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Enforcing the Intent of the Constitution's Foreign and Domestic Emoluments Clauses

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The Constitution's Foreign and Domestic Emoluments Clauses are meant to prevent corruption and conflicts of interest. The Foreign Emoluments Clause prohibits some federal officials, including the president, from receiving payments or other benefits from foreign governments, while the Domestic Emoluments Clause bans the president from receiving payments other than the office's salary from the federal and state governments. To enforce the clauses, this report recommends requiring the president to divest from business interests and increasing powers to investigate and punish violations of the clauses.

This report was researched and written during the 2018-2019 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, which is focused on developing non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic's reports are available at law.fordham.edu/democracyreports.



Enforcing the Intent of the Constitution's Foreign and Domestic Emoluments Clauses

Democracy and the Constitution Clinic
Fordham University School of Law

James Auchincloss, Megha Dharja, Krysia Lenzo

January 2020



FORDHAM UNIVERSITY
THE SCHOOL OF LAW

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Executive Summary

The Foreign and Domestic Emoluments Clauses were included in the Constitution to prevent corruption and the perception of conflicts of interest in government. The Constitution's framers understood the consequences of corrupt government officials, particularly executive officers who could be easily bribed or coerced into acting against the nation's interests. This report explores the history of the Emoluments Clauses from the Constitutional Convention to their modern interpretations, discusses our understanding of the proper interpretation of the clauses, and proposes policies to codify the clauses' spirit.

I. History and Context

The origins of the Emoluments Clauses can be traced to the 1650s, when the Dutch prohibited their foreign ministers from receiving "any presents, directly or indirectly, in any manner or way whatever." Influenced by this rule, the framers added their own version to the Articles of Confederation, the United States' first constitution.

The Foreign Emoluments Clause prohibits officers of the United States from accepting gifts, emoluments, or titles from foreign governments. At the Constitutional Convention, the framers discussed their concerns about foreign influence and corruption in light of gift-giving schemes British monarchs used to manipulate members of Parliament. Concerned that European kings might use the same schemes to gain influence over the newly formed American government, the framers added the Foreign Emoluments Clause to the Constitution.

The Domestic Emoluments Clause sets terms for the president's compensation and bans the president from receiving emoluments from the United States or any of the individual states. The framers were not just concerned with corruption emanating from foreign influence attempts; they recognized it could also have domestic sources, and they intended the Domestic Emoluments Clause as a bulwark against those threats. The Domestic Emoluments Clause was designed to prevent the president from becoming beholden to Congress or any of the state governments.

The debate over the definition of "emoluments" as used in Constitution is ongoing in academia and in the courts. Some scholars argue "emoluments" should be defined broadly to include any "profit," "gain," "benefit," or "advantage," while others submit that it should be interpreted narrowly to only include profits derived from carrying out the duties of office.

For decades, the Department of Justice's Office of Legal Counsel ("OLC") has opined on questions regarding the proper application of the Emoluments Clauses. The publicly available opinions indicate the OLC has considered partially overlapping factors when evaluating potential violations of the clauses. In analyzing questions regarding the Foreign Emoluments Clause, OLC looks at (1) whether the person or persons in question hold an "office of profit or trust;" (2) whether the organization providing the emoluments is truly a foreign government; and (3) whether the receipt of the emoluments would make the recipient susceptible to undue influence or corruption. To resolve questions where the Domestic Emoluments Clause is implicated, the OLC's analysis relies primarily on the last factor: the likely impact of receiving the emoluments.

Government employees and members of Congress are required to comply with ethics and conflict of interest laws and rules, some of which enforce the Foreign Emoluments Clause. There is wide agreement that the Foreign Emoluments Clause applies to appointed positions in the federal government. Accordingly, the Foreign Gifts and Decorations Act bars employees in appointed positions from receiving "gift[s] or decoration[s]" from foreign governments absent consent from Congress. Even though there is some debate over whether the Foreign Emoluments Clause applies to elected officials, ethics rules for members of the House and Senate state that the Constitution prevents them from receiving "present[s]" from foreign governments. These regulations are very much within the spirit of the Foreign Emoluments Clause in that they ensure that government employees and members of Congress are not improperly soliciting or receiving gifts from foreign sources.

II. In Support of a Broad Interpretation of "Emoluments"

We argue for a broader view of the term "emoluments," which bars those subject to the Emoluments Clauses from profiting from foreign and domestic Emoluments governments. The framers would have understood the term "emoluments" to have a broad meaning, defined as any "profit," "gain," or "advantage." Additionally, when considering the factors the OLC has looked to in interpreting the Emoluments Clauses as well as the regulations that Congress and the executive branch have imposed on themselves to prevent corruption, we believe that a broader definition is more aligned with the spirit of the clauses.

III. Policy Proposals

To better address the concerns that inspired the Emoluments Clauses, we propose that Congress pass legislation enacting the clauses' intent.

A. Mandatory Divestment

We recommend mandating that the president divest from any businesses that he or she has an ownership interest in by either liquidating their assets or transferring that interest into a qualified blind trust for the duration of their presidency.

B. Strengthening Office of Government Ethics

We also recommend strengthening the Office of Government Ethics ("OGE") by adding an arm of the office specifically tasked with investigating potential violations of the Emoluments Clauses. This unit within OGE should be given the necessary investigatory tools and resources to examine potential violations involving executive branch officials. The unit should also have authority to either take unilateral disciplinary action or refer the matter to Congress for it decide whether to exercise its discretion under the Foreign Emolument to provide consent for receipt of emoluments.

