THE LAWYERS WHO MISTOOK A PRESIDENT FOR THEIR CLIENT

Kathleen Clark*

I. INTRODUCTION

II. THE JUSTICE DEPARTMENT'S RECORD ON THE FOREIGN EMOLUMENTS CLAUSE
   A. FOUR TEXTUAL ELEMENTS IN THE CLAUSE
   B. JUSTICE DEPARTMENT OPINIONS INTERPRETING THOSE FOUR ELEMENTS
      1. “Office of Profit or Trust”
      2. “any present, Emolument, Office, or Title, of any kind whatever”
      3. “from any King, Prince, or foreign State”
      4. “without the Consent of the Congress”

III. TRUMP INTERPRETATION OF THE CLAUSE: PROTECT TRUMP, NOT THE REPUBLIC
   A. PRE-INAUGURATION: TRUMP'S PERSONAL LAWYERS NARROWLY CONSTRUE CLAUSE TO PROMOTE HIS FINANCIAL INTERESTS
   B. POST-INAUGURATION: JUSTICE DEPARTMENT ADOPTS TRUMP'S NARROW INTERPRETATION

IV. THE JUSTICE DEPARTMENT'S REVERSAL: FROM ROBUST TO RISIBLE PROTECTION

Appendix I: Justice Department Opinions on the Foreign Emoluments Clause
Appendix II: Comptroller General Opinions on the Foreign Emoluments Clause
Appendix III: Other Federal Government Opinions on the Foreign Emoluments Clause
Appendix IV: Memorandum for Laurence H. Silberman, Deputy Attorney General, from Mary C. Lawton, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 7, 1974) [obtained via FOIA]
Appendix V: Letter from Deputy Assistant Attorney General Leon Ulman to the General Counsel of Nuclear Regulatory Commission (July 26, 1976) [obtained via FOIA]

I. INTRODUCTION

The U.S. Department of Justice has a long history of interpreting the constitution’s Foreign Emoluments Clause to protect the government against foreign influences. Over the course of a century and a half, the Department

* Professor of Law, Washington University.
has issued more than fifty opinions interpreting the clause, prohibiting federal officials from accepting any benefit from foreign governments, even if the benefit is small in size, if it is part of an arms-length transaction, if the benefit is funneled through an intermediary, or if the official’s government responsibilities don’t affect the foreign government.\(^1\) Consistent with both the language and the purpose of the clause, the Department has been vigilant in safeguarding our republic from potentially corrupt foreign government influence by preventing foreign governments from currying favor with federal officials.

That strong and consistent record changed on June 9, 2017, when the Department responded to the first of three lawsuits charging that President Donald Trump violated the foreign emoluments clause by accepting payments from foreign governments through his commercial establishments, including his Washington, DC hotel.\(^2\) In that and later pleadings, the Justice Department has veered away from its long track record of vigilance on behalf of the republic. Instead, the Department adopted the legal arguments put forward by Donald Trump’s personal lawyers, pushing for a narrow interpretation of the clause in order to advance Trump’s private financial interests. That narrow interpretation of the clause would permit the President – and all federal officials – to accept unlimited amounts of money from foreign governments, as long as the money comes through commercial transactions with an entity owned by the federal official. In the emoluments litigation, the Department has chosen to protect the personal financial interests of Donald Trump instead of the institutional interests of the United States. The U.S. Department of Justice has mistaken this President for its actual client, the United States.

Other articles and commentary about the emoluments litigation have focused on competing definitions of “emolument,”\(^3\) but this is the first paper to take a comprehensive look at the clause, as interpreted by the Justice Department in more than fifty opinions over 150 years. That consistent historical record stands in sharp contrast to the position that the Department has taken in the emoluments litigation: its advocacy for Donald Trump’s personal enrichment.


Part II of this article provides a textual analysis of the four distinct elements found in the Foreign Emoluments Clause -- the federal offices covered, the types of benefits and foreign entities restricted, and the role of Congressional consent – and reviews how Justice Department opinions have interpreted each of those four elements to protect the republic against potentially malign foreign influences. Part III examines the arguments that Donald Trump’s personal lawyers put forward prior to his inauguration; demonstrates how those arguments would dramatically narrow application of the clause; and shows that the Justice Department adopted those same arguments to defend President Trump when he was sued in the three emoluments cases. Part IV analyzes the Justice Department’s decision to reverse its earlier position, and compares this reversal with other examples of Department reversals. While some of the earlier reversals have been controversial, this is the first time a reversal has served the personal financial interest of a president rather than the political ideology of his party.

I. THE JUSTICE DEPARTMENT’S RECORD ON THE FOREIGN EMOLUMENTS CLAUSE

A. Four Textual Elements in The Clause

The Foreign Emoluments Clause of the constitution states:

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.\(^4\)

The clause was not part of the original proposed text of the constitution, but was added at the convention in order to “‘prevent corruption.’”\(^5\) The clause can be divided into its four component parts:

- “no Person holding any Office of Profit or Trust under” the United States
- “without the Consent of the Congress”

\(^4\) U.S. CONSTITUTION, art. I, § 9, cl. 8. The foreign emoluments clause is part of a longer sentence, which reads in full:

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. In the text of this article, I have deleted the words before the colon and substituted the phrase, “the United States” in place of “them.”

Mistaking a President for their Client

• “shall … accept of any present, Emolument, Office, or Title, of any kind whatever?”
• “from any King, Prince, or foreign State.”

To determine whether a particular arrangement would violate the clause, we need to ask four distinct questions (changing their order slightly from above):

(1) Does the person involved hold “any Office of Profit or Trust under” the United States?
(2) Does the benefit involved constitute “any present, Emolument, Office, or Title, of any kind whatever?”
(3) Is that benefit “from any King, Prince, or foreign State?”

If the answers to those three questions are all “yes,” then ask:

(4) Has Congress consented to this arrangement?

Up until 2017, there had been little occasion for courts to interpret the clause. A search of the WESTLAW database on November 15, 2016 identified only two court cases interpreting the clause: a 2006 appellate decision rejecting a soldier’s claim that his participation in a United Nations Peacekeeping Force would violate the clause, 6 and a 1982 Court of Claims decision awarding a retired member of the Coast Guard retirement benefits that had been withheld as a consequence of his being employed by the government of Tasmania. 7

This limited case law does not mean there was a paucity of law on the subject. Congress had periodically enacted legislation pursuant to the clause, granting its consent to federal officials accepting benefits from foreign governments that the clause would otherwise prohibit. From 1789 until 1966, Congress handled its consent function on an ad hoc basis. 8 Federal officials who wanted to accept a “present, Emolument, Office, or Title” from a foreign government would seek specific Congressional consent. In response, Congress sometimes enacted private legislation granting its consent for that specific benefit. On August 30, 1856, for example, Congress passed a


The Westlaw search did identify a third court decision interpreting Article I, Section 9, Clause 8 of the Constitution: Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975), but that case dealt with the constitutional prohibition on granting a title of nobility, based on the 11 words that precede the colon in Article I, Section 9, Clause 8.

7 Ward v. U.S., 1 Cl. Ct. 46 (1982). The Comptroller General ruled that the government must withhold from a retiree’s retirement pay the amount he received from the Tasmanian government, To C. C. Gordon, United States Coast Guard, 44 Comp. Gen. 130 (1964); aff’d by To Mr. Harvey E. Ward, U.S.C.G., Ret., B-154213 (1964), but Congress eventually passed a private bill awarding the retiree $15,475.59, Pvt. L. 98-14 (June 28, 1984).

8 In 1881, Congress set up a specific procedure for obtaining Congressional consent in the future. Act of January 31, 1881, c 32 § 3. It required “any present, decoration, or other thing … conferred or presented by any foreign government to any officer of the United States,” to “be tendered through the Department of State,” which was not to deliver it to the officer “unless so authorized by Congress.” Id.; see Memorandum, The Constitutional Prohibition Against Acceptance of Gifts from Foreign Potentates (Sept. 23, 1952) (describing how executive branch implemented statute).
resolution permitting the Superintendent of the Coast Survey to accept a gold medal from the King of Sweden.\(^9\) Starting in 1966, Congress has provided its consent in a more systematic way, enacting legislation allowing federal officials to accept a “present, Emolument, Office, or Title” from a foreign government under limited circumstances.\(^10\) Federal employees may now accept gifts of modest size, and may accept combat-related decorations from a foreign government if executive branch officials provide their approval.\(^11\) Similarly, a retired member of the military -- who is deemed to hold an “Office of Profit or Trust” even after retirement\(^12\) -- may accept a military office in and compensation from a newly democratic country if executive branch officials approve.\(^13\)

In addition to these Congressional enactments, there is a substantial body of law interpreting the clause in the form of Department of Justice opinions, letters and memoranda dating back to 1854.\(^14\) The following section examines how the Justice Department has interpreted the four components of the clause.

B. **Justice Department Opinions Interpreting Those Four Elements**

The Justice Department has repeatedly been called upon to interpret the clause and determine whether it prohibits the acceptance of benefits from foreign governments. While the Department’s position on certain issues has varied over time, it has consistently interpreted the clause broadly to protect the republic against foreign government influences.

