classified information, Board members have received a delegation by legal authority of a portion of the sovereign power of the federal Government.

The mere provision of access to classified information, however, is not such a delegation. Board members are given access to classified information solely to help them perform their advisory function; they have no discretionary authority to access, remove, disseminate, declassify, publish, modify, change, manipulate, or originate classified information. They do not have supervisory or oversight authority for the government's handling or regulation of classified information. *Cf. id.* at 13-15 (discussing similar authority). Board members who receive such information do not thereby acquire "the right or power to make any . . . law, nor can they interpret or enforce any existing law," 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* 604, 608 (1907), nor can they "hear and determine judicially

[2] While the members of the President's Committee on Bioethics—the subject of the *2005 Opinion*—received modest compensation for their services, *see 2005 Opinion* at 1, the members of the Board are not compensated. We have previously concluded, however, that while "an emolument is . . . a common characteristic of an office," it "is not essential." *Appointments Clause Opinion* at 38.

questions submitted [to them]," *id.* at 607. Nor does their receipt of such information empower Board members to "bind the Government or do any act affecting the rights of a single individual citizen." *Id.* at 610; *accord Opinion of the Justices*, 3 Greenl. (Me.) 481, 482 (1822) ("The power thus delegated and possessed [by an officer], may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, *and in its effects it will bind the rights of others* . . . ") (emphasis added). Rather, receipt of classified information only gives rise to a negative duty not to disclose that information to persons who may not lawfully have access to it. We do not understand the duty to safeguard classified information to constitute a portion of the sovereign power of the federal Government. That duty is broadly analogous to the duty of any person entrusted with the due care of government property under his control, which—absent authority to alienate that property—has not traditionally been considered to constitute sovereign authority sufficient to render a position an "office." *See Appointments Clause Opinion* at 14 (collecting authorities).

In addition, the Board members' duty of nondisclosure originates not in the statute creating the Board and establishing its duties, but in such authorities as confidentiality agreements executed by the Board members, by Executive Order No. 13292, 3 C.F.R. 196 (2004), and by generally applicable statutes penalizing the unauthorized disclosure of classified information, *see, e.g.*, 18 U.S.C. § 793(d), (f) (2000); *id.* § 798 (2000). *See generally Freytag v. Comm'r*, 501 U.S. 868, 881 (1991) (contrasting special trial judges, whose duties were "specified by statute," with special masters, who were hired "on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute"); *id*. at 901 (opinion of Scalia, J.) (agreeing with this analysis); Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 507, at 332 (1890) ("The authority of a public officer in any given case consists of those powers which are expressly conferred upon him by the act appointing him, or which are expressly annexed to the office by the law creating it or some other law referring to it, or which are attached to the office by common law as incidents to it."). Although we do not consider that fact dispositive, *see Appointments Clause Opinion* at 36-37, it tends to confirm that Board members' duty of nondisclosure is simply ancillary to their advisory duties, which, as noted above, are not sufficient to render the position an "office" under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. It also tends to confirm that the Board members' duty of nondisclosure is indistinguishable from the general duty that any employee or even contractor with access to such information would have, rather than constituting some special authority associated with service on the Board.

Accordingly, we conclude that a member of the Board does not hold an "Office under the United States" by virtue of that position, and likewise does not hold an "Office of Profit or Trust [under the United States]" within the meaning of the Emoluments Clause. *See 2005 Opinion* at 16 ("A position that carried with it no governmental authority (significant or otherwise) would not be an office for purposes of the Appointments Clause, and therefore . . . would not be an office under the Emoluments Clause . . . .").

We acknowledge that the *2005 Opinion*, in concluding that members of the President's Council on Bioethics were not "officers" for purposes of the Emoluments Clause, noted, among other factors, that members did not have access to classified information, *see id.* at 1-2, and cited a handful of opinions that "suggested that individuals with access to sensitive, national security-related information held 'Office[s] of Profit or Trust' under the Emoluments Clause, without further analyzing the extent of governmental authority exercised by these federal employees." *Id.* at 16-17; *see also id.* at 17 n.10 (collecting citations). In light of those opinions, we wrote, "it is at least arguable that the authority to control and safeguard classified information does amount to the exercise of governmental authority sufficient to render employment with the federal government a public 'office.'" *Id.* at 17.

One of those opinions involved a part-time staff consultant to the Nuclear Regulatory Commission. *See Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96 (1986) ("*1986 Opinion*").[3] In the *1986 Opinion*, we concluded that such a staff consultant could not, consistent with the Emoluments Clause, accept employment with a private domestic corporation to perform work on a contract with a foreign government. *See id.* at 96. In reaching that conclusion, we appeared to place heavy weight on the fact that the consultant might have access to sensitive or classified information:

> [The consultant] is highly valued for his abilities and . . . in the course of his employment, he may develop or have access to sensitive and important, perhaps classified information. Even without knowing more specifically the duties of his employment, these factors are a sufficient indication that the United States government has placed great trust in [him] and requires and expects his undivided loyalty. Therefore, we believe the Emoluments Clause applies to him.

Id. at 99. In the *1986 Opinion*, we did not consider whether access to classified information constitutes a delegation by legal authority of a portion of the sovereign power of the federal Government. While we noted that "[p]rior opinions of this Office have assumed . . . that the persons covered by the Emoluments Clause were 'officers of the United States," *id.* at 98, we interpreted the Emoluments Clause as a "prophylactic provision" whose reach was not limited to "officers of the United States." *Id.* Instead, we concluded that the relevant inquiry under the Emoluments Clause was "whether [the employee's] part-time position at the NRC could be characterized as one of profit or trust under the United States—a position requiring undivided loyalty to the United States government." *Id.* As we have since determined, however, a person who does not hold an Office under the United States is not subject to the Emoluments Clause. *See 2005 Opinion* at 2 ("[I]n order to qualify as an 'Office of Profit or Trust under [the United States],' a position must, first and foremost, be an 'Office under the United States.'") (second alteration in original).

[3] The *2005 Opinion* also cites Letter for James A. Fitzgerald, Assistant General Counsel, U.S. Nuclear Regulatory Commission, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (June 3, 1986). That is not, however, a separate opinion, but simply the unpublished version of the *1986 Opinion*.

III.

A sentence in our *2005 Opinion* identifies *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1867), as supporting the proposition that "the authority to control and safeguard classified information does amount to the exercise of governmental authority sufficient to render employment with the federal government a public 'office.'" *2005 Opinion* at 17. But, on a close reading of *Hartwell*, we find it consistent with our analysis above. In *Hartwell*, the Court held that a clerk in the office of an assistant treasurer of the United States was an "officer of the United States" for purposes of a federal embezzlement statute. *See* 73 U.S. at 391-93. In reaching that conclusion, the Court noted a number of factors, including that Hartwell was "charged with the safe-keeping of the public moneys of the United States." *Id.* at 392. By analogy to *Hartwell*, "it could be argued that a federal government employee charged with safeguarding sensitive national security-related information would likewise be a public officer charged with the exercise of some governmental authority." *2005 Opinion* at 17.

We do not read *Hartwell* so broadly. The statute under which Hartwell was indicted applied to "all officers and other persons charged by this act or any other act with the safe-keeping, transfer and disbursement of the public moneys." 73 U.S. at 387 (emphasis and internal quotation marks omitted). The Court determined that Hartwell was *both* an "officer" and a "person charged with the safe-keeping of the public money within the meaning of the act." *Id.* at 393 (emphasis and internal quotation marks omitted); *see also id.* ("Was the defendant an *officer* or *person* 'charged with the safe-keeping of the public money' within the meaning of the act? We think he was both."). The fact that Hartwell was responsible for "the safe-keeping of the public moneys of the United States," *id.* at 392, was relevant, not because it made Hartwell an officer, but because it made him an "officer[] [or] other person[] charged by this act or any other act with the safe-keeping, transfer and disbursement of the public moneys." *Id.* at 387 (emphasis and internal quotation marks omitted). He therefore was liable for criminal prosecution under the act irrespective of the fact that he was an officer. *See id.* at 390-91.

That Hartwell was charged with the safekeeping of the public moneys of the United States does not appear to have been relevant to the Court's analysis of whether he was also an officer. Rather, Hartwell's status as an officer appears to have been based on the fact that his

> employment . . . was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

Id. at 393. *Hartwell* therefore is not dispositive of whether being generally entrusted with due care of public funds is itself a delegation by legal authority of a portion of the sovereign power of the federal Government, such that the recipient of such authority holds an "Office under the

United States." *A fortiori*, *Hartwell* does not determine whether receiving access to classified information constitutes such a delegation.

* * *

Because mere access to, or receipt of, classified information is not a delegation by legal authority of a portion of the sovereign power of the United States, a member of the Board does not hold an "Office under the United States" by virtue of that position and therefore does not hold an "Office of Profit or Trust [under the United States]" within the meaning of the Emoluments Clause. *See 2005 Opinion* at 16.[4] To the extent the *1986 Opinion* reached a contrary conclusion, the *2005 Opinion* has substantially undermined the basis for that conclusion, and the *1986 Opinion* is no longer authoritative.[5]

/s/

JOHN P. ELWOOD
Deputy Assistant Attorney General
Office of Legal Counsel

[4] The FBI may, of course, take foreign ties into account in determining the propriety of a person's service on the Board and the appropriateness of granting security clearances.

[5] The *2005 Opinion* referred to two other opinions in which "we suggested that individuals with access to sensitive, national security-related information held 'Office[s] of Profit or Trust' under the Emoluments Clause." *2005 Opinion* at 16; *see id.* at 17 n.10 (citing *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156 (1982), and Memorandum for James H. Thessin, Assistant Legal Adviser for Management, Department of State, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Emoluments Clause to a Civilian Aide to the Secretary of the Army* (Aug. 29, 1988)). In both of those opinions, however, the individuals in question were regular full-time employees of the United States Government, and those opinions therefore do not directly bear on the part-time advisory positions at issue here.

APPLICATION OF THE EMOLUMENTS CLAUSE TO A MEMBER OF THE PRESIDENT'S COUNCIL ON BIOETHICS

A member of the President's Council on Bioethics does not hold an "Office of Profit or Trust" within the meaning of the Emoluments Clause of the Constitution.

March 9, 2005

MEMORANDUM OPINION FOR THE ASSOCIATE COUNSEL TO THE PRESIDENT

You have asked whether a member of the President's Council on Bioethics holds an "Office of Profit or Trust" under the Emoluments Clause of the Constitution, Article I, § 9, cl. 8. As we previously advised you, we conclude that he does not. This memorandum memorializes and expands upon our earlier advice.

I.

On November 28, 2001, the President issued Executive Order No. 13237, 3 C.F.R. 821 (2001), creating the President's Council on Bioethics (the "Council" or "Bioethics Council"). The purpose of the Bioethics Council is to "advise the President on bioethical issues that may emerge as a consequence of advances in biomedical science and technology." Exec. Order No. 13237, § 2(a). The Council is composed of 18 members "appointed by the President from among individuals who are not officers or employees of the Federal Government." *Id.* § 3(a). Each member serves a two-year "term of office," subject to re-appointment. *Id.* § 3(c). Members of the Council may be compensated "to the extent permitted by Federal law" and "may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in Government service (5 U.S.C. 5701-5707), to the extent funds are available," *id.* § 4(d); pursuant to these provisions, we understand that each member receives $250 in compensation per day of work in addition to travel expenses. Although they are not required to do so by the Executive Order, we understand that members of the Council take an oath of office. We also understand that members of the Council do not have access to classified information.

The Council serves in a purely "advisory role." *Id.* § 2(a). It may, for example, "conduct inquiries, hold hearings, and establish subcommittees," *id.* § 4(b), and "conduct analyses and develop reports or other materials," *id.*, but it is "not . . . responsible for the review and approval of specific projects or for devising and overseeing regulations for specific government agencies," *id.* § 2(d). Nor does the Executive Order give the Council subpoena authority or the authority to implement any of its recommendations, whether at the President's direction or otherwise. In short, although the Council may offer its views to the President, it is without power to implement those views or execute any other governmental authority.

The question before us is whether membership on the Council—which, as explained, is a purely advisory position that carries with it no power to execute any governmental authority,

significant or otherwise, and has no access to classified information—is "any Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause. U.S. Const. art. I, § 9, cl. 8. We conclude that it is not.

II.

The Emoluments Clause of the Constitution provides in pertinent part that

> no Person holding any *Office of Profit or Trust under [the United States]*, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, § 9, cl. 8 (emphasis added).[1] We conclude that membership on the Council is not "any Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause. We first conclude that in order to qualify as an "Office of Profit or Trust under [the United States]," a position must, first and foremost, be an "Office under the United States." Next, we conclude that it is well-established that a purely advisory position is not an "Office under the United States" and, hence, not an "Office of Profit or Trust under [the United States]." Because a purely advisory position is not an "Office," we need not precisely define whether or to what extent the words "of Profit or Trust" narrow the category of offices governed by the Emoluments Clause.

A.

In order to hold an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause, an individual must hold an "Office . . . under [the United States]." This conclusion follows from the text of the Emoluments Clause. It is further confirmed by the ratification history of the Clause, which is admittedly limited, and by its early applications. Finally, our conclusion is confirmed by every judicial decision that has addressed the issue.

The text of the Emoluments Clause suggests that an "Office of Profit or Trust under [the United States]" must be an "Office under the United States." As discussed below, to the extent that the phrase "of Profit or Trust" is relevant, it may serve to narrow an "Office . . . under [the United States]" to those that are "of Profit or Trust," or an "Office of Profit or Trust" may be synonymous with an "Office . . . under [the United States]," but it is clear that the words "of Profit or Trust" do not expand coverage of the Emoluments Clause beyond what would otherwise qualify as an "Office . . . under [the United States]." This conclusion is apparent first

[1] In full, U.S. Const. art. I, § 9, cl. 8 states: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

and foremost by the phrase "Office of Profit or Trust under [the United States]" itself, which by its terms suggests that an office of profit or trust is necessarily a type of "Office . . . under [the United States]"—either one of "Profit" or one of "Trust." It is also confirmed by the remainder of the Emoluments Clause. In particular, the Emoluments Clause uses the term "Office" twice: first, in its reference to "any Office of Profit or Trust under [the United States]," and second, in its reference to "any present, Emolument, Office, or Title, of any kind whatever." The second reference—to "any . . . Office . . . of any kind whatever"—suggests that the first reference—to "any Office of Profit or Trust under [the United States]"—is narrower, not broader, than the second. Taken as a whole, then, the text of the Emoluments Clause suggests that an "Office of Profit or Trust under [the United States]" must, at a minimum, be an "Office under the United States." This conclusion is confirmed by the ratification history and early applications of the Emoluments Clause as well as relevant case law.

That the phrase "Office of Profit or Trust under [the United States]" is meant to be no more expansive than the phrase "Office under the United States" is confirmed by the limited discussion by the Framers and ratifiers of the Constitution as to the original understanding of the Emoluments Clause. This limited discussion reflects the assumption that the phrase "Office of Profit or Trust" was understood to be synonymous with the term "Office," with no particular emphasis placed on the additional words "of Profit or Trust." Governor Randolph, for example, who had attended the Philadelphia convention, explained to the Virginia ratifying convention that the Emoluments Clause:

> restrains any persons *in office* from accepting of any present or emolument, title or office, from any foreign prince or state. This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit *any one in office* from receiving or holding any emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the King of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.

3 Max Farrand, *The Records of the Federal Convention of 1787* at 327 (rev. ed. 1966) (emphases added) (footnote omitted) ("*Records*"). Likewise, according to Madison's notes, the Emoluments Clause was proposed at the convention by Charles Pinckney, who "urged the necessity of preserving *foreign Ministers & other officers* of the U.S. independent of external

influence and moved to insert [the Emoluments Clause]." 2 *Records* at 389 (emphasis added).[2] These two statements are the only contemporaneous explanations of the Emoluments Clause that we have discovered, and both reflect an understanding that it encompasses public "offices" generally.

The early applications of the Emoluments Clause likewise reflect the assumption that an "Office of Profit or Trust" is synonymous with the term "Office under the United States." The Fifth Congress, for example, was the first to face an issue involving the Emoluments Clause, when, in 1798, Thomas Pinckney asked Congress for permission to retain small presents he received from the Kings of Great Britain and Spain upon his departure from Europe after serving as Ambassador to those countries. *See* 8 *Annals of Congress* 1582 (1798) ("*Annals*"); David. P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* at 281 (1997). Congress refused to give permission. *See* 7 *Annals* at 553 (Senate granting consent); 8 *Annals* at 1593 (House refusing consent). In the debate that ensued, the participants seemed to assume that the term "Office of Profit or Trust" was synonymous with "officer of the United States" (and further, that the Emoluments Clause was aimed primarily at ambassadors and foreign ministers). The statement of Representative Bayard is illustrative. He observed with respect to an identical provision found in the Articles of Confederation[3]:

> Under the old articles of Confederation, a like provision was in being, only that the receipt of presents by our Ministers was positively forbidden, without any exception about leave of Congress; but their being allowed to be received under the present Government, by the consent of Congress, shows that they might be received in certain cases. He had indeed, been informed that, notwithstanding the prohibition under the former Constitution, presents were frequently received by Ministers; for, though persons

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[2] According to Madison's notes, the Clause was proposed by "Mr. Pinckney." Madison's custom was to refer to Charles Pinckney as "Mr. Pinckney" and to refer to Charles Cotesworth Pinckney (Charles Pinckney's cousin and fellow delegate from South Carolina) as "Genl. Pinckney," as Charles Cotesworth Pinckney completed his Revolutionary War service as a brevet brigadier general. *Compare, e.g., id.* (statement of "Mr. Pinckney"), *with* 2 *Records* at 373 (statement of "Genl. Pinckney").

[3] Article VI of the Articles of Confederation provided: "[N]or shall any person holding *any office of profit or trust under the United States*, or any of them, accept any present, emolument, office or title of any kind whatever from any king, prince or foreign State." Articles of Confederation art. VI, 1 Stat. 5 (1778) (emphasis added). An earlier draft of the Articles contained broader language that would have prohibited "*any Servant or Servants of the United States*" from accepting any such "Present, Emolument, Office, or Title." Articles of Confederation art. IV (July 12, 1776 draft), *in* 5 *Journals of the Continental Congress* 547 (1904-37) (emphasis added). By substituting the phrase "any person holding an office of profit or trust under the United States" for the phrase "any Servant or Servants of the United States," the drafters may have intended to narrow the scope of the clause to a particular type of government servant, which is consistent with our conclusion. *Cf.* Articles of Confederation art. IV (Aug. 20, 1776 draft), *in* 5 *Journals of the Continental Congress* 675 (noting this change, without explanation). We have found no additional drafting history or practice regarding the parallel phrase in the Articles of Confederation that would further illuminate the question before us.

> holding *offices* were forbidden to receive presents, the moment their *office* ceased, and they became private individuals, they were no longer prohibited from receiving any presents which might be offered to them. Under these circumstances he thought the resolution ought to be agreed to.

8 *Annals* at 1583-84 (emphases added).

Likewise, in 1817, Secretary of State John Quincy Adams issued instructions to the United States ambassador to England forbidding U.S. foreign ministers from accepting gifts from a foreign government:

> The acceptance of such presents by ministers of the United States is expressly prohibited by the constitution; and even if it were not, while the United States have not adopted the custom of *making* such presents to the diplomatic agents of foreign Powers, it can scarcely be consistent with the delicacy and reciprocity of intercourse between them, for the ministers of the United States to receive such favors from foreign Princes, as the ministers of those Princes never can receive from this Government in return. The usage, exceptionable in itself, can be tolerated only by its reciprocity. It is expected by the President, that every offer of such present which may, in future, be made to any public minister or *other officer of this Government*, abroad, will be respectfully, but decisively declined.

H. Rep. No. 23-302, at 3 (1834) (reprinting Adams's instructions) (second emphasis added). On one occasion in 1834 when these instructions were not followed, President Jackson asked Congress to consent to a particular gift. President Jackson noted:

> I deem it proper on this occasion to invite the attention of Congress to the presents which have heretofore been made to our *public officers*, and which have been deposited under the orders of the Government in the Department of State.

3 Richardson, *A Compilation of the Messages and Papers of the Presidents* 37 (1896). (emphasis added). He then explained:

> The provision of the Constitution which forbids *any officer*, without the consent of Congress, to accept any present from any foreign power may be considered as having been satisfied by the surrender of the articles to the Government, and they might now be disposed of by Congress to those for whom they were originally intended, or to their heirs, with obvious propriety in both cases, and in the latter would be received as grateful memorials of the surrender of the present.

Id. at 38 (emphasis added).

Finally, the judicial decisions addressing the meaning of the phrase "office of profit or trust," mostly state court cases, and leading treatises, all state or assume that an "office of profit or trust" must be a public "office." *See, e.g.*, *Shepherd v. Commonwealth*, 1 Serg. & Rawle 1, 9 (Pa. 1814) (a "commissioner of the Commonwealth" did not hold an "office of profit under th[e] Commonwealth" because he did not hold an "office"); *Opinion of the Justices*, 3 Me. (Greenl.) 481, 481-82 (1822) (an "agent[] for the preservation of timber on the public lands" did not hold an "office of profit under th[e] State" because he did not occupy an "office" of any sort); *Commonwealth ex rel. Bache v. Binns*, 17 Serg. & Rawle 219, 220 (Pa. 1828) (a printer selected by the U.S. Secretary of State to print congressional reports did not hold an "office of profit . . . or trust, under the government of the United States" because the position of printer was not an "office"); *Shelby v. Alcorn*, 36 Miss. 273, 290 (1858) (a levee commissioner held a "civil office of profit under th[e] State" because he occupied a "civil office" "under the State"); *In re Corliss*, 11 R.I. 638, 641 (1876) (commissioners on the U.S. Centennial Commission held an "office of trust" because "they are, properly speaking, officers, and . . . the places which they hold are offices"); *State ex rel. Gilson v. Monahan*, 84 P. 130, 133 (Kan. 1905) (the director of a drainage district did not hold an "office of public trust" because he did not hold a "public office"; "[t]he words 'office of public trust'" in the Kansas constitution "are equivalent to 'public office'"); *Kingston Assoc. Inc. v. LaGuardia*, 156 Misc. 116, 118-119, 121 (N.Y. S.Ct. 1935) (an advisory position was not a "civil office of honor, trust, or emolument under . . . the United States" because it lacked an "indispensable attribute of public office"); Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 13 (Chicago, Callaghan & Co. 1890) ("*Law of Public Offices*") (defining an "Office of Profit" as a type of "office"); *id.* § 16 (same for "Office of Trust"); 3 Joseph Story, *Commentaries on the Constitution* §§ 1345-46 (1833; reprint 1991) ("[T]he [Emoluments Clause] is highly important, as it puts it out of the power of *any officer of the government* to wear borrowed honours, which shall enhance his supposed importance abroad by a titular dignity at home.") (emphasis added); 1 St. George Tucker, *Blackstone's Commentaries* 295-96 & n.* (Philadelphia, William Y. Birch et al. 1803; reprint 1996) ("In the reign of Charles the second of England, that prince, and almost all his officers of state were either actual pensioners of the court of France, or supposed to be under its influence, directly, or indirectly, from that cause. The reign of that monarch has been, accordingly, proverbially disgraceful to his memory. The economy which ought to prevail in republican governments, with respects to salaries and other emoluments of office, might encourage the offer of presents from abroad, if the constitution and laws did not reprobate their acceptance. Congress, with great propriety, refused their assent to one of their ministers to a foreign court, accepting, what was called the usual presents, upon taking his leave: a precedent which we may reasonably hope will be remembered by all future ministers, and ensure a proper respect to this clause of the constitution [the Emoluments Clause], which on a former occasion is said to have been overlooked."); *see also Oath of Clerks in the Executive Departments*, 12 Op. Att'y Gen. 521, 521-22 (1868) (the phrase "office of honor or profit" in the Act of July 2, 1862, ch. 128, 12 Stat. 502, includes only those who "are within the legal designation of officers"). Indeed, we are aware of no judicial decision that has even suggested that a government position that fails to qualify as a public "office" could nevertheless qualify as an "office of profit or trust."