C. Penalties

The OGE should be authorized to demand that executive branch employees who violate the Foreign Emoluments Clause disgorge all profits from the foreign source and work with OGE to terminate the conflict through supervised divestiture. Employees who have committed multiple violations or failed to properly divest from their potentially conflicted assets should be subject to fines. Given that any president whose conflict was detected by this OGE unit would be in violation of both a constitutional provision and the divestment portion of our proposed legislation, a fine would be an appropriate remedy in addition to disgorgement and divestment. Depending on the circumstances, Congress might consider impeachment proceedings.

Introduction

Should the president of United States be allowed to profit from foreign governments or from the United States or any of the individual states while serving in office? This question, which has become the subject of increased public debate since the 2016 presidential election, does not have a clear answer in the Constitution. The framers were fearful that officers of the United States, particularly the president, could become

susceptible to undue influence. To protect against corruption, the framers included the Foreign and Domestic Emoluments Clauses in the Constitution. But the exact meaning and application of these clauses is the subject of continuing debate. In this report, we present the history of the clauses, our position on their meaning, and our proposal for laws to codify their spirit.

I. History and Context

The origins of the Emoluments Clauses stretch back to the 1600s. The Dutch, in 1651, barred their foreign ministers from accepting “any presents, directly or indirectly, in any manner or way whatever.”¹ This rule seems to have directly influenced the inclusion of a similar clause in the Articles of Confederation,² the United States’ first constitution.³ When weaknesses in the Articles of Confederation led the framers to convene in 1787, concerns about corruption persisted. At the Philadelphia Convention, the framers worried that undue influence from both foreign and domestic sources could undermine the new government they were designing. As defense against this threat, they included the Foreign and Domestic Clauses in the Constitution.⁴

A. The Foreign Emoluments Clause

The Foreign Emoluments Clause prohibits officers of the United States from accepting gifts, emoluments, or titles from foreign governments. It 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.⁵

The impetus for this clause lay in the framers awareness of the gift-giving schemes that were common in European governments. British monarchs had a history of manipulating members of Parliament with “gifts, offices, and other inducements.”⁶ And European kings often gave presents to foreign ministers.⁷ Benjamin Franklin, well known for his love of France, found himself at the center of a controversy when he received a diamond-adorned snuff box from King Louis.⁸ Concerned about the perception of corruption, Franklin asked for and was granted permission by Congress to keep the present.⁹

At the Constitutional Convention, Charles Pickney of South Carolina made the case for including the Foreign Emoluments Clause by urging “the necessity of preserving foreign Ministers [and] other officers of the U.S. independent of external influence.”¹⁰ Edmund Jennings Randolph of Virginia also advocated for the clause, describing the response in the United States to a foreign king giving an American ambassador a present.¹¹ He said, “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.”¹² Randolph asserted that the Foreign Emoluments Clause was “provided to prevent corruption.”¹³

B. The Domestic Emoluments Clause

The Domestic Emoluments Clause sets terms for compensation for the president and bans the president from receiving emoluments from the United States or any of the individual states. It states:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.¹⁴

The origins of the Domestic Emoluments Clause can be traced back to provisions in early state constitutions designed to curb domestic corruption. For example, Maryland’s constitution prohibited individuals holding offices of public trust from accepting any presents from foreign states, the United States, or any of the individual states without consent.¹⁵ Similarly, Massachusetts’ constitution of 1780 set a salary for the governor to ensure he would “not be under the undue influence of any of the members of the general court by a dependence on them for his support.”¹⁶ The salary provision further states that its purpose is to encourage the governor to act in the interest of the public instead of focusing on his private affairs.¹⁷

1 Norman L. Eisen et al., *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS 4 (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf.

2 *Id.*

3 See MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 13 (2016).

4 See KEVIN J. HICKEY & MICHAEL A. FOSTER, CONG. RESEARCH SERV., IF11086, *THE EMOLUMENTS CLAUSES OF THE U.S. CONSTITUTION* (2019).

5 U.S. CONST. art. I, § 9, cl. 8.

6 Eisen, *supra* note 1, at 6.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* at 4-5 (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Farrand ed., 1911)).

11 *Id.* at 5 (citing 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (Max Farrand ed., 1911)).

12 *Id.*

13 *Id.*

14 U.S. CONST. art. II, § 1, cl. 7.

15 M.D. CONST. § XXXII (1776).

16 M.A. CONST. pt. 2, ch. 2, § 1, art. 13 (1780).

17 *Id.*

At the Constitutional Convention, Benjamin Franklin opposed compensating the executive for his services. He cited men’s “love of power, and the love of money” in arguing that a salary would attract corrupt leaders.¹⁸ Franklin did not prevail in his opposition to a presidential salary provision because other delegates thought a salary would help maintain the president’s independence from the legislature.¹⁹ Like the Massachusetts constitution’s salary provision, the Domestic Emoluments Clause sets a fixed compensation for the president that cannot be adjusted while the president is in office.²⁰ Without a fixed salary, the framers believed the legislature might increase or decrease the president’s compensation to bend him to its will.²¹

The fixed salary was also intended to prevent the president from extorting the legislature. The framers were aware of examples of colonial governors refusing to take certain actions unless they received pay increases.²² And Franklin, in adamantly opposing an absolute presidential veto power, had shared Pennsylvania’s experience with a governor who had frequently threatened to veto legislation unless the legislature increased his salary or provided him with other benefits.²³

Franklin and John Rutledge were not satisfied that preventing the legislature from changing the president’s salary would be enough to prevent corruption—the legislature and state governments might still seek to provide benefits to the president to influence his behavior. They proposed adding language to the salary provision barring the president from receiving “any other Emolument from the United States, or any of them.”²⁴ The additional language received swift approval from the other delegates.²⁵