1. **“Office of Profit or Trust”**

The first element of the Clause requires inquiry into whether an individual who seeks to accept a benefit holds an “Office of Profit or Trust” under the United States. The Department has determined that the clause

---

\(^9\) 34 Res. No. 4, August 30, 1856, 11 Stat. 152.
\(^11\) 5 USC § 7342.
\(^12\) *Applicability of 18 USC § 219 to Retired Foreign Service Officers*, 11 Op. O.L.C. 67, 68 (1987) (referring to judicial “and administrative rulings dealing with the status of retired military officers as ‘officers of the United States’”). Numerous Comptroller General opinions assert that retired members of the military are subject to the clause. *See, e.g.*, 44 Comp.Gen. 130 (1964) (retired members of the armed forces hold “an office of profit and trust under the Federal Government after retirement” because they “remain a part of the service and are subject to recall to active duty in time of war or national emergency”).
\(^13\) 10 USC § 1060(c).
\(^14\) See Appendix I. In addition, the Comptroller General has published 30 opinions on the clause, *see Appendix II*, and three other federal offices have opined on the clause. *See Appendix III.*
applies to the President, constitutional officers … as well as] government employees, ‘lesser functionaries’ who are subordinate to officers.” It also applies to retired members of the military, but not to retired members of the foreign service.

The Department’s position on the reach of the clause – in other words, which federal offices count as an “Office of Profit or Trust” – has varied over time. A 1974 opinion said “there is a substantial question whether membership on the [National Voluntary Service Advisory] Council constitutes holding an office of profit or trust under the United States,” because the “primary responsibilities of the Council are to advise” on policy, “make recommendations” and “submit an annual report containing its recommendations.”

A 1991 opinion declared that federal advisory committee members “hold offices of profit or trust within the meaning of the Emoluments Clause,” and a 1993 opinion found that nongovernment members of the Administrative Conference of the United States (ACUS) hold an Office of Trust and are therefore “brought within the Clause,” even though they are unpaid and therefore do not hold an “Office of Profit.”

But the following year, the Department reversed course, indicating that “not every member of an advisory committee necessarily occupies an ‘Office of Profit or Trust’ under the Clause” and that the “1991 OLC opinion on advisory committees was overbroad.” OLC confirmed that reversal in a 1996 opinion “reject[ing] the sweeping and unqualified view, expressed on one occasion by our Office, that federal advisory committee members, as such, are

---


17 Memorandum to File from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 27, 1996) (quoted in 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. (2009)) (retired military officers continue to “hold[ ] [an] Office of Profit or Trust” under the United States and hence remain subject to the Emoluments Clause).

18 Application of the Emoluments Clause to a Member of the FBI Director’s Advisory Board, 31 Op. O.L.C. 154 (2007).

19 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 4 (May 10, 1974).

20 Id. at 5.


subject to the Emoluments Clause, and a 2010 ruling that nongovernment members of ACUS are not subject to the Emoluments Clause because they do not hold “Office[s] of Profit or Trust.”

The Department’s current position is that “in order to qualify as an ‘Office of Profit or Trust,’” a position must “involve some exercise of governmental authority.” Positions that are purely advisory in nature (such as membership on many federal advisory committees) do not involve the exercise of sovereign authority, and therefore are not subject to the Clause.

2. “any present, Emolument, Office, or Title, of any kind whatever”

The second issue is whether a particular benefit constitutes a “present, Emolument, Office, or Title” restricted by the clause. In several opinions, the Department notes that a particular benefit may be characterized as either a present or an emolument, with no need to differentiate between the two.

28 See, e.g., Memorandum for Andrew F. Oehmann, Office of the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Re: Invitation by Italian Government to officials of the Immigration & Naturalization Service & a Member of the White House Staff (Oct. 16, 1962) (a proposed trip to Italy for an employee and his spouse “can be regarded as being literally a ‘present’ and possibly as an ‘Emolument’”); Letter from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Joseph F. Hennessey, General Counsel, Atomic Energy Commission (Sept. 29, 1969) (“the difference might be looked on as a ‘present’ or ‘Emolument’ within Article I, section 9, clause 8 of the Constitution”); 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 Trip to Indonesia (Aug. 11, 1980) (“Ordinarily, reimbursement from a foreign government of a public official’s travel expenses would be considered a ‘present’ or ‘emolument’”); Applicability of the Emoluments Clause and the Foreign Gifts
The Department has found a wide range of benefits to be an emolument (or gift), including a salary and pension benefits from a foreign government, compensation for services performed, “lodging, meals, and transportation,” an opportunity “to conduct research of [the employee’s] choice for an extended period of time at research institutions in” a foreign country, and awards that include cash prizes. Particularly noteworthy is a 1993 opinion

and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 33 Op. O.L.C. (2009) (“the [Nobel] Peace Prize, including its [1.4 million] monetary award, is a ‘present’ or ‘Emolument . . . of any kind whatever.’ . . . ”); see also Applicability of the Emolument Clause & the Foreign Gifts & Decorations Act to the Göteborg Award for Sustainable Development, 34 Op. O.L.C. (2010) (noting that there was no need to determine whether each element of the Göteborg Award—the cash prize, the travel to Sweden, or the ceremonial globe—is a ‘present’ or ‘Emolument . . . of any kind whatever,’” because the Award did not come from a “foreign State”).

The distinction between a “present” and an “emolument” can be important where Congress has consented to the acceptance of certain “presents,” but has not consented to other benefits. See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156 (1982) (noting that in the Foreign Gift and Decorations Act, 5 U.S.C. § 7342, Congress consented to federal employees’ accepting modest gifts from foreign governments, but did not consent to employees’ receipt of compensation for services).


Assumption by People’s Republic of China of Expenses of U.S. Delegation, 2 Op. O.L.C. 345 (1977); see also Memorandum for Andrew F. Oehmann, Office of the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Re: Invitation by Italian Government to officials of the Immigration & Naturalization Service & a Member of the White House Staff (Oct. 16, 1962) (travel to Italy for the employee and his spouse); Memorandum for the Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, Re: Membership of Judge Parker on the International Law Commission (Nov. 27, 1953) (“reimbursement for … travel expenses and the additional costs of living away from home”); Application of the Emoluments Clause to a Member of the FBI Director’s Advisory Board, 31 Op. O.L.C. 154 (2007) (“Ordinarily, reimbursement from a foreign government of a public official’s travel expenses would be considered a ‘present’ or ‘emolument’”).

Letter for Walter T. Skallerup, Jr., General Counsel, Department of the Navy, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 17, 1983).

See, e.g., Letter for Walter T. Skallerup, Jr., General Counsel, Department of the Navy, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 17, 1983) ($24,000 award for a “Senior U.S. Scientist”); Applicability of the Emoluments Clause and the

Draft – Do Not Cite or Circulate
concluding that the clause reaches a law firm’s “partnership distribution that contained any proportionate share of the revenues generated from a law firm’s foreign government clients.” The clause prohibits a government official from accepting funds derived from a foreign government’s payment to a firm partially owned by that official.

Among the dozens of published Justice Department opinions addressing emoluments, only three identify benefits that should not be categorized as “emoluments.” A 1954 opinion found that “the Constitutional provision would not prevent an officer of the United States from receiving damages arising from some wrongful act of a foreign state,” but then went on to find that the benefit at issue, an “annuity payment of $263 a month for life to Mr. Newkirk is not exclusively a payment for damages,” and was prohibited because it was “intended to restore Mr. Newkirk to the financial position he would have enjoyed had he continued as a judge in the German Government until retirement.” A 1969 opinion found that money received by Atomic Energy Commission employees from the government of India did not constitute an “added benefit for the employee[s]” because the arrangement was “no more than a bookkeeping device for the sake of the mutual convenience of the United States and the Indian Government.” A 1981 opinion addressing both the foreign and domestic emoluments clauses found that President Reagan’s vested retirement benefits from his prior service as California governor were “not emoluments in the constitutional sense,” noting that their "receipt does not violate the spirit of the Constitution because they do not subject the President to any improper influence.”

3. “from any King, Prince, or foreign State”

The third question to ask is whether the benefit is “from any King, Prince, or foreign State.” If a benefit comes directly from a “King, Prince, or

---

35 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).

Draft – Do Not Cite or Circulate
foreign State,” or from a commercial enterprise that is owned or controlled by a foreign government, then the answer is clearly “yes.” But many Justice Department opinions address situations that are more complicated: where a benefit comes through an intermediary (such as a contractor or a foundation) with a connection to a foreign government, or even from a foreign public university.

On several occasions, federal employees wanted to receive compensation or travel expenses from an American organization in connection with that organization’s contract with a foreign government. (See Table: Federal Employee Working for Foreign Government Through US Organization.) The “interposition” of an American intermediary between a foreign government and a federal employee does not automatically relieve the “employee of the obligations imposed by the Emoluments Clause.” Instead, the key issue is whether the employee was selected by the American intermediary or by the foreign government. Where the foreign government made the selection, the clause applies and the employee must not accept the benefit. On the other hand, where a foreign government contracted for an

---


The Justice Department has determined that international bodies in which the United States is a member are not “foreign states” under the Emoluments Clause. See, e.g., Emoluments Clause & World Bank, 25 Op. O.L.C. 113 (2001) (noting “the role played by the United States in the World Bank as approved by Congress” and concluding that “an international organization such as the World Bank in which the United States participates” is not a “foreign state” under the clause); Memorandum for the Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, Re: Membership of Judge Parker on the International Law Commission (Nov. 27, 1953) (“there is little or no basis for regarding service on an United Nations commission, even in an individual capacity, as coming within the purpose of the Constitutional provision”).