Because a position must qualify as a public "office" in order to constitute an "*Office* of Profit or Trust," it is unnecessary for us to resolve definitively whether and to what extent the phrase "of Profit or Trust" narrows the category of public offices that are governed by the Emoluments Clause. Nevertheless, a few general observations may be warranted, as they confirm that the phrase does not *expand* the Emoluments Clause beyond public "offices" generally.

That phrase seems to be a term that had a technical significance at English common law. "Offices of profit" in England were offices to which a salary attached and in which the holder had a proprietary interest. As such, these offices were heritable, could be executed through hired deputies, and, in some cases, sold. *See* J.J.S. Wharton, *Wharton's Law Lexicon* 712 (14th ed. 1938) (defining "an office or place of profit under the Crown" as "an office held direct from the crown which nominally carries a salary"); Giles Jacob, *A New Law Dictionary*, *tit.* Office (London, W. Strahan 9th ed. 1772) (describing an "office[] of profit" as a type of "office" that has "fee or profit appurtenant to it," and explaining that "an assise lay at Common law for an . . . office of profit, [but] for an office of charge and no profit, an assise does not lie"); *see also* 2 Blackstone, *Commentaries on the Laws of England* 36-37 (Philadelphia, R. Bell 1771; reprint 1967) (describing "offices" as "incorporeal hereditaments"); 1 William Holdsworth, *A History of English Law* 248 (7th ed. 1956) (noting the introduction of the proprietary concept of offices into the colonies).

"Offices of trust," by contrast, were offices that, because they required "the exercise of discretion, judgment, experience and skill," *Law of Public Offices* § 16, were not heritable and could not be deputized or sold. *See* 2 Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 895 (1883) ("Public offices are either offices of trust, which cannot be performed by deputy . . . , or ministerial offices, which may be performed by deputy."); 2 T. Cunningham, *A New and Complete Law Dictionary*, *tit.* Office (London, 2d ed. 1771) (discussing the prohibition against selling "offices of trust"); 2 Blackstone, at 36-37 (explaining that an "office[] of public trust cannot be granted for a term of years," presumably because it might be inherited during the term by someone incompetent to perform it, "but *ministerial* offices may be so granted; for those may be executed by deputy" should the holder be incompetent to perform it). The English tradition of heritable offices that could be sold or executed entirely by hired deputies was rejected in this country after the Revolution. *See, e.g.*, Vt. Const. of 1777, ch. II, § 33, *reprinted in* 6 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3747 (1909; reprint 1993) ("[T]here can be no necessity for, nor use in, establishing offices of profit, the usual effect of which are dependence and servility, unbecoming freemen, in the possessor or expectants."). Yet, the phrase "of profit or trust"—which, given the English tradition, had greater significance at the time—was incorporated into the emoluments clause contained in the Articles of Confederation, *see* Articles of Confederation, art. VI, 1 Stat. 5 (1778), and, by virtue thereof, was later incorporated into the Constitution's Emoluments Clause, among other laws.

In other words, as later American sources confirm, to the extent that the phrase "of Profit or Trust" adds to the meaning of the term "Office," it narrows it, with "Profit" referring to offices for which the officeholder is paid, and "Trust" to offices the duties of which are particularly important. *See Corliss*, 11 R.I. at 642 (concluding that a position was not an "office of profit" because the holder of the position received no compensation, but that it was an "office of trust" because the holder "was intrusted with a large supervisory and regulative control of the property"); *Town of Meredith v. Ladd*, 2 N.H. 517, 519 (1823) ("[T]he office of constable is an office of trust [because] many important duties are devolved upon it, bonds are executed for fidelity, and in some places the income from it is very considerable."); *Shepherd*, 1 Serg. & Rawle at 9 (the position held by a state commissioner was not an office "of profit" "because he did not receive a cent as commissioner"). *See also Law of Public Offices* §§ 13, 16 (defining an "Office of Profit" as "[a]n office to which salary, compensation or fees are attached," and an "Office of Trust" as "[a]n office whose duties and functions require the exercise of discretion, judgment, experience and skill"). *Cf. Doty v. State*, 6 Blakf. 529, 530 (Ind. 1843) (rejecting distinction between office of "trust" and office of "profit" as "merely verbal," noting that "[a]ll offices of *profit* are necessarily offices of trust; and must, therefore be included in those of the latter description").[4]

As mentioned, however, we need not definitively resolve the meaning of the phrase "of Profit or Trust," because a position is not an "Office of Profit or Trust under [the United States]" if it is not, at the least, an "Office . . . under [the United States]." And, as we shall explain below, a purely advisory position is not an "Office . . . under [the United States]."

B.

Although we do not here attempt to define comprehensively the meaning of an "Office under the United States," it is clear that a purely advisory position does not qualify. This conclusion follows from the Executive Branch's historical and longstanding understanding of

[4] The Constitution also references an "Office of honor," U.S. Const. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.")—a term that arguably includes offices that are not "of profit" or "of trust." We do not definitively resolve the meaning of this term. We note, however, that it historically has been understood to encompass offices to which no fees, profits, or salary attach, *see Law of Public Offices* § 15 (an "honorary office" is "an office to which no compensation attaches"); *State ex rel. Clark v. Stanley*, 66 N.C. 59, 63 (1872) ("Where no salary or fees are annexed to the office, it is a naked office—honorary,—and is supposed to be accepted, merely for the public good."); *Dickson v. People ex rel. Brown*, 17 Ill. 191, 193-95 (1855) (holding that the director of a state "institution for the education of the deaf and dumb," a position for which "[t]here are no fees, perquisites, profits or salary," occupied an "office of honor"), and that the Attorney General has interpreted the statutory phrase "office of honor or profit" as synonymous with an "officer of the United States" under the Appointments Clause, *see Oath of Clerks in the Executive Departments*, 12 Op. Att'y Gen. 521, 521-22 (1868) (interpreting the phrase "office of honor or profit" in the Act of July 2, 1862, ch. 128, 12 Stat. 502, to include only those who "are within the legal designation of officers" as defined by the Supreme Court's Appointments Clause cases).

that phrase, confirmed by an 1898 report of a Judiciary Committee of the House of Representatives. And it is also confirmed by the uncontradicted weight of judicial authority. Accordingly, we conclude that a purely advisory position is not an "office" and therefore not an "Office of Profit or Trust under [the United States]."

The Executive Branch has long been of the view that a purely advisory position is not a public "office." This view has been expressed most clearly in opinions from this Office addressing the meaning of the Ineligibility and Incompatibility Clauses of the Constitution. The Ineligibility Clause provides:

> 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 encreased during such time.

U.S. Const. art. I, § 6, cl. 2 (emphasis added). The Incompatibility Clause provides:

> [N]o Person holding *any Office under the United States*, shall be a Member of either House during his Continuance in Office.

Id. (emphasis added).[5] Whether referring to the need to exercise "some portion of the sovereign

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[5] Notably, the Emoluments Clause and the Incompatibility and Ineligibility Clauses share a common purpose—the prevention of public corruption. *See, e.g.*, 3 *Records* at 327 (statement of Gov. Randolph) (The Emoluments Clause "is provided to prevent corruption."); 3 Story, *Commentaries* at §§ 1345-46 (The Emoluments Clause "is founded in a just jealousy of foreign influence of every sort."); 1 Tucker's *Blackstone* at 295-96 & n.* (explaining that the Emolument Clause is rooted in the recognition that "[c]orruption is too subtle a poison to be approached, without injury"); 3 Elliot's *Debates* at 368-75 (Madison, June 14, 1788) (The Ineligibility Clause "guards against abuse by taking away the inducement to create new offices, or increase the emolument of old offices."); 2 Story, *Commentaries* at 864-69 ("The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of disinterestedness."); 2 Elliot's *Debates* at 475-76 (James Wilson, Penn. Ratifying Convention Dec. 4, 1787) (the Incompatibility Clause seeks to prevent corruption by ensuring that "the mere acceptance of an office, as a bribe, effectually destroys the end for which it was offered"); *id.* at 483-84 ("The great source of corruption, in [England], is, that persons may hold offices under the crown, and seats in the legislature, at the same time."); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Personnel?*, 79 Cornell L. Rev. 1045, 1077 (1994) ("The Incompatibility Clause was motivated by worries about British-style corruption. The Framers did not perceive it as having much to do with the separation of powers or with Presidential independence."); *id.* at 1051 ("Interestingly, the [Incompatibility] Principle seems to have been grounded less in separation-of-powers theory than in the Framers' vivid memory of the British Kings' practice of 'bribing' Members of Parliament [] and judges with joint appointments to lucrative executive posts. This practice was repeated in the colonies, which, after independence, enacted strict constitutional bans on plural office holding. . . . . [The Incompatibility Clause was] intended [to] function as a constitutional ethics rule[,] . . . . [but had the] wholly unappreciated and unintended consequence of foreclosing 'parliamentary' government in this country by making the President's Cabinet and Administration much more independent of Congress."). *Compare Application of the Emoluments Clause of the Constitution and the*

functions of Government," or the need to exercise "significant authority pursuant to the laws of the United States," we have consistently concluded that a purely advisory position is neither a "civil Office under the Authority of the United States" nor an "Office under the United States," because it is not an "office" at all. To be an "office," a position must at least involve some exercise of governmental authority, and an advisory position does not.

In 1989, for example, then Assistant Attorney General Barr concluded that an advisory commission that "perform[s] only advisory or ceremonial functions" is not an "office" within the meaning of the Incompatibility and Ineligibility Clauses because members of such commissions do not "exercis[e] significant authority pursuant to the laws of the United States." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 249 & n.2 (1989). Likewise, in 1969, then Assistant Attorney General Rehnquist concluded that the Staff Assistant to the President did not hold a civil office within the meaning of the Ineligibility Clause, observing that the term "office" meant

> "the right, authority, and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, *an individual is invested with some portion of the sovereign functions of the Government* to be exercised by him for the benefit of the public."

Memorandum for Honorable Lamar Alexander, Staff Assistant to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2 (Dec. 9, 1969) (quoting 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* 604 (1907)) (emphasis added). *See also Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. O.L.C. 200, 207 & n.2 (1984) (noting that congressmen could serve on presidential commission if "purely executive functions" were separated from "advisory functions" and congressional participation was limited to the advisory functions); Memorandum for Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Draft Bill to Establish a Select Commission on Drug Interdiction and Enforcement* at 4 (Aug. 23, 1983) ("The Commission's duties appear to be 'investigative and informative' in nature. Thus, . . . the holding of membership on the Commission by Members of the Committees on the Judiciary[] raise[s] no constitutional issue under the . . . Incompatibility Clause[]."); *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 203 (1983) (concluding that appointment of members of Congress to a commission on deregulation of international ocean shipping would "not implicate the Incompatibility Clause of the Constitution," because the commission was "purely advisory": it would "make a comprehensive study of particular issues . . . and submit a report making recommendations to Congress and the President" but would

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Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156, 157-158 (1982) (declining to read the Emoluments Clause *in pari materia* with the Appointments Clause primarily because the two clauses serve different purposes, with the former being an anti-corruption measure and the latter grounded in separation of power principles).

"possess no enforcement authority or power to bind the Government"); Memorandum for Sanford M. Litvack, Assistant Attorney General, Antitrust Division, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Report to the President by the White House Commission on Small Business* at 2-3 (July 1, 1980) ("If the recommended Board is to exercise any significant Executive authority pursuant to the laws of the United States, it could not include . . . members of Congress . . . among its membership [under the Incompatibility Clause]."); *Office—Compensation*, 22 Op. Att'y Gen. 184, 187 (1898) ("The legal definitions of a public office have been many and various. The idea seems to prevail that it is *an employment to exercise some delegated part of the sovereign power*; and the Supreme Court appears to attach importance to the ideas of 'tenure, duration, emolument, and duties,' and suggests that the last should be continuing or permanent, not occasional or temporary."); *Congressmen and Senators—Eligibility to Civil Offices*, 26 Op. Att'y Gen. 457, 458-59 (1907) (members of Congress could serve on the Board of Managers of the Soldiers' Home because its members are selected by Congress and are not "Federal officers").

This view, moreover, is identical to that espoused by the Judiciary Committee of the House of Representatives in 1898. There, the House of Representatives passed a resolution directing the Judiciary Committee to report whether any member of the House has "accepted any office under the United States" and whether "the acceptance of such office under the United States has vacated the seat of the Member" pursuant to the Incompatibility Clause. The Judiciary Committee concluded that membership on "a commission created by law to investigate and report, but having no legislative, judicial, or executive powers," did not constitute an office within the meaning of the Incompatibility Clause. 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* 604 (1907). The committee's report explained that an "office":

> involves necessarily the power to (1) legislate, or (2) execute law, or (3) hear and determine judicially questions submitted.
>
> Therefore, mere power to investigate some particular subject and report thereon, or to negotiate a treaty of peace, or on some commercial subject, and report without power to make binding on the Government, does not constitute a person an officer.
>
> 'It (public office) implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office.'
>
> . . . .
>
> The duties of the commissioners appointed under the statutes (to which attention will be called[)], are not continuing or permanent; they have no place of

> business for the public use, or even for their own use; they give no bond and take no oath. In fact, they are mere agents appointed by direction of Congress for the purpose of gathering information and making recommendations for its use if the Congress sees fit to avail itself of the labors of the commission. The commissioners appointed under these statutes or resolutions can not be compelled to attend or act, and in the broadest sense they are mere agents of the Congress. These commissioners are not to execute any standing laws which are the rules of action and the guardians of rights, nor have they the right or power to make any such law, nor can they interpret or enforce any existing law.

Id. at 607-08.

Finally, the uncontradicted weight of judicial authority confirms that a purely advisory position is not a public "office." These authorities list several factors relevant to determining whether a position amounts to a public "office," including whether it involves the delegation of sovereign functions, whether it is created by law or by contract, whether its occupant is required to take an oath, whether a salary or fee is attached, whether its duties are continuing and permanent, the tenure of its occupant, and the method of appointment. *See, e.g.*, *Law of Public Offices* §§ 1-9 (describing factors and citing cases); *Wise v. Withers*, 7 U.S. (3 Cranch.) 331, 336 (1806); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823); *In re Attorney Oaths*, 20 Johns. (N.Y.) 492, 492 (1823); *Bunn v. People ex rel. Laflin*, 45 Ill. 397, 405 (1867). But they likewise make clear that the *sine qua non* of a public "office" is the exercise of some portion of delegated sovereign authority. *See Law of Public Offices* §§ 1, 4.

One case, arising out of New York, bears particular emphasis, because it most directly addresses the question at hand. In *Kingston Assoc., Inc. v. La Guardia*, 156 Misc. 116, 121 (N.Y. S. Ct. 1935), the court held that a purely advisory position was not a "civil office of honor, trust, or emolument under the Government of the United States" within the meaning of the Greater New York Charter, which prohibited certain city officials from accepting such an office. At issue was whether Mayor Fiorello La Guardia had forfeited the mayoralty by accepting a position on the federal Advisory Committee on Allotments. The court described several factors relevant to the question whether the federal advisory position was an "office" within the meaning of the charter, including whether the occupant was required to take an oath, whether the position involved a salary, and the duration of the position. *Id.* at 120-21. Dispositive, however, was the absence of any delegated sovereign authority: "There is . . . one indispensable attribute of public office, namely, the right to exercise some portion of the sovereign power." *Id.* at 121. "Clearly," the court explained, "the members of the Advisory Committee on Allotments possess none of the powers of the sovereign," because "[t]he right to recommend amounts to nothing more than the right to advise . . . . [and] [t]he making of a recommendation does not constitute the exercise of an executive function." *Id.* at 123. The court thus held that the advisory committee position was not an "office" at all and hence that Mayor La Guardia had not forfeited the mayoralty.

Innumerable other authorities likewise make clear that an indispensable element of a public "office" is the exercise of some portion of delegated sovereign authority, which, as *Kingston, supra,* and other authorities (discussed below) make clear, is absent with respect to a purely advisory position. As early as 1822, for example, the Maine Supreme Court held that an "agent[] for the preservation of timber on the public lands" did not occupy an "office of profit under th[e] State" because it was not an "office" of any sort, explaining:

> We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office ; — and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others.

Opinion of the Justices, 3 Greenl. (Me.) 481, 482 (1822). A leading late-19th century treatise on public offices is to like effect, defining an "office" as:

> the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. . . . *The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government*, to be exercised by him for the benefit of the public.

Law of Public Offices §§ 1, 4 (emphasis added); *see also id.* § 4 ("Unless the powers conferred are of this nature[—involving the delegation of some sovereign function—]the individual is not a public officer."). And other authorities supporting this proposition are numerous and uniform.[6]

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[6] *See, e.g.*, *Sheboygan Co. v. Parker*, 70 U.S. 93, 96 (1865) (individuals appointed by county as special agents for issuing bonds were not "county officers" because "[t]hey do not exercise any of the political functions of county officers, such as levying taxes, &c.," and "[t]hey do not exercise 'continuously, and as part of the regular and permanent administration of the government, any important public powers, trusts, or duties'"); *Hall v. Wisconsin*, 103 U.S. 5, 9 (1880) (commissioner appointed by county to make a scientific survey did not hold a public office, noting that under state law, the term "civil officer" "embraces only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of society is confided"); *Byrne's Administrators v. Stewart's Administrators*, 3 S.C. Eq. (Des.) 466, 478 (1812) (the "office of solicitor" is not a public office because "he does not possess any portion of the public authority"); *Commonwealth ex rel. Bache v. Binns*, 17 Serg. & Rawle 219, 244 (Pa. 1828) (opinion of Tod, J.) (printer of congressional reports does not hold an "office . . . of profit or trust, under the government of the United States,"

Indeed, although not every reported decision explicitly ties a public "office" to the exercise of some portion of sovereign authority, we have not found a single case in which an individual was deemed to hold such an "office," including one "of profit or trust," where he was invested with *no* delegated sovereign authority, significant or otherwise.[7]

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noting that an "office" requires "a delegation of a portion of the sovereign power"); *In re J.L. Dorsey*, 7 Port. 293 373 (Ala. 1838) (opinion of Ormond, J.) (the term "office" refers "to those who exercise an office or place of honor or profit under the State government, and by authority derived from it"); Bruce Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* 163 (1903) ("A public office . . . is the right, authority and duty conferred by law . . . [wherein] an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public . . . . It finds its source and limitation in some act of expression of governmental power."); James L. High, *A Treatise on Extraordinary Legal Remedies* 581 (Chicago, Callaghan and Co., 3d ed. 1896) ("An office, such as to properly come within the legitimate scope of an information in the nature of a quo warranto, may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public."); *United States, ex rel. Boyd v. Lockwood*, 1 Pin. 359, 363 (Wisc. Terr. 1843) ("An office is where, for the time being, a portion of the sovereignty, legislative, executive or judicial, attaches, to be exercised for the public benefit. That the office of judge of probate of Crawford county is an office within this definition, there can be no question."); *Bunn v. People ex rel. Laflin*, 45 Ill. 397, 406 (1867) (commissioners supervising construction of a statehouse did not hold an "office" because they had not "the slightest connection with the exercise of any portion of the executive power, or of any departmental powers"); *Eliason v. Coleman*, 86 N.C. 235, 239-40 (1882) (chief engineer of the Western North Carolina Railroad did not hold an "office," defined as "'a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public'"); *Commonwealth v. Swasey*, 133 Mass. 538, 541 (1882) (the city physician holds a "public office" because he "is by virtue of his office a member of the board of health, which is invested with important powers to be exercised for the safety and health of the people"); *State v. Kennon*, 7 Ohio St. 546, 562-563 (1857) (panel authorized to appoint, supervise and remove other government officials occupied "offices" because they were charged with "exercis[ing] continuously, and as part of the regular and permanent administration of the government, important public powers, trusts, and duties"); *Shelby v. Alcorn*, 36 Miss. 273, 292 (1858) (a "levee commissioner" is a "civil office of profit" because "[c]lothed with a portion of the power vested in [the executive] department, the commissioner, in the discharge of his proper functions, exercises as clearly sovereign power as the governor, or a sheriff, or any other executive officer, when acting within his appropriate sphere").

[7] In some such cases, the individual deemed to hold an "office" clearly exercised sovereign authority. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 164 (1803) (describing the position of justice of the peace for the District of Columbia, which carried with it substantial governmental authority, as among the "offices of trust, of honor or of profit"); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (an "agent of fortifications," whose duties included "disburs[ing] money placed in their hands" in accordance with "the orders of the engineer department," "provid[ing] materials and workmen deemed necessary for the fortifications," and "pay[ing] the labourers employed," occupied an "office" and was an "Officer of the United States"); *Wise v. Withers*, 7 U.S. (3 Cranch.) 331, 336 (1806) (a "justice of the peace" for the District of Columbia was an "officer under the government of the United States" within the meaning of a statute exempting such officers from militia duty); *In re Corliss*, 11 R.I. 638, 640-41(1876) (holding that commissioners of the United States Centennial Commission held an "Office of Trust" under U.S. Const. art. II, § 1, cl. 2, where their statutorily created duties were to "'prepare and superintend the execution of a plan for holding the [centennial] exhibition'"; work with a finance board "'to raise and disburse funds'"; make regulations setting entrance and admission or otherwise "'affecting the rights privileges, or interests of the exhibitors, or of the public'"; and "'have power to control, change, or revoke all . . . grants'" "'conferring rights and privileges'" relating to the exhibition or its grounds and buildings); *United States v. Hartwell*, 73 U.S. 385, 392-

In light of the overwhelming authority discussed above, we conclude that a purely advisory position is not an "Office under the United States," and hence not an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause.