C. Defining “Emoluments”

The current debate around the definition of “emolument” is based on how the term was used by the framers, its dictionary definitions throughout history, and how the Emoluments Clauses

have been applied. Advocates for a broad interpretation of the term assert that it includes anything of value.²⁶ As support for this definition, they look to the influences on the Constitution’s framers. Among the most significant influences on the framers were the works of Sir William Blackstone, an English jurist who authored the “Commentaries on the Laws of England.”²⁷ William D. Bader asserts that “Commentaries” “was the singularly most important intellectual influence on the attorneys who drafted the Constitution.”²⁸ John Mikhail notes that in “Commentaries” the term emoluments is used broadly to mean “profit,” “gain,” “benefit,” or “advantage.”²⁹ Mikhail also studied English language dictionaries published between 1604 and 1806, finding that in over 92% of these dictionaries, emolument was defined as “profit,” “advantage,” “gain,” or “benefit.”³⁰

In response to arguments that “emoluments” only refers to benefits tied to holding public office, Mikhail highlights that Blackstone used “emoluments” in the “context of family inheritance, private employment, and private ownership of land.”³¹ In addition, Mikhail observes that Blackstone argued in a copyright case in 1761 that a person should not be able to profit by publishing another person’s work because doing so “would be converting, to one’s own Emolument, the Fruits of another’s Labour.”³²

But not all historical evidence necessarily supports a broad interpretation of “emolument.” Seth Tillman argues that President Washington’s purchase of public land in office indicates that the definition of emolument should be narrow.³³ Tillman asserts that if the framers meant for “emoluments” to be interpreted broadly in the Domestic Emoluments

18 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 82 (Max Farrand ed., 1911).

19 Brianne J. Gorod et al., *The Domestic Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, CONST. ACCOUNTABILITY CTR. 4 (July 2017), https://www.theusconstitution.org/wp-content/uploads/2017/07/20170726_White_Paper_Domestic_Emoluments_Clause.pdf.

20 See U.S. CONST. art. II, § 1, cl. 7; M.A. CONST. pt. 2, ch. 2, § 1, art. 13 (1780).

21 Gorod, *supra* note 19, at 1.

22 See *id.* at 6.

23 *Id.* at 5.

24 *Id.* at 6.

25 *Id.*

26 See, e.g., Complaint, Citizens for Resp. and Ethics in Wash. v. Donald J. Trump, 276 F.Supp.3d 174 (S.D.N.Y. 2017); see also Brief for Amici Curiae Certain Legal Historians in Support of Plaintiffs-Appellees and in Opposition to Writ of Mandamus, In re: Donald J. Trump, 928 F.3d 360 (4th Cir. 2019).

27 *Sir William Blackstone, ARCHITECT OF THE CAPITOL*, <https://www.aoc.gov/art/relief-portrait-plaques-lawgivers/sir-william-blackstone> (last updated Apr. 29, 2016).

28 William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 40 (2011) (quoting William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 9 (1994)).

29 John Mikhail, “Emolument” in *Blackstone’s Commentaries*, BALKINIZATION (May 28, 2017), <https://balkin.blogspot.com/2017/05/emolument-in-blackstones-commentaries.html>.

30 John Mikhail, *The Definition of ‘Emolument’ in English Language and Legal Dictionaries, 1523-1806* 1 (June 30, 2017), <https://ssrn.com/abstract=2995693>.

31 Mikhail, “Emolument” in *Blackstone’s Commentaries*, *supra* note 29.

32 *Id.*

33 Seth Barrett Tillman, *Business Transactions and President Trump’s ‘Emoluments’ Problem*, 40 HARV. J.L. & PUB. POL’Y 759, 764-65 (2017).

Clause to cover benefits beyond those related to an office, then Washington's actions were "grossly negligent" because he engaged in a private business transaction with the government.³⁴ But Tillman reasons that Washington would not have engaged in the sale if the framers' intended the Domestic Emoluments Clause to bar such transactions.³⁵ Mikhail agrees with Tillman that "emolument" in the Domestic Emoluments Clause is meant to apply only to emoluments the president receives for his services in office.³⁶

Jed Shugerman disagrees with Tillman's position, arguing that Washington may have violated the Domestic Emoluments Clause.³⁷ Shugerman points out that the framers were fallible men who were also known to have accepted presents from foreign states, potentially violating the Foreign Emoluments Clause.³⁸ Additionally, Shugerman argues there is little evidence that Washington's land deal was in fact public, which could account for the lack of contemporary criticism of the sale.³⁹

1. Office of Legal Counsel's Interpretations

For decades, the Department of Justice's Office of Legal Counsel ("OLC") has provided guidance to government employees and officials, including presidents, on potential violations of the Emoluments Clauses. These decisions have not been entirely consistent through the years in their definitions of "emolument" and "Office of Profit or Trust."⁴⁰ But the OLC opinions do provide some of the only insights into interpretations of the Emoluments Clauses by a government entity. While the opinions do not explicitly endorse a broad definition of "emoluments," they do show that the OLC has consistently considered the anti-corruption spirit of the two clauses.