39 Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114 (1993) (“There is no express or implied exception for emoluments received from foreign States when the latter act in some capacity other than the performance of their political or diplomatic functions.”).


American university to select experts to provide consulting services, a federal employee could serve as a consultant and accept travel expenses because that emolument “cannot be said to be ‘from’ a foreign government within the meaning of” the clause, even though the expenses were ultimately paid by that foreign government.\footnote{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 Trip to Indonesia 5 (Aug. 11, 1980) (emphasis added).} Since the university had “complete discretion in the selection” of consultants, and the foreign government had “never sought to influence” the university’s selection of consultants, the federal official could accept the benefit.\footnote{Id. at 4.}

Several opinions have addressed whether a federal employee may accept compensation from a foreign public university. In a 1986 opinion permitting a federal government scientist to accept a $150 stipend for

<table>
<thead>
<tr>
<th>Opinion</th>
<th>Nation</th>
<th>Did foreign nation select federal employee?</th>
<th>Was emolument from foreign state?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expense Reimbursement in Connection with Chairman Stone’s Trip to Indonesia (1980)</td>
<td>Indonesia</td>
<td>No\footnote{Id. at 4.}</td>
<td>No</td>
</tr>
<tr>
<td>Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act (1982)</td>
<td>Mexico</td>
<td>Yes\footnote{Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156 (1982) (noting that “retention of the NRC employee by the consulting firm appears to be the principal reason for selection of the consulting firm by the Mexican government” and that “selection of personnel, remains with the Mexican government”).}</td>
<td>Yes\footnote{Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156 (1982) (noting that “retention of the NRC employee by the consulting firm appears to be the principal reason for selection of the consulting firm by the Mexican government” and that “selection of personnel, remains with the Mexican government”).}</td>
</tr>
<tr>
<td>Application of Foreign Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission (1986)</td>
<td>Taiwan</td>
<td>Yes\footnote{Application of Foreign Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Comm’n, 10 Op. O.L.C. 96 (1986) (noting that &quot;the Taiwanese government must approve Mr. A’s participation on this contract&quot;).}</td>
<td>Yes\footnote{Application of Foreign Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Comm’n, 10 Op. O.L.C. 96 (1986) (noting that &quot;the Taiwanese government must approve Mr. A’s participation on this contract&quot;).}</td>
</tr>
</tbody>
</table>
reviewing a thesis from a public university in Australia, the Department noted that the university had “independence from the government,” but did not come to any conclusion about whether the university should be considered a “foreign state” under the clause. Instead, the opinion examined the facts “in light of the Framers’ concerns expressed in the Emoluments Clause,” and found that the situation did not “present[] the opportunity for ‘corruption and foreign influence’ that concerned the Framers and that we must presume exists whenever a gift or emolument comes directly from a foreign government.”

This gestalt approach in the 1986 opinion was later replaced in 1994 by a presumption that foreign public universities are “foreign states within the meaning of the Emoluments Clause,” while allowing that presumption to be rebutted by evidence that the university acts independently of the government. That 1994 opinion found “compelling evidence” that faculty employment decisions at the University of Victoria were independent of the provincial government, and therefore the university would “not be considered to be a foreign state under the Emoluments Clause,” allowing two NASA scientists to join its faculty and receive compensation from the university.

---

48 Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, Re: Emoluments Clause Questions raised by NASA Scientists’s Proposed Consulting Arrangement with the University of New South Wales (May 23, 1986) (“it is not so clear that [the university] should necessarily be regarded as a "foreign state" for Emoluments Clause purposes, given its functional and operational separation and independence from the government”).

49 Id. Those facts included the fact that invitation came from the chair of an academic department, and was extended “because of [the scientist’s] international reputation as a scholar … and not because of his position with the U.S. government;” the fee was “an amount ordinarily paid by departments to outside experts for services of this kind;” and the consultancy was “limited both in time and in substantive scope,” and would not involve “any continuing relationship” with the university. Id.


Where the benefit is provided by an organization that has ties to but is not formally part of a foreign government, the Justice Department’s analysis focuses on three issues: (1) whether the foreign government directed the benefit to the federal employee; (2) whether the foreign government controls the intermediary (such as by selecting its board members); and (3) whether the foreign government provides substantial funding for the intermediary. Applying these criteria, the Department found that President Barack Obama could accept the 2009 Nobel Peace Prize even though he had been selected by a committee whose members were elected by the Norwegian Parliament. The Department determined that the Norwegian government had “no authority to compel the Committee to choose the Prize recipient; nor does it have any veto authority” over their selection, and the prize itself and the salaries of the committee members were funded by the private Nobel Foundation.

As these opinions make clear, determining whether a benefit should be deemed to come from a foreign government is complicated because of the many factual and institutional variations in which these issues arise. But no matter what the variation, the Department focuses on whether a foreign government directed a benefit to a federal official.

53 Applicability of the Emoluments Clause & the Foreign Gifts & Decorations Act to the Göteborg Award for Sustainable Development, 34 Op. O.L.C. (2010); 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. (2009) (same); see also Jeffrey Green, Application of the Emoluments Clause to Department of Defense Civilian Employees and Military Personnel, ARMY LAW. 15 (June 2013). Compare Letter for Walter T. Skallerup, Jr., General Counsel, Department of the Navy, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 17, 1983) (foundation should be considered a foreign government because the German government established and administers it, provides most of its funding, created the program for honoring American scientists, and government officials are on the committee that selects awardees) with Memorandum to File from Daniel L. Koffsky, Application of the Emoluments Clause to a U.S. Government Employee Who Performs Services for the Prince Mahidol Foundation (Nov. 19, 2002) (cited in 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. (2009)) (foundation not a foreign government despite presence of Thai government and royalty because decision-making process evidenced “independent judgment” and most of its funding did not come from Thai government).


55 Id. The following year, the Department found that the decision to give a NOAA scientist the Göteborg Award for Sustainable Development “should not be deemed an action of a foreign state for the purposes of the Emoluments Clause” even though the jurors who made the decision were appointed by a board “consisting of three officials of the City of Göteborg and one businessman,” and the award was “funded one-third by the City and two-thirds by the private businesses” because “the jury de facto has the complete control of and the full responsibility for the selection process as well as the final decision.” Applicability of the Emoluments Clause & the Foreign Gifts & Decorations Act to the Göteborg Award for Sustainable Development, 34 Op. O.L.C. (2010).
The fourth question under the clause is whether Congress has given its consent for the employee to accept the benefit. Congressional consent requires an affirmative enactment of law rather than mere Congressional silence or acquiescence.\(^56\) and some of these enactments have explicitly acknowledged that they constitute consent under the foreign emoluments clause.\(^57\) But an enactment can function as consent even if it does not use the term “consent” or specify a particular benefit as permitted under the clause.\(^58\) For example, a Navy scientist was permitted to accept a $24,000 award from a German government foundation because the award was similar to a scholarship, and Congress had consented to gifts "in the nature of an educational scholarship."\(^59\) Similarly, meteorologists from the U.S. Weather Service could accept compensation from the government of Ireland for serving in its Meteorological Service because the program for detailing U.S. meteorologists to Ireland had been “duly authorized by an act of … Congress.”\(^60\) In other words, the enactment must signal that Congress has contemplated that a foreign government will provide the benefit at issue.\(^61\)

Over the course of a century and a half, the Justice Department has provided the republic with robust protection from foreign governments’ potentially corrupt influence by interpreting the clause with the framers’ purpose in mind. When the Justice Department has been called upon to determine how the clause applies, it has looked to the purpose of the clause to

\(^{56}\) See Memorandum, The Constitutional Prohibition Against Acceptance of Gifts from Foreign Potentates (Sept. 23, 1952) (acknowledging that government’s past practice of turning over gifts from foreign governments to those leaving government service was improper because “their acceptance without the consent of Congress is barred by the constitutional provision”); cf. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 613 (Frankfurter, J., concurring) (referring to Congress’ “long-continued acquiescence” to executive branch action).

\(^{57}\) See, e.g., Foreign Gifts and Decorations Act, Pub. L. 89-673, 80 Stat. 952, § 4 (1966) (“Congress hereby gives its consent to a person to accept and retain a gift of minimal value …”).

\(^{58}\) See 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) (“It also seems reasonable to argue that Congress has consented, at least implicitly, to the membership of foreign nationals on the Council.”).

\(^{59}\) Letter for Walter T. Skallerup, Jr., General Counsel, Department of the Navy, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 17, 1983) (citing 5 U.S.C. § 7342(c)(1)(B)).


\(^{61}\) See Letter from Deputy Assistant Attorney General Leon Ulman to the General Counsel of Nuclear Regulatory Commission 6-7 (July 26, 1976) (legislation creating the “Special Government Employee” category and exempting such employees from certain conflict of interest statutes did not constitute consent for those employees to accept benefits from foreign governments).
inform its analysis. To determine whether the clause applies to an advisory board member who serves on a part-time basis, the Department asked whether

it would be reasonable to impart to the Framers an intent to apply the policy behind Clause 8 to a constitutional officer who works perhaps 300 days per year but not to an officer performing duties 120 days per year. I think not. Although the wording of clause 8 may be somewhat quaint, the policy it bespeaks, requiring the undivided loyalty of individuals occupying positions of great public trust, has lost no force since it was adopted.\(^\text{62}\)

In interpreting the clause, the Justice Department has construed the phrase “Office of Profit or Trust” so that it reaches federal officials who can exercise governmental authority; has construed “present, Emolument, Office, or Title” to restrict a wide range of possible benefits; has construed “from any King, Prince, or foreign State” in a nuanced manner to reach situations where a foreign government decides to provide a benefit to a federal official; and has construed “Consent of the Congress” to ensure that Congress has affirmatively given its approval of any such arrangement with a foreign government.