C.

This conclusion is generally consistent with the past opinions of this Office. First, this Office's more recent opinions have concluded that membership on certain advisory committees did not amount to an "Office of Profit or Trust." *See Advisory Committee on International Economic Policy*, 20 Op. O.L.C. 123, 123 (1996) (members of Advisory Committee on International Economic Policy did not hold an "Office of Profit or Trust"); Letter Opinion for the General Counsel, United States Trade Representative, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Emoluments Clause to "Representative" Members of Advisory Committees* at 2 (Sept. 2, 1997) ("'representative' members" of an advisory committee did not hold an "Office of Profit or Trust"). These opinions "reject[ed] the sweeping and unqualified view," 20 Op. O.L.C. at 123, expressed in dictum five years earlier, that all federal advisory committee positions were covered by the Emoluments Clause, *see Applicability of 18 U.S.C. § 219 to Members of Federal Advisory Committees*, 15

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93 (1867) (holding that a "clerk" in the office of the "assistant treasurer of the United States . . . at Boston" was a "public officer[]" within the meaning of a criminal embezzlement statute that applied to, among others, "'[a]ll officers and other persons charged . . . with the safe-keeping, transfer and disbursement of the public money,'" where the clerk was "subject to the duty, to keep safely the public moneys of the United States"); *Town of Meredith v. Ladd*, 2 N.H. 517, 519 (1823) ("[H]ere the office of constable is an office of trust . . . because both *ex-officio* and by precepts, a constable is empowered to arrest criminals under certain circumstances and by execution to seize either the person or property of small debtors."). In others, an individual who apparently did exercise some sovereign authority was nonetheless deemed *not* to hold a public "office" because he did not satisfy other elements of an "office"; for example, his duties were not continuing and permanent. *See, e.g.*, *United States v. Germaine*, 99 U.S. 508, 512 (1879) (a "civil surgeon" was not an "officer of the United States" within the meaning of a federal extortion statute because his duties were not "continuing and permanent," but "occasional or temporary," and noting that "[h]e is but an agent of the [C]ommissioner [of Pensions], appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties"); *Auffmordt v. Hedden*, 137 U.S. 310, 326-27 (1890) (a "merchant appraiser" selected by a customs collector to conduct an appraisal of goods is not an "officer of the United States" within the meaning of the Appointments Clause because "his position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily"); *Ex Parte William Pool*, 2 Va. Cas. 276, 280 (1821) (holding that a state justice of the peace with the power to arrest was not an "officer" because his duties were not regular and permanent), *but see id.* at 290-91 (dissenting opinion) (arguing that the authority of justices of the peace "to grant warrants of arrest against persons accused of crimes or offences against the Laws of the United States, to examine, bail, or commit the accused, compel the attendance of witnesses, recognize them to appear to give evidence under pain of imprisonment," made them officers under the Appointments Clause of the Constitution); *Shepherd v. Commonwealth*, 1 Serg. & Rawle 1, 8-9 (Pa. 1814) (holding that a commissioner charged with issuing binding decisions regarding state compensation for claimants to certain lands did not hold an office because the position was special or temporary). Such cases stand for the uncontroversial proposition that while some exercise of sovereign authority is a necessary element of an "office," it is not of itself a sufficient one.

Op. O.L.C. 65, 68 (1991). Although a 1993 opinion concluded that members of an advisory committee did hold an "Office of Profit or Trust," that entity, while nominally called an "advisory committee," was, in fact, a "Federal agency established by statute" with certain statutorily assigned powers and functions. *See Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114, 117, 123 n.10 (1993).

Second, the great majority of other opinions issued by this Office, mostly prior to 1982, equated an "Office of Profit or Trust" under the Emoluments Clause with an "officer of the United States" under the Appointments Clause.[8] As the Supreme Court made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976), however, an "officer of the United States" exercises "*significant authority* pursuant to the laws of the United States," *id.* at 126 (emphasis added). A position that carried with it no governmental authority (significant or otherwise) would not be an office for purposes of the Appointments Clause, and therefore, under the analysis of these opinions, would not be an office under the Emoluments Clause either. Accordingly, our conclusion is consistent with these opinions as well.

Finally, a small handful of this Office's opinions issued after 1982, do create some confusion as to what amounts to an "Office of Profit or Trust." Much of this confusion stems from a 1982 opinion, in which we abandoned this Office's longstanding position that an "Office of Profit or Trust" under the Emoluments Clause was synonymous with an "officer of the United States" under the Appointments Clause, relying primarily upon the differing purposes of the two clauses. *See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 157 (1982) (noting that the Appointments Clause "finds its roots in separation of powers principles" whereas "[t]he Emoluments Clause, on the other

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[8] *See, e.g.*, Memorandum for Laurence H. Silberman, Deputy Attorney General, from Mary C. Lawton, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Ability of Intermittent Consultant to United States to Hold Similar Position under Foreign Government* at 4 (Aug. 7, 1974) (concluding that, because a part-time consultant "would not be an officer in the constitutional sense . . . . [t]he prohibitions of [the Emoluments Clause] would not apply to him"); Memorandum for Peter Strauss, General Counsel, Nuclear Regulatory Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 2 n.1 (July 26, 1976) (reading "the term 'Office' as it appears in [the Emoluments Clause] . . . *in pari materia* with the term 'Officers' as it appears in Art. II, § 2 [the Appointments Clause]"); Memorandum for Dudley H. Chapman, Associate Counsel to the President, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of a Foreign National to the National Voluntary Service Advisory Council* (May 10, 1974); *Offices of Trust*, 15 Op. Att'y Gen. 187 (1877); *Foreign Diplomatic Commission*, 13 Op. Att'y Gen. 537 (1871); *Delivery of an Insignia from the German Emperor to a Clerk in the Post-Office Department*, 27 Op. Att'y Gen. 219 (1909); *Field Assistant on the Geological Survey—Acceptance of an Order from the King of Sweden*, 28 Op. Att'y Gen. 598 (1911); Memorandum for S.A. Andretta, Administrative Assistant Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government* (Oct. 4, 1954). *See also Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 90 & n.2 (1987) (relying upon pre-1982 opinion equating "Office of Profit or Trust" with "Officer of the United States" under the Appointments Clause) (citing 27 Op. Att'y Gen. 219 (1909)).

hand, is designed 'to exclude corruption and foreign influence'").[9] In the 1982 opinion and on three subsequent occasions we suggested that individuals with access to sensitive, national security-related information held "Office[s] of Profit or Trust" under the Emoluments Clause, without further analyzing the extent of governmental authority exercised by these federal employees.[10] Because these opinions did not analyze the extent of the governmental authority exercised by these federal employees, they could be taken to suggest that such analysis was not necessary to determining whether or not these individuals held an "Office of Profit or Trust."

This is not, however, how we understand these opinions. Rather, it is at least arguable that the authority to control and safeguard classified information does amount to the exercise of governmental authority sufficient to render employment with the federal government a public "office." Such a conclusion, for example, finds some support in the Supreme Court's *Hartwell* decision, wherein the Court held that a clerk in the Treasury Department "charged with the safe-keeping of public money" was a "public officer" within the meaning of a federal anti-embezzlement statute, *Hartwell*, 73 U.S. at 393, noting that he "was appointed by the head of a department within the meaning of [the Appointments Clause]," *id.* at 393-94 & n.9. *See also id.* at 394 (describing the clerk as a "subordinate officer[]"). By analogy, it could be argued that a federal government employee charged with safeguarding sensitive national security-related information would likewise be a public officer charged with the exercise of some governmental authority. *See, e.g.*, Exec. Order No. 12958, as amended, §§ 4.1-4.3 (procedures for

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[9] The 1982 opinion also stated that the "language . . . of the two provisions [is] significantly different" and suggested that all federal employees held an "Office of Profit or Trust" under the Emoluments Clause. *Id.* at 157-58. That opinion, however, undertook no analysis of the text of either the Appointments Clause or the Emoluments Clause, and we have since retreated from the suggestion that all federal employees held an "Office of Profit or Trust." *See, e.g.*, *Advisory Committee on International Economic Policy*, *supra* (some special government employees do not hold an "Office of Profit or Trust"); *Application of Emoluments Clause to "Representative" Members of Advisory Committees*, *supra* (same); *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 99 (June 3, 1986) (noting that although "this Office expressed the view in 1982 that the Emoluments Clause applies to all government employees, . . . the clause need not be read so broadly to resolve the matter at hand").

[10] *See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. at 157-158 (Nuclear Regulatory Commission employee "involve[d] [in] the [NRC's] assessment of operating [nuclear] reactors," "a field where . . . secrecy is pervasive"); *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 99 (June 3, 1986) (part-time Nuclear Regulatory Commission employee who "is furnish[ed] [by the NRC] with various materials and documentation," whose position "requires a security clearance," and who "may develop or have access to sensitive and important, perhaps classified, information"); Letter for James A. Fitzgerald, Assistant General Counsel, United States Nuclear Regulatory Commission, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (June 3, 1986) (among other things, fact that employee has access to classified information indicates that he holds an office of profit or trust); Memorandum for James H. Thessin, Assistant Legal Adviser for Management, United States Department of State, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel at 3 (Aug. 29, 1988) (civilian aide to the Secretary of the Army has "access to classified information, and receive[s] a 'security orientation concerning . . . responsibilities in receiving, handling, and protecting classified information").

safeguarding classified information); 32 C.F.R. § 2003.20 (2003) (all personnel granted access to classified information must sign nondisclosure agreement acknowledging that "all classified information . . . [subject to] th[e] Agreement is now and will remain the property of . . . the United States Government"); *cf. Snepp v. United States*, 444 U.S. 507, 510, 512 (1980) (a CIA agent's access to sensitive information imposed upon him a "fiduciary obligation" to safeguard that information, noting that the unauthorized disclosure of such information "impairs the CIA's ability to perform its statutory duties"). In this regard, it is noteworthy that our opinion concluding that membership on the Advisory Committee on International Economic Policy was not an "Office of Profit or Trust" expressly relied on the fact that the members "[did] not have access to classified information." *Advisory Committee on International Policy*, 20 Op. O.L.C. at 123. In the end, however, we need not definitively resolve whether these four opinions reached the correct result, for as we have explained, a member of the President's Bioethics Council does not have access to classified information and does not otherwise exercise any governmental authority.

* * *

Accordingly, we conclude that membership on the President's Bioethics Council, a purely advisory position without access to classified information, is not an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause.

NOEL J. FRANCISCO
Deputy Assistant Attorney General
Office of Legal Counsel

WHITE PAPER

APPLICATION OF THE EMOLUMENTS CLAUSE TO DoD CIVILIAN EMPLOYEES AND MILITARY PERSONNEL

INTRODUCTION

In 1787, the Founding Fathers, concerned about the possibility of undue influence caused by foreign governments providing gifts to United States ambassadors, included a provision in the U.S. Constitution that prohibits Federal personnel from accepting compensated positions with a foreign state or from accepting any items of value -- such as travel and gifts -- from a foreign government, except as authorized by Congress. This little known provision, the "Emoluments Clause," is still in effect today and applies to Federal civilian employees and active-duty military personnel. It also applies to retired military officers and enlisted personnel from the active and reserve components, including military officers, enlisted retirees and retired Reservists. Ethics counselors advising DoD personnel need to understand the Emoluments Clause, especially when advising retiring military personnel.

This paper explains how the U.S. Constitution's Emoluments Clause applies to DoD personnel. Specifically, the paper: (1) introduces the Emoluments Clause; (2) describes the categories of DoD employees to which the Clause applies; (3) identifies common payments subject to the Emoluments Clause; (4) summarizes the types of entities that are considered "foreign states"; (5) outlines the requirement and process for receiving advance approval before accepting an emolument from a foreign government; (6) describes the penalty for violating the Emoluments Clause, along with the debt collection procedures that are followed in situations of noncompliance; and (7) describes the waiver process and appeal rights for situations where Federal personnel may have unwittingly accepted an emolument without prior approval. Finally, the paper explores several related issues that may arise once an employee obtains consent to receive an emolument.

DISCUSSION

I. The Emoluments Clause, U. S. Constitution

The Emoluments Clause, U.S. Constitution, Art. I § 9, cl. 8 states:

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

Without the consent of Congress, an individual who holds an "Office of Profit or Trust"[1] in the Government may not accept a compensated position (an "emolument") from a foreign state unless Congressional consent is obtained. When Congressional consent is obtained, no violation of the Constitution occurs.

"Emoluments" is defined as "the profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private", except as authorized by Congress.[2] Thus, for example compensation[3] in the form of honoraria, travel expenses, household goods shipments at employer's expense, housing allowances, and gifts from a foreign state, except as authorized by Congress, are considered emoluments. As a result, most federal personnel, including retired military personnel, cannot accept outside compensated employment with, or receive gifts in excess of the minimal value from, a foreign government.[4]

Significantly, the Constitution provides an exception to this absolute ban on receipt of foreign gifts by authorizing Congress to consent to certain activities, gifts or honors through legislation. An example of Congressional consent is set forth in the Foreign Gifts and Decorations Act[5]. This statute permits all Federal personnel[6] to accept certain gifts from a foreign government: (1) a gift of "minimal value" or less (as of publication date, minimal value is $375); (2) travel paid for by a foreign government, provided that none of the travel takes place

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[1] See *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 158, February 24, 1982 (see footnote 4, *infra*)

[2] Black's Law Dictionary, 2nd Edition.

[3] "Emolument" has been interpreted to include compensation for employment. See, *e.g.*, 40 Op. Atty. Gen. 513 (1947). DoD Financial Management Regulation (FMR) Vol. 7B, Ch. 5, 050304, at pp. 5-6 defines "compensation."

[4] See *footnote 4, infra.*

[5] 5 U.S.C. § 7342

[6] Note that 5 U.S.C. § 7342 covers all civilian appointees appointed under 5 U.S.C § 2105 and all members of the uniformed services. See 6 Op. O.L.C. 156, 157-58 (1982) (accepting Congress' assumption that the Emoluments Clause applies to "any employee" who takes a gift from a foreign government). See discussion at II.

leaving from or coming back to the United States;[7] (3) meals provided by a foreign government; and (4) lodging provided by a foreign government overseas.[8]

Congress' consent is also set forth at 37 U.S.C. § 908, "Employment of Reserves and Retired Members by Foreign Governments." Retired members of the uniformed services and reservists may accept compensated civil employment from a foreign government if they obtain advance approval from both the Service and the Secretary of State.

Congress also provided statutory consent for retired military members of the armed forces to accept employment by, or hold an office in, the military forces of a newly democratic nation[9] provided advance approval is obtained.[10]

Is An Honorific Title an Emolument?

DoD personnel may accept an "honorific" title from a foreign government provided: (i) he or she has no duties that must be performed for the foreign government that are connected to the title and (ii) he or she obtains advance approval to accept the honorific title from the head of the component consistent with DoD Directive 1005.13 . Provided these conditions are met, then receipt of the honorific tile would not be considered a violation of the Emoluments Clause to the Constitution. For example, a DoD employee was offered the title of Honorary member of the Department of the Army for Bolivia. The employee is not from Bolivia, and did not perform any work for the Bolivian government. In this instance, the employee may accept the honorific title provided he or she receives advance approval from the head of the component.

II. Who is Covered by the Emoluments Clause?

Only those persons holding an "Office of Profit or Trust" under the United States are subject to the Constitution's Emoluments Clause.

Civilian Employees

The Department of Justice's Office of Legal Counsel (OLC) has opined that the term "Office of Profit or Trust" includes all full-time Federal employees.[11] It further concluded that the problem of divided loyalties can arise at any management level in the Government. Indeed

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[7] In other words, travel expenses may be paid by a foreign state only for travel which originates and ends outside of the U.S.

[8] See 5 U.S.C. § 7342.

[9] (10 U.S.C. § 1060)

[10] (See *infra Section IV(d))*

[11] See 6 Op. O.L.C., 156, 158 (1982)

OLC pointed out that Congress presumes that the Emoluments Clause applies to all Federal personnel because it enacted the Foreign Gifts and Decorations Act which applies to all Federal personnel in the Federal Government.[12] At DoD, this includes all civilian appointees.

Military Personnel

Like their civilian counterparts, **active-duty** military personnel (officers and enlisted members) hold an "Office of Profit or Trust", and are therefore subject to the Emoluments Clause.[13]

Significantly, **retired** regular military officers are also subject to the Emoluments Clause because they are subject to recall, and, therefore, hold an "Office of Profit or Trust" under the Emoluments Clause.[14] **Retired** regular military enlisted personnel are subject to the Emoluments Clause for the same reason as **retired** regular military officers.[15] Finally, reservists are also subject to the Emoluments Clause, even after reservists complete the requisite number of years to be eligible for retired pay and are transferred to inactive status.[16]

III. Types of Employment That May Involve an "Emolument": Traps for the Unwary

As noted above, an emolument includes compensation or other items of value. Whereas foreign travel, meals and lodging may present straightforward issues under the Emoluments Clause, other situations are less obvious, especially where the retired military member has not personally provided representational services to a foreign government. There are several types of scenarios in which an employee will be deemed to have received an "emolument" where the payment is indirectly received from a foreign state. Such scenarios include consulting, law, or

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[12] Id.

[13] See generally *Applicability of the Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 18 (March 1, 1994).

[14] See *Applicability of 18 U.S.C. § 219 to Retired Foreign Service Officers*, 11 Op. O.L.C. 67 (1987), footnotes 5 and 6.

[15] See *Comptroller General to the Secretary of the Navy*, 44 Comp. Gen. 227 (1964).

[16] 37 U.S.C. § 908. This statute requires advance approval before accepting an emolument from a foreign government "by members of a reserve component of the armed forces". Other military members that may obtain advance approval under this statute include "retired members of the uniformed services." Note that active duty military members may not obtain advance approval under this statute.

other partnership distributions, as well as payments (such as salary) from domestic professional corporations. Federal personnel, especially retired military personnel, need to be aware of these potential traps for the unwary.

Partnership Distributions

Query: Does a retired military officer violate the Emoluments Clause by becoming a partner in a large U.S. law firm and accepting pro rata partnership profits that include representation of foreign government clients? Yes. OLC has opined that this would violate the Emoluments Clause.

Accepting a share of partnership profits is considered an emolument where some portion of the share is derived from the partnership's representation of a foreign government.[17] OLC has determined that because the partnership would "be a conduit" for that foreign government payment, a portion of the recipient's income could be attributed to a foreign government. This is so even if the individual subject to the Emoluments Clause did not actually provide services to the foreign government. In other words, a distribution from a partnership that includes some proportionate share of revenues generated from the partnership's foreign government clients is an emolument.[18] We believe that this same rationale applies to distributions from limited liability corporations although this view has not been officially sanctioned by the Department of Justice

Payments from a Professional Corporation

The Emoluments Clause also applies to payments received by a professional corporation for services rendered to a foreign government. The Comptroller General found that retired Marine Corps lawyers, who were "of counsel" to a law firm that had been formed as a professional corporation (PC), were subject to the Clause if they represented a foreign government.[19] The Comptroller General concluded that the law firm's incorporation did not shield these former officers from the applicability of the Clause. While the monies from the foreign government would be paid to the PC, these attorneys would benefit from the payments. The opinion states that "where equity dictates, the corporate entity will be disregarded, for example, where there is such interest and ownership that the separate personalities of the corporation and its shareholders no longer exist."[20] In addition, the Comptroller General pointed out that the attorneys' loyalty was to their client directly, so the structure of the professional corporation did not shield the

[17] *Applicability of the Emoluments Clause to Non-Government Members of the Administrative Conference of the United States (ACUS),* 17 Op. O.L.C. 114, at 120 (October 28, 1993).
[18] Id.

[19] *Matter of Retired Marine Corps Officers*, Comp. Gen. B-217096 (Mar. 11, 1985) (1985 Comp. Gen. Lexis 1483).

[20] Id.

attorneys from the Emoluments Clause. The retired Marine Corps lawyers were required to obtain consent under 37 U.S.C. § 908 if they wanted to represent the foreign government.

IV. What is a "Foreign State"?

Except as authorized by Congress, the Emoluments Clause prohibits covered personnel from accepting a position with, or an emolument from, any king, prince, or "foreign state." A foreign state includes any organization that is owned or operated by a foreign government, including federal, regional and local level governments. Both OLC and the Comptroller General have opined that the term "foreign state" in the Emoluments Clause applies to both national governments and to sub-national governmental units.[21] Thus, foreign governmental entities, such as commercial entities owned or controlled by a foreign government and foreign public universities controlled by a foreign government, can be considered instrumentalities of "foreign states" for purposes of the Emoluments Clause.

Foreign Corporation

In general, business corporations owned or controlled by foreign governments are considered part of a foreign state for purposes of the Emoluments Clause.[22] By contrast, the Emoluments Clause does not apply to privately-owned foreign corporations.

OLC has articulated several factors to consider when assessing whether a foreign entity should be deemed a "foreign state" for purposes of the Emoluments Clause.[23]

These factors include: (1) whether a foreign government has an active role in the management of the decision–making entity; (2) whether a foreign government, as opposed to a private

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[21] See *Memorandum Opinion For Assistant General Counsel for the Department of Commerce from Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Goteborg Award for Sustainable Development* ("Goteborg Award") 34 Op. O.L.C. at 3 (Oct. 6, 2010); *Foreign Public Universities*, 18 Op. O.L.C. 13, 19 (noting that "foreign state" should include any political governing entity within that foreign state)(March 1, 1994); Major James D. Dunn, B-251084, 1993 WL 426335, at *3 (Comp. Gen. Oct. 12, 1993).

[22] *Applicability of the Emoluments Clause to Non-Government Members of the American Conference of the United States (ACUS),* 17 Op. O.L.C. 114, at 121 (1993).

[23] See *Goteborg Award*, 34 Op. O.L.C. at 3 (October 6, 2010) (neither the Emoluments Clause nor the Foreign Gifts and Decorations Act barred an employee of NOAA from accepting the 2010 Goteborg Award on Sustainable Development because the award was not from a king, prince, or foreign state).

intermediary, makes the ultimate decision regarding the gift or emolument; and (3) whether a foreign government is a substantial source of funding for the entity.[24]

DoD Financial Management Regulation: What Constitutes Foreign Control

One way to show foreign control is through an employer-employee relationship. At DoD, to determine whether an employer-employee relationship exists between the retired military member and a foreign government, DoD relies upon the DoD Financial Management Regulation 7000.14-R (DoD FMR) which implements the Clause. DoD FMR 7000.14-R provides that the employment analysis will follow the common law rules of agency. The analysis involves the evaluation of the following factors:

> the selection and engagement of the employee;
> the payment of wages;
> the power to discharge;
> the power to control the employee's conduct; and
> the relationship of the work to the employer's business, whether the work is a part of the regular business of the employer.