The publicly available opinions⁴¹ involving the Emoluments Clauses indicate that the OLC has considered three factors when determining whether acceptance of certain profits or

gains violates either the Domestic or Foreign Emoluments Clause. In analyzing questions regarding the Foreign Emoluments Clause, the office considers (1) whether the person or persons who are receiving the profits or gains hold an "Office of Profit or Trust,"⁴² (2) whether the organization providing the emoluments is truly a foreign government,⁴³ and (3) whether the receipt of the emoluments would make the recipient susceptible to undue influence or corruption.⁴⁴ The third component is the main factor for analyzing possible violations of the Domestic Emoluments Clause.⁴⁵

The OLC has gradually narrowed its view of the positions that are "Office[s] of Profit or Trust."⁴⁶ In the early 1990s, the office declared that unpaid members of federal advisory committees held offices of trust, making them subject to the limitations in the Foreign Emoluments Clause.⁴⁷ But within three years of issuing this interpretation, the office withdrew it. In a letter to the Legal Advisor of the State Department, the OLC wrote, "We agree that not every member of an advisory committee necessarily occupies an 'Office of Profit or Trust' under the Clause and accordingly that the April 29, 1991 OLC opinion on advisory committees was overbroad."⁴⁸

34 *Id.* at 763.

35 *See id.* at 763-64.

36 Mikhail, *The Definition of 'Emolument' in English Language and Legal Dictionaries*, *supra* note 30, at 21-22.

37 Jed Shugerman, *George Washington's Secret Land Deal Actually Strengthens CREW's Emoluments Claim*, TAKE CARE (June 2, 2017), <https://takecareblog.com/blog/george-washington-s-secret-land-deal-actually-strengthens-crew-s-emoluments-claim>.

38 *Id.*

39 *Id.*

40 *See generally* Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC's Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1 (2006).

41 The OLC has not published every opinion regarding the Emoluments Clauses, meaning changes or reversals in the office's analysis might be obscured from public view. *Id.* at 4.

42 *See* Application of the Emoluments Clause to a Member of the President's Council on Bioethics, 29 Op. O.L.C. 55 (2005) (concluding that "to be an 'office' a position must at least involve some exercise of governmental authority, and an advisory position does not."); Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission, 10 Op. O.L.C. 96, 99 (1986) (determining that a part-time consultant held an office of profit or trust because he was required to take an oath of office, have a security clearance, follow the rules and regulations of the NRC, and be "on call to serve the agency."); Payment of Compensation to Individual in Receipt of Compensation From a Foreign Government, OFF. LEGAL COUNS. (Oct. 4, 1954) (analyzing whether a DOJ employee who was appointed by the attorney general and took oath prescribed for all persons appointed to offices of honor or profit held an office of profit or trust).

43 *See* Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 18 (1994) (concluding that two NASA employees receiving compensation for teaching positions at a foreign university while on unpaid leave from NASA were not violating the Foreign Emoluments Clause because the university acted independently of the foreign state in making employment decisions); Expense Reimbursement in Connection with Chairman Stone's Trip to Indonesia, OFF. LEGAL COUNS. (Aug. 11, 1980) (concluding that an expense reimbursement was not an emolument when paid to the chairman of an independent agency for a consulting trip to Indonesia organized by Harvard University because the Indonesian government did not directly pay the reimbursement and did not have a role in choosing the visiting consultants).

44 *See* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1 (2009); President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187 (1981).

45 *See* President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187 (1981).

46 Edles, *supra* note 40, at 7-9.

47 *Id.* at 8.

48 *Id.* at 9.

Whether the president holds an “Office of Profit or Trust” is the subject of scholarly debate. Seth Tillman argues that the president is not an officer *under* the United States.⁴⁹ Tillman points to President Washington’s acceptance of foreign gifts without the consent of Congress and to a list made by Alexander Hamilton in response to a request to name all the persons holding office under the United States.⁵⁰ Hamilton did not include the president or other elected officials in this list.⁵¹ But others assert that it is more likely that the Senate was requesting a list of “civil offices,” which would include appointed offices instead of elected offices.⁵² In the OLC’s 2009 opinion on the applicability of the Foreign Emoluments Clause to President Barack Obama’s acceptance of the Nobel Peace Prize, the office took a clear position on whether the clause covered the president. The opinion stated that “the President surely ‘holds an Office of Profit or Trust’...”⁵³

The OLC has maintained that “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).”⁵⁴ But the office has made exceptions for some entities tied to foreign governments. It decided in 1994 that the Foreign Emoluments Clause “does not apply in cases of government employees offered faculty employment by a foreign public university where it can be shown that the university acts independently of the foreign state when making faculty employment decisions.”⁵⁵ In the case of President Obama’s Nobel Peace Prize, the office assessed that the Nobel Committee, which awards the prize, is “not a ‘foreign State’ within the Clause’s meaning.”⁵⁶

Opinions involving the applicability of the Emoluments Clauses to presidents have placed significant emphasis on whether receiving emoluments leads to undue influence on the recipient. One of these opinions, which is unpublished but referenced in subsequent opinions, concerns the ability of President John F. Kennedy’s estate to accept naval retirement payments that had accrued while Kennedy was in office.⁵⁷ The OLC determined that these payments would not violate the Domestic Emoluments Clause because Kennedy had earned them prior to taking office and he would not have to fulfill any obligations as a condition of accepting the payments.⁵⁸ The opinion stated that its reasoning was based on the purpose of the clause, which the OLC said would not be furthered by barring receipt of payments Kennedy was entitled to before taking office.⁵⁹

Two opinions—one in 1981 from the OLC and another in 1983 from the Comptroller General—analyzed whether President Ronald Reagan could receive retirement benefits earned while serving as governor of California. The OLC opinion begins by considering broad and narrow dictionary definitions of “emolument.” The narrow definition in the Oxford English dictionary that the opinion references defined “emoluments” as “profit or gain arising from station, office, or employment: reward, remuneration, salary.”⁶⁰ The broad definition in the same dictionary described an emolument as an “advantage, benefit, comfort,” but the opinion calls this definition obsolete.⁶¹ Instead of relying solely on the dictionary definitions of the term, the OLC considers the historical evidence surrounding the drafting of the Domestic Emoluments Clause. The opinion observes, “[I]t appears 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.”⁶² The OLC concludes that “retirement benefits are not emoluments within the meaning of the Constitution because interests of this kind were not contemplated by the members of the Constitutional Convention...”⁶³ The opinion adds that receipt of such benefits does not violate the “spirit of the Constitution because they do not subject the President to any improper influence.”⁶⁴

49 Seth Barrett Tillman, *The Foreign Emolument Clause Reached Only Appointed Officers*, CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/interpretations/the-foreign-emoluments-clause-reached-only-appointed-officers> (last visited Apr. 20, 2019).