III. TRUMP INTERPRETATION OF THE CLAUSE: PROTECT TRUMP, NOT THE REPUBLIC

A. Pre-Inauguration: Trump’s Personal Lawyers Narrowly Construe Clause to Promote his Financial Interests

After Donald Trump was elected but before he was inaugurated, his personal lawyers advanced a different interpretation of the Foreign Emoluments Clause -- one that would allow Trump to receive payments from foreign governments through his businesses. These lawyers focused on two terms within the clause, “present” and “Emolument,” and argued for a narrow definition of each so that the clause would not prohibit commercial payments from foreign governments to business entities owned by a federal official. In a January 11, 2017 White Paper, Trump’s lawyers took the position that the clause has no application to business transactions in which “foreign governments pay fair-market-value prices” because its term, “present,” is limited to voluntary transfers of property without compensation,\(^\text{63}\) and “Emolument”

\(^{62}\) Letter from Deputy Assistant Attorney General Leon Ulman to the General Counsel of Nuclear Regulatory Commission 5 (July 26, 1976).

\(^{63}\) MORGAN, LEWIS & BOCKIUS LLP, CONFLICTS OF INTEREST AND THE PRESIDENT 4 (Jan. 11, 2017) available at https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf (“So long as foreign governments pay fair-market-value prices, their business is not a “present” because they are receiving fair value as a part of the exchange.”)
should be limited to “a payment or other benefit received as a consequence of discharging the duties of an office.”

Some commentators had argued that “Emolument” has a broader meaning, reaching anything of value, and in response, Trump’s lawyers came up with five arguments to justify their narrower definition. First, they argued that if “Emolument” were defined so broadly as to reach any kind of benefit, then the clause’s use of the term “present” would be redundant. While this argument helps explain why “Emolument” should not be construed so broadly as “any benefit,” it does not explain why “Emolument” should be interpreted to exclude commercial transactions. Second, they pointed to a never-ratified 1810 constitutional amendment that used the term, “emolument,” and contended that its meaning in that context would have excluded commercial transactions. Third, they invoked a passage in an 1850 Supreme Court decision, Hoyt v. United States, stating that “the term emoluments . . . embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of [an] office.” But the Court used this definition in the context of a statute addressing the appropriate compensation for a particular office. It was not providing a definition of the term outside of that specific statutory context.

Fourth, Trump’s lawyers argued that “the factual circumstances giving rise to [non-judicial] opinions finding Foreign Emoluments Clause violations are different from those” involving Trump. It is true that the Justice Department had never addressed the propriety of foreign government payments to a business owned by a President, but it had addressed a similar situation: foreign government payments to a business partially owned by a government official, and had prohibited that official from accepting profits derived from such payments. In its 1993 opinion, the Department ruled that a government official who was also a partner in a law firm could not accept money from the firm’s work for foreign governments (even though he had not worked on those cases) because “the partnership would in effect be a conduit”

64 MORGAN LEWIS, WHITE PAPER.
66 MORGAN LEWIS, WHITE PAPER at 5 (“it would have been redundant to list “present” and “Emolument” in the Clause separately, because any present would already qualify as a benefit”).
67 Id. at 4-5.
68 Id. at 4, quoting Hoyt v. United States, 51 U.S. 109, 135 (1850).
69 Id.
for foreign governments.\textsuperscript{71} And finally, Trump’s lawyers argued that a broader definition of the term would lead to “absurd results,” such as prohibiting the President from receiving interest from federal or state bonds in a retirement account in light of the Constitution’s domestic emoluments clause.\textsuperscript{72}

What is perhaps most important about the arguments marshaled by Trump’s personal lawyers is that they never grappled with the clause’s underlying purpose: to protect the government and the republic from the kind of influence that could result from government officials’ accepting “\textit{any present, Emolument, Office, or Title, of any kind whatever}” from foreign governments. The Justice Department opinions interpreting the clause repeatedly invoke not just its language, but also its purpose. A 1986 opinion written by now-Justice Samuel Alito, for example, asked whether the proposed $150 payment from an Australian public university to a NASA scientist for reviewing a Ph.D. thesis “would raise the kind of concern (viz., the potential for ‘corruption and foreign influence’) that motivated the Framers in enacting the constitutional prohibition.”\textsuperscript{73} Trump’s personal lawyers, on the other hand, limited themselves to technical (and ultimately unpersuasive) arguments that would strip the clause of its vigor and would empower foreign governments to influence Trump by spending at his properties. Their interpretation would also enable all federal officials to accept unlimited sums from foreign

\textsuperscript{71} Id.

\textsuperscript{72} MORGAN LEWIS, WHITE PAPER at 5. The term “emolument” is also used in the domestic emoluments clause, which reads in full:

\begin{quote}
    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.
\end{quote}

U.S. CONSTITUTION, art. II, § 1, cl. 7.

\textsuperscript{73} Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, Re: Emoluments Clause Questions raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales (May 23, 1986); see also Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development, 34 Op. O.L.C. ___ (2010) (quoting same passage); 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) (noting clause’s anti-corruption purpose and discounting risk of corruption arising when appointing individual who already “possesses a title or renders services to a foreign state”); 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 Trip to Indonesia (Aug. 11, 1980) (reviewing the the facts regarding Harvard’s arrangement with Indonesia “with the underlying purpose of the constitutional prohibition in mind,” and finding Indonesia’s payment of travel expenses “cannot be said to be from a foreign government within the meaning of” the clause).
governments, as long as the payments came through transactions with business entities.\(^74\)

### B. Post-Inauguration: Justice Departmentadopts Trump’s Narrow Interpretation

Three days after Donald Trump was inaugurated as President, an anti-corruption group filed a lawsuit against Trump claiming that his businesses’ acceptance of money and other benefits from foreign governments violated the constitution’s Foreign Emoluments Clause.\(^75\) Five months later, the District of Columbia and Maryland filed a similar lawsuit against Trump,\(^76\) and two days after that, Senator Richard Blumenthal and 195 other members of Congress filed a third lawsuit with similar claims.\(^77\) In responding to those lawsuits, the Justice Department changed its position on the meaning of the clause and, following the lead of Donald Trump’s private lawyers, adopted a narrow interpretation.

The Trump Justice Department invoked the same five arguments that Trump’s private sector lawyers used in their January 2017 White Paper. It argued that interpreting “the term “Emolument” to mean “anything of value” would subsume the term “present” in the Foreign Emoluments Clause and render it redundant.”\(^78\) The Department also argued that the never-ratified 1810 constitutional amendment supported its interpretation,\(^79\) and invoked the

---

\(^74\) One mitigating factor would be that nearly all executive branch officials – other than the President and Vice President – are bound by criminal and administrative restrictions on conflicts of limits. See, e.g., 18 U.S.C. § 208(a). Those statutes and regulations would limit the ability of a particular executive branch official to act on government matters affecting a foreign government from whom the official receives benefits.

\(^75\) Complaint, Citizens for Responsibility and Ethics in Wash. v. Trump, No. 1:17-cv-00458-RA (S.D.N.Y. Jan. 23, 2017). The lead plaintiff is also known by its acronym, CREW. The lawsuit also alleged violation of the constitution’s Domestic Emoluments Clause. Id. at ¶ 50.

\(^76\) Complaint, District of Columbia and Maryland v. Trump, No. 8:17-CV-01596 (D. Md. June 12, 2017). This lawsuit also alleged violation of the constitution’s Domestic Emoluments Clause. Id. at 24-30.


Supreme Court’s narrow definition of the term in its 1850 Hoyt v. United States decision.\textsuperscript{80} The Justice Department tweaked the Trump’s lawyers’ argument that prior OLC opinions could be distinguished on the basis of different facts. Instead of distinguishing those earlier opinions, the Department contends that its narrow definition is consistent with them, arguing that “in every published OLC … opinion” where a proposed emolument was prohibited, the facts “involved an employment relationship (or a relationship akin to an employment relationship) with the foreign government.”\textsuperscript{81} But that assertion omits the Department’s opinion prohibiting a federal official from accepting profits derived from foreign government payments to his law firm.\textsuperscript{82} In its Motion to Dismiss, the Department acknowledged the existence of that opinion in a footnote,\textsuperscript{83} but did not explain how it could be squared with its contention about “every published OLC … opinion.” In its Motions to Dismiss in the Blumenthal and DC/MD lawsuits, the Department again relegated mention of that opinion to a footnote, but also asserted – without citing any language in the opinion – that its outcome was based on the fact that it involved a law firm rather than another type of business.\textsuperscript{84} Regarding the fifth argument – that a narrow definition was necessary to avoid absurd results – the Department doubled down on this theme, putting forward additional examples of the absurd results that it believed would follow if the clause prohibited foreign government payments to


Trump’s commercial establishments.\textsuperscript{85} It is useful to examine this issue in some detail because the absurdity comes not from a broad definition of “emolument,” but from the Justice Department’s failure to consider another component of the clause – whether the benefit should be deemed to come from a foreign government.