DoD FMR Vol. 7B 5-5 to 5-6. The regulation further provides that the "decisive test" is whether the employer has "the right to control and direct the employee in the performance of his or her work and in the manner in which the work is to be done." [25]

a. Foreign Public University

Payments from a foreign public university influenced or controlled by a foreign government may be a prohibited emolument.[26] OLC opinions addressing whether the Emolument Clause extends to foreign public universities have come to contrary conclusions depending on the facts. The key for OLC has been the extent of influence or control by the foreign government. OLC reasoned that improper "influence" occurs when the foreign government, and not the university, is making the payment. OLC explained that "control" is based on whether the foreign government selects the faculty members. OLC enumerated two factors to be considered in determining when a foreign government influences or controls a university: 1) whether a foreign government, as opposed to a private intermediary, makes the ultimate decision regarding the gift or emolument; and 2) whether a foreign government has an

[24] *Goteborg Award*, p. 3.

[25] DoD FMR Vol. 7B 5-5 to 5-6.

[26] *ACUS*, 17 Op. O.L.C. 114, at 121-22.

active role in the management of the entity, such as choosing the faculty or the Board of Governors.[27]

By contrast, for example, OLC opined that two NASA scientists could teach at the University of Canada without violating the Emoluments Clause. OLC concluded that evidence clearly demonstrated that the University acted independently from the Canadian Government, and the University selected its own faculty members independent from the Canadian government.[28] Similarly, a Federal officer serving as a consultant at Harvard on a project funded by the Government of Indonesia did not violate the Clause because the Indonesian Government had no veto power over Harvard's selection of consultants. In other words, Indonesia funded a Harvard study. Harvard selected a Federal employee who also was a consultant to Harvard. Harvard determined which consultant would participate in the project. The Indonesian Government never took part in the selection or rejection of the consultant; rather, it just provided funding to Harvard for the study. Because Harvard selected the Federal employee, and the Indonesian Government did not select or reject whom Harvard offered, the Federal employee was not considered to have violated the Emoluments Clause.[29] In sum, the foreign public university is generally considered part of a foreign state unless there is evidence that the university is independent of the foreign government on decisions regarding the terms and conditions of faculty appointments, and it is clear that the gift given is from the university and not from the foreign government.

b. Consultant to a Foreign Government

OLC also focuses on "control" for purposes of determining if an employee is subject to the Clause when he or she consults for a foreign government. Ultimate control is exercised when a foreign government selects the consultant. For example, the Government of Mexico specifically wanted a Nuclear Regulatory Commission (NRC) employee to serve as a consultant on a project.[30] Knowing that paying him directly could be a problem, the Mexican Government hired a consulting firm, and requested that the Federal employee be hired by the consulting firm for the sole purpose of providing consulting services to the Mexican Government. OLC concluded that, in this instance, the "ultimate control, including selection of personnel, remains with the Mexican government. That is because the principal reason for the Mexican government

[27] *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, December 7, 2009 ("*Nobel*").

[28] *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities ("Public University")*, 18 Op. O.L.C. 13 (1994)

[29] Nobel at page 9.

[30] 6 Op. O.L.C 156 (1982).

to hire the consulting firm was the selection of the Nuclear Regulatory Commission's employee." Therefore, OLC concluded that the Nuclear Regulatory Commission employee would violate the Emoluments Clause if he served as a consultant in this circumstance.[31] Note that Congress has not provided the option of advance approval for the career NRC employee.

By contrast, as discussed above, the Indonesian government paid Harvard for consulting services without selecting or rejecting any consultant Harvard assigned to the project. Harvard assigned the project to the Federal employee who happened also to be a consultant to Harvard. Because the Indonesian government did not select or reject the consultant who provided consulting services to Harvard, OLC concluded that the Federal employee did not violate the Clause because the Indonesian government had no veto power over Harvard's selection of consultants.[32]

c. International Organizations

OLC has concluded that the Emoluments Clause does not apply to emoluments from international organizations such as the World Bank, the United Nations, and other entities in which the United States is a member because those organizations are not deemed to be "foreign governments."[33] OLC reached that conclusion by making four points. First, the United States could not be a member of a "foreign state." Second the organization in which the United States is a member plays an important role in carrying out United States foreign policy. Third, the United States actually participates in the governance of the organization and undertakes a leadership role in its decision-making. Finally, OLC reasoned that because Congress approved participation by the United States in the World Bank, employment of government employees by the organization would not directly raise the concerns about divided loyalty that the Emoluments Clause was designed to address. By contrast, OLC advised that the Emoluments Clause would prohibit employees from receiving a salary or a gift from an international organization in which the U.S. is not a member because that organization could be considered a foreign state when none of the four points above would be applicable and there is evidence of foreign government control.

d. Newly Democratic Nations

Finally, a retired military member may be able to work for a "newly democratic nation" without violating the Emoluments Clause, but must comply with 10 U.S.C. § 1060, which also

[31] 6 Op.O.L.C. 156, 158 (1982).

[32] Nobel at 9.

[33] Memorandum for John E. Huerta, General Counsel, Smithsonian Institution. from Daniel Koffsky, Acting Assistant Attorney General, May 24, 2001.

requires advance approval from the Service Secretary and the Secretary of State. This statute does not extend to non-retired Reservists.[34]

V. Getting Advance Approval for an Emolument from a Foreign Government

If current personnel violate the Emoluments Clause by accepting a salary, payment or gift in excess of the minimal value from a foreign state, they would be subject to debt collection procedures. That is because the Congress has not consented to current employees' accepting such foreign payments or gifts. By contrast, Congress has consented to permitting retired military personnel to accept foreign state salary, payment or gifts in excess of the minimal value provided that advance approval is obtained from the Service Secretary and the Department of State.[35]

The process for obtaining advance approval is slightly different for each of the Services and requires contacting specific components within each Service as follows:

a. Air Force

The Department of the Air Force Instruction, AFI 36-2913, Request for Approval of Foreign Government Employment (19 Nov. 2003), provides guidance and explicitly requires advance approval from the Secretary of the Air Force and the Secretary of State for military retirees to accept an emolument. To request advance approval, contact:

AFPC Directorate of Airmen and Family Care
Airmen and Family Readiness Division
550 C Street West
Joint Base San Antonio-Randolph, Texas 78150-4713
Telephone: COM 210-565-2273 or DSN 665-2273
Mail application to afpc.retiree@us.af.mil
Questions: afpc.retiree@us.af.mil

b. Army

An Army regulation[36]governs the need for and process by which a military retiree should obtain advance approval before working for a foreign government.[37]

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[34] See 0505 of Volume 7B, of Chapter 5, http://www.defenselink.mil/comptroller/fmr/07b/index.html (last viewed on September 10, 2012).

[35] 37 U.S.C. 908.

[36] AR 600-291.

[37] See http://www.apd.army.mil/pdffiles/r600_291.pdf(last viewed on September 10, 2012).

To request advance approval, contact:

U.S. Army Human Resources Command
ATTN: AHRC-PDR
1600 Spearhead Division Avenue
Department 420
Fort Knox, KY 40122-5402
Telephone: 502-613-8957/8983

c. Navy

The Department of the Navy has no pertinent instruction. However, in 1981, then-Navy Secretary Lehman delegated authority to the Chief of Naval Personnel (CNP) to act on requests from Navy retirees to accept emoluments from foreign governments. The delegation letter provides some guidance on how the Navy will process requests. When the Navy receives an inquiry, it provides a questionnaire to the requesting individual. Then, after reviewing the request, Navy counsel makes a recommendation to CNP. If CNP approves, the Navy transmits the matter to the State Department (Political/Military) for a final determination. To seek advance approval, a retired Navy member should submit a written request to:

The Chief of Naval Personnel, Office of Legal Counsel (Pers-OOL)
Naval Support Facility Arlington
701 South Courthouse Road, Room 4T035
Arlington, VA 22204
(703) 604-0443

The request should contain a full description of the contemplated employment and the nature and extent of the involvement of the foreign government.

d. **Marines**

Like the Navy, the Marine Corps has no specific instruction providing guidance on receipt of emoluments from foreign governments, but in keeping with the Navy guidance, the retired Marine is well-served by providing a full description of the contemplated employment and the nature and extent of the involvement of the foreign government. A retired Marine Corps member seeking advance approval for a payment from a foreign government should write to:

Headquarters United States Marine Corps
Manpower & Reserve Affairs
Manpower Management Division
Separation and Retirement Branch
Retired Services and Pay (MMSR-6)

3280 Russell Road
Quantico, VA 22134

VI. Government Remedy for Failure to Obtain Advance Consent

The Government's remedy when an employee accepts an emolument from a foreign state without consent varies depending upon the circumstances.

a. Remedies

Generally, compensation received from a foreign government without advance approval is deemed an "erroneous payment," a payment that is not in compliance with applicable laws and regulations. Such an erroneous payment creates a debt in favor of the Government. Specifically, the DoD Financial Management Regulation[38] explains how the Emoluments Clause applies to retired military personnel. "[I]f the compensation received from a foreign government without approval is considered received by the retired member for the United States, a debt in favor of the Federal Government is created which is to be collected by withholding from retired pay."[39]

The Comptroller General of the United States has issued opinions regarding debt collection when an employee accepts an emolument from a foreign government. For example, if the employee who accepts an emolument from a foreign government without consent is a retired military member, the Comptroller found that the Government can suspend the member's retirement pay up to the amount of the foreign salary (or other emoluments) received if the foreign salary is less than or equal to his retirement pay.[40] By contrast, when the compensation earned during the period of unauthorized employment with a foreign state exceeds the amount of retired pay accrued during the same period, only the retired pay amount may be collected during the period of the violation.[41]

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[38] (FMR) Volume 7B, Chapter 5 (June 2011).

[39] FMR, Chapter 5, Section 0503.

[40] 65 Comp. Gen. 382 (1986, affirmed in 1990).

[41] See Comp. Gen. Op., B-193562 (the penalty imposed on a retired officer who violated the Emoluments Clause was suspension of military pay at the time the violation occurred, but not the payments from the foreign government). See also Comp.Gen. Op., B-251084 (applying the same remedy). Also, see the DoD Financial Management Regulation (FMR), Vol. 7B, Ch. 13. Note that loss of citizenship may occur if an oath is taken to uphold allegiance to the foreign state by a Federal employee (Coast Guard employee agreed to teach a course in Tasmania while still a US employee on leave, but did not take the foreign oath so did not lose citizenship). Comp Gen B-1542132 (December 28, 1964) and DoD FMR Vol. 7B, Ch. 6

In one particular case, a retired Marine major went to work for an American corporation, Frank E. Basil, Inc., where he served as an instructor for the Royal Saudi Naval Forces by way of an employment agreement with Frank E. Basil, Inc. Even though the retired officer was working for an American corporation, and had an employment agreement with the corporation, the Marine Corps found that the Saudi Arabian Government could control and direct him and then pay him for his services. The agreement specifically stated that the Saudi Arabian government may direct the employee. The Marine Corps suspended the retired member's retirement pay. The Comptroller General agreed with the Marine Corps view that the American corporation was just a shell or sham, and that the Saudi government's payments to the shell corporation went directly to the former retiree for work he performed on behalf of the Saudis. The Comptroller General advised the retired member to seek approval under 37 U.S.C. § 908 if he desired to have his retirement pay resumed.[42]

Similarly, in another case,[43] a regular retired officer was employed and paid by a U.S. corporation, which then assigned him to work for Israeli Aircraft Industries (IAI), an instrumentality of the Government of Israel. It was shown that the U.S. corporation was, in effect, merely an employment agency that procured personnel for IAI. The Comptroller General concluded that the officer and IAI had an employee-employer relationship and that IAI had the right to exercise supervision and control over the retired military officer. The Comptroller General opined that the retired officer's retired pay should be withheld until such time as the withholdings equaled the amount of foreign salary received since the foreign salary was less than the retired military pay.

b. DoD Debt Collection Procedures

In 2016, the Department consolidated its debt collection procedures in Volume 16, Chapter 1, in the Financial Management Regulation, section 10203, and established the Debt Collection Office (DCO) stating as follows:

> 1. DCO refers to the office or individuals at the DoD Component level that are primarily responsible for debt establishment and collection for the Component. DCOs that manage the debt collection for the Component are typically located in the following areas: AROs [Accounts Receivable Offices], military and civilian payroll offices (located both within and outside of the Defense Finance and Accounting Service (DFAS)), Debt Management Office (DMO), Debt and Claims Management Office (DCMO), contracting offices, disbursing offices, or the Foreign Debt Management Office. DCO also refers to any other organizational element within a DoD Component that performs debt management/collection activities.

[42] 65 Comp. Gen. 382 (1986).

[43] 53 Comp. Gen. 753 (1974).

2. After establishing a debt, the DCO is responsible for initial debt collection and due process procedures, including the issuance of debt notification letters that comply with all the requirements for debt collection under the FCCS. DCOs must ensure that all debts referred are valid and legally enforceable.[44]

VII. Waiver or Appeal of the Debt Collection Decision

a. Waivers

What if a retired military member did not know about the Emoluments Clause and has already accepted post-Government employment with a foreign-owned company? What if a retired military member asked for advice about an upcoming foreign trip but was misinformed by his ethics official? In these types of scenarios, an individual may seek a waiver of the debt resulting from the erroneous payment and, in some circumstances, a waiver may be granted. Good faith and ignorance of the law are not defenses.[45] However, equitable waiver of indebtedness may be granted in certain circumstances.

For example, the Comptroller General waived a debt where the retired military officer asked for prior approval to work for a foreign company that was an instrumentality of the foreign government, but he did not receive approval in a timely manner from the Air Force. In this case,[46] a retired Air Force major worked for an independent oil company, ARAMCO, in Saudi Arabia. When the major learned that the Saudi Arabian Government was preparing to nationalize his employer, ARAMCO, the Air Force major requested advance approval from the Air Force to perform work for the nationalized ARAMCO. At the time the major submitted his advance approval request, ARAMCO was yet to be nationalized.

Ultimately, while the major was waiting to hear from the Air Force, the Government of Saudi Arabia took over control of ARAMCO. The major then worked for the nationalized entity, ARAMCO. The major subsequently passed away, and the question was whether the estate was responsible for the Emoluments Clause debt. While the major never received advance approval during his lifetime to work for the nationalized ARAMCO, the major had responded each time the Air Force had questions about his application for advance approval. The Comptroller General held that the retired major had acted in good faith by seeking advance approval -- the Air Force had not given it, but was not withholding its approval. Concluding that a "waiver was in equity and in good conscience, and [the retired major] responded whenever Air

[44] http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_16.pdf, sections 10203, 04 and 05.

[45] Comp. Gen. Op. B-154213 (Dec. 28, 1964).

[46] *Matter of: Major Gilbert S. Sanders, U.S.A.F. (Retired) (Deceased) – Employment by a Federal Government*, Comp. Gen. B-231498 (June 21, 1989) (1989 WL 240844).

Force contacted him to complete the requisite form," the Comptroller General waived the debt pursuant to 10 U.S.C. § 2774 and the estate did not have an obligation to pay.

At DoD, DCO has authority to grant waivers for all or a portion of an individual's debt, including Emolument Clause debt, pursuant to Chapter 16, section 20505 (H). .

b. **Appeals**

A current or former DoD employee who wants to challenge the initial determination denying all or part of a waiver application may appeal the decision. Appeals for waivers of a debt created by receiving an emolument are governed by DoD Instruction 1340.23 (Feb. 14, 2006).

Final administrative appeals, pursuant to 31 U.S.C. § 3702, may be made to the Defense Office of Hearings and Appeals (DOHA) under its Claims Division pursuant to DoD Directive 1340.20 (July 14, 2003) and codified at 32 C.F.R. part 281. Detailed procedures for the settlement of claims are set forth in DoD Instruction 1340.21 (effective May 12, 2004) and codified at 32 C.F.R. part 282.

VIII. Other Issues to Consider

There are several other legal restrictions that a military retiree may face if he or she decides to do work for a foreign entity. These are not related to the Emoluments Clause but might be helpful to share during the post-government employment briefing. These include: registering as a foreign agent; representing a foreign government concerning an ongoing trade or treaty negotiation; enhanced representational restrictions for political appointees; and receiving representational funds earned from Government contracts by his or her new private employer.

1. An employee cannot act as an "agent of a foreign principal" as defined by the Foreign Agents Registration Act (FARA) (22 U.S.C. § 611) or as a "lobbyist" for a foreign entity required to register under the Lobbying Disclosure Act (LDA). The FARA ban prohibits representation of a foreign government or foreign political party before the United States Government as well as other activities conducted on behalf of foreign entities with respect to influencing the United States Government. Retired officers who represent a foreign government or foreign entity before the United States are required to register as foreign agents under FARA.[47]

[47] 28 C.F.R. § 5.2. The FARA Registration Unit, Criminal Division, Department of Justice, fara.public@usdoj.gov can provide further information.

2. For a period of 1 year after leaving Government service, former employees or officers may not knowingly represent, aid, or advise someone else on the basis of *covered information*, concerning any ongoing *trade or treaty negotiation* in which the employee participated personally and substantially in his last year of Government service. (18 U.S.C. § 207(b))

3. Retired officers who represent a foreign government or government-controlled entity may face post-employment restrictions under 18 U.S.C. § 207(f) because they cannot represent those entities before the Federal Government during their first year after retirement if the entity at issue is either a foreign government or it exercises control and sovereignty like a foreign government.[48]

4. Retired military officers who are employed by a representational entity (e.g., law, public relations, lobbying, advertising firms) that represents clients before the Executive or Judicial branches of the Federal Government and who are paid in the form of partnership shares based on those representations may violate 18 U.S.C. § 203 unless they accept their first year's compensation in the form of a straight salary.

CONCLUSION

The Emoluments Clause to the Constitution applies to all Federal personnel. The Clause prohibits receipt of foreign gifts unless Congress consents such as in the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342. For retired military personnel, the Emoluments Clause continues to apply to them because they are subject to recall. The Justice Department opinions referred to in this paper construe the Emoluments Clause broadly. Specifically, the Justice Department construes the Clause to include not only gifts of travel and food, but also payments such as proportionate profit-sharing. To avoid an Emoluments Clause problem resulting in suspension of retired pay, retired military personnel should seek advance consent through their respective Service consistent with 37 U.S.C. § 908. It is prudent for retired military personnel to obtain advance approval even when there is uncertainty about the Clause's applicability.

Finally, if a retired military member suspects that he or she has violated the Clause, but wants to continue to perform compensated work for a foreign state, he or she should expeditiously seek advance consent for future compensated work, and terminate current compensated employment with the foreign government until such approval is granted. This would be done to avoid increasing the amount of an erroneous payment.

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[48] See *Applicability of 18 U.S.C. 207(f) to Public Relations Activities Undertaken by a Foreign Corporation Controlled by a Foreign Government*, Op. O.L.C. (August 13, 2008).

THE OLC EMOLUMENTS CLAUSE JURISPRUDENCE IN THE EXECUTIVE BRANCH

Arthur H. Garrison, LP.D.[*]

The role of the Office of Legal Counsel (OLC) within the Department of Justice is to provide members of the Executive Brach and the President of the United States with legal guidance regarding the legality of proposed policies, actions, and legislation. The opinions of the OLC are dispositive within the executive branch. When President Trump was elected president, he held various domestic and international business interests and upon taking office was sued and it was claimed he was in violation of the foreign and domestic emoluments clauses. The OLC was not consulted on the question of whether President Trump could continue to receive payments through his businesses as president. This article proposes that had the OLC been asked it would have concluded that the president was in violation of both clauses to the extent that any profits and payments received were sourced from government entities, whether foreign or domestic.

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[*] Arthur Garrison is a professor of Criminal Justice at Kutztown University. Dr. Garrison received a B.A. from Kutztown University, M.S. from West Chester University, and a Doctor of Law and Policy from Northeastern University.

INTRODUCTION

The role of the Attorney General and the Office of Legal Counsel (OLC) is to provide the President and members of the executive branch with advice regarding the legality of proposed actions or proposed legislation.[1] The advice provided by the Attorney General and the OLC is considered binding and determinative on the executive branch.[2] The Emoluments Clause of Article II of the United States Constitution prohibits the President from receiving an emolument outside of his proscribed salary.[3] Subsequent to his election, Donald Trump has been sued in three separate cases in which it was asserted that he received emoluments outside of his proscribed salary and as a result violated the Emoluments Clause.[4]

The OLC has issued more than twenty opinions on the applicability and purpose of the Emoluments Clause and has defined each of its prohibitions and enforcement within the executive branch. The two emoluments clauses[5] of relevance to the executive branch are located in Article I and Article II of the Constitution: the first commonly referred to as the *Foreign Emoluments Clause* and the second as the *Domestic Emoluments Clause*. The majority of OLC opinions focus on the Foreign Emoluments Clause and this precedent provides a basis for defining the Domestic Emoluments Clause.

This Article was part of the Volume 22 Symposium presented by the University of Pennsylvania Journal of Constitutional Law in Fall 2020, in which it was proposed that the OLC has developed a significant body of law on the meaning and application of the Emoluments Clause and the OLC's jurisprudence on the clauses establishes that the purpose of the clauses has been to prevent undue influence or corruption of government officials.[6] The clauses are not concerned with the amount of the emolument that is received by the government official but the fact that it is received.[7] While the Constitution and OLC jurisprudence on the emolument clauses are clear that they apply to the President, the Constitution is not as clear on how or whether the clauses can be enforced in court, against a president who accepts an

1 *Infra* Part I.
2 *Id.*
3 *Infra* Part II.
4 *Id.*
5 The third clause refers to Congress. *See infra* note 27.
6 *Infra* Part II.
7 *Id.*

emolument, due to issues of standing.[8] This inability to establish standing to enforce the Emoluments Clause in court has led to the possible conclusion that the clauses cannot be enforced. Thus, the only possibility in changing this practical impossibility is for Congress to act and legislatively require the President to be covered by the clause and provide Congress, as a whole, and specifically individual members of Congress and/or private parties, with standing to assert the violation of the clause in court. Such legislation would also need to specifically provide for judicially enforceable remedies to presidential violation of the clause.