50 *Id.*

51 *Id.*

52 Gautham Rao & Jed Shugerman, *Presidential Revisionism*, SLATE (July 17, 2017, 5:42 PM), <https://slate.com/news-and-politics/2017/07/the-new-york-times-published-the-flimsiest-defense-of-trumps-apparent-emoluments-violations.html>; Frank Bowman, *Foreign Emoluments, the President & Professor Tillman*, IMPEACHABLE OFFENSES (Oct. 27, 2019), <https://impeachableoffenses.net/2017/10/27/foreign-emoluments-the-president-professor-tillman/>; *contra* Seth Barrett Tillman, *The Blue Book & the Foreign Emoluments Clause Cases Against the President: Old Questions Answered*, NEW REFORM CLUB (Dec. 31, 2017), <https://reformclub.blogspot.com/2017/12/the-blue-book-foreign-emoluments-clause.html>.

53 Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, *supra* note 44, at 4.

54 Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, *supra* note 43.

55 *Id.*

56 Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, *supra* note 44, at 4.

57 President Reagan’s Ability to Receive Retirement Benefits from the State of California, *supra* note 45.

58 *Id.* at 189.

59 *Id.*

60 *Id.* at 188.

61 *Id.*

62 *Id.*

63 *Id.* at 192.

64 *Id.*

The 1983 Comptroller General Memo concludes that “emoluments” as used in the Domestic Emoluments Clause “does not extend to payments for services rendered prior to the occupancy of, and having no connection with the Presidency.”⁶⁵ Citing Federalist 73, the memo states that the purpose of the clause is to prevent the president from being subject to undue

⁶⁵ Letter from Milton J. Socolar, Off. of the Comptroller Gen., to George J. Mitchell, U.S. Senate (Jan. 18, 1983).

influence in carrying out his duties. Accordingly, the memo reasons that it is inapplicable when the benefits the president is to receive have already been earned and have no connection to the presidency.⁶⁶

These OLC opinions indicate that while the office has generally viewed the actual profit or gain from foreign and domestic actors as “emoluments,” they have generally considered each potential violation on a case-by-case basis to determine if the particular emoluments in question would have a corrupting influence.

⁶⁶ *Id.*

II. In Support of a Broad Interpretation of “Emoluments”

The Constitution’s framers intended the Emoluments Clauses to protect against government corruption. This purpose is hindered by interpretations of the clauses that cover only gains or profits derived from carrying out the duties of office.

In the Foreign Emoluments Clause, “emoluments” is best interpreted broadly to bar any profits or benefits from foreign governments. The Domestic Emoluments Clause should be interpreted to prevent the president from receiving any profits or benefits from state governments or the federal government, aside from his or her salary. A broad reading of the clauses is not only consistent with the framers’ intentions. It also reflects the framers likely understanding of the term “emoluments,” which, as evidenced by John Mikhail’s work, is likely to have been any “profit,” “gain,” or “advantage.”⁶⁷ Instead of limiting the scope of “emoluments” in these clauses, the framers describe the restrictions imposed by the clauses in broad terms, such as prohibiting presents, titles, and emoluments of “any kind whatever” in the Foreign Emoluments Clause.⁶⁸

⁶⁷ See generally Mikhail, *supra* note 30.

⁶⁸ U.S. CONST. art. I, § 9, cl. 8.

Additionally, the OLC’s interpretations of the Emoluments Clauses indicate that a broader understanding is more aligned with the clauses’ spirit. In evaluating possible violations of the clauses, the office has placed significant emphasis on the potential of the alleged benefits to influence the recipient.⁶⁹ Bad actors have a variety of methods to exert influence over government officials that can go beyond traditional bribery. The framers understood the concepts of *quid pro quo* and bribery but chose not to write the Emoluments Clauses in these terms. The concerns about corruption extend further than government officials accepting some benefit in exchange for carrying out official actions. Instead, concerns of undue influence extend to the states of mind of these government officials. There is, at the very least, a perception that a government official who is profiting from a foreign or domestic government is not truly acting in the best interests of the United States. The mere perception of undue influence or corruption could taint every decision made by such an official. To prevent perceptions of corruption and actual corruption, the Emoluments Clauses should be interpreted broadly—how the balance of historical evidence indicates the framers intended them to be interpreted. As such, the following proposals embrace the broader definition of emoluments.

⁶⁹ See President Reagan’s Ability to Receive Retirement Benefits from the State of California, *supra* note 45.

III. Policy Proposals

To better address the concerns that prompted the framers to include the Emoluments Clauses in the Constitution, we recommend a federal law mandating that the president divest from any businesses that he or she has an ownership interest in by either liquidating their assets or transferring that interest into a qualified blind trust for the period of their presidency. We also recommend legislation strengthening the Office of Government Ethics (“OGE”) by adding an arm of the office specifically tasked with investigating potential violations of the Emoluments Clauses by executive branch officials. This unit would have the authority to either refer matters to the Department of Justice or to Congress for it to decide whether consent should be granted to an official to receive foreign emoluments.