In the emoluments cases, the Justice Department contends that “royalties from foreign book sales received by a President … would offend the Foreign Emoluments Clause if any of them were attributable to purchase by a foreign government instrumentality, such as a foreign public university,”\textsuperscript{86} citing the 1994 Justice Department opinion on foreign universities hiring federal officials.\textsuperscript{86} Yet this argument is undermined by that very opinion, which indicates that a benefit provided by a foreign public university is not deemed to be “from” a foreign government if the university has functional independence from that government and its decisions are made without being influenced by that government.\textsuperscript{87} On the other hand, if a foreign government sought to enrich a U.S. President by directing its public universities to purchase his books, the clause would prohibit the President from accepting such royalties. By examining this “absurd” result through the lens not just of the term “emolument,” but of the entire clause, it becomes clear that the broader definition of “emolument” does not produce absurd results.

\textbf{IV. The Justice Department’s Reversal: From Robust to Risible Protection}

For over 150 years, the Justice Department used its opinion-writing function to provide robust protection against foreign government influence on federal officials. After President Trump was sued for violating the foreign


\textsuperscript{87} \textit{Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities}, 18 Op. O.L.C. 13, (1994) ("The Emoluments Clause of the Constitution does not apply in the cases of government employees offered faculty employment by a foreign public university where it can be shown that the university acts in dependently of the foreign state when making faculty employment decisions.")
emoluments clause, the Department faced a critical juncture. Would it continue its longstanding policy and practice of protecting the republic from foreign government influence, or would it abandon that position in order to protect the narrow private financial interests of Donald Trump? Former White House Counsel Robert Bauer called for President Trump to retain private counsel to represent him in the emoluments litigation, permitting career Justice Department lawyers to develop a response independent of the presidential appointees leading the Department. Instead, President Trump’s political appointees and career lawyers both signed the pleadings in which the Department has advocated for the narrow interpretation of the Foreign Emoluments Clause developed by Trump’s private lawyers to protect his personal financial interests, defending his acceptance of unlimited payments from foreign governments through his businesses.

While there are past examples of the Justice Department changing its view on specific legal issues after a newly elected administration takes office, there is something unprecedented about this particular reversal. Past reversals have been based on changes in an administration’s policy preferences and ideological commitments. This change, on the other hand, was based not on ideology, but on the personal financial interests of this particular President. Never before have the immense litigation resources of the Justice Department been deployed to personally enrich a President. In essence, the Justice Department has abandoned its institutional client, the United States, and is now litigating to advance the personal financial interests of Donald J. Trump.

88 Robert Bauer, <i>Trump has been sued. Here’s why the Justice Department shouldn’t represent him</i>, WASH. POST (May 4, 2017)
89 See Josh Blackman, <i>Presidential Maladministration</i>, 2018 U. ILL. L. REV. 397, 405-22 (2018) (cataloging examples of agencies reversing their earlier interpretations of statutes and describing the extent to which such reversals affect judicial deference to agencies).
90 See, e.g., <i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i>, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (noting that “[t]he agency’s changed view of the standard [on seatbelts] seems to be related to the election of a new President of a different political party” and that a “change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations”); see also Josh Blackman, <i>Presidential Maladministration</i>, 2018 U. ILL. L. REV. at 420 (noting unapologetic embrace of presidential reversals).
Appendix I
Justice Department Opinions Addressing the Foreign Emoluments Clause

<table>
<thead>
<tr>
<th>Date</th>
<th>Title (or topic)</th>
<th>Cite (or web location)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1902-09-08</td>
<td>Gifts from Foreign Prince</td>
<td>24 Op. A.G. 116 (1902)</td>
</tr>
<tr>
<td>1909-03-10</td>
<td>Delivery of an Insignia from the German Emperor to a Clerk in the Post-Office Department</td>
<td>27 Op. A.G. 219 (1909)</td>
</tr>
<tr>
<td>1911-02-03</td>
<td>Field Assistant on the Geological Survey—Acceptance of an Order from the King of Sweden</td>
<td>28 Op. A.G. 598 (1911)</td>
</tr>
<tr>
<td>1952-09-23</td>
<td>The Constitutional Prohibition Against Acceptance of Gifts from Foreign Potentates</td>
<td>[not available](^2)</td>
</tr>
<tr>
<td>1953-11-13</td>
<td>Article I, Section 9, Clause 8 of the Constitution—Its Meaning</td>
<td>[not available](^2)</td>
</tr>
<tr>
<td>1953-11-27</td>
<td>Membership of Judge Parker on the International Law Commission</td>
<td>[not available](^2)</td>
</tr>
<tr>
<td>1954-10-04</td>
<td>Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government</td>
<td>[not available](^2)</td>
</tr>
<tr>
<td>1957-10-15</td>
<td>Appointments to Civil Rights Commission</td>
<td>[not available](^2)</td>
</tr>
<tr>
<td>1958-02-18</td>
<td>Historical survey re gifts from foreign monarchs and governments to Government officers</td>
<td>[not available](^2)</td>
</tr>
<tr>
<td>1961-11-03</td>
<td>employment of retired foreign service officers by foreign governments</td>
<td>[not available](^2)</td>
</tr>
<tr>
<td>Date</td>
<td>Title (or topic)</td>
<td>Cite (or web location)</td>
</tr>
<tr>
<td>--------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>1962-10-16</td>
<td>Invitation by Italian Government to officials of the Immigration &amp; Naturalization Service &amp; a Member of the White House Staff</td>
<td><a href="http://www.justice.gov/olc/page/file/935741/download8">www.justice.gov/olc/page/file/935741/download8</a></td>
</tr>
<tr>
<td>1969-09-29</td>
<td>Indian government payments to Atomic Energy Commission employees</td>
<td><a href="https://www.politico.com/f/?id=00000">https://www.politico.com/f/?id=00000</a> 158-b52f-d012-ab5a-b5af63ce00019</td>
</tr>
<tr>
<td>1974-04-26</td>
<td>Conditional gifts to the President from anonymous donors</td>
<td><a href="https://www.politico.com/f/?id=00000">https://www.politico.com/f/?id=00000</a> 158-b543-d012-ab5a-b5c39957000110</td>
</tr>
<tr>
<td>1974-08-07</td>
<td>Ability of Intermittent Consultant to United States to Hold Similar Position under Foreign Government</td>
<td>Appendix IV12</td>
</tr>
<tr>
<td>1976-07-26</td>
<td>meaning of “Office”</td>
<td>Appendix V13</td>
</tr>
<tr>
<td>1978-02-08</td>
<td>wedding gifts to President Nixon’s daughters</td>
<td><a href="http://www.justice.gov/olc/page/file/936081/download15">www.justice.gov/olc/page/file/936081/download15</a></td>
</tr>
<tr>
<td>1980-08-11</td>
<td>Expense Reimbursement in Connection with Chairman Stone’s Trip to Indonesia</td>
<td><a href="http://www.justice.gov/olc/page/file/936091/download16">www.justice.gov/olc/page/file/936091/download16</a></td>
</tr>
<tr>
<td>1983-03-17</td>
<td>award from German Alexander Von Humboldt Foundation</td>
<td><a href="http://www.justice.gov/olc/page/file/936131/download17">www.justice.gov/olc/page/file/936131/download17</a></td>
</tr>
<tr>
<td>1986-05-23</td>
<td>Emoluments Clause Questions raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales</td>
<td><a href="http://www.justice.gov/olc/page/file/936146/download18">www.justice.gov/olc/page/file/936146/download18</a></td>
</tr>
<tr>
<td>Date</td>
<td>Title (or topic)</td>
<td>Cite (or web location)</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>--------------------------------</td>
</tr>
<tr>
<td>1988-08-29</td>
<td>Application of the Emoluments Clause to a Civilian Aide to the Secretary of the Army</td>
<td>[not available]^{19}</td>
</tr>
<tr>
<td>1990-11-15</td>
<td>Emoluments Clause and Appointment to the President's Committee on the Arts and Humanities</td>
<td>[not available]^{20}</td>
</tr>
<tr>
<td>1992-08-27</td>
<td>Applicability of Emoluments Clause to Employment of CFTC Attorney by East China Institute of Politics and Law</td>
<td>[not available]^{21}</td>
</tr>
<tr>
<td>1994-03-01</td>
<td>meaning of “Office of Profit or Trust”</td>
<td>58 ADMIN. L. REV. 36 (2006)^{22}</td>
</tr>
<tr>
<td>1996-08-28</td>
<td>Proposed Award of Honorary British Knighthood to Retiring Military Officer</td>
<td>[not available]^{23}</td>
</tr>
<tr>
<td>Date</td>
<td>Title (or topic)</td>
<td>Cite (or web location)</td>
</tr>
<tr>
<td>------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>2007-06-15</td>
<td>Application of the Emoluments Clause to a Member of the FBI Director’s Advisory Board</td>
<td>31 Op. O.L.C. 154 (2007)</td>
</tr>
</tbody>
</table>

**Endnotes for Appendix I:**

1 Memorandum, The Constitutional Prohibition Against Acceptance of Gifts from Foreign Potentates (Sept. 23, 1952).
3 Memorandum for the Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, Membership of Judge Parker on the International Law Commission (Nov. 27, 1953).
4 Memorandum for S. A. Andretta, Administrative Assistant Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government (Oct. 4, 1954); cf. Assistant Comptroller General Weitzel to the Attorney General, 34 Comp. Gen. 331 (1955) (coming to opposite conclusion).


6 Memorandum to Files, Historical survey re gifts from foreign monarchs and governments to Government officers (Feb. 18, 1958).