In Part I of this Article, a brief explanation of the purpose and significance of the OLC will be provided with a focus on why an opinion of the OLC matters within the executive branch. Part II will focus on the emoluments clauses as interpreted by the OLC. Part II will review the two types of emoluments and how they have been enforced within the executive branch including how they have been applied to past presidents. Part III will focus on the applicability of both clauses on the business activities of President Trump. Part III will conclude that the Foreign Emoluments Clause clearly applies to President Trump's international ventures and the Domestic Emoluments Clause applies to his domestic ventures with the caveat that source of these emoluments must originate from individual states or from agencies within those governments or foreign governments or from agencies within those governments. Neither clause affects or prohibits his financial endeavors or receipt of emoluments from private individuals or entities.

I. THE SIGNIFICANCE AND POWER OF THE ATTORNEY GENERAL AND OLC TO MAKE SURE THE LAW IS FAITHFULLY EXECUTED WITHIN THE EXECUTIVE BRANCH

The power of the United States Attorney General and the OLC to opine on what the law means within the executive branch is based on the interaction between the Article II power granted to the President, the creation of the Attorney General under the Judiciary Act of 1789, and the power of the President to request written advice from his executive departments under Article II. The President under Article II, "shall take Care that the Laws be faithfully executed"[9] and the Attorney General under the Judiciary Act of 1789, shall be

8 *Id.*

9 U.S. CONST. art. II, § 3.

> a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to *give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments*, and shall receive such compensation for his services as shall by law be provided.[10]

This statutory authorization of the Attorney General to advise the President and Cabinet supplemented Article II which authorizes the President to, "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices."[11]

One of the significant aspects of the office of the Attorney General is that of the original four cabinet officers, including the Secretary of State, Defense, and Treasury, the Attorney General was not created by a separate statute but was created within the statute that created the federal judiciary.[12] The creation of the Attorney General within the Judiciary Act of 1789 has provided support for the proposition that the office is considered a quasi-judicial office when the Attorney General is "giv[ing] his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments" and such opinions are binding within the executive branch.[13]

Subsequently to the passage of the Judiciary Act and almost a century and a half of opinions and growth of the office of Attorney General, President Woodrow Wilson formally recognized that the Attorney General was determinative regarding the meaning of the law within the executive branch in his Executive Order 2877, which he issued in 1918:

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10 Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (emphasis added). The Judiciary Act also created the office U.S. District Attorney, later changed to U.S. Attorney, in which, "there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court . . . ." *Id.*

11 U.S. CONST. art. II, § 2, cl. 1.

12 For general discussion on the history of the Attorney General, see Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. Rev. 217 (2013).

13 *Id.* at 230, 238 (citation omitted).

> Whereas, in order to avoid confusion in policies, duplication of effort, and conflicting interpretations of the law, unity of control in the administration of the legal affairs of the Federal Government is obviously essential, and has been so recognized by the acts of Congress creating and regulating the Department of Justice;
>
> Now, therefore, I, Woodrow Wilson, President of the United States, by virtue of the authority vested in me as Chief Executive and by the act "authorizing the President to coordinate or consolidate executive bureaus, agencies and offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government," approved May 20, 1918, do hereby order that all law officers of the Government . . . . shall "exercise their functions under the supervision and control of the head of the Department of Justice," in like manner as is now provided by law with respect to the Solicitors for the principal Executive Departments and similar officers; that all litigation in which the United States or any Department, executive bureau, agency or office thereof, are engaged shall be conducted under the supervision and control of the head of the Department of Justice; and that *any opinion or ruling by the Attorney General upon any question of law arising in any Department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus, agencies or offices therewith concerned*. This Order shall not be construed as affecting the jurisdiction exercised under authority of existing law by the Comptroller of the Treasury and the Judge Advocates General of the Army and Navy.[14]

This executive order was affirmed and continued by the Executive Order 6166 issued by President Franklin Delano Roosevelt on June 10, 1933, which placed all department solicitors, U.S. Attorneys, and U.S. Marshalls under the direction of the Justice Department.[15] To further facilitate the authority of the Attorney General Congress created the position Assistant Solicitor General in 1933[16] as head of the Justice Department Civil Division which was tasked with preparing legal opinions from the Attorney General and reviewing declarations that would be issued by the President.[17] Under Executive Orders 6247 (on August 10, 1933) and 7298 (February 18, 1936) issued by President Franklin Roosevelt, all proposed executive orders and proclamations were to be submitted to the Assistant Solicitor General for review before final

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14 Exec. Order No. 2877 (May 31, 1918) (emphasis added).

15 Exec. Order No. 6166, § 5 (June 10, 1933). This executive order provided support for legislation that placed all U.S. Attorneys and U.S. Marshalls under the Attorney General. *See also* An Act Concerning the Attorney-General and the Attorneys and Marshalls of the Several Districts, ch. 37, § 1, 2 Stat. 285 (1861) ("[T]he Attorney General of the United States be . . . charged with the general superintendence and direction of the attorneys and marshals of all the districts in the United States . . . ."); An Act to Authorize the Commencement and Conduct of Legal Proceedings Under the Direction of the Attorney General, ch. 3935, 34 Stat. 816 (1906) (codified as amended at 28 U.S.C. § 515(a) (2006)) (explaining the authority of the Attorney General).

16 Independent Offices Appropriations Act of 1934, ch. 101, § 16, 48 Stat. 283, 307–08 (1933).

17 Garrison, *supra* note 12, at 234.

consideration by the Attorney General for publication by the President.[18] The Civil Division was subsequently disbanded and the Assistant Solicitor General was placed directly under the supervision of the Attorney General under the Office of the Assistant Solicitor General.[19] In 1950, in compliance with the Reorganization Act of 1949, the Office of the Assistant Solicitor General was eliminated as part of the 1950 Justice Department reorganization plan and a new office, the Executive Adjudications Division under an Assistant Attorney General, was created, which in turn was renamed the Officer of Legal Counsel in 1953.[20]

The daily operation of the power of the Attorney General to provide legal opinions to the President and other executive offices was transferred from the Attorney General to the Assistant Solicitor General in 1933 which was transferred to the OLC in 1953.[21] While the final authority to deal with disputes of law remains with the Attorney General, in 1979 President Carter issued Executive Order 12146 which required any dispute between two or more executive agencies to be submitted to the Attorney General, and the OLC has subsequently determined that the executive order places a requirement for final adjudication by the OLC and that the OLC determination, exercising the authority of the Attorney General, is determinative and final.[22]

II. THE EMOLUMENTS CLAUSES AND THE OLC APPLICATION WITHIN THE EXECUTIVE BRANCH

In America, the concern over corrupt enrichment of public officers predates the Constitution with the writing of the Articles of Confederation on

18 *See* Exec. Order No. 7298 (Feb. 18, 1936) (establishing the order of review for executive orders); Exec. Order No. 6247 (Aug. 10, 1933) (superseded by Exec. Order No. 7298) (establishing the old process for executive orders); 1937 ATT'Y GEN. ANN. REP. 125 (describing the new process for executive order submission and review); 1936 ATT'Y. GEN. ANN. REP. 119 (describing the President's Executive Order establishing the new executive order review process).

19 Garrison, *supra* note 12, at 234.

20 *Id.* at 234–35.

21 Reorganization Act of 1949, ch. 226, 63 Stat. 203, 204 (codified as amended at 5 U.S.C. §§ 901–12 (2006)); 1953 ATT'Y. GEN. ANN. REP. 168; 1952 ATT'Y. GEN. ANN. REP. 148; 1935 ATT'Y. GEN. ANN. REP. 129; 1934 ATT'Y. GEN. ANN. REP. 119.

22 *See* Exec. Order No. 12146, 44 Fed. Reg. 42657 (July 18, 1979) (describing the dispute resolution process); *see also* Application of the Davis-Bacon Act to Urban Development Projects That Receive Partial Federal Funding, 11 Op. O.L.C. 92, 92 (1987) ("This question arose pursuant to a dispute between the Secretary of Labor and the Secretary of Housing and Urban Development . . . . The Office of Legal Counsel has jurisdiction to resolve the dispute pursuant to Executive Order No. 12146.").

November 15, 1777 and its formal adoption on March 1, 1781, in which it made clear

> nor shall any person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit, receives any salary, fees or emolument of any kind . . . [N]or shall any person holding any office of profit or trust under the united states, or any of them, accept any of present, emolument, office or title of any kind whatever from any king, prince or foreign State; nor shall the united states in congress assembled, or any of them, grant any title of nobility.[23]

Note that "emolument of any kind" is a separate category of enrichment, listed alongside salary or fees, and it encompasses "any kind" of enrichment.

In his famous *Pacificus-Helvidius* debate in the summer and fall of 1793 with Alexander Hamilton writing as *Pacificus* defending President Washington's declaration of neutrality during the war between France and Great Britain and asserting President Washington had the authority to unilaterally declare America neutral regardless of congressional opinion on the subject,[24] James Madison, writing as *Helvidius*, reflected on the fear of financial corruption of the person in the presidency with the sole power to regulate foreign policy as follows:

> However proper or safe it may be in a government where the executive magistrate is an hereditary monarch to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration. It has been remarked . . . that an hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government to be in any material danger of being corrupted by foreign powers. But that a man raised from the station of a private citizen to the rank of chief magistrate, possessed of but a moderate or slender fortune, and looking forward to a period not very remote, when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand. *An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents.* The history of human conduct does not warrant that exalted opinion of human virtue, which would make it wise in a nation, to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the

23 ARTICLES OF CONFEDERATION of 1781, art. V, cl. 2; *id.* art. VI, cl. 1.

24 For discussion, see ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR: A HISTORICAL PERSPECTIVE 5–21 (2011) ("[O]ne side was supportive of neutrality in an effort to protect business and trade with Britain (Hamilton being the key leader of this interest) and those wanting to honor agreements with America's Revolutionary War ally (Jefferson being the leader of this interest) on the other.").

> world, to the sole disposal of a magistrate, created and circumstanced, as would be a President of the United States.[25]

The U.S. Constitution reflects this concern in the emoluments clauses in which officers of the United States, including the President, are prohibited from accepting any emolument—financial or otherwise—from a foreign state or from any state domestically not authorized by Congress. The Constitution retained the same focus and language from the Articles of Confederation.

The U.S. Constitution makes clear that various types of emoluments are prohibited. Under the *Foreign Emoluments Clause* of Article I of the U.S.[26] Constitution, "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

Under the *Congressional Clause* of Article I of the U.S. Constitution,

> 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 encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.[27]

Under the *Domestic Emoluments Clause* of Article II of the U.S. Constitution,

> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.[28]

In 1856, Attorney General Caleb Cushing issued an opinion regarding the meaning of the word emoluments regarding "several acts of Congress, fixing the compensation of the collectors, and other officers, of the maritime revenue of the United States"[29] to which he explained that the word emoluments in the

> compensation fund of the act of 1822 is not confined to these commissions, either in express terms or in legal intendment. The word of this act is "emoluments," which, the act proceeds to say, "shall not extend to fines,

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25 "Helvidius" Number 4 [14 September] 1793, *Founders Online,* NATIONAL ARCHIVES (Original source: *The Papers of James Madison*, vol. 15, *24 March 1793–20 April 1793*) (emphasis added) https://founders.archives.gov/documents/Madison/01-15-02-0070.

26 U.S. CONST. art. I, § 9, cl. 8.

27 U.S. CONST. art. I, § 6, cl. 2.

28 U.S. CONST. art. I, § 6, cl. 2.

29 Comp. of Collectors of Customs, 8 Op. Att'y Gen. 46, 46 (1856).

> penalties, and forfeitures," clearly implying that it shall comprehend all other ordinary sources of compensation . . . .[30]

The dispute was whether, "the language of the act of 1841" prohibited compensation outside

> the money received in any one year by any collector, naval officer, or surveyor, on account (of,) and for rents, and storage, as aforesaid, and for fees and emoluments, shall in the aggregate exceed the sum of two thousand dollars, such excess shall be paid by the said collector, naval officer, or surveyor, as the case may be, into the Treasury of the United States, as part and parcel of the public money.[31]

In other words: was the emoluments clause independent of fees and does it include commissions. Cushing concluded that emoluments was independent to fees and commissions, because the law required the return

> of all sums of money . . . respectively received or collected for fines, penalties, or forfeitures, or for seizure of goods, wares, or merchandise . . . beyond the rents paid by the collector or other such officer; and . . . money received . . . by any collector, naval officer, or surveyor . . . shall in the aggregate exceed two thousand dollars, such excess shall be paid by the said collector, naval officer, or surveyor, as the case may be, into the Treasury of the United States.[32]

Cushing concluded, "[a]re not the receipts of a collector from all these legal services really 'emoluments' in any and every possible signification of the term?"[33]

Thus, in an early official adjudication of the term, it was determined by the Attorney General that "emoluments" is financial gain or enhancement that is outside of fees, commission or other payments authorized by Congress. Opinions both before and after Cushing's opinion make clear that an emolument is a financial gain outside of a regular fee structure.[34] In simple terms any outside gain is an enrichment, which is an emolument and financial gain is not exclusive in defining what is an emolument.[35] When used with other

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30 *Id.* at 54.

31 *Id.*

32 *Id.* at 55.

33 *Id.* at 56.

34 *See* Pay and Emoluments of Paymaster, 2 Op. Att'y Gen. 220, 220 (1829); Naval Officers Serving as Bureau Chiefs—Rank and Emoluments, 28 Op. Att'y Gen. 531, 531 (1910); Retired Pay of Surgeon-Gen. Finley, 14 Op. Att'y Gen. 76, 76 (1872); Pay of Acting Quartermaster Gen., 3 Op. Att'y Gen. 261, 264 (1837); Comp. of Marshal of the D.C., 10 Op. Att'y Gen. 458, 458 (1863).

35 *See* Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regul. Comm'n, 10 Op. O.L.C. 96, 98–99 (1986) ("[P]ast Attorney Generals have stated that the Clause is 'directed against every kind of influence by foreign governments upon officers of the United States' in absence

categories of enrichments, emoluments are listed as a source of enrichment independent of other listed categories.[36] The context of these opinions was whether a person had a right to the emoluments outside of other fee structures. Various Attorneys General opinions settled that the definition of emoluments

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of consent of Congress . . . .[T]he Emoluments Clause, [is] aimed at preventing corruption and extra-government influence." (citations omitted)); Applicability of Emoluments Clause to Proposed Serv. of Gov't Emp. on Comm'n of Int'l Historians, 11 Op. O.L.C. 89, 90 (1987) ("Consistent with its expansive language and underlying purpose, the provision has been interpreted as being 'particularly directed against every kind of influence by foreign *governments* upon officers of the United States, based upon our historic policies as a nation.' . . . [T]he Emoluments Clause is plainly applicable where an official is offered the gift, title or office in his private capacity." (citations omitted)); Auth. of Foreign Law Enf't Agents to Carry Weapons in the U.S., 12 Op. O.L.C. 67, 68-70 (1988) ("[The Emoluments Clause] . . . was intended by the Framers to preserve the independence of officers of the United States from corruption and foreign influence. The Emoluments Clause must be read broadly in order to fulfill that purpose. Accordingly, the Clause applies to all persons holding an office of profit or trust under the United States . . . At a minimum, it is well established that compensation for services performed for a foreign government constitutes an 'emolument' for purposes of the Emoluments Clause . . . .[D]ivided loyalty . . . is prohibited by the Emoluments Clause . . . ."); Applicability of 18 U.S.C. § 219 to Members of Fed. Advisory Comms., 15 Op. O.L.C. 65, 67 (1991) ("The Emoluments Clause provides that absent congressional consent, a person holding an 'Office of Profit or Trust' under the United States may not hold any position in, or receive any payment from, a foreign government."); Applicability of the Emoluments Clause to Non-Gov't Members of ACUS, 17 Op. O.L.C. 114, 120 (1993) ("Accordingly, we conclude that . . . the Emoluments Clause would prohibit members of the Conference from accepting a share of partnership earnings, where some portion of that share is derived from the partnership's representation of a foreign government."); Applicability of Emoluments Clause to Emp. of Gov't Emps. by Foreign Pub. Univs., 18 Op. O.L.C. 13, 18 (1994) ("Those who hold offices under the United States must give the government their unclouded judgement and their uncompromised loyalty. That judgement might be biased, and that loyalty divided, if they received financial benefit from a foreign government, even when those benefits took the form of remuneration for academic work or research."); Application of the Ineligibility Clause, 20 Op. O.L.C. 410, 410 (1996) (stating that the context of the Congressional Emoluments Clause is increase in salary of a position within the government); Emoluments Clause & the World Bank, 25 Op. O.L.C. 113, 114 (2001) ("[T]he prohibitions of the Emoluments Clause apply not only to constitutional officers . . . but also to government employees, 'lesser functionaries' who are subordinate . . . . The term 'emolument' . . . was intended to cover compensation of any sort arising out of an employment relationship with a foreign state." (quoting Memorandum for S.A. Andretta, Administrative Assistant Attorney General, from J. Lee Rankin Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government* at 8 (Oct. 4, 1954))).

36 *See* Comp. of Dist. Att'ys in Suits Against Revenue Officers, 11 Op. Att'y Gen. 88, 89 (1864) ("The act of February 26, 1853, see. 3, requires every district attorney . . . to make to the Secretary of the Interior . . . '*a return in writing, embracing all the fees and emoluments*' of his office, '*of every name and character*, distinguishing the fees and emoluments received or payable under the bankrupt act . . . .[And] no district attorney shall be allowed by the said Secretary of the Interior to retain *of the fees and emoluments of his said office, for his own personal compensation*, over and above his necessary office expenses . . . .").

was an enrichment outside other fee structures.[37] Attorney General Henry D. Gilpin opined on October 3, 1840 as to "whether a navy agent, employed to make purchases or perform any services for a department other than the Navy Department, can be allowed a commission or compensation for such services."[38] He concluded that under a 1839 act of congress, no person receiving a fixed salary can receive and extra allowance or compensation from public money.[39]

While these opinions were focused on statutory issues regarding emoluments, the office of the Attorney General has also issued opinions on the constitutional prohibition on officers of the United States receiving emoluments from foreign states and from within the United States. The first case in which the Attorney General opined on the *Foreign Emoluments Clause* was in 1902.[40] The clause has three parts: it prohibits (1) any "person holding any office of profit or trust under [the United States], (2) from "accept[ing] any present, emolument . . . of any kind", (3) "from any king, prince or foreign state."[41] Attorney General Henry M. Hoyt was confronted with the question of whether the clause applies to a non-ruling prince of Germany who gave to the German embassy presents for the Navy Department, West Point, and the Naval Academy in appreciation to his visit to America.[42] Specifically, General Hoyt said the question is, "whether the constitutional provision . . . may be construed as applying only to a reigning prince, in which case the authority of Congress for the delivery of these presents would not be required."[43]

General Hoyt opined that "from any king, prince, or foreign state" clause "language has been viewed as particularly directed against every kind of influence by foreign governments upon officers of the United States" thus "it would not, in my judgment, be sound to hold that a titular prince, even if not a reigning potentate, is not included in the constitutional prohibition."[44] General Hoyt explained that since the purpose of the clause is government influence on officers of the United States, the significance of "any king, prince,

37 *See* Comp. to Judges for Extra Servs., 3 Op. Att'y Gen. 589, 589 (1840); Brevet Pay of Gens. Gaines & Scott, 1 Op. Att'y Gen. 564, 564 (1822); Fees of Marshals, 9 Op. Att'y Gen. 176, 176 (1858); Member of Congress—Appointment to Office, 21 Op. Att'y Gen. 211, 211 (1895).

38 Comp. to Navy Agents for Extra Servs., 3 Op. Att'y Gen. 588, 588 (1840).

39 *Id.*

40 Gifts from Foreign Prince—Officer—Const. Prohibition, 24 Op. Att'y Gen. 116, 116–18 (1902).

41 U.S. CONST. art. I, § 9, cl. 8.

42 *Id.* at 117.

43 *Id.*

44 *Id.* at 117-18.

or foreign state" is in the power to act officially representing the government or otherwise act in the name of that government. Because, "a titular prince, although not reigning, might have the function of bestowing an office or title of nobility or decoration, which would clearly fall under the prohibition."[45] Hoyt opined, as the OLC would make clear in later decades, that the Foreign Emoluments Clause applies to the *possibility* of corrupting influence, not actual corrupting influence. Because the Prince could bestow a title or office, that ability placed him within the clause. He further opined that, "it must be observed that even a simple remembrance of courtesy . . . like the photographs in this case, falls under the inclusion of 'any present . . . of any kind whatever.'"[46] After making clear that the clause applies to all persons holding an office under the United States and that any present is covered and any representative of the foreign state is covered, he qualified the application of the clause to focus on persons. He concluded that, "the constitutional prohibition expressly and exclusively relates to official *persons*, it could not properly be extended, under the circumstances at all events, in my judgment, to a department of the Government and to governmental institutions."[47] The result was that the embassy could accept the gifts without congressional approval because they were gifts to the United States and its institutions and not a gift to persons who were holders of an office of trust under the United States.

In 1909, Attorney General George W. Wickersham was asked by the Department of the Navy whether it could accept and allow the Secretary of State to accept and bestow upon "Capt. N. M. Brooks, a clerk of class 4 in the Post-Office Department the insignia of the third class of the Order of the Red Eagle conferred upon him by the German Emperor."[48] General Wickersham focused on the status of Captain Brooks and concluded that since he is under the civil service law, Brooks holds an appointment in the Post Office Department and has a set and established salary for work and services rendered in that department and that,

> his duties are continuing and permanent, and not occasional and temporary. He is, therefore, an inferior officer of the United States within the meaning of that clause of Article II, section 2, of the Constitution . . . It follows, therefore, that in the absence of a special consent obtained from

45 *Id.* at 118.

46 *Id.* (second alteration in original).

47 *Id.*

48 George W. Wickersham, Delivery of an Insignia from the German Emperor to a Clerk in the Post-Office Dep't, 27 Op. Att'y Gen. 219, 220 (1909).

> Congress, Mr. Brooks is inhibited from accepting the insignia in question, by the last clause of, Article I, section 9 . . . ."[49]

General Wickersham concluded that the reach of the Foreign Emoluments Clause is broad in that it reached presidential level officers and department heads as well as persons that are inferior level government officers.