This Part begins by describing relevant existing ethics laws to provide context for our recommendations. The following three sections of this Part describe the different aspects of our proposal: (1) a mandatory divestment requirement for the president; (2) strengthening the Office of Government Ethics; and (3) the penalties for violating the restrictions in the Emoluments Clauses. This Part concludes with a discussion of some of the alternative proposals we considered.

A. Ethics Requirements in Government

Throughout government, employees and members of Congress are required to comply with ethics and conflict of interest laws. Published by the Office of Government Ethics, the Standards of Ethical Conduct for Employees of the Executive Branch was codified at 5 C.F.R. Part 2635.⁷⁰ These regulations bar employees from “holding financial interests that conflict with the conscientious performance of duty” or soliciting or accepting gifts or items of monetary value from any “person or entity seeking official action from, doing business with, or conducting activities regulated by the employee’s agency, or whose interests may be substantially affected by the performance or nonperformance of the employee’s duties.”⁷¹ Employees are also prohibited from using their positions for private gain.⁷² Additionally, employees are not allowed to accept or solicit gifts from “prohibited sources” or gifts given to the employee because of their position in government.⁷³

70 *Employee Standards of Conduct*, U.S. OFF. OF GOV’T ETHICS, <https://www.oge.gov/Web/OGE.nsf/Employee%20Standards%20of%20Conduct> (last visited Apr. 20, 2019).

71 Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. pt. 2635.

72 *Id.*

73 *Id.*

There are some exceptions to accepting unsolicited gifts. Employees are permitted to accept gifts with a market value of \$20 or less per occasion from the same source, but, in a given calendar year, they cannot accept gifts from the same source with a total value of more than \$50. Food and entertainment in domestic or foreign settings are also exempted, so long as non-government employees are not required to pay for the same events.⁷⁴

Both the House and Senate ethics committees have imposed rules against the acceptance of gifts. The Senate rules generally forbid all members, officers, and employees from knowingly accepting any gifts valued at over \$50.⁷⁵ But the Senate Ethics Committee’s website states, “The U.S. Constitution prohibits government officials, including Members, officers, and employees of Congress, from receiving any present of any kind from a foreign state or representative without the consent of Congress.”⁷⁶ The House Ethics Manual similarly states, “The Constitution prohibits federal government officials, including Members and employees of Congress, from receiving ‘any present . . . of any kind whatever’ from a foreign state or a representative of a foreign government without the consent of the Congress.”⁷⁷ Congress has consented to the acceptance of some foreign gifts, such as gifts worth no more than \$100 given as souvenirs or as a courtesy.⁷⁸ Any gift exceeding this value can only be accepted if a refusal to accept would be offensive to the giving nation.⁷⁹ Such a gift is accepted on behalf of the United States and within 60 days of receipt must be turned over for disposal.⁸⁰ But members can request authorization to use the gift during their tenures.⁸¹

Additionally, both Senate and House members and staff are prohibited from earning significant income from outside sources and are barred from conducting professional services, such as legal services, for compensation.⁸² Finally, the Senate

74 *Id.*

75 See STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XXXV, at 1(2)(A) (2013); RULES OF THE HOUSE OF REPRESENTATIVES r. XXV, at 5(a)(1)(B)(i) (2015).

76 *Gifts*, U.S. SENATE SELECT COMM. ON ETHICS, <https://www.ethics.senate.gov/public/index.cfm?p=Gifts> (last visited Aug. 5, 2019).

77 COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., HOUSE ETHICS MANUAL 57 (2008).

78 See *Gifts*, *supra* note 76; Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2011); Mutual Education and Cultural Exchange Act, 22 U.S.C. § 2451 (2015).

79 Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2011).

80 *Id.*

81 *Id.*

82 *Conflicts of Interest*, SENATE SELECT COMM. ON ETHICS, <https://www.ethics.senate.gov/public/index.cfm/conflictsofinterest> (last visited Apr. 20, 2019).

and House restrict their members from serving on the boards of organizations for compensation.⁸³

These Senate and House rules and statutory provisions addressing conflicts of interest and the acceptance of gifts show that Congress is concerned with the possibility of undue influence on its members and employees. These regulations are consistent with the spirit of the Emoluments Clauses; they ensure that members of Congress are not soliciting and accepting any sort of benefit from sources that might lead to the appearance of corruption or actual corruption.

B. Mandatory Divestment

Our proposal would require the president and his or her spouse and minor children to divest from all business interests while the president is in office. This proposal draws on two proposed bills that have been introduced in Congress. Senator Elizabeth Warren introduced the first bill, the Presidential Conflicts of Interest Act of 2017. It would compel the president, vice president, and their spouses and minor children to divest from any business interest that posed a conflict, as determined by the OGE, by selling the interest and then purchasing conflict-free holdings with the gains from the sale.⁸⁴ To provide OGE with sufficient information about the president's conflicts, the legislation would require the president and vice president to file more detailed financial disclosures, including three years of tax returns.⁸⁵ The bill provides a cause of action to enforce the divestiture to the U.S. attorney general, the attorney general of any state, or any aggrieved person. It further states that failing to divest is a high crime or misdemeanor,⁸⁶ which is part of the Constitution's standard for impeachment and removal.⁸⁷

Representative Katherine Clark of Massachusetts proposed a similar bill in 2019. The Presidential Accountability Act would amend the Ethics in Government Act of 1978 by adding financial disclosure requirements for the president and vice president.⁸⁸ It would also require the president and vice president to divest any business interests that created a conflict by either converting the interest to cash or placing it in a qualified blind trust.⁸⁹ Neither of these proposed bills have become law.

Our proposal would borrow elements from both bills. While liquidation of business interests is preferable because it would eliminate all possible conflicts, it would be a difficult imposition on presidents with complicated or extensive personal holdings. It might even deter people with substantial assets from running for office, as it would make transitioning back into their business lives much more complicated after leaving office. The Presidential Accountability Act provides a preferable alternative: letting presidents choose between liquidation and placing the assets into a qualified blind trust. Qualified blind trusts are overseen by OGE and ensure that the beneficiary of the trust has no control over the assets involved.⁹⁰ Congress mandating that the president place his or her holdings in this type of trust would be a stronger step towards preventing conflicts of interest, if not a completely sufficient preventative measure in all instances.

Elements that we would borrow from Senator Warren's bill are the enhanced financial disclosures to OGE and the opinion of Congress that failure to properly disclose or divest assets would be a high crime or misdemeanor. Without disclosure to OGE of all assets it would be impossible to determine whether a president has properly divested. A statement from Congress that failing to properly divest would be impeachable offense would send a clear message to the president that compliance with the law was required. It would also provide a strong basis for Congress to initiate impeachment proceedings if it believed the president's failure was serious enough to merit such a step.

Our proposal would go further than either of the proposed bills by mandating that the president divest from all business interests, instead of only conflicted business interests. This requirement would go further towards eliminating any possibility of impropriety and it would make executing the mandate easier in some respects, as neither OGE nor the president and their staff would have to engage in the potentially complex and time consuming process of determining whether each business interest created a conflict.

The proposed bills require the vice president to abide by the same divestment requirements as the president, but our proposal does not impose these obligations on the vice president. The vice president does not have the same level of decision-making authority or the same position of public trust as the president, so the balance between the vice president's personal interests and the interests of the public in knowing the government is free of perceived and actual conflicts of interest weighs more in the vice president's favor. We propose that the vice president, as well as all other members of the executive branch, only be subject to the second part of our proposal, the newly created watchdog branch

83 See STANDING RULES OF THE SENATE, *supra* note 75, at r. XXXVII, at 6(a); RULES OF THE HOUSE OF REPRESENTATIVES, *supra* note 75, at r. XXV, at 2(d).

84 See Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong. (2017).

85 See *id.*

86 See *id.*

87 See U.S. CONST. art. II, § 4.

88 See Presidential Accountability Act, H.R. 1481, 116th Cong. (2019).

89 See *id.*

90 See Qualified Blind Trusts, 5 C.F.R. § 2634.403 (2006).

of OGE. But our proposal would establish a process for timely divestment of all of the vice president's business interests should the vice president ascend to the presidency.

Requiring presidents to divest from their business interests upon taking office is controversial, even though executive branch officials routinely divest from their assets before taking office.⁹¹ This level of regulation of the executive branch by Congress might face challenges on a separation of powers theory.⁹² Some fear that such a divestment requirement would dissuade qualified candidates from seeking the office by imposing a reverse property qualification on candidates.⁹³ While we do not believe that a mandatory divestment would bar anyone eligible from seeking the presidency, these concerns are valid. No policy should be implemented that strongly dissuades any group, including wealthy individuals and those with complex personal holdings, from running for president. Many who have achieved financial success have done so through innovative thinking, discipline, and leadership—all desirable qualities for the nation's top executive. Therefore, it will be important for Congress to structure the divestment requirement to avoid needlessly discouraging anyone from running for president.

C. Strengthening the Office of Government Ethics

The second part of our proposal calls for a new OGE unit to investigate conflicts of interest, including violations of the Emoluments Clauses. Others have recently advocated for strengthening OGE's power to enforce ethical standards in the federal government.⁹⁴ While executive branch officials are barred by statute from participating in matters in which they have a personal financial stake,⁹⁵ OGE has limited authority to investigate or enforce ethics laws.⁹⁶ Additionally, the president and vice

president are exempt from the statute preventing conflicts of interest.⁹⁷ Our proposal would give a new OGE unit authority to investigate both appointed and elected officials in the executive branch for conflicts of interest. This unit's investigatory mandate would draw from the language of the Emoluments Clauses by focusing on both conflicts of interest with foreign governments and foreign government-controlled companies as well as with the federal government and the states.

If the unit found potential conflicts of interest or Emoluments Clause violations, it would be required to refer the matter to the Department of Justice if it violated existing conflicts of interest statutes. Where the issue involved a possible violation of the Foreign Emoluments Clause, OGE would be required to refer the matter to Congress so lawmakers could decide whether to exercise their constitutional authority to consent to the receipt of emoluments.⁹⁸ These referrals would not have to be made public initially, consistent with the general principle of avoiding disclosure of the identities of individuals who are under investigation. This unit would need the investigative tools to thoroughly conduct its work. Accordingly, Congress should provide it subpoena power and the authority to issue fines for failure to cooperate with its investigations.

Congress might consider placing its members under the jurisdiction of this new OGE unit. This proposal is designed to strengthen public trust, and it is important from that standpoint for members of Congress to be held to same standards as other government officials. While the statute creating the unit would have to be designed to avoid separation of powers issues and running afoul of the Speech and Debate Clause, Congress could decide to expand the scope of the unit to shine a spotlight on areas where congressional business interests create perceived or actual conflicts.

D. Penalties

The new OGE unit would need a way to penalize Emoluments Clause violations that Congress did not consent to. Federal law provides penalties for executive branch officials who participate in matters in which they have a financial stake.⁹⁹ OGE should be authorized to demand that officials who violate the Foreign Emoluments Clause without breaking current conflict of interest laws disgorge all profits from the foreign source and work with

91 See, e.g., *Paulson to Sell His Goldman Shares*, N.Y. TIMES (June 22, 2006), <https://www.nytimes.com/2006/06/22/business/22disclose.html>; Laura Litvan, *Billionaire Pritzker Confirmed as Commerce Secretary*, MORNING CALL (June 26, 2013), <https://www.mcall.com/news/mc-xpm-2013-06-26-mc-pritzker-commerce-20130626-story.html>.

92 We believe that this type of law would survive such a challenge, as Congress would not be acting outside of their legislative power and is not increasing its own power at the executive's expense or undermining the proper role of the executive. See *Morrison v. Olson*, 487 U.S. 654, 694-95 (1988).

93 See, e.g., Telephone Interview with Seth B. Tillman, Lecturer, Maynooth Univ. (Mar. 15, 2019).

94 See, e.g., Executive Branch Comprehensive Ethics Enforcement Act of 2018, H.R. 5902, 115th Cong. (2018); NAT'L TASK FORCE ON RULE OF LAW & DEMOCRACY, BRENNAN CNTR. FOR JUSTICE, PROPOSALS FOR REFORM (2018), https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf.

95 See Acts Affecting a Personal Financial Interest, 18 U.S.C. § 208 (2010).

96 See NAT'L TASK FORCE ON RULE OF LAW & DEMOCRACY, *supra* note 94, at 12.

97 See Andrew Stark, *Can a President Trump Keep His Business Intact?*, ATLANTIC (Oct. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/10/trump-holdings-conflict-of-interest/503333/>.

98 See U.S. CONST. art. I, § 9, cl. 8.

99 See Penalties and Injunctions, 18 U.S.C. § 216 (2011).

OGE to terminate the conflict through supervised divestiture. Employees who commit multiple violations or fail to properly divest from their potentially conflicted assets should face fines.

Devising a penalty structure for the president is more challenging. The current position of the Department of Justice is that the president cannot be indicted for alleged criminal conduct,¹⁰⁰ but that position does not explicitly rule out fines.¹⁰¹ Given that any president whose conflict was detected by the new OGE unit would be in violation of both a constitutional provision and the divestment portion of our proposed legislation, a fine would be an appropriate remedy in addition to disgorgement of profits and any required divestment. Depending on the circumstances, Congress would also have the option of commencing impeachment proceedings.

If Congress were to decide to impose self-regulation via this new OGE unit, penalties could range from mandated recusal on a vote to possible divestment. To comply with separation of powers concerns, it would be necessary for OGE to have less unilateral sanctioning power over members of Congress than its authority over executive branch officials.

E. Alternative Proposals

We considered several alternative options for addressing violations of the Emoluments Clauses.

1. Private Cause of Action

Congress could pass a statute describing what constituted violations of the Emoluments Clauses and creating a cause of action for parties to seek judicial review of possible violations.

Congress has the authority to recognize specific rights in certain people and entities and to allow them to file lawsuits to enforce those rights.¹⁰² Congress could use this authority to allow parties whose business interests were injured by the unconstitutional receipt of emoluments by the president or another executive official to seek judicial review. Congress could also outline declaratory and injunctive relief for a court to provide in such a suit. While violation of a statute alone does not necessarily guarantee standing,¹⁰³ any plaintiff who could show the injury described by the statute would likely be given standing. Congress could also attempt to grant itself a cause of action by

granting the right to sue to the Speaker of the House or Senate Majority Leader acting on behalf of their institutions.¹⁰⁴

This type of legislation would have several disadvantages compared to our primary proposal. It is possible but unlikely that presidential emoluments could be properly regulated through lawsuits. Lawsuits move at a slow pace and presidential terms are not particularly long, meaning that by the time any issues were resolved the president might be almost out of office or could have been compelled to make a critical decision that was possibly influenced by their conflict of interest. Further, a bill that has no clear enforcement mechanism is ripe for abuse by presidents who are deceptive about their business interests and personal assets. Nevertheless, a bill creating a cause of action would be an upgrade over the current paucity of regulatory and enforcement options.

2. Concurrent Resolution

Congress could pass a concurrent resolution outlining its interpretation of the Emoluments Clauses. A concurrent resolution is passed by both houses of Congress to set rules for the Congress or to express its position on an issue.¹⁰⁵ These resolutions are not submitted to the president and do not carry the force of law.¹⁰⁶ While a resolution outlining Congress's position on the Emoluments Clauses would not be directly enforceable, it could serve an important public education function, assist courts in reviewing the clauses, and instruct executive branch officials on the behavior expected of them.

3. Constitutional Amendment

A constitutional amendment might clarify the existing language of the Emoluments Clauses or override them with a new anti-conflict of interest provision. But such an amendment seems impractical for two reasons. First, amending the Constitution is extremely difficult and would require much greater political consensus than the other proposals already listed. Second, the Constitution already includes these Emoluments Clauses, and, even if their exact interpretation is up for debate, their general purpose seems clear. Congress should focus on clarification of the existing language instead of trying to restart the entire debate.

100 A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (2000).

101 *Id.* at 230.

102 See, e.g., Civil Action for Deprivation of Rights, 42 U.S.C. § 1983; Right of Review, 5 U.S.C. § 702 (2014).

103 See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

104 See ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., R42454, CONGRESSIONAL PARTICIPATION IN ARTICLE III COURTS: STANDING TO SUE (2014), <https://fas.org/sgp/crs/misc/R42454.pdf>.

105 See *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm (last visited July 31, 2019).

106 *Id.*

Conclusion

It is time for Congress to enforce the anti-corruption purpose behind the Emoluments Clauses. The proposed reforms will prevent self-dealing in government and strengthen confidence that government officials are acting in the public interest.



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