8 Memorandum for Andrew F. Oehmann, Office of the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Invitation by Italian Government to officials of the Immigration & Naturalization Service & a Member of the White House Staff (Oct. 16, 1962).


10 Memorandum for Dudley H. Chapman, Associate Counsel to the President, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Conditional gifts to the President from anonymous donors (April 26, 1974).

11 Memorandum for Dudley H. Chapman, Associate Counsel to the President, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Appointment of a Foreign National to the National Voluntary Service Advisory Council (May 10, 1974).


13 Letter from Deputy Assistant Attorney General Leon Ulman to the General Counsel of Nuclear Regulatory Commission (July 26, 1976).


15 Letter for Allie B. Latimer, General Counsel, General Services Administration, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Feb. 8, 1978).

16 Memorandum for John G. Gaine, General Counsel, Commodity Futures Trading Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, Expense Reimbursement in Connection with Trip to Indonesia (Aug. 11, 1980).

17 Letter for Walter T. Skallerup, Jr., General Counsel, Department of the Navy, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 17, 1983).

18 Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, Emoluments Clause Questions raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales (May 23, 1986).

19 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, Application of the Emoluments Clause to a Civilian Aide to the Secretary of the Army at 3 (Aug. 29, 1988).
20 Memorandum to Files from Barbara F. Armacost, Emoluments Clause and Appointment to the President’s Committee on the Arts and Humanities (Nov. 15, 1990) (cited in Applicability of the Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 17 n.6 (1994)).


25 Available at www.justice.gov/sites/default/files/olc/opinions/2009/05/31/ineligibility-clause_0.pdf.

26 Available at www.justice.gov/file/18441/download.

27 Available at www.justice.gov/file/18411/download.

28 Available at www.justice.gov/file/18401/download.
## Appendix II
### Comptroller General Opinions on the Foreign Emoluments Clause

<table>
<thead>
<tr>
<th>Date</th>
<th>Holding</th>
<th>Cite</th>
</tr>
</thead>
<tbody>
<tr>
<td>1955-01-12</td>
<td>Justice Department employee may accept annuity payments from Germany as reparations for wrongful acts inflicted by Nazi regime</td>
<td>34 Comp. Gen. 331</td>
</tr>
<tr>
<td>1957-08-26</td>
<td>newly-appointed court crier may not accept United Kingdom military pension</td>
<td>37 Comp. Gen. 138</td>
</tr>
<tr>
<td>1962-05-01</td>
<td>Congress consented to retired military reserve officers being employed by foreign governments</td>
<td>41 Comp. Gen. 715</td>
</tr>
<tr>
<td>1963-12-12</td>
<td>factors to consider re: retired naval officer could be employed by foreign public university</td>
<td>B-152844</td>
</tr>
<tr>
<td>1964-08-31</td>
<td>Civil Service Commission employee does not hold an “office” in the constitutional sense</td>
<td>B-154223</td>
</tr>
<tr>
<td>1964-09-11</td>
<td>retired coast guard member’s receipt of salary from Department of Education in Tasmania violated clause; his retirement pay will be docked the amount of that salary</td>
<td>44 Comp. Gen. 130</td>
</tr>
<tr>
<td>1964-10-23</td>
<td>retired enlisted coast guard member holds an &quot;office&quot; within meaning of clause</td>
<td>44 Comp. Gen. 227</td>
</tr>
<tr>
<td>1964-11-10</td>
<td>Domestic Emoluments Clause prohibits President Kennedy from accepting military retirement pay while President</td>
<td>B-153438</td>
</tr>
<tr>
<td>1964-12-28</td>
<td>retired coast guard member violated foreign emoluments clause by accepting salary from Tasmania Department of Education</td>
<td>B-154213</td>
</tr>
<tr>
<td>1966-02-03</td>
<td>retired military officer may not accept retirement pay while employed by foreign government</td>
<td>B-158396</td>
</tr>
<tr>
<td>1970-06-01</td>
<td>military officer may not accept monetary reward from Colombia for supplying information about contraband</td>
<td>49 Comp. Gen. 819</td>
</tr>
<tr>
<td>1972-06-01</td>
<td>retired Public Health Service officer holds an “office” within meaning of clause; can’t accept retirement pay while employed by Canadian government</td>
<td>51 Comp. Gen. 780</td>
</tr>
<tr>
<td>1974-04-09</td>
<td>retired military officer can’t accept retirement pay while working for corporation owned by Israel</td>
<td>53 Comp. Gen. 753</td>
</tr>
<tr>
<td>1976-08-24</td>
<td>whether a retired foreign service officer is an “officer”</td>
<td>B-126318</td>
</tr>
<tr>
<td>1977-10-13</td>
<td>retirement pay for retired military member employed by foreign government will be withheld in amount equal to amount received from foreign government because “the emoluments are accepted on behalf of the United States”</td>
<td>B-178538</td>
</tr>
<tr>
<td>Date</td>
<td>Holding</td>
<td>Cite</td>
</tr>
<tr>
<td>------------</td>
<td>-------------------------------------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>1978-04-07</td>
<td>Congress’ enactment of legislation consenting to retired officers’ employment by foreign government was not retroactive</td>
<td>B-17516614</td>
</tr>
<tr>
<td>1979-05-03</td>
<td>forms of compensation other than salary are also prohibited, such as free or reduced transportation, household goods shipments at employer expense, housing allowances</td>
<td>58 Comp. Gen. 48715</td>
</tr>
<tr>
<td>1979-05-25</td>
<td>retired military members who accept emoluments incident to employment by foreign governments “are deemed [to have] accepted [those emoluments] on behalf of the United States, and therefore, the members’ retired pay is to be withheld in an amount equal to such emoluments”</td>
<td>58 Comp. Gen. 56616</td>
</tr>
<tr>
<td>1979-12-04</td>
<td>construed Foreign Relations Authorization Act, Fiscal Year 1978, Public Law 95-105, August 17, 1977, 91 Stat. 844, 859-860 as congressional consent for retired military members employed by foreign governments at time of enactment to start receiving retirement pay as soon as they obtained secretarial approval for foreign government employment, even if the prior deductions had not completely offset the emoluments they received from foreign governments</td>
<td>B-19356217</td>
</tr>
<tr>
<td>1980-06-13</td>
<td>state department takes the position that retired foreign service officers and retired foreign service information officers continue to be officers for purpose of clause</td>
<td>B-19906118</td>
</tr>
<tr>
<td>1980-07-17</td>
<td>standard for recouping retirement pay when retired military officer has received approval from one but not both cabinet secretaries</td>
<td>B-19855719</td>
</tr>
<tr>
<td>1982-03-25</td>
<td>standard for recouping retirement pay received during period of unauthorized employment by foreign government</td>
<td>61 Comp. Gen. 30620</td>
</tr>
<tr>
<td>1983-01-18</td>
<td>President Reagan’s acceptance of a retirement allowance from the State of California does not violate Domestic Emoluments Clause</td>
<td>B-20746721</td>
</tr>
<tr>
<td>1983-06-02</td>
<td>clause does not apply if retired military officer from being employed by “American Motors Corporation, which is 46.9% owned by Renault, which is 92 % owned by the French government,” but would apply &quot;where it appears that a domestic corporation is ultimately controlled by a foreign government and the domestic corporation acts as an agent or instrumentality of a foreign government”</td>
<td>62 Comp. Gen. 43222</td>
</tr>
<tr>
<td>Date</td>
<td>Holding</td>
<td>Cite</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>1983-10-17</td>
<td>Saudi Arabian Airlines, which is attached to Saudi Ministry of Defense and Aviation, managed by board headed by Minister of Defense and Aviation or his nominee, with other board members appointed by Council of Ministers on nomination by the Minister of Defense and Aviation, is an instrumentality of the Saudi Arabian government</td>
<td>B-21272423</td>
</tr>
<tr>
<td>1985-03-11</td>
<td>retired military officers who were attorneys employed by or “of counsel” at a law firm could not serve as legal counsel for the Office of the Saudi Military Attache without congressional consent even though no attorney will be entitled to or receive any compensation on the basis of collection by the firm from any particular client or for any particular service, noting that the Saudi Government would pay the professional corporation for the services performed and retired military “officers and they in turn would benefit from these payments through the receipt of salary and other compensation and benefits from the professional corporation”</td>
<td>B-21709624</td>
</tr>
<tr>
<td>1986-03-10</td>
<td>retired military officer “effectively was an employee of the Saudi Arabian Government since it could control and direct him” even though he formally worked for Delaware company; the clause “requires the broadest possible scope and application, and have held that the transportation and payment of other expenses”</td>
<td>65 Comp. Gen. 38225</td>
</tr>
<tr>
<td>1989-06-21</td>
<td>retired military officer was employed by ARAMCO at time when it was unclear whether Saudi Arabia owned company; government waived any claim against officer’s estate</td>
<td>B-23149826</td>
</tr>
<tr>
<td>1990-01-19</td>
<td>applies 5-part test to determine whether retired military officer is employed by foreign government; &quot;for purposes of the constitutional prohibition, [retired military officer] was an employee of the Saudi Arabian government which had the power to fire him and, equally important, to control his conduct by supervising and directing his activities” “Our consistent position has been to give this constitutional provision the broadest possible scope and application.”</td>
<td>69 Comp. Gen. 17527</td>
</tr>
<tr>
<td>1993-10-12</td>
<td>“the term “foreign State” should be interpreted to include local governmental units within a foreign country as well as the national government itself.” “The intent of the constitutional prohibition is to curb foreign influence upon government officials. Foreign governmental influence can just as readily occur whether a member is employed by local government within a foreign country or by the national government of the country.”</td>
<td>B-25108428</td>
</tr>
</tbody>
</table>
Endnotes for Appendix II:

1 Assistant Comptroller General Weitzel to the Attorney General, 34 Comp. Gen. 331 (1955); cf. 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) (coming to opposite conclusion).