> It is not intended to imply that a present of the kind mentioned in the above-quoted clause of the Constitution can be accepted by any and every employee of the Government other than those appointed by the President, the courts of law, and the heads of departments; but *the office here* in question is clearly one of that character, and is, therefore, *recognized by the Constitution*, and there can be no question that the inhibition applies to its incumbent.[50]

On February 3, 1911, General Wickersham opined as to whether,

> Prof. J. A. Udden, special assistant on the United States Geological Survey, may accept from the King of Sweden the order of the "Knighthood of the North Star," which that Sovereign has conferred on him, in view of Article I, section 9, paragraph 8, of the Constitution of the United States.[51]

General Wickersham wrote that although Udden was employed by the United States under civil service law and that he "is employed by the chief geologist, with the approval of the director, under authority of the Civil Service Commission,"[52] his employment was for an indefinite term and he was paid day by day, his employment status did not require an oath, and his duties did not require continuous service.[53] "Under these conditions I am of the opinion that Professor Udden can not be called an officer under the United States within the meaning of the provision above quoted."[54] Thus, "I have the honor, therefore, to advise you that there is nothing in the Constitution or laws to prevent the acceptance by Professor Udden of the order conferred upon him by the King of Sweden."[55]

The opinions by Generals Hoyt and Wickersham make clear that the application and reach of the Foreign Emoluments Clause is to all persons who hold an office of employment in the United States which requires continuous service and one that is recognized by the constitution. If covered, the type of present or emoluments is not relevant and congressional approval is required

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49 27 Op. Att'y Gen. at 220–21.

50 *Id.* at 221 (emphasis added).

51 George W. Wickersham, Field Assistant on the Geological Surv.—Acceptance of an Order from the King of Sweden, 28 Op. Att'y Gen. 598, 598 (1912).

52 *Id.* at 599.

53 *Id.*

54 *Id.* (citing United States v. Germaine, 99 U.S. 508 (1878)).

55 *Id.*

if the source of the emolument is from a foreign state or any representative thereof. Both made clear that such persons covered by the Foreign Emoluments Clause would require congressional approval to accept any emolument. Attorney General Tom Clark found congruence with these opinions and opined that a general congressional statute can be used to provide that approval.

On April 17, 1947, General Clark opined on "the propriety of placing certain employees of the Weather Bureau on a leave-without-pay status and detailing them to serve as expert meteorologists for the Government of Eire."[56] The question involved the nation of Eire and its request that the Department of Commerce allow and detail employees of the United States Weather Bureau to work with the Director of the Meteorological Service, Department of Industry and Commerce of Eire to provide training and other technical expertise for the development of its weather-forecasting service as well as its air navigation.[57] Clark made a point in noting that the agreement was such that, "It is understood that the employees in question would retain their full United States citizenship and would not take any oath of allegiance to the Government of Eire."[58] Clark opined that the detailing of Americans to foreign nations was authorized by the act of August 8, 1946, which authorized, "the Chief of the Weather Bureau, under the direction of the Secretary of Commerce . . . [to] establish and coordinate the international exchanges of meteorological information required for the safety and efficiency of air navigation."[59] Clark concluded that since Congress had authorized such exchanges of information and that the detailed employees would retain their loyalty to the United States, the fact that the employees would be paid by Eire was not in conflict with the foreign emoluments clause because such an arrangement for payment was not prohibited by Congress and could have been anticipated by Congress.[60]

On May 10, 1963, the OLC responded to the Attorney General's request to respond to the National Security Advisor's inquiry and opine on whether the President of the United States could accept an honorary Irish citizenship and whether such an act was violative of the Foreign Emoluments Clause.[61] This is the first published case in which the Foreign Emoluments Clause was applied to the president. The OLC was asked to determine whether the

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56 Tom C. Clark, Comp. of Emps. Detailed to Assist Foreign Gov'ts, 40 Op. Att'y Gen. 513, 513 (1947).

57 *Id.*

58 *Id.*

59 *Id.* at 514

60 *Id.* at 514–15.

61 Norbert A. Schlei, Proposal That the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 278 (1963).

president could accept an honorary awarding of Irish citizenship from Ireland. The OLC concluded,

> [T]hat acceptance by the President of honorary Irish citizenship would fall within the spirit, if not the letter, of Article I, Section 9, Clause 8, of the Constitution which requires that an individual who holds an office of profit or trust under the United States must obtain the consent of Congress in order to accept "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State."[62]

The OLC explained that under current law, the Act of January 31, 1881,[63] the President could accept the award during formal ceremonies and deposit it with the Department of State and wait for congressional approval or have the award deposited with the State Department and then have the Department forward it to him upon his leaving office.[64]

The OLC confirmed that Ireland law conferring the honorary citizenship would not carry any duties or responsibilities regarding loyalty to the nation of Ireland[65] which affirmed the concern of General Clark in the aforementioned *Compensation of Employees Detailed to Assist Foreign Governments* opinion. "Consequently, the problems which might have arisen as a result of dual citizenship are no longer presented."[66] In defining the meaning of the Foreign Emoluments Clause, the OLC held that the purpose of the clause was, "a means of preserving the independence of foreign ministers and other officers of the United States from external influences . . . . '[P]articularly directed against every kind of influence by foreign *governments* upon officers of the United States, based on our historic policies as a nation.'"[67] The OLC determined that although the award would be the functional equivalent to a decoration or medal, "medals and decorations have always been regarded as coming within the constitutional provision."[68] Additionally, the 1881 federal law makes clear that:

> [A]ny present, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States . . . shall be tendered through the Department of State, and not to the individual in person . . . [and] shall not be delivered by the Department of State unless so authorized by act of Congress.[69]

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62 *Id.*

63 *See* 5 U.S.C. § 115 (1952) (codifying the Act of January 31, 1881).

64 1 Op. O.L.C. Supp. at 278.

65 *Id.* at 279.

66 *Id.*

67 *Id.* (quoting Gifts from Foreign Prince, 24 Op. Att'y Gen. 116, 117 (1902)).

68 *Id.* at 280.

69 *Id.* (first alteration in original) (quoting Act of January 31, 1881, 5 U.S.C. § 115).

The OLC advised the president that international social protocol practice and past policies would allow the President to accept the award on behalf of the United States or he could have the award deposited with the State Department to be held by the department until the President leaves office, or he could have the award handed to the American ambassador to Ireland who would accept it on behalf of the United States.[70] But the OLC was clear in the fact that the Foreign Emoluments Clause as well as federal law applied to the President because he was an officer of the United States.[71]

In 1981, the OLC was presented with the first application of the *Domestic Emoluments Clause* to the President which provides that the "President . . . shall not receive . . . any other Emolument from the United States, or any of them."[72] The legal question was, "whether the receipt by President Reagan of the retirement benefits to which he became entitled as the result of his service as Governor of the State of California conflicts with the Presidential Emoluments Clause of the Constitution."[73] The OLC first explained that the benefits of the California retirement were the result of the president making contributions to the state retirement system when he was a member of the California legislature and he was eligible to receive benefits after leaving office as Governor in 1975. Thus, the payments under consideration are "vested rights . . . . [N]ot gratuities which the state is free to withdraw."[74]

The OLC explained that emoluments as used in Article II means, "profit or gain arising from station, office, or employment: reward, remuneration, salary."[75] The OLC held that the purpose of the prohibition of emoluments was to protect the President from corruption or the appearance of corruption and to protect the independence of his office, affirming General Hoyt in the aforementioned *Gifts from Foreign Prince - Officer - Constitutional Prohibition* 1902 case, "the term emolument has a strong connotation of, if it is not indeed limited to, payments which have a potential of influencing or corrupting the integrity of the recipient."[76] The determination is guided by "whether the payments were intended to influence, or had the effect of

70 *See id.* at 281–83 (explaining the options available for President Kennedy to accept honorary Irish citizenship, and also, in an addendum, presenting the proposal for him to the award).

71 *Id.* at 280.

72 U.S. CONST. art. II, § 1, cl. 7.

73 President Reagan's Ability to Receive Ret. Benefits from the State of Cal., 5 Op. O.L.C. 187, 187 (1981).

74 *Id.* at 187–88.

75 *Id.* at 188 (citation omitted).

76 *Id.*

influencing, the recipient as an officer of the United States."[77] In other words, "Article II, § 1, clause 7 has to be interpreted in the light of its basic purposes and principles, *viz.*, to prevent Congress or any of the states from attempting to influence the President through financial awards or penalties."[78]

The OLC concluded that

> if Article II, § 1, clause 7 is to be interpreted only on the basis of the purposes it is intended to achieve, it would not bar the receipt by President Reagan of a pension in which he acquired a vested right 6 years before he became President, for which he no longer has to perform any services, and of which the State of California cannot deprive him.[79]

The OLC reasoned that the benefits were earned before he became President, and more importantly, the receipt of those payments are not attached to any duties that he is currently performing and that California was not in a position to deny them. The OLC explained that earned benefits are different from gratuities, which are presents, and benefits are not gifts or deferred compensation for services rendered, all of which are defined within emoluments.[80] Thus the OLC concluded, the retirement benefits do not violate the *Domestic Emoluments Clause*, "because those benefits are not emoluments in the constitutional sense" and they don't "violate the spirit" of the clause "because they do not subject the President to any improper influence" because benefits are not deferred payments subject to California actions of increasing or decreasing or withholding them.[81]

The OLC was called upon to opine on the applicability of the *Foreign Emoluments Clause* to the President in 2009 when President Obama was awarded the 2009 Nobel Peace Prize and the OLC had to determine if the Foreign Emoluments Clause prevented his acceptance of the award.[82] Because the *Foreign Emoluments Clause* prohibits any person "holding any Office of Profit or Trust under [the United States]" from accepting "any present, Emolument . . . of any kind whatever, from any King, Prince, or foreign State" the OLC opined that the two issues to be decided is whether the president holds an office of profit or trust and secondly, whether the Nobel Foundation that makes the award is within the definition of "King, Prince, or foreign

77 *Id.* at 189.
78 *Id.*
79 *Id.* at 190.
80 *Id.* at 190–91.
81 *Id.* at 192.
82 David J. Barron, President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 370, 370 (2009)

State."[83] The first is self-evident in the affirmative,[84] but as to the second, the OLC held that the Nobel Foundation was not within the definition of "King, Prince, or foreign State" and as such the Foreign Emoluments Clause did not apply and prevent the President from accepting the award.[85]

The OLC jurisprudence of the definition of "King, Prince, or foreign State" in line with the definition of emoluments is the purpose of the emolument and the source of the emolument.[86] In 1993 the OLC was asked to opine on whether non-government members of the Administrative Committee of the United States (ACUS) could receive distribution of revenue from partnerships that in part were received from foreign governments.[87] The OLC reviewed the relationship between the ACUS member and their law firm and the foreign government-owned or controlled instrumentalities, businesses or proprietary corporation client interests and assessed whether the interposition of these entities between the foreign government and the ACUS member alleviates applicability of the foreign emoluments clause.[88] The OLC determined that it did not because although it may be true that

> when foreign governments act in their commercial capacities, they do not exercise powers peculiar to sovereigns. . . . [N]othing in the text of the Emoluments Clause limits its applicability solely to foreign governments acting as *sovereigns*. . . . There is no express or implied exception for emoluments received from foreign States when the latter

83 *Id.* (first alteration in original).

84 *Id.* The OLC defines an "Office of Profit or Trust" and a person holding such an office includes a person who is required to take an oath, is expected to hold loyalty to the United States, exercises decision making authority regarding policy, exercises sovereign power under the laws of the United States, has a security clearance, has access to classified or confidential information as a result of the position held, governs domestic policy or government operations, has authority to enforce criminal law, holds an office that requires appointment and/or confirmation, holds an office by appointment of a constitutional officer, person holds a constitutional office, and/or holds an elected office. The OLC has held that there is no one definitive definition but any combination of these factors establishes that the domestic and foreign emoluments clause will apply to the person who has a combination of these factors. For a discussion on defining "Office of Profit or Trust," *see* Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278 (1963); Application of the Emoluments Clause of the Constitution & the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156 (1982); Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114 (1993); Application of the Emoluments Clause to a Member of the President's Council on Bioethics, 29 Op. O.L.C. 55 (2005).

85 33 Op. O.L.C. at 370.

86 *See generally supra* notes 34–35.

87 17 Op. O.L.C. at 114.

88 *Id.* at 120.

> act in some capacity other than the performance of their political or diplomatic functions.[89]

The OLC explained that the purpose of the Foreign Emoluments Clause must be the focus of how its defined and applied.

> The language of the Emoluments Clause is both sweeping and unqualified. It prohibits those holding offices of profit or trust under the United States from accepting "*any* present, Emolument, Office, or Title, of *any kind whatever*" from "*any* . . . foreign State" unless Congress consents. . . . We believe that the Emoluments Clause should be interpreted to guard against the risk that occupants of Federal office will be paid by corporations that are, or are susceptible of becoming, agents of foreign States, or that are typically administered by boards selected by foreign States. Accordingly, we think that, in general, business corporations owned or controlled by foreign governments will fall within the Clause.[90]

The prohibition of "[a]ny . . . foreign State" is applied to any situation in which there is the "potential for corruption or improper foreign influence" on the person holding an office of the United States.[91] James Madison stands affirmed.

The OLC held that, "the language of the Emoluments Clause does not warrant any distinction between the various capacities in which a foreign State may act. *Any* emoluments from a foreign State, whether dispensed through its political or diplomatic arms or through other agencies, are forbidden to Federal office-holders (unless Congress consents)."[92] The OLC concluded that the purpose of the clause defines its meaning and application.

> [F]oreign States even when they act through instrumentalities which, like universities, do not perform political or diplomatic functions. Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty. That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government, even when those benefits took the form of remuneration for academic work or research. Thus, United States Government officers or employees might well find themselves exposed to conflicting claims on their interests and loyalties if they were permitted to accept employment at foreign public universities.[93]

A year later the OLC continued to define what constitutes a "foreign State" under the foreign emoluments clause by reviewing a request regarding,

89 *Id.* at 120–21.

90 *Id.* at 121 (citations omitted).

91 *Id.* at 122.

92 *Id.*

93 *Id.* (citation and footnote omitted).

"whether foreign entities that are public institutions but not diplomatic, military, or political arms of their government should be considered to be 'foreign States' for purposes of the Emoluments Clause. In particular, [the OLC has] been asked whether foreign public universities constitute 'foreign State[s]' under the Clause."[94] The OLC held "[f]oreign public universities are, presumptively, foreign states within the meaning of the Clause."[95] The OLC reasoned that a foreign government university is still under the control of a foreign government regardless of the fact that the university does not perform political, military or diplomatic functions of the foreign state.[96] Foreign state control is sufficient to meet the "any . . . foreign State" threshold.

But, the OLC held that in the specific case of the University of Victoria, the university was not within the clause because, "the University of Victoria is generally free from the control of the provincial government of British Columbia, we think that the evidence shows that the university is independent of that government when making faculty employment decisions."[97] The OLC was asked whether two government scientists with NASA while on leave could accept a teaching position at the University.[98] Having determined that foreign universities as a group were covered by the Clause, the OLC stated that the purpose of the Clause—preventing possible corruption and influence on the loyalty of the officer—is served when the foreign government has no direct influence on the selection, employment or duties of the officer.[99] The focus on the purpose of the foreign emoluments clause as the determiner of its meaning was supplemented in 2001 when the OLC opined on whether the World Bank was a foreign state.[100] The OLC determined that it was not covered by the clause because the United States is a member of the World Bank and it would not make sense to hold that officers of the United States would be serving a foreign state when the United States is as a directing member of the World Bank.[101]

With the OLC jurisprudence being clear that in defining the emoluments clause the focus is on its purpose and "foreign state" is defined by the governmental control over the entity providing the emolument, the OLC

94 Walter Dellinger, Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 16 (1994).

95 *Id.* at 17.

96 *Id.* at 17–18.

97 *Id.* at 20.

98 *Id.* at 13.

99 *Id.* at 22.

100 Daniel L. Koffsky, Emoluments Clause and the World Bank, 25 Op. O.L.C. 113 (2001).

101 *Id.* at 115–116.

determined in 2009 that President Obama could accept the Nobel Prize because the award is not from a "foreign State."[102] Reviewing the structure and source of the prize, the OLC explained that the peace prize selection is made by the Nobel Prize Foundation which awards the peace prize through a process of deliberations in the Nobel Committee.[103] The members of the Committee are selected by the Norwegian Parliament.[104] Both by tradition and law, the Committee, although selected by the Norwegian Parliament, has functioned independently of the Parliament in all of its decisions and designations of peace awardees.[105] Further, the funding for the prize is completely sourced from the Nobel Prize Foundation and not from the Norwegian Parliament.[106] The OLC concluded that since the president holds an "Office of Profit or Trust" and that a prize is clearly a "present" or "emolument" the "critical question [is] the status of the institution that makes the reward. Based on . . . our Office's precedents interpreting the Emoluments Clause in other contexts, we conclude that the President in accepting the Prize would not be accepting anything from a 'foreign State' within the Clause's meaning."[107] Affirming previous opinions,[108] the OLC held that, "the Emoluments Clause reaches not only 'foreign State[s]' as such but also their instrumentalities" and the question in defining what a foreign state is under the Clause is, "whether the Committee has the kind of ties to a foreign government that would make it, and by extension the Nobel Foundation in financing the Prize, an instrumentality of a foreign state under our precedents."[109]

The OLC opined that to be exempt from the Clause, the awarding foreign entity must be sufficiently independent of the foreign government of that entity, "specifically with respect to the conferral of the emolument or present at issue."[110] The factors that go into whether a foreign entity is independent of its government, which is made on a case by case determination, includes whether the government is the substantial source of funding, whether the government makes the determinative decision regarding the emolument, and/or whether the government has substantial control over the management

102 David J. Barron, President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 370 (2009).

103 *Id.* at 371.

104 *Id.*

105 *Id.*

106 *Id.* at 373.

107 *Id.* at 4.

108 Walter Dellinger, Applicability of the Emoluments Clause to Non-Government Members of ACUS, *supra* note 87; Walter Dellinger, Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, *supra* note 94.

109 Barron, *supra* note 102 at 379.

110 *Id.* at 380.

of the entity.[111] If the entity has independence from government control, autonomy in making decisions, and if the entity and the prize are financially independent from the foreign government then the entity is not a "foreign state"[112] under the Emoluments clause.[113] The OLC concluded that since the Nobel Foundation and the Nobel Committee were independent from direction of the Norwegian government both as to deliberations, decision making, and the prize was financially sourced and managed independently of the Norwegian government, President Obama was free to accept the award without needed congressional approval.[114]

III. THE EMOLUMENTS CLAUSES AND THEIR APPLICABILITY TO PRESIDENT TRUMP

The OLC has not opined on whether President Trump in holding various national and international hotels, golf courses, and other leisure venues and receiving payments from them is in violation of the emolument clauses because it was not asked.[115] Subsequent to his election in 2016, three separate lawsuits have been filed against President Trump, based on his holdings which he has not divested from, asserting that his receipt of payments violates the emoluments clause.[116] In *Citizens for Responsibility and Ethics in Washington (CREW) v Trump*[117] Citizens for Responsibility and Ethics in Washington (CREW), "a nonprofit, nonpartisan organization founded in 2002 that works

111 *Id.*

112 *See* Daniel L Koffsky, Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development, 34 OLC 1, at 2 n.3 (2010). (opining that a government entity need not be a national government but could be a local municipality under a national government)

113 Barron, *supra* note 102 at 380–381.

114 *Id.* at 382–84, 86.

115 "Historically, Presidents have complied with the Clause by either seeking and obtaining congressional consent prior to accepting foreign presents or Emoluments, or by requesting an opinion from the Executive or Legislative Branch's advisory office as to whether the Clause applies. Modern Presidents, except for President Trump, have sought advice from OLC prior to accepting potentially covered Emoluments." *See Blumenthal v. Trump*, 373 F. Supp. 3d 191, 206 (D.D.C. 2019) (internal citation and quotation marks omitted.)]

116 For discussion, *see* Michael Foster, *Landlord and Tenant: The Trump Administration's Oversight of the Trump International Hotel Lease: Hearing Before the Subcomm. on Econ. Dev., Public Bldgs., and Emergency Mgmt., H. Comm. on Transp. and Infrastructure*, 116th Cong. (2019); CONGRESSIONAL RESEARCH SERVICE, THE EMOLUMENTS CLAUSES AND THE PRESIDENCY: BACKGROUND AND RECENT DEVELOPMENTS (2019); CONGRESSIONAL RESEARCH SERVICE, THE EMOLUMENTS CLAUSE OF THE U.S. CONSTITUTION (2020).

117 Complaint, Citizens for Resp. and Ethics in Wash. (CREW) v. Trump, No. 17-CV-458 (S.D.N.Y. Jan. 17, 2017). A listing of all filings by CREW is on their web page (https://www.citizensforethics.org/lawsuit/crew-v-donald-j-trump/)

on behalf of the public to foster an ethical and accountable government and reduce the influence of money in politics," filed a law suit in the District Court of New York asserting that without judicial action President Trump has and would continue to violate the foreign emoluments clause.[118] They specifically asserted that,

> Defendant has committed and will commit Foreign Emoluments Clause violations involving at least: (a) leases held by foreign-government-owned entities in New York's Trump Tower; (b) room reservations and the use of venues and other services and goods by foreign governments and diplomats at Defendant's Washington, D.C. hotel; (c) hotel stays, property leases, and other business transactions tied to foreign governments at other domestic and international establishments owned, operated, or licensed by Defendant; (d) payments from foreign-government-owned broadcasters related to rebroadcasts and foreign versions of the television program "The Apprentice" and its spinoffs; and (e) property interests or other business dealings tied to foreign governments in numerous other countries . . . .
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> Defendant owns and controls hundreds of businesses throughout the world, including hotels and other properties . . . . he owns or controls, in whole or in part, operating in the United States and 20 or more foreign countries . . . . Defendant also has several licensing agreements that provide streams of income that continue over time. Through these entities and agreements, Defendant personally benefits from business dealings, and Defendant is and will be enriched by any business in which they engage with foreign governments and officials.
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> . . . .
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> Through the use of various entities, Defendant owns and controls Trump Tower. Among the largest tenants of Trump Tower is the Industrial and Commercial Bank of China (ICBC), which is owned by a foreign nation, China. The ICBC's lease is set to expire during Defendant's term as President. In addition, the Abu Dhabi Tourism & Culture Authority, an entity owned by the foreign nation of the United Arab Emirates, leases office space in Trump Tower . . . .
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> . . .
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> The Trump International Hotel Washington, D.C . . . .is located . . . just blocks from the White House . . . . [F]oreign diplomats have been flocking to Defendant's D.C. hotel, eager to curry favor with Defendant and afraid of what Defendant may think or do if they send their business elsewhere in Washington. One week after the election, the hotel held a special event for the diplomatic community. About 100 foreign diplomats attended; they were greeted with champagne, food, a tour, a raffle for overnight stays at properties belonging to Defendant around the world, and a sales pitch about the new D.C. hotel.

118 *Id.* at 2.

> . . . .
>
> Defendant regularly receives money—and, without judicial intervention, will continue to receive money during his presidency—each time a foreign state, a foreign diplomat, some other agent of a foreign state, or some other instrumentality of a foreign nation stays in a room or pays for a venue or other service in Defendant's D.C. hotel.[119]

The complaint proceeded to discuss similar financial ventures, both international and domestic, that resulted in multiple sources of financial payments that President Trump would receive through his multiple companies after assuming the office of the presidency, which CREW asserted violated both the foreign and domestic emoluments clauses.[120]

A second lawsuit[121] was filed on June 12, 2017 by the District of Columbia and the state of Maryland, *District of Columbia and State of Maryland v. Trump*, in which the plaintiffs asserted similar financial dealings by President Trump in which the

> defendant, his organization, and its affiliates have received presents or emoluments from foreign states or instrumentalities and federal agencies, and state and local governments in the form of payments to the defendant's hotels, restaurants, and other properties. The defendant has used his position as President to boost this patronage of his enterprises, and foreign diplomats and other public officials have made clear that the defendant's position as President increases the likelihood that they will frequent his properties and businesses.[122]

Both D.C, and the state of Maryland asserted that they suffered injury because international and domestic guests will use the hotels and facilities of President Trump over those not owned by him to gain his favor and his competitors in D.C. and Maryland will suffer financial loss due to his violations of the foreign and domestic emoluments clauses; "the District and Maryland have an interest in protecting their economies and their residents, who, as the defendant's local competitors, are injured by decreased business, wages, and tips resulting from economic and commercial activity diverted to the

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119 *Id.* at 3, 9–10, 12–14.

120 *Id.* at 6–22. Note that the CREW case was vacated and remanded for dismissal as moot once Trump left office. Trump v. Citizens for Resp. and Ethics in Wash., 141 S.Ct. 1262, 1262 (2021).

121 Complaint, District of Columbia v. Trump, No. 17-CV-01596 (D. Md. June 12, 2017). A listing of all the filings in this case are located at Washington D.C. Attorney General Emoluments Lawsuit web page https://oag.dc.gov/about-oag/emoluments-lawsuit and the Maryland Attorney General Emoluments Lawsuit Court Filings web page https://www.marylandattorneygeneral.gov/Pages/Emoluments/Court_Filings.aspx

122 *Id.* at 5–6.

defendant and his business enterprises due to his ongoing constitutional violations."[123]

The third lawsuit was filed on June 14, 2017 by one hundred ninety-six members of Congress[124] who sought "relief from the President's continuing violation of the Foreign Emoluments Clause" and asserted that his accepting of emoluments through his multiple businesses were in violation the Clauses due to his failure to abide by the power invested in the Congress which required the President to seek approval from Congress to receive emoluments.[125] The complaint asserted,

> Defendant has chosen to accept numerous benefits from foreign states without first seeking or obtaining congressional approval. Indeed, he has taken the position that the Foreign Emoluments Clause does not require him to obtain such approval before accepting benefits arising out of exchanges between foreign states and his businesses . . . . By accepting these benefits from foreign states without first seeking or obtaining congressional approval, Defendant has thwarted the transparency that the "Consent of the Congress" provision was designed to provide.
>
> Moreover, by accepting these benefits from foreign states without first seeking or obtaining congressional approval, Defendant has also denied Plaintiffs the opportunity to give or withhold their "Consent" to his acceptance of individual emoluments and has injured them in their roles as members of Congress.
>
> To redress that injury, Plaintiffs seek declaratory relief establishing that Defendant violates the Constitution when he accepts any monetary or nonmonetary benefit—any "present, Emolument, Office, or Title, of any kind whatever"—from a foreign state without first obtaining "the Consent of the Congress." Plaintiffs also seek injunctive relief ordering Defendant not to accept any such benefits from a foreign state without first obtaining "the Consent of the Congress."[126]

The third lawsuit was dismissed by the D.C. Court of Appeals (February 7, 2020)[127] and the second was dismissed by a panel of the Fourth Circuit Court of Appeals (July 10, 2019) for lack of standing[128] but the Fourth Circuit granted

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123 *Id.* at 6. Like the CREW case, this case was vacated and remanded for dismissal following Trump's departure from office. Trump v. District of Columbia, 141 S. Ct. 1262, 1262 (2021).

124 Complaint at 19, Blumenthal v. Trump, No 17-CV-01154 (D.D.C. June 14, 2017). A listing of all the filings in this case is located on the Constitutional Accountability Center web page at https://www.theusconstitution.org/litigation/trump-and-foreign-emoluments-clause/

125 *Id.* at 18–19.

126 *Id.* at 19.

127 Blumenthal v. Trump, 949 F.3d 14, 21 (D.C. Cir. 2020).

128 The court issued two opinions holding that both in his official and individual capacities, the plaintiffs did not have standing and the district court was instructed to dismiss the case with prejudice. For court holding regarding case against President Trump in his official capacity, *see* In re Trump, 928

an appeal for an *en banc* hearing which occurred on December 12, 2019.[129] On May 14, 2020 the Fourth Circuit *en banc* reversed the panel decision.[130] In the first lawsuit, on September 13, 2019, the Second Circuit Court of Appeals reversed the District Court's decision that the plaintiffs lacked standing and remanded the case for further proceedings.[131] On October 28, 2019, President Trump filed a petition for an *en banc* rehearing by the Second Circuit.[132] On August 17, 2020 the Second Circuit denied President Trump's petition for an *en banc* rehearing.[133]

On July 6, 2020 the plaintiffs in *Richard Blumenthal, et. al. v Donald Trump* filed a writ of certiorari with the Supreme Court for review of the D.C. Court of Appeals holding dismissing the congressional lawsuit for lack of standing.[134] On September 9, 2020 President Trump filed a writ of certiorari with the Supreme Court for review of the Second Circuit Court[135] and the Fourth Circuit Court holdings that the plaintiffs had standing.[136] On October 13, 2020 the Supreme Court denied certiorari in the *Richard Blumenthal, et. al. v. Donald Trump*[137] effectively ending the attempt of members of Congress to enforce the emoluments clause in the courts. On January 25, 2021 the Supreme Court granted certiorari in both the *Trump v. District of Columbia* and *Trump v. Citizens for Responsibility and Ethics in Washington* cases with

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F.3d 360 (4th Cir. 2019), *reh'g granted*, No. 18-2486 (4th Cir. 2019) and for holding regarding case in his individual capacity, *see* In re Trump, No. 18-2488 (4th Cir. 2019), *reh'g granted*, No. 18-2486 (4th Cir. 2019).

129 In re Trump, No. 18-2488 (4th Cir. 2019).

130 The *en banc* Court issued two opinions. In regard to President Trump's official capacity, *see* In re Trump, 958 F.3d 274 (4th Cir. 2020) (holding that the plaintiffs did not have standing and instructing the district court to dismiss the case with prejudice). In regard to President Trump's individual capacity, *see* Dist. of Columbia v. Trump, 959 F.3d 126, 132 (4th Cir. 2020) (holding that because "the district court did not deny the President's immunity claim, [they] did not have jurisdiction to consider the appeal").

131 Citizens for Resp. and Ethics in Wash. (CREW) v. Trump, 939 F.3d 131, 160 (2d Cir. 2019).

132 Defendant's Petition for Rehearing *en banc* at 1–2, Citizens for Resp. and Ethics in Wash. (CREW) v. Trump, No. 18-474 (2d Cir. October 28, 2019), https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/01/03160150/2019-10-28-204-DOJ-Pet.-for-Rehg-En-Banc.pdf.

133 Citizens for Resp. and Ethics in Wash. (CREW) v. Trump, 971 F.3d 102, 102 (2nd Cir. 2020).

134 Elizabeth Wydra, et al., *Blumenthal, et al. v. Trump*, CONSTITUTIONAL ACCOUNTABILITY CENTER, https://www.theusconstitution.org/litigation/trump-and-foreign-emoluments-clause/.

135 Petition for Writ of Certiorari at 1, Trump v. Citizens for Resp. and Ethics in Wash., (No. 20-330) (Sept. 9, 2020) ("Whether plaintiffs who claim to compete with businesses in which the President of the United States has a financial interest can seek redress in an Article III court to enforce the Foreign and Domestic Emoluments Clauses of the U.S. Constitution against the President.").

136 Petition for Writ of Certiorari at 1, Trump v. Citizens for Resp. and Ethics in Wash., (No. 20-330) (Sept. 9, 2020) ("Mandamus Is Appropriate to Correct the District Court's Clear and Indisputable Legal Errors in Declining to Dismiss Respondents' Suit[.]").

137 Blumenthal v. Trump, No. 20-5, *cert. denied*, (U.S. Oct. 13, 2020).

orders that the judgments of the United States Court of Appeals for the Second and Fourth Circuit were vacated and the cases remanded with directions to dismiss the cases as moot[138] affirming the arguments submitted by District of Columbia and CREWS that the petitions of certiorari should not be granted due to the fact that Donald Trump lost the November 2020 presidential election and would not be president on January 20, 2021.[139] Although the question of whether the plaintiffs had standing to enforce the emoluments clause was not finally settled by the Supreme Court, in two of the three cases standing was affirmed,[140] and two courts had formally held that the emoluments clause applies to the financial activities of President Trump.[141]

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138 See *Supreme Court Orders*, at 2 (January 25, 2021), https://www.supremecourt.gov/orders/courtorders/012521zor_3f14.pdf.

139 *See* Respondents' Brief in Opposition to Petition of Certiorari at 6, 8, Trump v. Citizens for Resp. and Ethics in Wash., (No-20-330) ("[T]he case will become moot on January 20, 2021, when President-Elect Biden is inaugurated as President. . . . That alone is reason to deny the petition. . . . Because there is no reasonable expectation that this 'same controversy' will persist once President Trump leaves office, the government's petition here amounts to a request for an advisory opinion on the standing of plaintiffs to bring Emoluments Clause challenges to future presidents."); Brief in Opposition to Petition of Certiorari at 27, Trump v. District of Columbia, (20-331) ("This case arises from Donald Trump's decision to retain ownership of the Trump Organization while holding the Office of President. Based on the certified election results, however, President-Elect Joseph R. Biden, Jr. will be inaugurated as the 46th President of the United States on January 20, 2021. The moment that occurs . . . [t]he case will be moot.")

140 On December 21, 2017, the District Court for the Southern District of New York held that CREW did not have standing to sue President Trump to enforce the Emoluments clause. On September 13, 2019 the Second Circuit reversed. *See* Citizens for Resp. and Ethics in Gov't v. Trump, 939 F.3d 131, 141–42 (2nd Cir. 2019).

On September 28, 2018, the District Court for the District of Columbia held that the members of congress had standing to sue President Trump for violations of the Emoluments clause. *See* Blumenthal v. Trump, 335 F. Supp. 3d 45, 51 (D.D.C. 2018).

On March 28, 2018, the District Court for the District of Columbia found that the District of Columbia and the State of Maryland had standing, *see* Dist. of Columbia v. Trump, 291 F. Supp. 3d 725, 732 (D. Md. 2018). On July 25, 2018, the district court held on the merits:

> that Plaintiffs have convincingly argued that the term "emolument" in both the Foreign and Domestic Emoluments Clauses, with slight refinements that the Court will address, means any "profit," "gain," or "advantage" and that accordingly they have stated claims to the effect that the President, in certain instances, has violated both the Foreign and Domestic Clauses. The Court DENIES the Motion to Dismiss in that respect.

See District of Columbia v. Trump, 315 F. Supp. 3d 875, 878 (D. Md. 2018).

141 District of Columbia v. Trump, 315 F. Supp. 3d 875, 878 (D. Md. 2018) and Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018). The District of Columbia District Court held regarding the Foreign Emoluments Clause:

> The language of the Emoluments Clause is both sweeping and unqualified. The acceptance of an emolument barred by the Clause is prohibited unless Congress

Leaving the question of standing aside,[142] I propose to look at the various complaints from the perspective of OLC jurisprudence on the emoluments

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> chooses to permit an exception. The Constitution of the United States has left with Congress the exclusive authority to permit the acceptance of presents from foreign Governments by persons holding Offices under the United States. And the President may not accept any emolument until Congress votes to give its consent.
>
> The Clause was intended by the Framers to guard against corruption and foreign influence. Historically, Presidents have complied with the Clause by either seeking and obtaining congressional consent prior to accepting foreign presents or emoluments, or by requesting an opinion from the Executive or Legislative Branch's advisory office as to whether the Clause applies.
>
> Modern Presidents, except for President Trump, have sought advice from the Department of Justice Office of Legal Counsel ("OLC") prior to accepting potentially covered emoluments. For example, President Kennedy requested an opinion on whether the offer of an "honorary Irish citizenship" would fall within the scope of the Clause. And prior to his acceptance of the Nobel Peace Prize in 2009, President Obama requested an opinion from OLC as to whether accepting the prize would conflict with the Clause.
>
> Since the Clause prohibits the President from accepting a prohibited foreign emolument unless Congress votes to consent, the Constitution gives each individual Member of Congress a right to vote before the President accepts. That Congress acts as "the body as a whole" in providing or denying consent does not alter each Member's constitutional right to vote before the President accepts a prohibited foreign emolument because the body can give its consent only through a majority vote of its individual members.
>
> Accordingly, the Court finds that plaintiffs have standing to sue the President for allegedly violating the Foreign Emoluments Clause.

Blumenthal, 335 F. Supp. 3d at 53–54, 72 (D.D.C. 2018) (internal quotation marks and citations omitted).

142 In defending the Second Circuit panel opinion and the denial of *en banc* review, Judge Leval asserted that plaintiffs' economic competitor injury claim established standing under Article III. *Supra* note 133, Judge Leval, Statement in Support of the Denial of *En Banc* Rehearing at 128, 129, 131–32, 138.

Judge Leval's opinion was in line with OLC jurisprudence regarding the appearance of or actual conflict of interest and possibility of corruption. Judge Leval argued that the plaintiff's argument that they suffered economic injury was logical because the nature of Trump's position as chief of American foreign policy and as President, both provide an incentive for diplomats (foreign emoluments clause) and states (domestic emoluments clause) to choose his hotels and restaurants over others in Washington D.C. to curry favor with him due to his position in the government and policy made by the government. *Id.* at 130–32. "What is involved in the plaintiffs' allegations is an advantage (derived by the defendant from allegedly illegal conduct) that will be clearly perceptible to governmental customers, and will provide them with a strong incentive to patronize the President's establishments in preference to the plaintiffs'." *Id.* at 136. Which is precisely what the foreign and domestic emoluments clauses are designed to prevent, *see supra* part II.

As to the emoluments clause itself regarding standing, Judge Leval asserted, while it is true, "a violation of the Emoluments Clauses does not, by itself, confer standing" the plaintiffs establish standing because they make an "entirely plausible allegation that, as a result of the President's conduct, their businesses will suffer a direct and particularized economic injury" because the

clauses and determine what the OLC would have concluded regarding the applicability of the foreign and domestic emoluments clauses to President Trump and his domestic and international businesses which produce income to him.

President Trump did not seek an OLC opinion on his finances, but if the OLC were presented with a question from the White House as to whether President Trump was in violation of the domestic emolument or foreign emolument clauses it would, according to past opinions, have made the following inquiries:

1. Whether the president is a "Person holding any Office of Profit or Trust under [the United States]."

2. Whether profits, fees, or payments from his hotels or other financial business patronized by foreign diplomats or governments are "Emolument[s] . . . from any King, Prince, or foreign State."

3. Whether profits, fees, or payments from his hotels of other business patronized by officials from various states within the United States is receiving "any other Emolument from the United States, or any of them."

Taking as a given that question one is answered in the affirmative, if either or both questions two and three are answered in the affirmative the OLC would have advised that the president would be in violation of the foreign and/or domestic emoluments clauses and could not accept such emoluments. For the purposes of this exercise, it will be assumed as true the assertions made in the three lawsuit complaints regarding the income and business practices of President Trump and his domestic and international businesses.

Questions one and two: The foreign emoluments clause. The OLC opined in 1982 that the threshold question presented in a foreign emoluments clause inquiry is whether the person is holding an office of Profit or trust and concluded that a person holding a supervisory capacity or a person ~~who~~ holding a position under the Appointment Clause is a person who holds an office under the United States and thus is holding an office of profit or trust.[143] The OLC assumed without discussion that the foreign emolument clause applied to the president in both the 1963 *Irish Citizenship* opinion and the 1981 *Retirement Benefits* opinions. In the 2009 *Nobel Prize* opinion the assumption that the president holds an office of profit or trust was affirmed

President's conduct "harm to a plaintiff's competitive position in the marketplace is precisely the type of palpable economic injury that has long been recognized as sufficient to lay the basis for standing." *Id.* at 143 (internal citation and quotation marks omitted).

143 Robert B. Shanks, Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156, 157 (1982).

holding that, "[t]he President surely holds an Office of Profit or Trust."[144] This presumption is based on prior opinions that defined the office of profit or trust by the nature of office in question and its function and authority defined by factors including whether the office is a constitutional office above offices filled through the appointments clause, whether the office has supervisory authority over the formation and/or implementation of government policy, whether the position carries law enforcement responsibilities and powers of the nation, whether the position requires an oath, whether the position requires security clearances, and whether the position carries a demand for a high level of loyalty to the United States.[145] In a 1988 opinion on the nature of federal law enforcement agents in relation to the emoluments clause the OLC concluded,

144 Barron, *supra* note 82, at 374.

145 *See generally* Karl R. Thompson, Special Government Employee Serving as Paid Consultant to Saudi Company, 40 op OLC 1 (2016) ("office of Profit or trust" under the Foreign Emoluments clause is defined in two different ways, either as any office covered by the Appointments Clause or an office covered by the multi-factor test designed to apply to an employee subject possible foreign corruption); Applicability of the Emoluments Clause to Non-Government members of ACUS (II), 34 Op. O.L.C. 181 (2010); Charles J Cooper, Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission *supra* note 35 ("Rather, under the Emoluments Clause, the inquiry is whether [the] position . . . could be characterized as one of profit or trust under the United States—a position requiring undivided loyalty to the United States government."); John O. McGinnis, Authority of Foreign Law Enforcement Agents to Carry Weapons in the United States *supra* note 35 ("The Emoluments Clause must be read broadly in order to fulfill that purpose. Accordingly, the Clause applies to all persons holding an office of profit or trust under the United States, and not merely to that smaller group of persons who are deemed to be 'officers of the United States' for purposes of Article II, Section 2 of the Constitution."); Walter Dellinger, The Advisory Committee on International Economic Policy, 20 Op. O.L.C. 123 (1996) (finding that sitting on the advisory committee was not holding an office of profit or trust because the position met "only occasionally, serve without compensation, take no oath, and do not have access to classified information; furthermore, the Committee is purely advisory, is not a creature of statute, and discharges no substantive statutory responsibilities."); Christopher H. Schroeder, The Constitutionality of Cooperative International Law Enforcement Activities Under the Emoluments Clause, 20 Op. O.L.C. 346, 349-350 (1996); ("the ordinary meaning of the term "office" does not include assignments of duties to persons who hold no positions in the government. In interpreting the term even outside the context of the Constitution, the Supreme Court has stated that an office is a public station conferred by the appointment of government and that the term embraces the idea of tenure, duration, emolument and duties fixed by law.")(internal citation and quotation omitted); Richard L Shiffrin, Application of Emoluments Clause to "Representative" Members of Advisory Committees, 21 Op. O.L.C. 176 (1997) (A person holds an office of profit or trust when that person is a servant of the government.); John P. Elwood, Application of the Emoluments Clause to a Member of the FBI Director's Advisory Board, 31 O.L.C. 154, 156 (2007) ("an indispensable element of a public 'office' is the exercise of some portion of delegated sovereign authority . . . sovereign authority as power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit . . . . Such authority primarily involves the authority to administer, execute, or interpret the law . . . . To be an 'office,' a position must at least involve some exercise of governmental authority . . . .") (internal citation omitted); and *supra* note 84.

> As a matter of general principle, anyone exercising law enforcement powers on behalf of the United States must be viewed as holding an office of trust under the Emoluments Clause. Federal law enforcement agents, by the nature of their office, are frequently granted an array of powers that are denied to the private citizen; in turn, citizens look to such officers to perform a host of dangerous but necessary tasks to the best of their ability and with undivided loyalty to the United States.
>
> These same characteristics of office—the reposing of trust, the importance of the task performed by those who hold the office, the necessity for undivided loyalty—have been cited in other contexts in support of a determination that an office is an "office of profit or trust" under the United States for purposes of the Emoluments Clause. Moreover, as the text of the Emoluments Clause suggests, one can hold an "office of trust" for purposes of the Emoluments Clause even if the office entails no compensation. 15 Op. Att'y Gen. 187, 188 (1877) (members of Centennial Commission who receive no compensation may nonetheless hold "offices of trust" under the Emoluments Clause). Accordingly, those who possess federal law enforcement powers, whether paid or unpaid, hold offices of trust under the United States.[146]

Clearly if a federal law enforcement officer with the power and duty to enforce federal law is a holder of an office or profit or trust under the emolument clause, surely the president as the constitutional officer who is constitutionally the chief law enforcement officer of the United States ("shall take Care that the Laws be faithfully executed")[147] holds an office applicable to the emoluments clause.

In 2005 the OLC issued an opinion, *Application of the Emoluments Clause to a Member of the President's Council on Bioethics*, which provided

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146 *Supra* note 35, at 69. The OLC rejected the broad scope of this opinion in Christopher H. Schroeder, The Constitutionality of Cooperative International Law Enforcement Activities Under the Emoluments Clause, 20 O.L.C. 346, 349 (1996), which focused on cooperative agreements between U.S. and United Kingdom law enforcement jointly enforcing anti-drug laws in the Caribbean and finding that allowing United Kingdom law enforcement to function within U.S. waters did not violate the emoluments clause when they jointly enforced federal law. Thus the "reject[ing] this sweeping and unqualified view" was attached to "extending the Emoluments Clause to persons having *no* position or employment in the United States Government." *Id.* Clearly the President of the United States has a position or employment in the United States government. The OLC rejection of the 1988 opinion in the 1996 opinion was limited to its reach to foreign law enforcement in cooperation with U.S. Law enforcement and the rejection of the broad assertion that members of advisory boards are holders of an office of Profit or Trust. *See infra* note 148 and accompanying text. But the 1996 OLC opinion did not reject the framework in defining an office of profit or trust which includes holding law enforcement powers and powers that are not provided to private citizens and powers that require a level of loyalty of the office holder.

147 U.S. CONST. art. II, § 3. *See also* U.S. CONST. art. II, § 1 and U.S. CONST. art. VI (requiring the president to swear an oath to "preserve, protect and defend the Constitution of the United States" which is the "the supreme Law of the Land.").

a direct and formal analysis on the definition of the office of Profit or Trust under the United States,[148] and determined,

> [W]e have consistently concluded that a purely advisory position is neither a "civil Office under the Authority of the United States" nor an "Office under the United States," because it is not an "office" at all. To be an "office," a position must at least involve some exercise of governmental authority, and an advisory position does not.[149]
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> . . . .
>
> The legal definitions of a public office have been many and various. The idea seems to prevail that it is an employment to exercise some delegated part of the sovereign power; and the Supreme Court appears to attach importance to the ideas of 'tenure, duration, emolument, and duties,' and suggests that the last should be continuing or permanent, not occasional or temporary.[150]
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> . . . .
>
> Finally, the uncontradicted weight of judicial authority confirms that a purely advisory position is not a public "office." These authorities list several factors relevant to determining whether a position amounts to a public "office," including whether it involves the delegation of sovereign functions, whether it is created by law . . . , whether its occupant is required to take an oath, whether a salary or fee is attached, whether its duties are continuing and permanent, the tenure of its occupant, and the method of appointment. But they likewise make clear that the sine qua non of a public "office" is the exercise of some portion of delegated sovereign authority.[151]
>
> . . . .
>
> [A]n individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. . . . *The most important characteristic . . . the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government*, to be exercised by him for the benefit of the public.[152]
>
> . . . .
>
> [W]e have not found a single case in which an individual was deemed to hold such an "office," including one "of profit or trust," where he was invested with no delegated sovereign authority, significant or otherwise.[153]

148 Noel J. Francisco, Application of the Emoluments Clause to a Member of the President's Council on Bioethics, 29 Op. O.L.C. 55 (2005).

149 *Id.* at 64.

150 *Id.* at 65 (citations omitted).

151 *Id.* at 66–67 (citations omitted).

152 *Id.* at 68.

153 *Id.* at 69.

It is without a doubt that the President of the United States holds an office of sovereign authority which is "delegated and possessed . . . belonging . . . to one of the three great departments"[154] in the American government.

Having determined that President Trump holds an office of Profit or Trust under the United States, the remaining question would be (1) whether the payments he is receiving through business interactions in his hotels are emoluments and (2) whether the payments are from "foreign State" which are prohibited without congressional approval.

As previously discussed, the OLC has opined that any payment or present (gift or reward) that can be given, withheld, and/or has been is earned for actions or services provided is emolument.[155] But under the foreign emoluments clause, the emolument must be received from a foreign state or its instrumentality.[156] The plaintiffs in the *Blumenthal*, *CREW*, and *District of Columbia* lawsuits asserted that President Trump was gaining earned payments through his commercial enterprises both domestic and international. President Trump did not dispute the income by these enterprises.[157] He asserted to the contrary that these earned payments, like those earned by previous presidents, were never covered by the emoluments clause.[158] President Trump asserted that the framers, "gave no indication that they intended to require officeholders to divest their private commercial businesses in order to assume federal office. And yet, it was common at the time for federal officials to have private business pursuits."[159] OLC

154 *Id.* at 68.

155 *See* Barron *supra* note 102 (discussing emolument). *See also supra* notes 34–35 (discussing emolument).

156 *See* Koffsky *supra* note 112 (discussing emolument). *See also supra* notes 34–35 (discussing emolument).

157 *See* Memorandum in Support of Defendant's Motion to Dismiss at 41, District of Columbia v. Trump, 17-1596 (D. Md.) (Sept. 29, 2017) ("[T]he Emoluments Clauses were not designed to reach commercial transactions that a President (or other federal official) may engage in as an ordinary citizen through his business enterprises. At the time of the Nation's founding, government officials were not given generous compensations, and many federal officials were employed with the understanding that they would continue to have income from private pursuits . . . . Presidents who were plantation owners similarly continued their agriculture businesses, exporting cash crops overseas.").

158 *See id.* at 45 ("For over two centuries, the Emoluments Clauses have been interpreted and applied in an office- and employment-specific manner, without infringing on the ability of Presidents or other officeholders to have private business interests, when there is no indication that the official is using such businesses as a conduit to receive compensation for service to a foreign government in an official capacity or in an employment-like capacity. In line with its drafting history, the Foreign Emoluments Clause was invoked most often, for the several decades following its adoption, in the context of foreign-government gifts tendered to U.S. diplomats or officials.").

159 *Id.* at 51.

jurisprudence retorts that the defining of the range and meaning of emoluments is based on its purpose which is to avoid the possibility of corruption of any holder of an office of profit or trust and such holder must be shielded from the corrupting influence of outside emoluments. The search and pursuit of business profits while holding an office of trust under the United Sates by definition is a corrupting influence.

Having concluded that outside business ventures and profits secured by them are emoluments, OLC jurisprudence would focus on the source of these emoluments—whether they originated from a "foreign state" or its instrumentality. President Trump provided no denial that his international ventures included clients that were government agencies or instrumentalities. Diplomats were engaged to use his hotels and golf courses and other business entities. The OLC would conclude that the "foreign state" or its instrumentality requirement was met.

Thus, if asked[160] and if the OLC affirmed its jurisprudence, the OLC would advise the White House that the President Trump would be in violation of the foreign emoluments clause if he received payments, fees, profits from business ventures with foreign governments through his national and international businesses without approval from Congress.[161] The OLC would conclude that the purpose of the clause was to prevent corruption and the possibility of corruption and that broader purpose defines the meaning of the

160 The president did not request an OLC opinion regarding his actions which is break from executive branch tradition. Presidents Kennedy, Reagan and Obama all sought OLC opinions regarding possible emoluments clause concerns, as the D.C. District Court observed in *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 206 (D.D.C. 2019). The D.C. court, as the Maryland court does, affirms the test (totality of the circumstances) and conclusions of the OLC regarding the definition and application of the emoluments clause. *Id.* "OLC opinions have consistently cited the broad purpose of the Clause and broad understanding of "Emolument" advocated by plaintiffs to guard against even the *potential* for improper foreign government influence." *Id.* "Accordingly, adopting the President's narrow definition of "Emolument" would be entirely inconsistent with Executive Branch practice defining "Emolument" and determining whether the Clause applies." *Id.*

161 The Maryland court came to the same conclusion regarding the emoluments clause. *See* District of Columbia v. Trump, 315 F. Supp. 3d 875, 899 (D. Md. 2018) ("[S]ole or substantial ownership of a business that receives hundreds of thousands or millions of dollars a year in revenue from one of its hotel properties where foreign and domestic governments are known to stay (often with the express purpose of cultivating the President's good graces) most definitely raises the potential for undue influence, and would be well within the contemplation of the Clauses.").

foreign emoluments clause.[162] The OLC would conclude that the emoluments clause is not voluntary but constitutionally required.[163]

Question three—*the domestic emoluments clause*. The domestic emoluments clause prohibits the president from receiving "any other Emolument from the United States, or any of them."[164] In the Reagan *Retirement Benefits* opinion the OLC concluded that the domestic emolument clause was implicated because President Reagan was receiving payments from a state government, but the clause did not prohibit the president from receiving the retirement payments because they were not

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162 *See id.* at 900 for the court affirming this approach to defining emoluments:

> The Court is satisfied, consistent with the text and the original public meaning of the term "emolument," that the historical record reflects that the Framers were acutely aware of and concerned about the potential for foreign or domestic influence of any sort over the President. An "emolument" within the meaning of the Emoluments Clauses was intended to reach beyond simple payment for services rendered by a federal official in his official capacity, which in effect would merely restate a prohibition against bribery. The term was intended to embrace and ban anything more than *de minimis* profit, gain, or advantage offered to a public official in his private capacity as well, wholly apart from his official salary.

The court proceeded to affirm OLC jurisprudence directly: "OLC pronouncements repeatedly cite the broad purpose of the Clauses and the expansive reach of the term 'emolument.'" *Id.* at 901. "The main takeaway from executive precedent stands in bold relief: The Emoluments Clauses are intended to protect against any type of potentially improper influence by foreign, the federal, and state governments upon the President." *Id.* at 902. The court also discussed the Reagan retirements opinion, stating "profits received from foreign or domestic governments that patronize the Trump International Hotel for the express purpose of potentially currying favor with a sitting President present a stark contrast to the fully vested retirement benefits that then-Governor Reagan earned from the State of California which the State of California was not free to withdraw." *Id.* at 903. The court correctly observed the distinction between profits secured through business—prohibited by the emoluments clause—and payments by right (retirement pension) that could not be withdrawn increased or decreased by the state of California—which are not emoluments.

163 The D.C. Court in *Blumenthal v. Trump*, came to the same conclusion. Citing the OLC, the court concluded that:

> "The language of the Emoluments Clause is both sweeping and unqualified." The acceptance of an Emolument barred by the Clause is prohibited unless Congress chooses to permit an exception. Given the "sweeping and unqualified" Constitutional mandate, the President has "no discretion . . . no authority to determine whether to perform the duty" to not accept any Emolument until Congress gives its consent. Accordingly, seeking congressional consent prior to accepting prohibited foreign emoluments is a ministerial duty. . . . The President complains about the "significant burdens" an injunction requiring him to comply with the Clause would impose. However . . . the correct inquiry is not whether injunctive relief requiring the President to comply with the Constitution would burden him, but rather whether allowing this case to go forward would interfere with his ability to ensure that the laws be faithfully executed . . . . Accordingly, the injunctive relief sought in this case is constitutional.

Blumenthal v. Trump, 373 F. Supp. 3d 191, 212 (D.D.C. 2019), *vacated as moot*, 949 F.3d 14 (D.C. Cir. 2020) (internal citations omitted).

164 U.S. CONST. art. II, § 1, cl. 7.

subject to the state changing or in any way affecting his receipt of them.[165] Although it is clearly established that the clause applies to fees, payments, profits[166] from states and their instrumentalities or from the United States it does not apply to such emoluments from private parties.[167] The OLC concluded in the *Nobel Prize*[168] and in the *Goteborg Award*[169] opinions that the

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165 Simms, *supra* note 73.

166 *District of Columbia v. Trump*, 315 F. Supp. 3d at 898. ("Where, for example, a President maintains a premier hotel property that generates millions of dollars a year in profits, how likely is it that he will not be swayed, whether consciously or subconsciously, in any or all of his dealings with foreign or domestic governments that might choose to spend large sums of money at that hotel property? How, indeed, could it ever be proven, in a given case, that he had actually been influenced by the payments? The Framers of the Clauses made it simple. Ban the offerings altogether (unless, in the foreign context at least, Congress sees fit to approve them).").

167 *See id.* at 899 ("In any event, it must be remembered that the Emoluments Clauses only prohibit profiting from transactions with foreign, the federal, or domestic *governments*; they do not prohibit all private foreign or domestic transactions on the part of a federal official."). The court concluded,

> Executive branch precedent and practice have clearly and consistently held, apart from *de minimis* instances, that both Emoluments Clauses prohibit Presidents from receiving any profit, gain, or advantage from foreign, the federal, or domestic governments, except in the case of the Foreign Clause, where Congress approves. Based on precedent from the OLC and Comptroller General, there would be an exception, at least under the Domestic Emoluments Clause, where the thing of value received by the federal office holder, after the fashion of the Reagan-California pension precedent, was fully vested and indefeasible before the federal official became a federal official, the rationale being that the benefit would lack any potential to influence the federal office-holder in his decision-making.

Id. at 904.

The D.C. District Court came to the same conclusion utilizing the similar reasoning in *Richard Blumenthal v. Donald Trump*. Citing Judge Messitte's opinion a year earlier, the court concluded that, "defining an 'Emolument' as a 'profit,' 'gain,' or 'advantage' 'ensure[s] that the Clause covered all types of financial transactions—solicited or unsolicited, reciprocated or unreciprocated, official or private'—even if 'Emolument' is sometimes used synonymously with 'present.'" *Blumenthal v. Trump*, 373 F. Supp. 3d at 201. "Finally, there is no question that the receipt of Emoluments is tied to the office of President and regulating his conduct as President . . . ." *Id.* at 202.

168 Barron, *supra* note 102, at 380 ("To determine whether a particular case involves receipt of a present or emolument from a foreign state, however, our Office has closely examined the particular facts at hand. Specifically, we have sought to determine from those facts whether the entity in question is sufficiently independent of the foreign government to which it is arguably tied—specifically with respect to the conferral of the emolument or present . . . that its actions cannot be deemed to be those of that foreign state. In short, our opinions reflect a consistent focus on whether an entity's decision to confer a particular present or emolument is subject to governmental control or influence.")

169 Daniel L. Koffsky, NOAA Employee's Receipt of the Göteborg Award for Sustainable Development, 34 Op. O.L.C. 210, 212–213 ("In our view, the Emoluments Clause does not apply to the NOAA scientist's acceptance of the Göteborg Award because that prize would not be tendered by a "foreign State" within the Clause's meaning. That view does not rest on the notion that the City of Göteborg is not a "foreign State" under the Emoluments Clause, but rather on the conclusion, based on the representations you have made, that the City does not appear to control the granting of

critical question regarding the emolument was the status of the source of the emolument and if that source is private—nongovernmental—the person holding the office of profit or trust can accept the emolument without congressional approval. The domestic emoluments clause uses the same limiting scope, and the OLC would conclude "the United States, or any of them" means any state or local government entity and that President Trump would not be in violation of the domestic emolument clause when he receives payments from private nongovernmental entities. He would be in such violation if he received any emolument from a U.S. government agency or any state or subdivision thereof.[170]

CONCLUSION

In 1903 President Theodore Roosevelt asserted the following in his third address to Congress,

> Under our form of government all authority is vested in the people and by them delegated to those who represent them in official capacity. There can be no offense heavier than that of him in whom such a sacred trust has been reposed, who sells it for his own gain and enrichment. . . . The exposure and punishment of public corruption is an honor to a nation, not a disgrace. The shame lies in toleration, not in correction . . . . If we fail to do all that in us lies to stamp out corruption we can not escape our share of responsibility for the guilt. The first requisite of successful self-government is unflinching enforcement of the law and the cutting out of corruption.[171]

As discussed in this article, the OLC and the Attorney General before them, have asserted that the goal and purpose of the emoluments clauses is to prevent not only government corruption, but the possibility of it occurring by preventing any officer from accepting any payment, fee, or emolument from any government entity; foreign or domestic. The President is obliged to comply with this constitutional prohibition.[172]

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the Göteborg Award. Rather, the selection of the award recipients appears to be made by the Göteborg Award Association, acting through a jury appointed by the Board of the Association. The relevant question here is whether the decision to grant the award to a particular individual by the jury appointed by the Board of the Association is sufficiently independent of the government of the City of Göteborg that conferral of the award should not be deemed an action of a foreign state for the purposes of the Emoluments Clause.").

170 *Id. See also supra* note 102 (arguing that President Obama is not violating the Emoluments Clause by receiving the Nobel Peace Prize "because the Norwegian Nobel Committee is not a 'King, Prince, or foreign State"); Shanks, *supra* note 143, at 158 ("Congress has consented only to the receipt of minimal *gifts* from any foreign state . . . . Therefore, any other emolument stand forbidden . . . .").

171 President Theodore Roosevelt, Third Annual Message to Congress (Dec. 7, 1903).

172 *See supra* notes 169, 171. *See infra* note 173.

Presidents are not kings and all officers under the Constitution—the president included—are required to comply with its texts and the laws passed under its authority.[173] As the Supreme Court has recently ruled in a different context regarding the standing of the president under the requirements of the law,

> In our judicial system, the public has a right to every man's evidence. Since the earliest days of the Republic, every man has included the President of the United States. Beginning with Jefferson and carrying on through Clinton [there is a] 200-year history of Presidents being subject to federal judicial process [and] presidential immunity does not bar the enforcement of a state grand jury subpoena . . . even when the subject matter under investigation pertains to the President.[174]

This 200-year history includes past presidents and their rhetorical defense of the rule of law, as Theodore Roosevelt made clear in his third annual address at the turn of the twentieth century: "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor."[175]

This truism has been long advocated by the courts as well as by past presidents dating back to the founding generation; as John Adams explained in 1776 before the drafting of the Constitution.

> The dignity and stability of government in all its branches, the morals of the people and every blessing of society, depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.[176]

In defense of this truism that acts required of the president under the law are not subject to discretion in obedience, the Fourth Circuit Court of Appeals went out of its way to correct the error in the advocacy of President Trump making clear that the President was not a King and that his powers as president were limited under the law.

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173 For discussion on the rule of law as applied to executive power, *see generally* Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEO. J.L. PUB. POL'Y 565, 565 (2014) (noting that "the arbitrary use of executive power is condemned"); Arthur H. Garrison, *The Rule of Law and the Rise of Control of Executive Power*, 18 TEX. REV. L. POL. 303, 304 (2014) (discussing the notion "that executive power can and should be controlled").

174 Trump v. Vance, 140 S. Ct. 2412, 2420–2421 (2020). The Court concluded that " . . . entrenched by 200 years of practice . . . confirms that *federal* criminal subpoenas do not 'rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions.'" *Id.* at 2425.

175 President Theodore Roosevelt, Third Annual Message to Congress (Dec. 7, 1903).

176 John Adams, Thoughts on Government (1776), https://press-pubs.uchicago.edu/founders/print_documents/v1ch4s5.html.

> Although the Constitution entrusts the President with the enormous responsibility of faithfully executing the law, see U.S. Const. art. II, § 3, cl. 5, the notion that the President is vested with unreviewable power to both execute and interpret the law is foreign to our system of government. The Framers, concerned about the corrosive effect of power and animated by fears of unduly blending government powers, dispersed the authority to enforce the law and the authority to interpret it. To hold otherwise would mean that the President alone has the ultimate authority to interpret what the Constitution means. Allowing the President to be the final arbiter of both the interpretation and enforcement of the law—as the dissents would—would gravely offend separation of powers. Rather than sanction an "assault by the judicial branch against the powers of the executive," first dissent at 27, our holding affirms the separation of powers principles dictated by the Constitution and endorsed by centuries of foundational jurisprudence.[177]

Although courts and presidential practice and tradition as well as the letter of the law all have a role in defending the principle that no man is above the law and all are subject to it; this maxim must also be defended by the people themselves; as James Garfield warned during the centennial celebration of the writing of the Declaration of Independence[178] before he was elected president.

> [T]he people are responsible for the character of their [Government]. . . . If it be intelligent, brave, and pure, it is because the people demand those high qualities. . . .
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> The most alarming feature of our situation is the fact that so many citizens . . . allow the less intelligent and the more selfish and corrupt members of the community to make the slates and "run the machine" of politics. They wait until the machine has done its work, and then, in surprise and horror at the ignorance and corruption in public office, sigh for the return of that mythical period called the "better and purer days of the republic." It is precisely this neglect of the first steps in our political processes that has made possible the worst evils of our system.

The Supreme Court held in *Trump v. Vance* that all presidents, from Jefferson through Clinton and now Trump, are subject to the dictates of the law and it was in defense of this principle that regarding the restraints placed on presidential enrichment under the Emoluments Clauses, the *en banc* Fourth Circuit court wrote,

> Such restraints are positive law, and of course the President must comply with the law. The duty to do so, however, is not a uniquely official executive duty of the President, for in the United States, every person—even the President—has a duty to obey the law. The duty to obey these particular laws—the Constitution's Emoluments Clauses—flows from the President's status as head

177 In re Trump, 958 F.3d 274, 288–289 (4th Cir. 2020), *vacated*, 141 S.Ct 1262 (2021).

178 James A. Garfield, *A Century of Congress*, (July 4, 1876), reprinted in THE ATLANTIC (April 1877), https://www.theatlantic.com/magazine/archive/1877/04/a-century-of-congress/519708/.

> of the Executive Branch, but this duty to obey neither constitutes an official executive prerogative nor impedes any official executive function.
>
> Moreover, even if obeying the law were somehow an official executive duty, such a duty would not be "discretionary," but rather a "ministerial" act.[179]

President Trump has sought to escape the application of the emoluments clauses by disputing the standing of the parties seeking their enforcement. As discussed previously, the Fourth and Second circuit courts had cleared the way for review of the cases on the merits of the meaning the emoluments clauses and their applicability to the financial actions of President Trump. The whole question became moot when President Trump lost his reelection in November 2020.

This article has asserted that if the OLC had been consulted, it would rule that the clauses apply to financial activities of President Trump and his accepting of payments from foreign governments for the use of his facilities is a foreign emolument and payments by the federal government or states for use of his facilities is a domestic emolument. The purpose of the payments in not the concern of the clauses, it is the receipt of enrichment and the threat or perception of corruption that is the point. As President Roosevelt made clear, "Every man must be guaranteed his liberty and his right to do as he likes with his property or his labor, so long as he does not infringe the rights of others."[180] But as president, the holder of the office must hold fidelity to the constitution and the laws and the traditions of the office[181] that govern actions while in that office even when they infringe on the holder's rights as businessman. As the *en banc* Fourth Circuit made clear regarding the purpose and applicability of the emoluments clauses of the Constitution, such

> [C]onstitutional dictates, like the Emoluments Clauses, do not vest the President with any duty to execute the law. They are, rather, restraints on the President. Indeed, as the dissenters acknowledge, the Founders themselves recognized that the Foreign Emoluments Clause constitutes a restraint. See second dissent at 323 (quoting 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 465 (Jonathan Elliot ed., 2d ed. 1836) ("The [Foreign Emoluments Clause] restrains any person in office from accepting of any present or emolument, title or office, from any foreign prince or state." (emphasis added))).[182]

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179 *In re Trump*, 958 F.3d at 288.

180 President Theodore Roosevelt, Third Annual Message to Congress (Dec. 7, 1903).

181 U.S. CONST. art II, § 1, cl. 8 (requiring the President to state that "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.").

182 *In re Trump*, 958 F.3d at 288.

But neither of the clauses apply if the payments or profits ae sourced from private entities, foreign or domestic. Exercising its role[183] as the neutral arbiter and defender of the law within the executive branch,[184] the OLC would have opined that any financial gain secured by President Trump that was from private hands would be lawful and not subject to congressional approval under the foreign emoluments clause or prohibited outright by the domestic clause because both only focus on government sourced enrichment, not private enrichment.

183 Arthur H. Garrison, *Law and Politics in the Aftermath of 9/11: Understanding the Interaction of Politics, Power, the Role of the OLC, and the Law during the Bush Administration, through Agency and Policy Theory*, 24 S. CAL. INTERDISC. L.J. 1 (2014); Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-in-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 648 (2012).

184 Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217 (2012); Arthur H. Garrison, *The Office of Legal Counsel "Torture Memos": A Content Analysis of What the OLC Got Right and What They Got Wrong*, 49 CRIM. L. BULL. 997 (2013); Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*,43 CUMB. L. REV. 375 (2012).