3 To the Honorable John W. Macy, Jr., Chairman, Civil Service Commission, B- 154223 (1964).

4 To C. C. Gordon, United States Coast Guard, 44 Comp. Gen. 130 (1964); aff’d by To Mr. Harvey E. Ward, USCG, Ret., B-154213 (1964).

5 To the Secretary of the Navy, 44 Comp. Gen. 227 (1964).


7 To Mr. Harvey E. Ward, USCG, Ret., B-154213 (1964) (aff’g To C. C. Gordon, United States Coast Guard, 44 Comp. Gen. 130 (1964)).


10 To the Secretary of Health, Education and Welfare, 51 Comp. Gen. 780 (1972), aff’d by Dr. R. Edward Bellamy, USPHS, Ret., B-175166 (1978).


12 Discussed in Matter of: Frank Church, United States Senate, B-199061 (1980)

13 Department Of Defense Military Pay And Allowance Committee Action No. 538, B- 178538 (1977).

14 Dr. R. Edward Bellamy, USPHS, Ret., B-175166 (1978), aff’g To the Secretary of Health, Education and Welfare, 51 Comp. Gen. 780 (1972).


18 Frank Church, United States Senate, B-199061 (1980).


21 The Honorable George J. Mitchell U.S. Senate, B-207467 (1983)


23 Mr. Robert M. McGowan, B-212724 (1983).


27 Major Stephen M. Hartnett, USMC, Ret. 69 Comp. Gen. 175 (1990) (aff’g 65 Comp. Gen. 382 (1986)).
Appendix III
Other Federal Government Opinions on the Foreign Emoluments Clause

U.S. Department of Justice, Immigration and Naturalization Service General Counsel Op. No. 96-9, Questions Pertaining to the United States/Canada Accord on Inspections Operations at Our Shared Border (June 26, 1996)
"A person exercising law enforcement powers on behalf of the United States holds an office of trust under the Emoluments Clause. Because Canadian officers are paid a salary by Canada, they accept an emolument from a foreign government. Therefore, they may not exercise United States law enforcement powers, including immigration inspections, without the consent of Congress."

White paper addressing definition of "emolument," including the types of employment that may involve an "emolument;" the federal officials who hold an "Office of Profit or Trust;" what counts as a "foreign state;" and details regarding Congressional consent for retired military personnel to accept foreign government salaries, including specific procedures for obtaining advance approval from the Departments of Defense and State.

"the term 'emoluments' is not limited to payments from a foreign government that result from an individual's official duties;" "the receipt of profit from a foreign government for rental property may implicate the constitutional prohibition against receipt of 'any emolument' of 'any kind whatever' from a foreign state."

---

1 The White Paper is not dated, but appears to have been issued in late 2012. (Footnotes 34 and 37 refer to websites “last viewed on September 10, 2012.”)
Re: Ability of Intermittent Consultant to United States to hold similar position under a foreign government

The Department of the Treasury seeks to retain a person as an intermittent consultant for the next twelve months. The consultant would be subject to call by the Secretary on an occasional and irregular basis, but would work less than 130 days a year. We understand that the consultant would advise the Secretary directly, would not be subject to any bureaucratic supervision and would not have any permanently assigned office space in the Department of the Treasury. The services of the consultant would be procured by contract pursuant to 5 U.S.C. 3109; hence, he would not be an independent contractor under 41 U.S.C. 252(b)(4).

The consultant is now also an intermittent consultant to a foreign government and intends to continue in that capacity while serving as a consultant to the Department of the Treasury. We have been advised that his services to that foreign government are not of a nature which would require his registration under the Foreign Agents Registration Act, and that they would not involve a conflict of interest.

The Department of Justice has been asked by the Department of the Treasury whether the employment of the prospective consultant by a foreign government would violate Article I, section 9, clause 8 of the Constitution or 5 U.S.C. 7342 and the departmental regulations implementing those statutory provisions.

1.

Article I, section 9, clause 8 of the Constitution provides:
"** no person holding any Office of Profit or Trust under them [the United States] shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

The prohibitions of this section are directed at a person holding an Office of Profit or Trust under the United States. The primary issue to be determined is whether the person whose employment as consultant is here envisaged would hold an Office in the constitutional sense. In United States v. Maurice, 2 Brockenborough 96, 103 (C.C. Va., 1823), Chief Justice Marshall, while sitting in circuit, pointed out that although—

"** an office is 'an employment' it does not follow that every employment is an office. A man may certainly be employed under a contract, expressly to do an act or perform a service, without becoming an officer."

He suggested that a position is likely to be an office, rather than a contractual employment, if the duties are of a continuous nature, defined by government rule rather than by specific agreement, and if the duties continue even if the incumbent changes.

The classic definition of an office in the constitutional sense is found in United States v. Hartwell, 6 Wall. 385, 395 (1867):

"An office is a public station, or employment, conferred by the appointment of the Government. The term embraces the ideas of tenure, duration, emoluments, and duties,"

And one of the reasons from which the Court inferred that Hartwell was an officer was "His duties were continuing and permanent, not occasional and temporary."
Using the Hartwell test of tenure, duration, emoluments, and duties, the Supreme Court ruled in United States v. Germaine, 99 U.S. 508, 511-512 (1878), that a doctor who was to examine claimants for pensions when requested to do so by the Commissioner of Pensions was not an officer in the constitutional sense. The Court held:

"** In the case before us, the duties are not continuing and permanent, and they are occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. **

"No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute."
In our view the considerations of the Germaine case apply fully to the position envisaged for the consultant here involved. It is therefore concluded that he would not be an officer in the constitutional sense. The prohibitions of Article I, section 9, clause 8 of the Constitution therefore would not apply to him. In this context it may be stated that the determination of whether a consultant or expert is an officer in the constitutional sense depends on the factual circumstances of his relationship and not on the technical point whether his services have been procured pursuant to 5 U.S.C. 3109 or according to 41 U.S.C. 252(b)(4).

II.

Independent of the issue whether the prospective consultant is an officer in the constitutional sense is the question whether the receipt of compensation from a foreign government is prohibited by 5 U.S.C. 7342 and the regulations issued pursuant to that section.

5 U.S.C. 7342 is derived from the Foreign Gifts and Decorations Act of 1966, Pub. L. 89-673, 80 Stat. 952. It prohibits in substance an "employee" from requesting or otherwise encouraging the tender of a gift or decoration, or from accepting or retaining a gift of more than minimal value. The coverage of this section is not limited to officers in the constitutional sense but extends to all "employees." That term includes those who are employees within the meaning of 5 U.S.C. 2105. It would appear that a consultant appointed pursuant to 5 U.S.C. 3109 is an employee under 5 U.S.C. 2105, even if he is only a "special Government employee" as defined in 18 U.S.C. 202.

The question remaining is whether the compensation received by the consultant from the foreign government in payment of his services constitutes a "gift" within the purview of 5 U.S.C. 7342. That section defines a gift as a present or thing, other than a decoration, tendered by or received from a foreign government. It could, of course, be said that a compensation for services, especially if paid in
cash or in kind, constitutes a thing. Nevertheless, in the context of the words "gift," "present," and "decoration," the term "thing" has a connotation of a gratuity rather than of a compensation for a valuable consideration such as services actually performed. Moreover, the legislation from which 5 U.S.C. 7342 is derived, addressed itself only to the problem of gifts and medals received by Government employees from foreign governments and did not consider the problem of contractual relations between U.S. officials and foreign governments. That issue is governed to some extent by the conflict of interest provisions of title 18. We have been advised that no conflict of interest problem is involved here. We therefore conclude that the receipt by the consultant of compensation from a foreign government would not violate the prohibitions of 5 U.S.C. 7342.

III.

The various departments have issued regulations under 5 U.S.C. 7342. The pertinent regulatory provisions are as follows:

1. Executive Order 11320 of December 12, 1966, delegating to the Secretary of State the authority to prescribe rules and regulations to carry out the purposes of the Foreign Gifts and Decorations Act of 1966, supra, which subsequently was codified in 5 U.S.C. 7342.

2. The regulations issued by the Department of State under E.O. 11320, applicable to "all persons occupying an office or position in the Executive, Legislative and Judicial branches of the Government of the United States." 22 C.F.R. Part 3. These regulations implement 5 U.S.C. 7342 and are directed only at the request or encouragement of the tender of gifts or the retention thereof. As explained above, we do not consider that the compensation for services actually performed constitutes a gift.

3. The Treasury regulations governing the standard of conduct of its employees and special employees contain the following pertinent provision:
"§ 0.735-34 Gifts or gratuities from foreign governments.

"The Constitution prohibits employees from accepting from foreign governments, except with the consent of the Congress, presents, emoluments, offices, or titles. The Congress has given its consent in 5 U.S.C. 7342 to the acceptance of certain specified gifts and decorations."

31 C.F.R. 0.735-209 makes that provision applicable to special Government employees "when serving in their official capacities with the Department."

These regulations are somewhat ambiguous. If read together they appear to prohibit a special Government employee in the Department of the Treasury from accepting compensation for a position with a foreign government. It should be remembered, however, that the constitutional prohibition against the acceptance of presents, emoluments, offices, and titles referred to in 31 C.F.R. 0.735-34 is directed only at officers in the constitutional sense and not against intermittent employees. Conversely, 5 U.S.C. 7342, while covering special Government employees, is limited to the acceptance of gifts and decorations and does not extend to emoluments and offices. This raises the question whether these two regulations must be read as limited by the scope of the applicable constitutional and statutory provisions, i.e., as not extending to the acceptance of emoluments of employment from a foreign government by an intermittent employee. It is arguable that the Secretary of the Treasury, in the exercise of his authority under 5 U.S.C. 3011, to prescribe regulations for the conduct of the departmental employees, imposed rules of conduct going beyond the scope of the constitutional and statutory prohibitions and thus prohibited intermittent employees from accepting emoluments from foreign governments. In our view, it is a matter peculiarly within the competence of the Department of the Treasury to interpret its own internal regulations. In any event, the Department of Justice
should not attempt to do so absent a prior construction thereof by the Treasury.

We therefore recommend that the Department of Justice advise the Department of the Treasury to the effect that we are not aware of any constitutional or statutory prohibition to the appointment, but that we cannot take any position as to whether the continued acceptance of compensation from a foreign government by the consultant would be permissible under the pertinent regulations of the Department of the Treasury, viz., 31 C.F.R. 0.735-34 and 31 C.F.R. 0.735-209.
Peter L. Strauss, Esquire  
General Counsel  
United States Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Mr. Strauss:

This letter is in response to your letter of July 8, 1976, requesting the opinion of this office as to whether Article I, §9, clause 8 of the Constitution prohibits the acceptance by Dr. Okrent of certain sums from the French Government under the circumstances set forth in your letter. For the reasons stated hereinafter, I have concluded that Dr. Okrent may not, without the consent of Congress, accept any sum from the French Government so long as he remains a member of the Advisory Committee on Reactor Safeguards (ACRS).

Article I, §9, clause 8 (hereafter Clause 8) reads as follows:

"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 any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

It is well established that the compensation Dr. Okrent would receive from the French Government would constitute an "Emolument" for purposes of Clause 8. See 40 Op. A.G. 513
(1947); 44 Comp. Gen. 130 (1964). It is also plain that the French Government is a "foreign State." Thus, unless Congress has given its consent, and apparently it has not, Dr. Okrent cannot accept compensation from the French Government unless he does not hold an "Office of Profit or Trust" within the intent of Clause 8.

The question is not free from difficulty. It may in this case be broken down into two separate questions: (1) whether Dr. Okrent would be an "officer" in the constitutional sense on those days when he was performing ACRS duties; (2) whether, assuming the answer to question (1) is in the affirmative, he is nevertheless not an "Officer" in the constitutional sense on those days on which he performs no ACRS duties.

Turning first to question (1), case law, which is virtually non-existent respecting Clause 8, has established a test for use in answering the question of who is an "Officer" for purposes of Article II, §2, which reads, in pertinent part, as follows:

"[The President] shall have Power [to] . . . appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." 1/

1/ I think it safe to assume that the term "Office" as it appears in Clause 8 is to be read in pari materia with the term "Officers" as it appears in Art. II, §2.
The test focuses initially upon the method by which a particular office was established and the method by which the officer holding that office was appointed. United States v. Hartwell, 6 Wall. 385 (1867); 29 Op. A.G. 593, 594-95 (1912).

In this particular instance Dr. Okrent is a member of a statutorily-created board, 42 U.S.C. §2039, whose members were appointed by the Atomic Energy Commission (AEC) and are now appointed by the Nuclear Regulatory Commission (NRC). Members of the ACRS serve a four-year term and their responsibilities are set forth explicitly in that statute and other provisions of the Atomic Energy Act. I am informed that ACRS appointees do take an oath of office. Congress, in establishing the ACRS as a statutory board, emphasized the need for the continuing scrutiny of experts over this obviously important phrase of government regulation. See S. Rept. No 296, 85th Cong., 1st Sess._______(1957), 1957 U.S. Code Cong. & Adm. News 1803, 1825.

In addition, rather than acting as a simple agent for the NRC, the ACRS and its members are required by §6 of the 1957 legislation to review certain applications for licenses. Id. at_______, 1957 U.S. Code Cong. & Adm. News at 1825.

Given the aforementioned facts, it seems clear to me that Dr. Okrent, since his position is statutorily created and defined, is within Art. II, §2's definition of "Officer" so long as he was appointed by one of the "Heads of Department." We regard AEC and its successor, NRC, as a "Department" for Art. II, §2 purposes. Cf. 37 Op. A.G. 227 (1933). Thus, I conclude that Dr. Okrent in fact holds an "Office of Profit or Trust" for purposes of
Clause 8, at least on days on which he performs duties for ACRS. This position is fully supported by the opinion of Chief Justice Marshall, sitting as Circuit Justice, who wrote as follows:

"Although an office is an 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an officer, or the person who performs the duties from an officer."

*United States v. Maurice*, 96, 103 (CCA. Va. 1823). 2/

2/ In some instances, the Supreme Court has included within its analysis of this question an examination of the particulars of a person's employment relationship. E.g., *United States v. Germaine*, 99 U.S. 509, 511 (1878). I read Germaine as requiring such a detailed inquiry only when there is doubt as to whether Congress, in authorizing the employment of a person to fill a particular position, intended to create a constitutional office within the express language of Art. II, §2, 'which shall be established by Law . . . .' Because I think the language of 42 U.S.C. §2309 demonstrates that intent, no further treatment of the circumstances of Dr. Okrent's employment is required.
Arguably, a question remains as to whether Dr. Okrent is a constitutional officer on those days when he performs no ACRS duties.

Certainly for purposes of Art. II, §2, a constitutional "Office" is a continuing one, whether established by the Constitution or by statute, because, inter alia it does not rely for its existence upon the continuance in office of any particular individual. Although Congress left with NRC the question of the minimum number of persons to serve on the ACRS at any given time, Congress clearly intended a sufficient number of those positions to be filled to carry out the important responsibilities assigned directly by Congress to the ACRS. Thus, while Dr. Okrent may perform work for ACRS 120 or fewer days per year, both 42 U.S.C. §2039 and its legislative history, as well as common sense, support the view that an appointee to ACRS must be available at all times to perform the work of ACRS. The "Office" continues, even though the "Officer" may not be at his desk on a given day.

Perhaps more to the point is whether, relative to Clause 8, it would be reasonable to impart to the Framers an intent to apply the policy behind Clause 8 to a constitutional officer who works perhaps 300 days per year but not to an officer performing duties 120 days per year. I think not. Although the wording of Clause 8 may be somewhat quaint, the policy it be-speaks, requiring the undivided loyalty of individuals occupying positions of great public trust, has lost no force since it was adopted. Congress having so assigned that trust in §2039, the answer to the question whether part-time officers should be treated differently must be in the negative, unless such a distinction could be historically justified. 3/

3/ Although there is no textual justification in Art.II, §2, for such a distinction, I do not read the text of Art. II, §2 as foreclosing an interpretation of it that would recognize such a distinction.
It is true that, in enacting what are now 18 U.S.C. §§202 et seq., Congress has carved out for general exemption from conflict of interest laws what it characterized as a "special Government employee."

Dr. Okrent, under the facts as described in your letter, would apparently qualify as a "special Government employee" under 18 U.S.C. §202, thereby receiving under that legislation the same exemption that ACRS members had held by virtue of 42 U.S.C. §§2039 and 2203. But I cannot read into §202 any understanding on the part of the Congress that constitutional offices created separately by it were to be stripped of that status solely by the fact that the appointee to that office, here Dr. Okrent, might in a given year serve 130 days or less. Section 2039 itself places no limit whatsoever upon the number of days during a year on which a member may perform ACRS duties.

That one may be a "special Government employee" and yet hold a constitutional office as a constitutional officer is implicit in 18 U.S.C. §202. That section includes within that category part-time United States commissioners and magistrates. Those officers and the offices they fill have been held by the Supreme Court to be constitutional in the Art. II, §2, sense, *Rice v. Ames*, 180 U.S. 371, 378 (1901) (by implication), yet they could have performed the duties of those offices on a part-time basis. Given this, the question for a part-time commissioner or magistrate, or for Dr. Okrent, is whether there is sound basis for reading into Art. II, §2 or Clause 8 a distinction between full-time and part-time officers. My conclusion is that there is no such basis. 4/

4/ The sparse debate on Art. II, §2 and Clause 8 in the Constitutional Convention lends no support to the drawing of such a distinction.
Should Congress pass legislation pursuant to Clause 8 giving blanket consent to "officers" working only part-time I have no doubt that it would be constitutional. But such line drawing should properly be left with Congress. Congress has, in the past, seen fit to grant blanket consent to certain classes of constitutional officers. See, for example, 10 U.S.C. §1032 (permitting a Reserve in the Uniformed Services to accept employment and compensation from a foreign government"[s]ubject to the approval of the Secretary concerned.") Congress has also extended permission to accept certain gifts or presents to both constitutional officers and nonconstitutional employees in certain circumstances, 5 U.S.C. §7342, but it has not passed similar legislation respecting employment that would bear on this particular problem.

Sincerely,

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel