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## THE FOREIGN EMOLUMENTS CLAUSE: PROTECTING OUR NATIONAL SECURITY INTERESTS

*Deborah Samuel Sills\**

*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.<sup>1</sup>*

### INTRODUCTION

Classical republican ideals, including concerns that corruption and greed could destroy a nation, played an important role in the

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<sup>1</sup> U.S. CONST. art. I § 9, cl. 8.

formation of our country.<sup>2</sup> Guided by these ideals, several provisions were included in the Constitution to protect the United States from these harms. One such provision is the Emoluments Clause.<sup>3</sup> The Emoluments Clause prohibits United States officials from accepting certain types of benefits from foreign nations, except with the consent of Congress.<sup>4</sup> It protects our national interests by ensuring that federal officials remain free from improper pressures from foreign states and act for the welfare of our country.<sup>5</sup> This provision promotes transparency and

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<sup>2</sup> See GORDON WOOD, *THE IDEA OF AMERICA, REFLECTIONS OF THE BIRTH OF THE UNITED STATES* 57–61, 68, 324 (2012); James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 174–76, 181–82 (1994).

<sup>3</sup> For purposes of this paper, when the term “Emoluments Clause” is used, unless otherwise noted, it refers to:

- **U.S. CONST. art. I, § 9, cl. 8:** “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.”

The word “emolument” or “emoluments” is also found in the Constitution in two other places including:

- **U.S. CONST. art. I, § 6, cl. 2:** “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”
- **U.S. CONST. art. II, § 1, cl. 7:** “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”

<sup>4</sup> U.S. CONST. art. I § 9, cl. 8. Express consent from Congress for certain gifts is set forth in the Foreign Gifts and Decorations Act which provides express consent for officials to accept a “gift or decoration” from “foreign government[s]” under certain limited circumstances. Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2006) (“An employee may not . . . accept a gift or decoration, other than in accordance with the provisions of [the Act].”). *Id.* at § (b)(2).

<sup>5</sup> See, e.g., THE FEDERALIST NO. 22 (Alexander Hamilton) (stating that Hamilton believed that federal officials, including those elected to office, could

accountability in that certain benefits received from foreign states must be reported to and approved by Congress, conferring a meaningful check on those in positions of power.<sup>6</sup> It helps guard against corrupt influences that could undermine, and even destroy, a nation.<sup>7</sup> Especially in our shrinking world, where technology is advancing and our economic dealings increasingly are global in nature, the Emoluments Clause remains relevant.

This Article, which is divided into three parts, focuses on the significance of the Emoluments Clause to the protection of the American public and security of our country. Part I provides a historical overview of the Emoluments Clause. Part II discusses the parameters of the Emoluments Clause and considers the varying interpretations of the provision. Part III examines how the clause protects our national security interests by: (1) requiring that federal officials remain free from corrupt influences to prevent harm to our country; (2) mandating transparency and accountability concerning possible influences of foreign states; and (3) fostering trust of federal officials. These national security considerations should be central to the interpretation of the scope of this constitutional provision. Extraordinary care must be taken to comply with the Emoluments Clause to ensure that the interests of the American people and the United States—not the self-interests of government officials or foreign powers—determine the way in which our country is governed.<sup>8</sup>

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be vulnerable to compensation that could sway their ‘obligations of duty’ against the United States and in favor of a foreign government).

<sup>6</sup> Norman L. Eisen et al., *The Emoluments Clause: Its Text, Meaning, and Application To Donald J. Trump*, BROOKINGS INST. 7 (Dec. 16, 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_121616\\_emolument-s-clause1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emolument-s-clause1.pdf) [hereinafter BROOKINGS INST. Study] (explaining that the Emoluments Clause compels “federal officeholders to examine their judgments and open[s] the entire arrangement to probing scrutiny.”).

<sup>7</sup> See generally WOOD, *supra* note 2, at 68, 324 (describing the Framers’ awareness of corruption leading to the downfall of previous empires and that those with less corruption are not as susceptible to failure).

<sup>8</sup> For example, multiple federal bills have been introduced since the 2016 presidential election proposing that particular requirements be set forth to ensure compliance with the Emoluments Clause. See, e.g., Presidential Conflicts of Interest Act of 2017, S. 65, 115th Cong., 1st Sess. (2017), 2017 CONG US S 65 (Westlaw); Presidential Tax Transparency Act, S. 26, 115th Cong., 1st Sess.

## I. ORIGINS OF THE EMOLUMENTS CLAUSE

A. *Classical Republican Ideals Influenced the Founding of the United States*

Classical republican ideals played an important role in the formation of our country.<sup>9</sup> As described by noted historian Gordon Wood, the republican values of ancient Rome inspired the republican revolutions of the eighteenth century, including the American Revolution.<sup>10</sup> The strength of the ancient Roman republic arose from the “freedom of its citizens to govern themselves.”<sup>11</sup> James Savage, Professor of Politics and Public Policy at the University of Virginia, explains that core elements of classical republican ideology include the concepts of virtue and corruption.<sup>12</sup> To be virtuous in the republican sense was to place the interests of the republic above self-interest in order to preserve the nation.<sup>13</sup> The attributes of virtue include “courage, justice, moderation, wisdom, and, most importantly, public service” for the benefit of the state.<sup>14</sup> In contrast, the concept of corruption encompasses the classical republican concerns about “dependency, cabal, patronage, unwarranted influence, and bribery” as well as “luxury, decadence, and self-interest.”<sup>15</sup> Corruption also signified the destabilization of the institutions, customs, and social relations that were essential to the preservation of a republican

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(2017), 2017 CONG US S 26 (Westlaw); Presidential Conflicts of Interest Act of 2017, H.R. 371, 115th Cong., 1st Sess. (2017), 2017 CONG US HR 371 (Westlaw).

<sup>9</sup> WOOD, *supra* note 2, at 58.

<sup>10</sup> *Id.* at 58–59.

<sup>11</sup> *Id.* at 68.

<sup>12</sup> Savage, *supra* note 2, at 174.

<sup>13</sup> Savage, *supra* note 2, at 174–75 (citing THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 57 (1988)); *see* WOOD, *supra* note 2, at 68 (“Public virtue was the sacrifice of private desires and interests for the public interest. It was devotion to the commonweal.”).

<sup>14</sup> Savage, *supra* note 2, at 174.

<sup>15</sup> *Id.* 174–75. Corruption presented a “constant threat to republican virtue and government.” *Id.* at 175.

government.<sup>16</sup> Virtuous qualities were needed to sustain a republican government while corrupt traits were viewed as destructive.<sup>17</sup>

These classical republican principles, including deep concerns about corruption and self-interest, gained prevalence in the thoughts of those “on both sides of the Atlantic” during the eighteenth century.<sup>18</sup> Those who formed our country were profoundly aware that corrupt influences could damage, and even destroy, a country.<sup>19</sup> They recognized that the decline of ancient republics illustrated their fragility and vulnerability to corruption.<sup>20</sup> Heedful of the need to prevent corruption from undermining our newly-created nation, the Founders emulated many of the classical

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<sup>16</sup> *Id.* at 175 (“Corruption, therefore, referred to the subversion of the institutions, customs, and social relations that preserved republican government.”).

<sup>17</sup> *Id.* at 174–75, 177.

<sup>18</sup> WOOD, *supra* note 2, at 60–62; *see* Savage, *supra* note 2 at 175 (“By the mid and late 1700s, the concept of corruption incorporated not only the ancient fears of luxury, decadence, and self-interest supplanting the public interest, but also an opposition to those conditions found in Augustan England that undermined the Constitution.”).

<sup>19</sup> For example, when they observed Great Britain during the late 1700s, they “saw a corrupt, increasingly urban and industrial society in which greed, avarice, corruption and self-interest infected the body politic.” Joshua Zeitz, *Trump’s Defense of Taking Foreign Money Is Historically Illiterate*, POLITICO (June 11, 2017), <http://www.politico.com/magazine/story/2017/06/11/trumps-defense-of-taking-foreign-money-is-historically-illiterate-215244>. They believed that during this time period the moral underpinnings of Great Britain “conflicted with the great ancient republics of Rome . . . where [] statesmen were ‘not influenced by private profit.’” *Id.* (quoting Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, EXPLAINED IN THEIR DIFFERENT MEANINGS AND AUTHORIZED BY THE NAMES OF THE WRITERS IN WHOSE WORKS THEY ARE FOUND 310 (1818)).

<sup>20</sup> THE FEDERALIST NO. 22, *supra* note 5 (Alexander Hamilton); WOOD, *supra* note 2, at 68 (“The power of the ancient Roman republic had flowed from the freedom of its citizens to govern themselves. But as Rome’s fate showed, republics required a high degree of civic virtue and disinterestedness among their citizens, and thus they were very fragile polities, extremely liable to corruption.”).

republican concepts in the establishment of the United States.<sup>21</sup> The Framers of the Articles of Confederation and the Constitution included language in both documents that reflect “efforts to insulate the new government from the corruption exemplified by contemporary politics in England.”<sup>22</sup> While several provisions in both documents reflect these classical republican principles, this article focuses on one: the prohibition of federal officials from receiving certain benefits from foreign states. This ban was designed to ensure that federal officeholders would place the interests of the republic above undue influences from foreign nations and their own personal gain.<sup>23</sup>

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<sup>21</sup> WOOD, *supra* note 2 at 72; *see* Savage, *supra* note 2, at 181 (There was a “near unanimous” consensus that corruption “was to be avoided [and] that its presence in the political system produced a degenerative effect.”).

<sup>22</sup> Savage, *supra* note 2, at 174–76 (citing PANGLE, *supra* note 13, at 57). Professor Savage focuses on the Constitution and does not discuss the Articles of Confederation in his paper. Text in both documents, however, reflect the Founders’ intent to exclude corruption in the newly-formed government. Elements of the classical republican philosophy of preventing corruption were incorporated into the Articles of Confederation and Constitution. *Id.* For example, the Framers of these documents objected to the British practice of “ministers of the crown” serving “simultaneously [as] members of Parliament.” WOOD, *supra* note 2, at 180, 233. They believed that there should be a separation between service on the legislative branch of government and other parts of the government. *Id.* As described by Wood, the drafters of the Articles of Confederation and the Constitution were determined to destroy “this linkage, which American colonists labeled ‘corruption.’” *Id.* at 180. As such, to ensure that members of Congress in the newly-established country were not influenced by serving in positions in other parts of the government—creating a meaningful check—the Articles of Confederation in Article V, paragraph 2, and the United States Constitution in Article 1, Section 6, prohibited members of Congress from holding other governmental offices. *Id.* at 180, 233. Provisions in the Constitution which prevent corruption include: “Article I, Section 3, which requires that the Senate try cases of impeachment; Article I, Section 6, which prohibits multiple office holding; Article I, Section 9, which prohibits officials from accepting foreign emoluments and gifts; Article II, Section I, which outlines the procedures for selecting the president; and Article II, Section 4, which provides for impeachment.” Savage, *supra* note 2, at 180–81.

<sup>23</sup> Zephyr Teachout & Seth Barrett Tillman, *The Foreign Emoluments Clause: Article I, Section 9, Clause 8*, in THE INTERACTIVE CONSTITUTION (National Constitution Center 2016), <https://constitutioncenter.org/interactive-constitution/articles/article-i/the-foreign-emoluments-clause-article-i-section-9->

*B. Elements of Classical Republican Ideals Were Incorporated into the Articles of Confederation and Constitution*

Influenced by these classical republican ideals, the Articles of Confederation included the first Foreign Emoluments Clause which provided:

No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.<sup>24</sup>

This provision banned U.S. officeholders from accepting certain gifts, benefits, and compensation from foreign states.<sup>25</sup> This

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clause-8/clause/34 [hereinafter Teachout & Tillman, *The Foreign Emoluments Clause*].

<sup>24</sup> ARTICLES OF CONFEDERATION of 1777, art. VI, para. 1. “The Continental Congress adopted the Articles of Confederation, the first constitution of the United States, on November 15, 1777. However, ratification of the Articles of Confederation by all thirteen states did not occur until March 1, 1781.” *The Articles of Confederation*, LIBRARY OF CONG., <https://www.loc.gov/rr/program/bib/ourdocs/articles.html> (last visited Nov. 6, 2017). The Articles of Confederation, our first United States constitution, was in effect from 1781 through 1789. *Id.*

<sup>25</sup> With respect to the receipt of gifts from foreign states, as explained by Zephyr Teachout, the “ban against receiving foreign gifts finds its initial source in the Dutch Republic, which adopted a rule in 1651 that its foreign ministers were not allowed to take ‘any presents, directly or indirectly, in any manner or way whatever.’” Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. U. L. REV. COLLOQUY 30, 34 (2012) [hereinafter Teachout, *Gifts, Offices, and Corruption*] (citing 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 651 (1906)). Teachout explained that, “[i]n choosing to adopt, and then maintain the rule against United States representatives accepting foreign gifts, the Founders were truly trying to create their own ‘Plato’s Republic’ against what they perceived as corrupt European practices.” *Id.*



absolute ban, however, proved difficult to follow.<sup>26</sup> American diplomats presented with gifts from foreign dignitaries were placed in a difficult position.<sup>27</sup> While they wanted to adhere to their new Constitution, they did not want to offend foreign dignitaries by refusing to accept gestures of goodwill.<sup>28</sup>

The Constitutional Convention was convened in 1787 to discuss the need for a stronger federal government than the one that had been created by the Articles of Confederation.<sup>29</sup> During the convention, early drafts of the Constitution omitted language similar to the Articles of Confederation's Foreign Emoluments Clause.<sup>30</sup> Near the end of the convention, however, on August 23, 1787, Charles Pinckney of South Carolina introduced language similar to the Foreign Emoluments Clause included in the Articles of Confederation.<sup>31</sup> The written notes of James Madison from that day reported that the provision was introduced due to the "*necessity of preserving foreign Ministers & other officers of the U. S. independent of external influence.*"<sup>32</sup> As observed by

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<sup>26</sup> Robert J. Delahunty, *Emoluments Clause*, HERITAGE, <http://www.heritage.org/constitution#!/articles/1/essays/68/emoluments-clause> (last visited Dec. 20, 2017); see Teachout & Tillman, *The Foreign Emoluments Clause*, *supra* note 23, at 2.

<sup>27</sup> Delahunty, *supra* note 26.

<sup>28</sup> *Id.*; Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 35.

<sup>29</sup> LIBRARY OF CONG., *supra* note 24 ("The Articles created a loose confederation of sovereign states and a weak central government, leaving most of the power with the state governments. The need for a stronger Federal government soon became apparent and eventually led to the Constitutional Convention in 1787. The present United States Constitution replaced the Articles of Confederation on March 4, 1789.").

<sup>30</sup> Teachout & Tillman, *The Foreign Emoluments Clause*, *supra* note 23, at 2.

<sup>31</sup> BROOKINGS INST. Study, *supra* note 6, at 4–5.

<sup>32</sup> Applicability of the Emoluments Clause to Non-Government Members of ACUS, 17 Op. O.L.C. 114, 116 (1993) [hereinafter ACUS] (emphasis added) (quoting James Madison, *Notes on Proceedings at Convention* (Aug. 23, 1788), in 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 389 (Max Farrand ed., Yale Univ. Press rev. ed. 1966)). In 2010, OLC reconsidered one of its findings from the 1993 ACUS decision, namely the narrow issue of whether the Emoluments Clause applies to non-governmental members of ACUS. Applicability of the Emoluments Clause to Non-Governmental Members of ACUS, 34 Op. O.L.C. 1 (2010). In the 2010 decision, OLC concluded that the

Madison, similar to the Articles of Confederation, the purpose of the provision was to ensure the independence of U.S. officials from unwarranted pressures from foreign states.<sup>33</sup> Unlike the Articles of Confederation, however, the language drafted by Pinckney, while still expansive, permitted congressional consent to retain such gifts, benefits, or compensation rather than an absolute ban.<sup>34</sup>

Pinckney's provision was adopted unanimously, without debate, by the delegates to the Constitutional Convention.<sup>35</sup> It became the Emoluments Clause of the Constitution, Article 1, Section 9, Clause 8, which provides:

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

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Emoluments Clause did not apply to non-governmental members of ACUS because they did not occupy an office of profit or trust within the meaning of the Emoluments Clause but rather served in an advisory position. *Id.* at 3-8.

<sup>33</sup> Memorandum from the Office of Legal Counsel on Historical Survey re Gifts from Foreign Monarchs and Governments to Government Officers (February 18, 1958) (citing 3 JAMES MADISON, PAPERS 1408 (1840)), <http://www.politico.com/f/?id=00000158-b544-d679-a75f-bff5f2fe0001>.

<sup>34</sup> See *Application of the Emoluments Clause to a Member of the President's Council on Bioethics*, 29 Op. O.L.C. 55, 58–59 (2005) [hereinafter *Bioethics*] (quoting 8 ANNALS OF CONGRESS 1582, 1583–84 (1798) (“Under the old articles of Confederation, a like provision was in being, only that the receipt of presents by our Ministers was positively forbidden, without any exception about leave of Congress; but their being allowed to be received under the present Government, by the consent of Congress, shows that they might be received in certain cases.”); Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 33.

<sup>35</sup> Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 3 (Dec. 7, 2009) [hereinafter *President's Receipt of the Nobel Peace Prize*] (citing James Madison, Notes on Proceedings at Convention, *supra* note 32, at 389); see also Edward Randolph, *Remarks at the Debate at the Virginia Convention* (June 17, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 327 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) (“It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.”); President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 188 (1981) [hereinafter *President Reagan's Ability to Receive Retirement Benefits*] (discussing the background of the ratification of the Clause)).

the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.<sup>36</sup>

Although the delegates did not debate the inclusion the Emoluments Clause during the convention, they were cognizant of the destructive effects of corruption on republican governments.<sup>37</sup> Indeed, as noted by Savage, during the convention, Madison recorded that “15 delegates used the term ‘corruption’ no less than 54 times.”<sup>38</sup> Likewise, Professor Zephyr Teachout from Fordham School of Law observed that “the notes from the convention suggest that regardless of the topic, the issues of influence, dependence, and corruption were at the front of mind for many of the speakers there.”<sup>39</sup> Echoing classical republican ideals, the Framers included provisions in the Constitution, including the Emoluments Clause, to guard against corruption in order to preserve and protect our young Republic and its institutions from ruin.<sup>40</sup>

Remarks contemporaneous to the drafting of the Constitution offer insight into why the Framers included the Emoluments Clause in the Constitution. Alexander Hamilton, a delegate to the Constitutional Convention and a signatory of the Constitution, believed that federal officials, including those elected to office, could be vulnerable to compensation that could sway their “obligations of duty” against the United States and in favor of a foreign government.<sup>41</sup> Seemingly influenced by the republican

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<sup>36</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>37</sup> Savage, *supra* note 2, at 180; Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 53.

<sup>38</sup> Savage, *supra* note 2, at 174–77 (citing JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (W.W. Norton & Co. 1987)).

<sup>39</sup> Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 53.

<sup>40</sup> Savage, *supra* note 2, at 174, 177.

<sup>41</sup> THE FEDERALIST NO. 22, *supra* note 5, at 142 (Alexander Hamilton) (Hamilton wrote: “One of the weak sides of republics, among their numerous advantages, is that they *afford too easy an inlet to foreign corruption* . . . In republics, *persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust*, which, to any but minds animated and guided by superior virtue, may appear to exceed the proportion of interest they

philosophy of ancient Rome, Hamilton recognized that influences from foreign nations had corrupted ancient republics and contributed to their collapse.<sup>42</sup>

Similarly, Virginia Governor Edmund Randolph, a delegate to the Constitutional Convention but not a signatory of the document,<sup>43</sup> explained the importance of the Emoluments Clause during the Virginia Ratification Convention in June 1788. As succinctly stated by Randolph, the Emoluments Clause “is provided to prevent corruption.”<sup>44</sup> In addition to actual corruption, Randolph recognized that the perception of undue influence from foreign states was as significant as actual foreign influence itself.<sup>45</sup> He noted that even the perception of favoritism toward a foreign nation might have impeded relations with a vital ally during the

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have in the common stock, *and to overbalance the obligations of duty*. Hence it is that history furnishes us with so many mortifying examples of the *prevalency of foreign corruption in republican governments*.”) (emphasis added).

<sup>42</sup> *Id.*; see, e.g., Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 33 (“In choosing to adopt, and then maintain the rule against United States representatives accepting foreign gifts, the Founders were truly trying to create their own “Plato’s Republic” against what they perceived as corrupt European practices.”).

<sup>43</sup> *Delegates to the Constitution: Edmund J. Randolph*, TEACHINGAMERICANHISTORY.ORG, [http://teachingamericanhistory.org/static/convention/delegates/edmund\\_j\\_randolph.html](http://teachingamericanhistory.org/static/convention/delegates/edmund_j_randolph.html) (last visited Dec. 20, 2017) (explaining that Governor Randolph did not sign the Constitution because he believed that it provided insufficient protections “for individual liberties and the rights of states,” but that he believed that it should be ratified to preserve the Union).

<sup>44</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 35, at 327 (statement of Edmund Randolph) (“This restriction is *provided to prevent corruption*. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the king of our allies. It was thought proper, in order to *exclude corruption and foreign influence*, to prohibit any one in office from receiving or holding any emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the King of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.”) (emphasis added).

<sup>45</sup> *Id.*

Revolutionary War.<sup>46</sup> Randolph also explained that the Emoluments Clause applies to presidents of the United States.<sup>47</sup>

The Framers of the Constitution, aware of these vulnerabilities and learning from the past, included the Emoluments Clause to protect the United States from such manipulation that could threaten the stability of our country and lead to its demise.<sup>48</sup> They believed that those governing our nation should place the interests of the state above their self-interests to sustain our country.<sup>49</sup> Reflecting upon these classical republican values, they wanted to ensure the survival of our young country by guarding against corruption perceived as a destructive force.<sup>50</sup> The Framers recognized that officials receiving benefits from foreign governments might be persuaded, either consciously or subconsciously, to alter their decisions to benefit foreign powers

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<sup>46</sup> *Id.*

<sup>47</sup> BROOKINGS INST. Study, *supra* note 6, at 5 (statement of Edmund Randolph) (citing DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 345 (2d ed. 1805) (1788)) (“If discovered he may be impeached. If he be not impeachable he may be displaced at the end of the four years . . . I consider, therefore, that he is restrained from receiving any present or emoluments whatever. It is impossible to guard better against corruption.”). Randolph stated that the Emoluments Clause guards against “the president receiving emoluments from foreign powers.” *Id.*

<sup>48</sup> THE FEDERALIST NO. 22, *supra* note 5, at 142–43 (Alexander Hamilton) (Hamilton wrote: “How much this contributed to the ruin of the ancient commonwealths has been already delineated. It is well known that the deputies of the United Provinces have, in various instances, been purchased by the emissaries of the neighboring kingdoms. The Earl of Chesterfield (if my memory serves me right), in a letter to his court, intimates that his success in an important negotiation must depend on his obtaining a major’s commission for one of those deputies. And in Sweden the parties were alternately bought by France and England in so barefaced and notorious a manner that it excited universal disgust in the nation, and was a principal cause that the most limited monarch in Europe, in a single day, without tumult, violence, or opposition, became one of the most absolute and uncontrolled.”).

<sup>49</sup> Savage, *supra* note 2 at 174–75 (citing PANGLE, *supra* note 13, at 57); see WOOD, *supra* note 2, at 68 (“Public virtue was the sacrifice of private desires and interests for the public interest. It was devotion to the commonweal.”).

<sup>50</sup> See Zeitz, *supra* note 19 (“When members of the founding generation looked from a distance at Great Britain, they saw a corrupt, increasingly urban and industrial society in which greed, avarice, corruption and self-interest infected the body politic.”).

over the American people and the United States. They thought that such corrupt influences, or even the perception of such influences, could undermine the integrity, and indeed the very existence, of our young republic.<sup>51</sup>

## II. PARAMETERS OF THE EMOLUMENTS CLAUSE

Influenced by the classical republican principle that corrupt influences from foreign states could destroy a nation, the Framers incorporated the Emoluments Clause into the Constitution.<sup>52</sup> They believed that this constitutional provision would help protect our national interests by ensuring that federal officials act for the welfare of the American public rather than for unwarranted interests of foreign states.<sup>53</sup> The Emoluments Clause can be analyzed in four distinct parts, including: (1) to whom does the provision apply, *i.e.*, individuals holding any Offices of Profit or Trust under the United States; (2) what does the provision prohibit an official from receiving, *i.e.*, “any present, Emolument, Office, or Title, of any kind whatever;” (3) from whom is receipt of such present, emolument, office, or title prohibited, *i.e.*, “from any King, Prince, or foreign State;” and (4) what are the exceptions to the provision, *i.e.*, congressional consent.<sup>54</sup> These factors must be evaluated in light of the provision’s underlying purpose of preventing corrupt influences from foreign states and protecting the integrity and security of our Republic.<sup>55</sup>

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<sup>51</sup> See THE FEDERALIST NO. 22, *supra* note 5, at 142–45 (Alexander Hamilton).

<sup>52</sup> See WOOD, *supra* note 2, at 68; see Savage, *supra* note 2, at 174–75.

<sup>53</sup> THE FEDERALIST NO. 22, *supra* note 5, at 142–45 (Alexander Hamilton).

<sup>54</sup> See U.S. CONST. art. I, § 9, cl. 8.

<sup>55</sup> In interpreting this provision, this paper principally relies upon decisions by the Department of Justice, Office of Legal Counsel (OLC). OLC provides controlling advice on questions of law to officials in the executive branch. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, on Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> (“By delegation, the Office of Legal Counsel (OLC) exercises the Attorney General’s authority under the Judiciary Act of 1789 to provide the President and executive agencies with advice on questions of law. OLC’s core function, pursuant to the Attorney

### A. To Whom Does the Emoluments Clause Apply?

As stated in its text, the Emoluments Clause applies to individuals holding positions that qualify as an “Office of Profit or Trust” under the United States.<sup>56</sup> To determine whether an individual holds an “Office of Profit or Trust” under the United States within the meaning of the Emoluments Clause, three factors are considered: (1) whether the position is one held *under the United States*; (2) whether the position is considered an “office;” and (3) if the position is considered an “office,” whether such office is one of “profit” or “trust.”<sup>57</sup>

#### 1. Is the Position Held Under the United States?

To answer these questions, the first consideration is whether the individual is occupying a position that is considered to be *under the United States*. Professor Seth Barrett Tillman from Maynooth University Department of Law and Professor Teachout have engaged in considerable debate as to whether this text applies to both state and federal officials, or federal officials alone.<sup>58</sup> While Teachout asserts that it applies to both state and federal

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General’s delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government. In performing this function, OLC helps the President fulfill his or her constitutional duties to preserve, protect, and defend the Constitution, and to ‘take Care that the Laws be faithfully executed.’”). In addition, this paper relies upon academic literature, contemporaneous documents, and case law. *See, e.g.*, Memorandum from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel for James H. Thessin, Assistant Legal Adviser for Management, United States Department of State on Application of the Emoluments Clause to a Civilian Aide to the Secretary of the Army 2 (Aug. 29, 1988), <http://www.politico.com/f/?id=00000158-b542-d012-ab5a-b5e3944e0001> [hereinafter Application of the Emoluments Clause to a Civilian Aide].

<sup>56</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>57</sup> President’s Receipt of the Nobel Peace Prize, *supra* note 35, at 3 (emphasis added).

<sup>58</sup> *See, e.g.*, Teachout & Tillman, *The Foreign Emoluments Clause*, *supra* note 23.

officials, Tillman contends that it applies only to federal officials.<sup>59</sup> The predominant opinion, however, is that the Emoluments Clause in the Constitution, unlike its predecessor in the Articles of Confederation, does not apply to state-held positions; rather, the provision applies only to those who hold *federal* positions.<sup>60</sup>

Further, Teachout and Tillman have differing opinions as to whether *under the United States* applies to only appointed officials (Tillman), or to both appointed *and elected* officials (Teachout).<sup>61</sup> Contemporaneous documents to the drafting of the Constitution support the position that the Emoluments Clause applies to both appointed and elected officials.<sup>62</sup> For example, Randolph explained that the Emoluments Clause applies to the President, an elected office, stating that the Emoluments Clause protects against the threat of “the *president* receiving emoluments from foreign powers.”<sup>63</sup> Similarly, Hamilton wrote that the provision applies to elected officials, such as “persons elevated from the mass of the community, *by the suffrages of their fellow-citizens*, to stations of great pre-eminence and power.”<sup>64</sup> In addition, OLC, in a 2009 decision, concluded that the term “office” applies to the elected

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (“The prevailing view is that the modern Foreign Emoluments Clause, unlike its Articles predecessor, does not reach state positions.”); see Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 37 (“Tillman’s reading that the prohibition was deliberately narrowed to the federal government is arguably a better reading.”).

<sup>61</sup> Teachout maintains that the Emoluments Clause applies to both elected and appointed positions. See Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 40–41. In contrast, Tillman’s view is that the provision only applies to those in appointed federal statutory offices and does not apply to elected or constitutionally created positions. Teachout & Tillman, *The Foreign Emoluments Clause*, *supra* note 23, at 4. See also Seth Barrett Tillman, *Closing Statement, The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 181–82 (2013).

<sup>62</sup> BROOKINGS INST. Study, *supra* note 6, at 5 (citing ROBERTSON, *supra* note 47, at 9 n. 32).

<sup>63</sup> *Id.* (emphasis added) (quoting ROBERTSON, *supra* note 47, at 345 (statement of Edmund Randolph)).

<sup>64</sup> THE FEDERALIST NO. 22, *supra* note 5, at 142 (Alexander Hamilton).



office of president.<sup>65</sup> Based upon the 2009 OLC opinion and contemporaneous documents, the more compelling view is that the Emoluments Clause applies to both appointed and elected officials.<sup>66</sup>

## 2. Is the Position Considered an “Office?”

The next consideration is whether an individual occupies a position that qualifies as an “office” under the United States.<sup>67</sup> If a person does not occupy an “office” under the United States, then such person is not bound by the mandates of the Emoluments Clause.<sup>68</sup> In a 2005 decision, *Application of the Emoluments Clause to A Member of the President’s Council on Bioethics*, OLC considered the meaning of the term “office” as used in the Emoluments Clause, meticulously reviewing court decisions,

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<sup>65</sup> President’s Receipt of the Nobel Peace Prize, *supra* note 35, at 4 (“The President surely ‘hold[s] an[] Office of Profit or Trust.’”) (quoting U.S. CONST. art. I, § 9, cl. 8)). Similarly, the Foreign Gifts and Decorations Act applies to the President. 5 U.S.C. § 7342 (a)(1)(E) (2011) (providing that the President is subject to the Act). Former White House ethics lawyers Norman L. Eisen and Professor Richard W. Painter, and constitutional law Professor Laurence H. Tribe, believe—based upon Executive Branch interpretation and practice, contemporaneous remarks, and the text of the Constitution—that the Emoluments Clause applies to an elected position. BROOKINGS INST. Study, *supra* note 6, at 7–10, 9 n. 34.

<sup>66</sup> President’s Receipt of the Nobel Peace Prize, *supra* note 35, at 4 (stating that the President holds an “Office” as defined in the Emoluments Clause); THE FEDERALIST NO. 22, *supra* note 5 (Alexander Hamilton); *see also* BROOKINGS INST. Study, *supra* note 6, at 8 (providing examples where the text of the Constitution supports a reading that the Emoluments Clause applies to the President); Teachout, *Gifts, Offices, and Corruption*, *supra* note 25 (discussing evidence of the Framers’ intent to apply the Emoluments Clause to both elected and appointed officials).

<sup>67</sup> *Bioethics*, *supra* note 34, at 56–57 (“We first conclude that in order to qualify as an ‘Office of Profit or Trust under [the United States],’ a position must, first and foremost, be an ‘Office under the United States.’ Next, we conclude that it is well-established that a purely advisory position is not an ‘Office under the United States’ and, hence, not an ‘Office of Profit or Trust under [the United States].’”) (quoting U.S. CONST. art. I, § 9, cl. 8)).

<sup>68</sup> *Id.*

historical authorities, and past OLC opinions.<sup>69</sup> After extensively analyzing these authorities, OLC concluded that a fundamental element of a public “office” is the “exercise of some portion of delegated sovereign authority” for the benefit of the public.<sup>70</sup> Stated another way, OLC believed that the “term ‘office’ implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office.”<sup>71</sup> OLC explained that positions that would qualify as exercising a portion of sovereign authority include, but are not limited to, the positions that encompass the authority to: (1) create legislation,<sup>72</sup> (2) execute or administer the law,<sup>73</sup> (3) make judicial determinations and interpret the law,<sup>74</sup> (4) bind the United States,<sup>75</sup> (5) implement policies or recommendations,<sup>76</sup> or (6) create or approve specific projects or

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<sup>69</sup> *Id.* at 57–63.

<sup>70</sup> *Id.* at 67.

<sup>71</sup> *Id.* at 67–68 (quoting *Opinion of the Justices*, 3 Me. 481, 482 (1822)) “The legal definitions of a public office have been many and various. The idea seems to prevail that it is an employment to exercise some delegated part of the sovereign power; and the Supreme Court appears to attach importance to the ideas of ‘tenure, duration, emolument, and duties,’ and suggests that the last should be continuing or permanent, not occasional or temporary.” *Id.* at 65 (citing *Office—Compensation*, 22 Op. Att’y Gen. 184, 187 (1898)).

<sup>72</sup> *Id.* at 66 (quoting 1 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 604 (1907)).

<sup>73</sup> *Id.*

<sup>74</sup> Application of the Emoluments Clause to a Member of the Federal Bureau of Investigation Director’s Advisory Board, 31 Op. O.L.C. 154, 157–58 (2007) [hereinafter FBI Director’s Advisory Board]; *Bioethics*, *supra* note 34, at 66 (quoting HINDS, *supra* note 72, at 604).

<sup>75</sup> *Bioethics*, *supra* note 34, at 65 (citing Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202–03 (1983)).

<sup>76</sup> *Id.* at 55–56 (finding that a position on the President’s Council on Bioethics is not an office within the scope of the Emoluments Clause because “although the Council may offer its views to the President, it is without power to implement those views or execute any other governmental authority.”). In a 1982 decision, OLC abandoned its “longstanding position that an ‘Office of Profit or Trust’ under the Emoluments Clause was synonymous with an ‘officer of the United States’ under the Appointments Clause, relying primarily upon the differing purposes of the two clauses.” *Id.* at 71 (noting that the Appointments Clause “finds its roots in separation of powers principles” whereas “[t]he Emoluments Clause, on the other hand, is designed ‘to exclude corruption and

regulations.<sup>77</sup> While these factors are not exhaustive, they should be considered to determine whether an individual occupies an “office” within the meaning of the Emoluments Clause.<sup>78</sup>

Conversely, a person who does not hold a position that qualifies as an “office” under the United States does not fall within the parameters of the Emoluments Clause.<sup>79</sup> For example, in *Application of the Emoluments Clause to a Member of the President’s Council on Bioethics*, OLC concluded that a purely advisory position generally is not considered an “office” within the meaning of this constitutional provision because such a position does not “involve some exercise of governmental authority.”<sup>80</sup> Similarly, in a 1996 opinion, *The Advisory Committee on International Economic Policy (IEP)*, OLC determined that a position on an advisory board fell outside the scope of the Emoluments Clause, primarily because IEP advisory committee members served in a purely advisory role.<sup>81</sup> In sum, individuals whose responsibilities include the exercise of a portion of delegated sovereign authority are considered to occupy an “office” within the meaning of the Emoluments Clause and must abide by its mandate,<sup>82</sup> whereas those serving in positions that do not include the delegation of sovereign authority, such as those serving

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foreign influence”) (quoting *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 156–57 (1982)).

<sup>77</sup> *Id.* at 55–56 (citing *Creation of the President’s Council on Bioethics*, 66 Fed. Reg. 59,851 (Nov. 21, 2001)).

<sup>78</sup> *Id.* at 67–68 (noting definitions of public office).

<sup>79</sup> *Id.* at 56.

<sup>80</sup> *Id.* at 64; see *Advisory Committee on International Economic Policy*, 20 Op. O.L.C. 123 (1996).

<sup>81</sup> *Advisory Committee on International Economic Policy*, *supra* note 80. In addition to serving in a purely advisory role, OLC concluded that individuals on certain advisory boards did not occupy an “office” within the meaning of the Emoluments Clause because they: (1) met only occasionally; (2) received no compensation for their service; (3) did not take an oath in order to serve in their position; (4) did not access to classified information; (5) were in a positions not created by statute; and (6) discharged no substantive statutory responsibilities. *Id.* See *FBI Director’s Advisory Board*, *supra* note 74, at 156; *Bioethics*, *supra* note 34, at 55–57.

<sup>82</sup> *Bioethics*, *supra* note 34, at 55–57.

in a purely advisory role, generally are not deemed to hold an “office” and fall outside the provision’s scope.<sup>83</sup>

3. If a Position Qualifies as an “Office” under the Emoluments Clause, is the Office one “of Profit or Trust?”

If it is determined that a position qualifies as an “office” under the Emoluments Clause, the next issue to consider is whether the position, or office, is one “of Profit or Trust.” In considering the meaning of this phrase, OLC first noted that the phrase “Office of Profit or Trust” describes that the “office” must be either of “profit” or “trust.”<sup>84</sup> OLC explained that to “the extent that the phrase ‘of Profit or Trust’ adds to the meaning of the term ‘Office,’ it narrows it.”<sup>85</sup> The term “Office of *Profit*” refers to an office in which a person in office receives a salary, fee, or compensation.<sup>86</sup> The term “Office of *Trust*,” refers to offices involving “duties of which are particularly important”<sup>87</sup> and requiring “the exercise of discretion, judgment, experience and skill.”<sup>88</sup>

Even if an individual does not receive a salary from the federal government, he or she may be considered a federal official within the scope of the Emoluments Clause if they occupy an office of

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<sup>83</sup> *Id.* at 68.

<sup>84</sup> *Id.* at 57 (“[T]he phrase ‘Office of Profit or Trust’ under [the United States]’ itself, which by its terms suggests that an office of profit or trust is necessarily a type of ‘Office . . . under [the United States]’—either one of ‘Profit’ or one of ‘Trust.’” (citation omitted)); see FBI Director’s Advisory Board, *supra* note 74, at 156.

<sup>85</sup> *Id.* at 56–57. “[A] position was not an ‘office of profit’ because the holder of the position received no compensation, but that it was an ‘office of trust’ because the holder ‘was intrusted with a large supervisory and regulative control of the property.’” *Id.* at 62 (quoting *In re Corliss*, 1 R.I. 638, 642 (1876)).

<sup>86</sup> *Id.* at 62; see also President Reagan’s Ability to Receive Retirement Benefits, *supra* note 35, at 188 (“[I]t appears that the term emolument has a strong connotation of, if it is not indeed limited to, payments which have a potential of influencing or corrupting the integrity of the recipient.”).

<sup>87</sup> *Bioethics*, *supra* note 34, at 62.

<sup>88</sup> *Id.* at 61–62 (citation omitted).

*trust*.<sup>89</sup> For example, in *Application of the Emoluments Clause to a Civilian Aide*, OLC considered whether a civilian aide to the Secretary of the Army, who served without compensation, fell within the scope of the Emoluments Clause.<sup>90</sup> In deciding this issue, OLC evaluated the following duties of his position, including that he would: (1) serve for a “term of office” of two years; (2) provide advice to the Secretary of the Army and Chief of Staff; (3) work closely with high-ranking officers; (4) disseminate information about the Army to the public; (5) provide advice concerning the development of programs; (6) receive, handle, and protect classified information; and (7) advise on methods to achieve maximum understanding between civilians and the Army.<sup>91</sup> Based upon these factors, OLC concluded that the unpaid civilian aide was within the scope of the Emoluments Clause because his position was an “office of trust.”<sup>92</sup>

As discussed above, the Emoluments Clause applies to individuals who hold appointed and elected federal positions;<sup>93</sup> who occupy an “office,” *e.g.*, have responsibilities that include the exercise of a portion of delegated sovereign authority;<sup>94</sup> and whose positions are ones of profit or trust.<sup>95</sup> If an individual meets these criteria, then they fall within the scope of the Emoluments Clause and must abide by its mandate.

### B. *What Does the Emoluments Clause Prohibit a Federal Office from Receiving?*

The Emoluments Clause prohibits federal officials from receiving “any present, Emolument, Office, or Title, of any kind

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<sup>89</sup> *Id.* at 62 (stating that an office of “Profit” refers to paid positions in office and that an office of “Trust” refers to “offices the duties of which are particularly important”).

<sup>90</sup> *Application of the Emoluments Clause to a Civilian Aide*, *supra* note 55, at 1–2.

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.* at 3–4.

<sup>93</sup> *See, e.g.*, sources cited *supra* note 66 and accompanying text.

<sup>94</sup> *Bioethics*, *supra* note 34, at 64.

<sup>95</sup> U.S. CONST. art. I, § 9, cl. 8.

whatever” from a foreign government.<sup>96</sup> There is general agreement to the meaning of the terms, “present,”<sup>97</sup> “office,”<sup>98</sup> and “title.”<sup>99</sup> As such, these terms will not be further discussed. There is much debate, however, over the meaning of the term “emolument.”<sup>100</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *See, e.g.*, Memorandum from Andrew F. Oebann, Executive Assistant, Office of the Attorney General and Robert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Invitation by Italian Government to officials of the Immigration and Naturalization Service and a member of the White House Staff, and Their Wives, to be Guests of the Italian Government 2, n.1 (Oct. 16, 1962) (concluding that the Italian government’s offer to three federal officials and their wives of an all-expense paid trip to Italy constituted a gift under the Emoluments Clause, and thus was prohibited).

<sup>98</sup> *Bioethics*, *supra* note 34, at 60 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 216 (Fred B. Rothman & Co. 1991) (1833) (“[T]he [Emoluments Clause] is highly important, as it puts it out of the power of any officer of the government to wear borrowed honours, which shall enhance his supposed importance abroad by a titular dignity at home.”).

<sup>99</sup> Application of the Emoluments Clause to a Civilian Aide, *supra* note 55, at 4 (citing Foreign Diplomatic Commission, 13 Op. Att’y Gen. 537, 538 (1871) (concluding that “an American minister to one foreign power could not accept a diplomatic commission to the same power from another foreign State because such a commission would create ‘an official relation between the individual thus commissioned and the government which in this way accredits him as its representative.’”)).

<sup>100</sup> *See, e.g.*, John Mikhail, *The Definition of ‘Emolument’ in English Language and Legal Dictionaries, 1523-1806* (June 30, 2017) (unpublished article), <https://ssrn.com/abstract=2995693> [hereinafter Mikhail, *The Definition of ‘Emolument’*] (discussing that, based upon comprehensive research of how “emolument” is defined in English language dictionaries published between 1604 and 1806, and in common law dictionaries published between 1523 and 1792, the term “emolument” is used in many contexts, including private commercial transactions); Andy Grewal, *Exploitation of Public Office and the Foreign Emoluments Clause*, YALE J. ON REG.: NOTICE & COMMENT (July 4, 2017), <http://yalejreg.com/nc/exploitation-of-public-office-and-the-foreign-emoluments-clause/> [hereinafter Grewal, *Exploitation of Public Office*] (discussing that when the Emoluments Clause “speaks of prohibited emoluments, it is referring to the compensation a U.S. Officer would receive through holding an office or employment position with a foreign government, not benefits received through the exploitation of his U.S. position”); Robert G. Natelson, *The Original Meaning of ‘Emoluments’ in the Constitution*, 52 GA. L.

1. OLC Decisions Interpreting the Term “Emolument” as Set Forth in the Emoluments Clause

A key to understanding the scope of the Emoluments Clause is to determine the meaning of the term “emolument” as used in this provision. OLC has defined the term “emolument” as used in the Emoluments Clause to include every kind of benefit from a foreign state that has the potential to influence or pressure the actions of a federal official.<sup>101</sup> Longstanding OLC and DOJ opinions dating

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REV. 1, 16, 60 (2017); BROOKINGS INST. Study, *supra* note 6, at 7 (discussing that the “theory of the Emoluments Clause—grounded in English history and the Framers’ experience—is that a federal officeholder who receives something of value from a foreign power can be imperceptibly induced to compromise what the Constitution insists be his exclusive loyalty: the best interest of the United States of America”).

<sup>101</sup> See, e.g., U.S. Dep’t. of Justice, Office of Legal Counsel, Opinion Letter on Emoluments Clause Questions raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales (May 23, 1986), 1986 WL 1239553, at \*2 [hereinafter NASA Scientist’s Proposed Consulting Arrangement] (noting that “the Emoluments Clause is ‘directed against every kind of influence by foreign governments upon officers of the United States,’” unless Congress expressly consents to the payment (emphasis added) (quoting Gifts from Foreign Prince-Officer-Constitutional Prohibition, 24 Op. Att’y Gen. 116, 117 (1902) (citing 5 U.S.C. 7342))); President Reagan’s Ability to Receive Retirement Benefits, *supra* note 35 at 187, 189–90 (providing that “the test to be whether the payments were intended to influence, or had the effect of influencing, the recipient as an officer of the United States”) (citing 34 Comp. Gen. 331, 334–35 (1955)); U.S. Dep’t. of Justice, Office of Legal Counsel, Opinion Letter on Expense Reimbursement in Connection with Chairman’s Trip to Indonesia, (Aug. 11, 1980), at 1–2, <https://www.justice.gov/olc/page/file/936091/download> (advising that an arrangement where the chairman of the Commodity Futures Trading Commission would be reimbursed by Harvard for funds paid under a consultancy contract with Finance Ministry of the Government of Indonesia did not violate the emoluments clause because it was not an “influence by [a] foreign government[] upon officers of the United States” (quoting 24 Op. Att’y. Gen at 117)); Memorandum from Ellis Lyons, Assistant Att’y Gen., U.S. Dep’t. of Justice, Office of Legal Counsel, Opinion Letter on The Constitutional Prohibition Against Acceptance of Gifts from Foreign Potentates (Sept. 23, 1952), <https://www.justice.gov/olc/page/file/935716/download> (“The language [of the emoluments clause] has been viewed as particularly directed against every kind of influence by foreign governments upon officers of the United States.”

back to 1902 have embraced this definition.<sup>102</sup> For example, a 1902 opinion stated that the intent of the Emoluments Clause was “‘particularly directed against every kind of influence by foreign governments upon officers of the United States.’”<sup>103</sup> In a 1981 decision, OLC held the meaning of the word “emolument” has a “strong connotation of, if it is not indeed limited to, payments which have a potential of influencing or corrupting the integrity of the recipient.”<sup>104</sup> Under the reasoning set forth in these opinions, if the benefits from a foreign state have the potential to influence or corrupt the official receiving them, then such payments would be prohibited under the Emoluments Clause.

OLC applied this analysis, *e.g.*, preventing the corruption of United States officials, in a 1986 decision, *NASA Scientist’s Proposed Consulting Arrangement*, authored by then-Deputy Assistant Attorney General Samuel A. Alito, Jr.<sup>105</sup> In this 1986 opinion, OLC considered whether a payment for services by a foreign government would have the potential to corrupt or influence a federal official.<sup>106</sup> Specifically, OLC considered

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(quoting 21 Op. Att’y. Gen. at 117)); Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission, 10 Op. O.L.C. 96, 98 (“Although no court has yet construed the Emoluments Clause . . . past Attorneys General have stated the Clause is ‘directed against every kind of influence by foreign governments upon officers of the United States.’” (quoting 29 Op. Att’y Gen. at 117)); Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 15 (1994) (noting that “[c]onsistent with its expansive language and underlying purpose, the provision has been interpreted as being ‘particularly directed against every kind of influence by foreign governments upon officers of the United States . . .’” (quoting 24 Op. Att’y Gen. at 117 (citing Application of the Emoluments Clause to Proposed Service of Government Employee, 11 Op. O.L.C. 89, 90 (1987))).

<sup>102</sup> See *supra* note 101 and accompanying text.

<sup>103</sup> President Reagan’s Ability to Receive Retirement Benefits, *supra* note 35, at 189 (quoting 24 Op. Att’y Gen. at 117).

<sup>104</sup> *Id.* at 188–89 (“The test to be whether the payments were intended to influence, or had the effect of influencing, the recipient as an officer of the United States.”) (quoting 34 Comp. Gen. 331, 334–35).

<sup>105</sup> *NASA Scientist’s Proposed Consulting Arrangement*, *supra* note 101, at \*2.

<sup>106</sup> See *id.* It is noted that in this matter, OLC did not conclusively determine that the university was a foreign state under the Emoluments Clause



whether it was acceptable for a NASA scientist to accept a consulting fee for \$150 from an Australian university to review a doctoral thesis.<sup>107</sup> In determining whether receipt of the consulting fee was permissible under the Constitution, OLC focused upon whether the consulting fee had “the potential for ‘corruption and foreign influence’ that motivated the Framers in enacting the constitutional prohibition.”<sup>108</sup> OLC concluded that, based upon several factors, the consulting fee did not present the opportunity for corrupting foreign influences from foreign states that worried the Framers.<sup>109</sup> Accordingly, OLC concluded that accepting the consulting fee from the University would not be prohibited by the Emoluments Clause.<sup>110</sup>

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“given its functional and operational separation and independence from the government of Australia and state political instrumentalities.” *Id.*

<sup>107</sup> *Id.* at \*1.

<sup>108</sup> *Id.* at \*2 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 35, at 327). In determining whether the payment had the potential for corruption and foreign influence, OLC considered several factors that included: (1) the NASA scientist was selected to review the thesis because of his reputation as a scholar and not because of his position with the U.S. government; (2) the offer was “extended to him on University letterhead by the chairman of the academic department in which the Ph.D. candidate is enrolled” and not by the government of Australia; (3) the \$150 consulting fee is from University funds for this purpose and is in an “amount ordinarily paid to outside experts” for comparable services; (4) the thesis would “be sent directly to the NASA scientist” in the United States and he would review it on his own time in the United States, and then submit a written report to the University; (5) there does not appear to be any reason for him to “have any direct contact with officials of the University” during the course of the consultancy; (6) the consultancy is limited both in time and in substantive scope; and (7) it is not expected that there will be a “continuing relationship” between the University and the NASA employee after the report has been submitted. *Id.* at 5; *see also* Jane Chong, *Reading the Office of Legal Counsel on Emoluments: Do Super-Rich Presidents Get a Pass?*, LAWFARE (July 1, 2017), <https://www.lawfareblog.com/reading-office-legal-counsel-emoluments-do-super-rich-presidents-get-pass> [hereinafter Chong, *Reading the Office of Legal Counsel on Emoluments*] (“[T]he fact the scientist would be acting in an employment or personal services capacity did not automatically render the payment an emolument.”).

<sup>109</sup> NASA Scientist’s Proposed Consulting Arrangement, *supra* note 101, at \*2.

<sup>110</sup> *Id.* at \*3.

OLC and DOJ's longstanding interpretation that the term "emolument" is "directed against every kind of influence by foreign states upon U.S. officials" echoes the classical republican ideology of the need to prevent undue influence, corruption, and self-interest of those in power.<sup>111</sup> The Framers of the Constitution, guided by these ideals, were deeply concerned that these corrupt influences could damage, and even destroy, a country. They recognized that the decline of ancient republics exposed their fragility and susceptibility to corruption.<sup>112</sup> OLC's interpretation of the term "emoluments" mirrors the Founder's intent to protect our republic from these corrupt influences of foreign states.<sup>113</sup>

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<sup>111</sup> WOOD, *supra* note 2, at 60–62; *see* Savage, *supra* note 2, at 175 ("By the mid and late 1700s, the concept of corruption incorporated not only the ancient fears of luxury, decadence, and self-interest supplanting the public interest, but also an opposition to those conditions found in Augustan England that undermined the Constitution."); *Bioethics*, *supra* note 34, at 55, 57–58 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 35, at 327); THE FEDERALIST NO. 22, *supra* note 5 (Alexander Hamilton).

<sup>112</sup> THE FEDERALIST NO. 22, *supra* note 5 (Alexander Hamilton); WOOD, *supra* note 2.

<sup>113</sup> OLC has used the term "emoluments"—as used in the Emoluments Clause—to include both compensation received in connection to a governmental office as well as compensation that was not received in connection to a governmental office. *See generally* ACUS, *supra* note 32, at 120, 123 (concluding that non-government attorneys in law firms, who served on a part-time basis on a governmental board, could not accept partnership income *for their non-governmental work* that was derived from foreign governments or foreign government-owned or controlled instrumentalities because this compensation was considered an "emolument" under the Emoluments Clause); Emoluments Clause and World Bank, 25 Op. O.L.C. 113, 114 (2001) ("[T]he term 'emolument' . . . was intended to cover compensation of any sort arising out of an employment relationship with a foreign state.") (quoting Office of Legal Counsel, Opinion Letter on Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government, at 8 (Oct. 4, 1954)). In both of these matters, however, the central issue before OLC was not the meaning of the term "emolument" as used in the Emoluments Clause.

## 2. Academic Interpretations of the Term “Emoluments” as Set Forth in the Emoluments Clause

Scholars have applied varying meanings to the term “emolument” as used in the Emoluments Clause.<sup>114</sup> Generally, they focus their interpretation on whether the meaning of this term: (1) is limited to compensation received in connection to duties related to a governmental office; or (2) includes the receipt of compensation *not* associated with a governmental office. John Mikhail, Professor of Law, Georgetown University Law Center, maintains that the term “emolument” is associated with any type of compensation received by a federal official from a foreign government—not only compensation received that is associated with one’s official responsibilities.<sup>115</sup> While acknowledging that the term does encompass some office-related payments or benefits, he underscores that the converse of this proposition is not true.<sup>116</sup> Based upon his comprehensive review of contemporaneous documents to the drafting of the Constitution as well as English language dictionaries published between 1604 and 1806, Mikhail found that the term “emolument” is not necessarily associated with the duties of a governmental office.<sup>117</sup>

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<sup>114</sup> See BROOKINGS INST. Study, *supra* note 6, at 11 (“[T]he Clause, by referring to ‘any kind whatever,’ instructs that it be given a broad construction.”).

<sup>115</sup> See John Mikhail, *A Note on the Original Meaning of “Emolument,”* BALKINIZATION (Jan. 18, 2017), <https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html> [hereinafter Mikhail, *A Note on the Original Meaning of “Emolument”*].

<sup>116</sup> John Mikhail, *Other Uses of “Emolument” in The Federalist,* BALKINIZATION (Jan. 25, 2017), <https://balkin.blogspot.com/2017/01/other-uses-of-emolument-in-federalist.html> (“The form of that argument is not ‘All office-related payments or benefits are emoluments’ but rather ‘All emoluments are office-related payments or benefits.’ To assume that these propositions are logically equivalent is to commit the fallacy of affirming the consequent. And to assert that the latter proposition is true as a matter of original meaning is to say something empirically false, as even a cursory look at a fraction of the pertinent evidence illustrates.”).

<sup>117</sup> *Id.* (noting that the term “emolument” was used in a context *not* associated with an office in several contemporaneous documents as well as in

Likewise, Ambassador Eisen, Professor Painter, and Professor Tribe, as set forth in a Brookings Institution study, believe that the term “emoluments” includes “any conferral of a benefit or advantage, whether through money, objects, titles, offices, or economically valuable waivers or relaxations of otherwise applicable requirements.”<sup>118</sup> They believe that “emoluments” include fair market value transactions that result in any economic benefit to a federal official.<sup>119</sup> Jane Chong, Deputy Managing Editor of *Lawfare* and National Security and Law Associate at the Hoover Institution, while not affording as broad of a definition as Eisen, Painter, and Tribe, believes that the word “emoluments” as used in Constitution includes payments beyond those that are “discharging the duties of an office.”<sup>120</sup>

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the Federalist Papers); see also John Mikhail, “*Emolument*” in *Blackstone’s Commentaries*, BALKINIZATION (May 28, 2017), <https://balkin.blogspot.com/2017/05/emolument-in-blackstones-commentaries.html>; Mikhail, *The Definition of ‘Emolument’ supra* note 100, at 10 (“Blackstone and other influential writers of the period frequently used the word in comparably diverse contexts, including private business settings.”). Mikhail’s study “was limited to English dictionaries published between 1604 and 1806 and legal dictionaries published between 1523 and 1792.” *Id.* at 26. Mikhail discovered that “the broad definition of ‘emolument’ . . . —‘profit,’ ‘advantage,’ ‘gain,’ or ‘benefit,’—can be found in every known English language dictionary definition of “emolument” published between 1604 (when the first English language dictionary was published) and 1806 (when Noah Webster published his first American dictionary).” *Id.* at 8 (citing ROBERT CAWDREY, A TABLE ALPHABETICALL (1604) and NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806)).

<sup>118</sup> BROOKINGS INST. Study, *supra* note 6, at 11.

<sup>119</sup> *Id.* at 11–12.

<sup>120</sup> Chong, *Reading the Office of Legal Counsel on Emoluments, supra* note 108 (“[T]he proper question for purposes of discerning the historical scope of “emoluments” is not whether the term could be interpreted in a restricted way, to refer only to benefits derived from discharging the duties of an office, but whether it was necessarily so interpreted at the time the Emoluments Clauses were drafted. As John Mikhail has painstakingly documented, the answer is no . . .”). See also, e.g., Jane Chong, *What the Law Is vs. What the Executive Is Willing to Argue: Understanding the Stakes of the Emoluments Debate*, YALE J. ON REG.: NOTICE & COMMENT (July 5, 2017), <http://yalejreg.com/nc/what-the-law-is-vs-what-the-executive-is-willing-to-argue-understanding-the-stakes-of-the-emoluments-debate-by-jane-chong/> [hereinafter Chong, *What the Law Is vs. What the Executive Is Willing to Argue*]; Jane Chong, *Distributed Risk: On Conflicts, Doesn’t Matter If Trump Is a Saint*, LAWFARE (Nov. 23, 2016),

In contrast to these views, Robert Natelson, Professor of Law, University of Montana, believes that the best interpretation of “emolument” as used in the Constitution means “compensation, in money or in items of financial value, paid solely by reason of a public military or civil position.”<sup>121</sup> Similarly, Andy Grewal, Professor of Law, University of Iowa College of Law, believes that the term “emoluments” refers to the compensation received for services provided as an officer or employee of the United States to a foreign government.<sup>122</sup> Grewal does not believe that, under his definition, ordinary business transactions between foreign states and U.S. officials would violate the Emoluments Clause.<sup>123</sup> Rather, “[o]nly transactions conducted at other than arm’s length or transactions involving the provision of services” by the U.S. official would “personally establish potential violations.”<sup>124</sup>

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<https://www.lawfareblog.com/distributed-risk-conflicts-doesnt-matter-if-trump-saint> [hereinafter Chong, *Distributed Risk*]. Chong relies upon decisions by the OLC and the Comptroller General to reach her conclusion. Chong, *Reading the Office of Legal Counsel on Emoluments*, *supra* note 108. Chong also notes how the term is used expansively in several state constitutions drafted in the 1770s and 1780s, writing: “The Pennsylvania Constitution (1776) provides: ‘That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument of advantage of any single man, family or sett [sic] of men, who are a part only of that community[.]’ Very similar language appears in the Virginia (1776), Vermont (1777), and New Hampshire (1784) constitutions.” *Id.*

<sup>121</sup> Natelson, *supra* note 100, at 15, 57 (“[T]he word ‘emolument(s)’ in the Constitution meant . . . all compensation with financial value received by reason of public office, including salary and fringe benefits. Proceeds from unrelated market transactions were outside the scope of the term.”). In reaching this conclusion, Natelson analyzed the use of the word “emoluments” in documents created before May 29, 1790, the day the Constitution was approved by the thirteenth state, Rhode Island. *Id.* at 10.

<sup>122</sup> Andy S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 101, 103–04 (2017) [hereinafter Grewal, *The Foreign Emoluments Clause and the Chief Executive*] (citing several Comptroller General and OLC decisions as well as definitions set forth in several dictionaries); Grewal relies upon a survey of Comptroller General decisions, OLC opinions, judicial decisions, and dictionary definitions, to reach his conclusions. *Id.* at 103–05.

<sup>123</sup> *Id.* at 104.

<sup>124</sup> *Id.* at 104–05. Grewal cites several examples to support his position that the term should be afforded a narrow interpretation. *Id.* For example, Grewal

### 3. Supreme Court Decisions Interpreting the Term “Emoluments” Generally

Neither the Supreme Court nor any other Article III court has considered the meaning of the term “emolument” as used in the context of the Emoluments Clause.<sup>125</sup> The Supreme Court,

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contends that “many U.S. Officers, beginning with George Washington, openly maintained expansive business enterprises during their times of public service.” Grewal, *Exploitation of Public Office and the Foreign Emoluments Clause*, *supra* note 100 (citing Justin Fox, *George Washington Had Business Interests, Too*, BLOOMBERG VIEW (Nov. 22, 2016), <https://www.bloomberg.com/view/articles/2016-11-22/like-donald-trump-george-washington-had-business-interests>)). While this example raises an interesting issue, it does not support Grewal’s narrow interpretation of the clause. Historian Joshua Zeitz noted that it is inconclusive at best whether George Washington, Thomas Jefferson or James Madison sold agricultural products to foreign governments because “their surviving plantation records don’t speak to the question.” Zeitz, *supra* note 19.

<sup>125</sup> See, e.g., Chong, *Reading the Office of Legal Counsel on Emoluments*, *supra* note 108 (“No Article III court has ever rendered an opinion on how either Emoluments Clause should be interpreted, though the Supreme Court has offered interpretations of the term “emoluments” as it appears in Foreign Emoluments Clause-related statutes periodically enacted by Congress since 1881.”). While no Article III court has defined the scope of the term “emolument” under the Emoluments Clause, on December 21, 2017, the United States District Court for the Southern District of New York dismissed a complaint—alleging violations of the Emoluments Clause by the president—for lack of standing. Citizens for Responsibility and Ethics in Washington, Restaurant Opportunities Centers United, Inc., Jill Phaneuf, and Eric Goode v. Donald J. Trump, 17 Civ. 458 (S.D.N.Y. Dec. 21, 2017). In dismissing this lawsuit, the Court concluded, among other reasons, that the connection between the plaintiffs’ alleged injury and defendant’s actions were “too tenuous to satisfy Article III’s causation requirement.” *Id.* at 13. Moreover, the Court held that determining the scope of the Emoluments Clause is a political question solely within the purview of Congress. *Id.* at 26. Specifically, the Court wrote: “As the explicit language of the Foreign Emoluments Clause makes clear, this is an issue committed exclusively to Congress. As the only political branch with the power to consent to violations of the Foreign Emoluments Clause, Congress is the appropriate body to determine whether, and to what extent, Defendant’s conduct unlawfully infringes on that power. If Congress determines that an infringement has occurred, it is up to Congress to decide whether to challenge or acquiesce to Defendant’s conduct. As such, this case presents a non-justiciable political question.” *Id.* at 26. In addition to this case, two other lawsuits concerning the Emoluments Clause currently are pending against the president, including: (1)

however, has applied various meanings to this term depending upon the facts presented to the Court. In *Hoyt v. United States*, the Court stated that the meaning of the term applies to compensation associated with a governmental office, writing: the term “emoluments” includes “every species of compensation or pecuniary profit derived from a discharge of the duties of the office.”<sup>126</sup> In *Hoyt*, the Court evaluated the term solely in connection to the amount of compensation a government official could receive on an annual basis under a certain statute, namely the amount of compensation received by collectors at ports of entry to the United States.<sup>127</sup> In *United States v. Hartwell*, the Court also recognized that emoluments are associated with a position with the government.<sup>128</sup> The issue in *Hartwell* was whether a clerk was

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one filed by the attorneys general of Washington D.C. and Maryland in the United States District Court for the District of Maryland; and (2) another filed by 196 congressional Democrats in the United States District Court for the District of Columbia. See Chong, *Reading the Office of Legal Counsel on Emoluments*, *supra* note 108. Article III courts are established under Article III of the Constitution which provides: “The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1. Courts that have been established under Article III include, but are not limited to, the Supreme Court of the United States, United States Courts of Appeals, and United States District Courts. *Article III Courts Law and Legal Definition*, U.S. LEGAL, <https://definitions.uslegal.com/a/article-iii-courts/> (last visited Dec. 20, 2017).

<sup>126</sup> *Hoyt v. United States*, 51 U.S. 109, 135 (1850) (emphasis added).

<sup>127</sup> *Hoyt*, 51 U.S. at 110; see Chong, *Reading the Office of Legal Counsel on Emoluments*, *supra* note 108 (“But in *Hoyt*, the Supreme Court was specifically asked to decide what constitutes an ‘emolument of office’ per a statute governing Treasury Department collectors in their official capacity; the case did not require the Court to consider or rule on the existence of emoluments of other kinds.”); Mikhail, *The Definition of ‘Emolument’*, *supra* note 100, at 19 (“*Hoyt* was a statutory case, however, which required the Court to interpret an 1802 statute referring to ‘the annual emoluments of any collector of the customs.’ The Court’s language makes perfect sense in that statutory context, but it has no constitutional implications. It certainly did not purport to circumscribe the scope of ‘emolument’ for constitutional purposes.”).

<sup>128</sup> See *U.S. v. Hartwell*, 73 U.S. 385, 393 (1867).

considered an officer within the meaning of the Sub-Treasury Act of August 6, 1846, and the Court limited its analysis within this context.<sup>129</sup>

In contrast to *Hoyt* and *Hartwell*, other Supreme Court opinions reflect an understanding that the meaning of the term extends beyond compensation associated with a governmental office. Some of these decisions include *Charles River Bridge v. Warren Bridge*, in which emoluments were associated with tolls from a bridge;<sup>130</sup> *East Hartford v. The Hartford Bridge Company*, in which emoluments were earned from the use of a ferry;<sup>131</sup> and *Maryland v. West Virginia*, in which emoluments related to the use, advantage, and privilege of making improvements on the shores of the Potomac River and certain adjoining lands.<sup>132</sup> These decisions indicate that the Court's use of the term is not limited to compensation received in connection to a governmental office, but rather has a more expansive meaning.<sup>133</sup>

As seen from these decisions, the Supreme Court has applied various meanings to the term "emoluments" depending upon the

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<sup>129</sup> *Hartwell*, 73 U.S. at 385 (citing 9 Stat. at Large, 59) (using "emolument" to define the meaning of the word "officer" as used under the Sub-Treasury Act of August 6, 1846).

<sup>130</sup> *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 586 (1837) ("The proprietors have, under these grants, ever since continued to possess and enjoy the emoluments arising from the tolls taken for travel over the bridge; and it has proved a very profitable concern.").

<sup>131</sup> *Town of East Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 516 (1850) ("That with the exception of the time when the bridge of the petitioners has been impassable, and said town of Hartford has by law been compelled to keep up said ferry, the said town of Hartford has not made any use of said ferry as a franchise, or derived any benefit or emolument therefrom, since the year 1814.").

<sup>132</sup> *Maryland v. West Virginia*, 217 U.S. 577, 580 (1910) ("By the compact of 1785, Maryland assented to this, and declared that 'the citizens of each state respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'"). Additionally, a District of Rhode Island decision, *Vanlaarhoven v. Newman*, stated that emoluments include "tuition payments, endowments, gifts, and the like" that were paid to a Board of Regents at a university. *Vanlaarhoven v. Newman*, 564 F. Supp. 145, 149 (D.R.I. 1983).

<sup>133</sup> See cases cited *supra* notes 130–132.



context of the matters before it. While some decisions limit the term “emolument” to benefits received in connection to an office,<sup>134</sup> others provide an interpretation beyond office-related compensation.<sup>135</sup> OLC applies the latter interpretation, holding that the Emoluments Clause should be interpreted to guard against *any* type of influence by a foreign government that has the potential of unduly influencing or corrupting the integrity of a federal official regardless of whether the benefit is associated with a governmental office.<sup>136</sup> These longstanding OLC decisions reflect the classical republican concerns of the destructive effects of corrupt influences on a republican government.<sup>137</sup>

Based upon the historical context in which the Constitution was drafted as well as contemporaneous documents, it appears that OLC’s interpretation of the term “emolument” is the strongest. These OLC decisions should be given serious consideration in defining the scope of this constitutional provision. Any type of benefit received by a foreign government that has the potential of unduly influencing or corrupting the integrity of a federal official, regardless of whether the benefit was received in connection to a governmental office, should be considered an “emolument” within the scope of the Constitution, and accordingly, prohibited from receipt, absent congressional approval.

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<sup>134</sup> See, e.g., *Hoyt v. United States*, 51 U.S. 109, 135 (1850).

<sup>135</sup> See cases cited *supra* notes 130–132 and accompanying text.

<sup>136</sup> See, e.g., President Reagan’s Ability to Receive Retirement Benefits, *supra* note 35, at 188 (citing 34 Comp. Gen. 331, 334–35 (1955) (providing that “the test to be whether the payments were intended to influence, or had the effect of influencing, the recipient as an officer of the United States.”)); Emoluments Clause and World Bank, 25 Op. O.L.C. 133, *supra* note 113, at 114 (OLC used the term “emoluments”—as used in the Emoluments Clause—to include compensation received in connection to a governmental office); ACUS, *supra* note 32, at 120, 123 (OLC used the term “emoluments”—as set forth in the Emoluments Clause—to include compensation that was received by attorneys as part of partnership distribution from law firms that included revenues from clients that were foreign governments or commercial entities owned or controlled by foreign governments).

<sup>137</sup> WOOD, *supra* note 2, at 60–62; see Savage, *supra* note 2, at 175; *Bioethics*, *supra* note 34, at 57–58 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 35, at 327; THE FEDERALIST NO. 22, *supra* note 5 (Alexander Hamilton)).

C. *What Entity is Considered a “King, Prince, or foreign State” under the Emoluments Clause?*

The Emoluments Clause prohibits “any present, Emolument, Office, or Title, of any kind whatever, *from any King, Prince, or foreign State.*”<sup>138</sup> To determine whether an entity is considered a “King, Prince, or foreign State” within the meaning of the provision, OLC considers whether such entity is: (1) a foreign state; (2) an *instrumentality* of the foreign government, or (3) *independent* of the foreign government.<sup>139</sup> If the entity is a foreign state or an instrumentality of one, it falls within the scope of the Emoluments Clause. If the entity is independent of the state, it is beyond the purview of the clause.<sup>140</sup>

Several OLC decisions provide instructive guidance for determining whether the Emoluments Clause applies. In a 1993 decision, *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, OLC examined whether payment from entities that are owned or controlled by foreign governments, but that do not engage in traditional governmental functions, are considered “foreign states” for the purposes of the Emoluments Clause.<sup>141</sup> With respect to corporations, OLC concluded that corporations that are owned or controlled by a foreign government are considered to be a “foreign State” within the parameters of the Emoluments Clause.<sup>142</sup> OLC acknowledged that when foreign governments “act in their commercial capacities,” they are not exercising powers that are unique to sovereign states.<sup>143</sup> Yet, while recognizing that a state may not be acting in a traditional government role, OLC held that the language of the Emoluments Clause does not limit its “application solely to foreign

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<sup>138</sup> U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

<sup>139</sup> ACUS, *supra* note 32, at 120; President’s Receipt of the Nobel Peace Prize, *supra* note 35, at 7.

<sup>140</sup> ACUS, *supra* note 32, at 120; President’s Receipt of the Nobel Peace Prize, *supra* note 35, at 7.

<sup>141</sup> ACUS, *supra* note 32, at 120.

<sup>142</sup> *Id.* (citing N.R. Breningstall, 53 Comp. Gen. 753, 756 (1974)); *see* 53 Comp. Gen. at 756 (holding that corporation owned by government of Israel is subject to the Emoluments Clause).

<sup>143</sup> *Id.*

governments acting as *sovereigns*.”<sup>144</sup> Accordingly, OLC concluded that corporations owned or controlled by foreign governments will fall within the scope of the Emoluments Clause.<sup>145</sup> Similarly, OLC has held that when a university serves as an instrumentality of a foreign state, it falls within the scope of the Emoluments Clause as well.<sup>146</sup> OLC cautioned that if federal officials accept employment at foreign public universities, they “might well find themselves exposed to conflicting claims on their interests and loyalties.”<sup>147</sup>

Subsequently, in a 2009 decision, *President’s Receipt of the Nobel Peace Prize*, OLC further delineated the scope of the clause, describing that “corporations owned or controlled by a foreign government are presumptively foreign states under the Emoluments Clause.”<sup>148</sup> Building upon this presumption, OLC set forth a framework to determine whether the Emoluments Clause applies to benefits received from a foreign entity.<sup>149</sup> Under this framework, OLC considered specific factors including: (1) “whether [the foreign] government is the substantial source of

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<sup>144</sup> *Id.* (emphasis in the original). OLC explained that the Emoluments Clause does not include an express or implied exception for payments received from foreign states, even if they are not acting in their political or diplomatic capacities (e.g., as a corporation). Further, OLC cites to a Supreme Court decision which recognizes that a foreign state’s ownership or control of a corporation may cause the corporation to be an agent of the foreign government. *Id.* at 121 (citing *First Nat’l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 629 (1983)). OLC, noting that the Emoluments Clause is “both sweeping and unqualified,” believes that the text of the clause “should be interpreted to guard against the risk that occupants of Federal office will be paid by corporations that are, or are susceptible of becoming, agents of foreign States, or that are typically administered by boards selected by foreign States.” *Id.* at 122.

<sup>145</sup> *Id.* at 121. OLC further recognized that if a foreign government owns or controls a corporation, such corporation may become an agent of the government. *Id.* (citing *First Nat’l City Bank*, 462 U.S. at 629).

<sup>146</sup> *Id.* at 122–23 (“Further, it serves the policy behind the Emoluments Clause to construe it to apply to foreign States even when they act through instrumentalities which, like universities, do not perform political or diplomatic functions.”).

<sup>147</sup> *Id.* at 122.

<sup>148</sup> *President’s Receipt of the Nobel Peace Prize*, *supra* note 35, 7 n. 6 (citing ACUS, *supra* note 32, at 120).

<sup>149</sup> *Id.* at 7–8.

funding for the entity”;<sup>150</sup> (2), whether the foreign government makes the final decision about the gift, compensation, payment, or emolument (in contrast to a private intermediary);<sup>151</sup> and (3) “whether [the foreign] government has an active role in the management of the entity.”<sup>152</sup> OLC noted that these factors, as well as OLC precedent, should be considered to determine whether an entity is an instrumentality of a foreign government or is acting independently.<sup>153</sup>

Further, OLC has considered the issue of the actual source of the income, *e.g.*, whether it comes from a foreign government or a U.S. intermediary.<sup>154</sup> For example, in a 1982 decision, *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, OLC reviewed whether an employee of the Nuclear Regulatory Commission (NRC) was able to work as a consultant for an American consulting firm providing advice to a foreign government.<sup>155</sup> The NRC employee’s assignment would be to “review the design of a nuclear power plant being constructed in Mexico.”<sup>156</sup> The plant was being built by the Mexican government.<sup>157</sup> The “American consulting firm . . . would compensate the NRC employee for his expenses and services.”<sup>158</sup> After considering the facts, OLC concluded that “ultimate control, including selection of personnel, remains with the Mexican government,” and that “the interposition of the American

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<sup>150</sup> *Id.* (citing Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians, 11 Op. O.L.C. 89, 90 (1987)).

<sup>151</sup> *Id.* at 8 (citing Expense Reimbursement in Connection with Trip to Indonesia, *supra* note 101).

<sup>152</sup> *Id.* at 7 (citing Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, *supra* note 101, at 15).

<sup>153</sup> *See id.* at 8, 10–11 (“[D]etermining whether an entity is an instrumentality of a foreign government is necessarily a fact-bound inquiry”) (citing Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, *supra* note 76, at 158).

<sup>154</sup> Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, *supra* note 76, at 158.

<sup>155</sup> *Id.* at 156.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

corporation [did not] relieve [] the NRC employee of his obligations under the Emoluments Clause.”<sup>159</sup> Accordingly, the Emoluments Clause prohibited the NRC employee from working as a consultant on this project.<sup>160</sup>

As set forth in these decisions, OLC has provided an effective framework for evaluating whether an entity is considered a “King, Prince, or foreign State” under the meaning of the Emoluments Clause.<sup>161</sup> Under the framework outlined in the above decisions, if the entity is a foreign state or an instrumentality of one, it falls within the scope of the Emoluments Clause.<sup>162</sup> If the entity is independent of the foreign state, it is beyond the purview of the clause.<sup>163</sup>

#### *D. What are the Exceptions to the Emoluments Clause?*

Finally, even if a federal official receives “any present, Emolument, Office, or Title” from a foreign government or its instrumentality, he or she may be able to retain it with congressional consent.<sup>164</sup> Under the Foreign Gifts and Decorations Act, Congress has given consent to retain certain gifts from foreign governments.<sup>165</sup> In addition, Congress has approved the receipt of

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<sup>159</sup> *Id.* at 158–59 (finding the interposition of the American firm insufficient under these facts because “the 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”).

<sup>160</sup> *Id.*

<sup>161</sup> See sources cited *supra* notes 138–50.

<sup>162</sup> See, e.g., ACUS, *supra* note 32, at 120 (regarding payments from entities that do not engage in traditional government functions but are controlled by foreign governments); Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, *supra* note 76, at 158–59 (regarding interposition of American consulting firm).

<sup>163</sup> U.S. CONST. art. I, § 9, cl. 8 (limiting applicability to receipt from a “king, prince or foreign state”). See also, e.g., sources cited *supra* notes 138–60.

<sup>164</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>165</sup> Under 5 U.S.C. § 7342, federal officials are able to accept a “gift of minimal value tendered and received as a souvenir or mark of courtesy.” 5 U.S.C. § 7342 (c)(1)(A) (2017). As provided in the statute, “on January 1, 1981, and at 3 year intervals thereafter, ‘minimal value’ shall be redefined in regulations prescribed by the Administrator of General Services, in consultation

specific gifts on a case-by-case basis.<sup>166</sup> For example, Congress consented to the receipt of: (1) certain medals presented by the Governments of Brazil and Spain to President Benjamin Harrison;<sup>167</sup> (2) the title of a commander of the Royal Norwegian Order of St. Olaf, presented by the King of Sweden and Norway to the Secretary of the Smithsonian Institution;<sup>168</sup> and (3) a sword of honor present by the government of Great Britain to a Navy Captain.<sup>169</sup>

In sum, in determining whether the Emoluments Clause applies to certain benefits, four factors are considered including: (1) to whom does the provision apply, *i.e.*, individuals holding any offices of profit or trust under the United States; (2) what does the provision prohibit an official from receiving, *i.e.*, “any present, Emolument, Office, or Title, of any kind whatever;” (3) from whom is receipt of such present, emolument, office, or title prohibited, *i.e.*, “from any King, Prince, or foreign State;” and (4) what are the exceptions to the provision, *i.e.*, congressional consent.<sup>170</sup> These factors must be evaluated in light of the provision’s underlying purpose of preventing undue influences

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with the Secretary of State, to reflect changes in the consumer price index for the immediately preceding 3-year period.” *Id.* § 7342 (a)(5)(A) (2012). Effective January 1, 2017, an employee covered under the statute may not accept a gift exceeding \$390 from a foreign government as defined in the statute. GSA BULLETIN FMR B-41 FOREIGN GIFT AND DECORATION MINIMAL VALUE, GEN. SERVS. ADMIN 1 (Jan. 12, 2017), [https://www.gsa.gov/cdnstatic/GSA\\_Bulletin\\_FMR\\_B-41\\_Foreign-Gift\\_Decoration\\_Minimal\\_Value.pdf](https://www.gsa.gov/cdnstatic/GSA_Bulletin_FMR_B-41_Foreign-Gift_Decoration_Minimal_Value.pdf). The implementing regulation is 41 CFR § 102-42, *Utilization, Donation, and Disposal of Foreign Gifts and Decorations*, and the current minimal value of \$390 is defined in Federal Management Regulation (FMR) Bulletin B-41, *Foreign Gift and Decoration Minimal Value* (effective Jan. 1, 2017).

<sup>166</sup> See President’s Receipt of the Nobel Peace Prize, *supra* note 35, at 12 (setting forth examples in which Congress authorized a federal official to accept a gift from a foreign state).

<sup>167</sup> *Id.* at 12 n. 5 (“authoriz[ing]” President Harrison “to accept certain medals presented to him by the Governments of Brazil and Spain during the term of his service as President of the United States”).

<sup>168</sup> *Id.* at 5.

<sup>169</sup> *Id.*

<sup>170</sup> U.S. CONST. art. I, § 9, cl. 8.

from foreign states.<sup>171</sup> These factors should also be considered in another context: the national security protections provided by this provision. Preserving the integrity and survival of our country—the predominant purpose of the Emoluments Clause—is central to our national security interest in protecting the welfare of the American people and the security of the United States.<sup>172</sup>

### III. NATIONAL SECURITY PROTECTIONS OF THE EMOLUMENTS CLAUSE

The Supreme Court has held that national security is the principal responsibility of the federal government and that “no governmental interest is more compelling than the security of the Nation.”<sup>173</sup> “National security” has been defined in many ways. Alexander Hamilton described the security of our country as “The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks.”<sup>174</sup> Congress has defined the term as “the national defense and foreign relations of the United States.”<sup>175</sup> The Director of National Intelligence (DNI), Daniel R. Coats, believes that national security involves protecting “American lives and America’s interests anywhere in the world.”<sup>176</sup> Executive Order 12333, *United States*

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<sup>171</sup> Application of the Emoluments Clause to a Civilian Aide, *supra* note 55, at 2.

<sup>172</sup> Susan Hennessey, Executive Editor of *Lawfare* and a Brookings Institution Fellow in National Security Law, succinctly wrote that the Emoluments Clause “is, fundamentally, a national security provision.” Susan Hennessey, *Ethics Rules Are National Security Rules*, *LAWFARE* (Jan. 10, 2017), <https://www.lawfareblog.com/ethics-rules-are-national-security-rules> (“Ethical transparency is critical to national security because it ensures that personal financial interests are not placed before the interests of the country.”); *see* Chong, *Distributed Risk*, *supra* note 120, (The Emoluments Clause is “a national security provision designed to the protect the country from officers too enmeshed with foreign interests.”).

<sup>173</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

<sup>174</sup> THE FEDERALIST NO. 23 (Alexander Hamilton).

<sup>175</sup> *See* Classified Information Procedure Act, 18 U.S.C. § app. § 1(b).

<sup>176</sup> DANIEL R. COATS, U.S. INTELLIGENCE CMTY., *WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY* i (May 11, 2017),

*Intelligence Activities*, provides that information related to national security includes information that “involves threats to the United States, its people, property, or interests; the development, proliferation, or use of weapons of mass destruction; or any other matter bearing on United States national or homeland security.”<sup>177</sup> While no specific definition exists for the term “national security,” based upon the above definitions, national security includes protecting the interests and welfare of the American people and the security and sovereignty of the United States. As set forth below, the Framers included the Emoluments Clause to achieve this goal.<sup>178</sup>

The Emoluments Clause safeguards our national security interests by: (1) requiring that federal officials remain free from corrupt influences from abroad to prevent harm to our country; (2) mandating transparency and accountability concerning the receipt of certain benefits from foreign states; and (3) fostering trust of federal officials. In interpreting the scope of the Emoluments Clause, its underlying national security implications should be taken into consideration. Adherence to the Emoluments Clause is critical to ensure that government officials place the welfare of our country above undue pressures from foreign states, especially when making decisions vital to the national security interests of our country and the American people. As recognized by the Framers of the Constitution, corrupt influences from foreign powers, or even the perception of such influences, could damage

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<https://www.dni.gov/files/documents/Newsroom/Testimonies/SSCI%20Unclassified%20SFR%20-%20Final.pdf>. In a May 2017 annual report to the Senate Select Committee on Intelligence, DNI Coats assessed that national security threats can arise from varying risks. In his report, Daniel Coats included the following threats to our security: cyber intrusions or operations; terrorism; weapons of mass destruction, including nuclear, biological, and chemical weapons; space technology, including reconnaissance satellites; counterintelligence; transnational organized crime, including human trafficking, drugs, wildlife poaching; threats to the economic and natural resources; threats to human security, including infectious disease, environmental risks, climate change, and global displacements; and risks of violent or regime-threatening instability and atrocities. *Id.*

<sup>177</sup> Exec. Order No. 12,333, as amended, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

<sup>178</sup> See THE FEDERALIST NO. 22, *supra* note 5 (Alexander Hamilton).



the integrity and threaten the existence of our government and institutions.<sup>179</sup>

*A. The Emoluments Clause Requires that United States Officials Place the Welfare of the American People and the Interests of the United States above the Interests of Foreign Powers*

The Framers of the Constitution were influenced by classical republican ideals, and held that those governing the country must place its interests above their own private gain.<sup>180</sup> The Framers believed that corruption had destroyed ancient republics and sought to prevent such harm.<sup>181</sup> Guided by these classical republican principles, the Framers of the Constitution included certain provisions to prevent corruption from undermining our young government, including the Emoluments Clause.<sup>182</sup> They adopted the Emoluments Clause to ensure that federal officials would place the welfare of the American people and the security of the United States above the interests of foreign nations.<sup>183</sup>

The Framers recognized that federal officials receiving payments from foreign governments might be persuaded, either consciously or subconsciously, to alter their decisions to benefit

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<sup>179</sup> See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 345, 348–50 (2009) [hereinafter Teachout, *The Anti-Corruption Principle*] (“[The Framers’] concerns, which might sound quaint to the modern jurist, are very close to the concerns of modern American citizens, who consider corruption, inchoate a concept as it may be, to be one of the biggest threats to government. Understanding the threat of corruption, and incorporating that understanding into constitutional law, may be necessary for good self-government. The Constitutional Convention delegates were right to be diligent in including the anti-corruption principle in the Constitution. Internal decay of our political life due to power-and-wealth seeking by representatives and elites is a major and constant threat to our democracy.”).

<sup>180</sup> Savage, *supra* note 2, at 174–75 (citing PANGLE, *supra* note 13, at 57); see WOOD, *supra* note 2, at 68.

<sup>181</sup> THE FEDERALIST NO. 22, *supra* note 5, at 142–43 (Alexander Hamilton).

<sup>182</sup> Savage, *supra* note 2, at 174–75 (citing PANGLE, *supra* note 13, at 57).

<sup>183</sup> See THE FEDERALIST NO. 22, *supra* note 5, at 142–45 (Alexander Hamilton).

foreign powers over the American public.<sup>184</sup> They thought that such influence, or even the perception of such influence, could undermine the integrity, and indeed the very survival, of our government and institutions.<sup>185</sup> For example, Hamilton remarked that republics could “afford too easy an inlet to foreign corruption.”<sup>186</sup> Randolph stated that the Emoluments Clause was included to “exclude corruption and foreign influence” from those governing our country.<sup>187</sup> Randolph recognized that the perception of influence by a foreign state was as significant as the actual influence itself.<sup>188</sup>

In forming our country, the Framers drew upon their knowledge of republican governments that had been damaged by unwarranted interference from foreign powers and corruption.<sup>189</sup> Teachout explained that the Framers were concerned that pressures from outside states could improperly manipulate our leaders, undermining our institutions and leading to our country’s decline.<sup>190</sup> Aware of these human shortcomings, the Framers focused on the possibility of corruption that could sway a public official to act in self-interest rather than for the welfare of the

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<sup>184</sup> *Id.*; BROOKINGS INST. Study, *supra* note 6, at 2 (“Foreign interference in the American political system was among the gravest dangers feared by the Founders of our nation and the Framers of our Constitution.”).

<sup>185</sup> BROOKINGS INST. Study, *supra* note 6, at 2 (“As careful students of history, the Framers were painfully aware that entanglements between American officials and foreign powers could pose a creeping, insidious risk to the Republic.”).

<sup>186</sup> THE FEDERALIST NO. 22, *supra* note 5, at 142 (Alexander Hamilton).

<sup>187</sup> *Bioethics*, *supra* note 34, at 57–58 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 *supra* note 35, at 327).

<sup>188</sup> *See id.*

<sup>189</sup> Teachout, *The Anti-Corruption Principle*, *supra* note 179, at 348–50.

<sup>190</sup> Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 53 (stating that the Framers’ view at the time “involved a set of beliefs about human motivation that assumed that the same person could be virtuous or corrupt, depending on a combination of circumstance, temptation, and temperament.”); Teachout, *The Anti-Corruption Principle*, *supra* note 179, at 374 (“The Framers believed that an individual is corrupt if he uses his public office primarily to serve his own ends.”).

public.<sup>191</sup> Similarly, Noah Feldman, Professor of Constitutional and International Law at Harvard University, wrote: “The idea behind the clause is pretty intuitive: If federal officials can be compensated by foreign governments, they can be bought.”<sup>192</sup>

Likewise, Painter explained that from “the beginnings of our republic, the Founders were concerned about foreign influences over our government.”<sup>193</sup> Painter drew a parallel between the purpose behind the Emoluments Clause and the need to close loopholes in our campaign finance laws.<sup>194</sup> Analogous to the Emoluments Clause, foreign campaign contributions might influence or corrupt—or create the perception of undue influence or corruption—officials once they are elected into power.<sup>195</sup> Painter expressed concern that “foreign corporations, including corporations controlled by foreign governments, [are able] to channel money through [certain] organizations to help the

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<sup>191</sup> THE FEDERALIST NO. 75 (Alexander Hamilton) (“An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents.”); Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 54.

<sup>192</sup> Noah Feldman, *Trump’s Hotel Lodges a Constitutional Problem*, BLOOMBERG (Nov. 21, 2016), <https://www.bloomberg.com/view/articles/2016-11-21/trump-s-hotel-lodges-a-constitutional-problem>. Feldman described that the concern of being “bought” by a foreign power dated back to the 17th Century, when France paid British Parliament members and other government officials. *Id.*

<sup>193</sup> RICHARD W. PAINTER, TAXATION ONLY WITH REPRESENTATION: THE CONSERVATIVE CONSCIENCE AND CAMPAIGN FINANCE REFORM 107 (2016).

<sup>194</sup> *Id.* at 106–08.

<sup>195</sup> *Id.* at 109 (noting that unlike the United States, some foreign governments play a greater role in corporate decisions and investments). As such, while a foreign company may be funneling money through a shell corporation into a super PAC (Political Action Committee), in reality, the money may be from a foreign government. *Id.* at 108–09. In addition to super PACS, Painter points out that an “enormous” amount of political advertising is paid for through “dark pools of funds” controlled by organizations that are not required to disclose their donors. *Id.* at 113. Painter explained that in 1966, Congress restrained foreign influence when it prohibited contributions from foreign governments and foreign nationals. *Id.* at 108 (citing 2 U.S.C. § 431). However, there are loopholes in these laws that permit foreign entities to make political contributions in United States elections. *Id.*

candidates they like and—with negative advertising—take down candidates they don't like.”<sup>196</sup> Indeed, the Supreme Court has long recognized that it is “neither novel nor implausible” “that large campaign contributions . . . can corrupt or create the appearance of corruption of federal candidates and officeholders.”<sup>197</sup> Likewise, Congress has recognized the ability of campaign contributions to corrupt or sway elected officials, enacting several statutes to protect against this type of political influence.<sup>198</sup>

Similar to the influence of foreign campaign contributions, foreign governments may attempt to influence or corrupt federal officials in positions of power with monetary means. Through such payments, federal officials may be swayed to act in the interests of a foreign state or their own private gain—exactly what the Emoluments Clause was designed to prevent.<sup>199</sup> As such, foreign states could gain power and influence over federal office holders. It would be highly problematic for a federal official to afford preferential treatment to a foreign state if such treatment were against the interests of the United States. Even if the preferential treatment is warranted, the perception that a federal official was providing favorable treatment to a foreign government because of compensation that he or she received would be troublesome. Such a perception would call into question the motives of federal officials and undermine the United States' moral leadership both at home and abroad, weakening our democracy.<sup>200</sup>

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<sup>196</sup> *Id.* at 113.

<sup>197</sup> *McConnell v. FEC*, 540 U.S. 93, 95 (2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 25–28 (1976), *overruled by Citizens United v. FEC*, 588 U.S. 310 (2010)) (alteration of arrangement in original).

<sup>198</sup> *See, e.g.*, *Contributions and Donations by Foreign Nationals*, 52 U.S.C. § 30121 (2002) (prohibiting a foreign national from making donations to elections or committees of political parties); *Contributions by Government Contractors*, 52 U.S.C. § 30119 (2015) (prohibiting campaign contributions from government contractors).

<sup>199</sup> BROOKINGS INST. Study, *supra* note 6, at 2, 10–13 (recognizing that “private financial interests can subtly sway even the most virtuous leaders”).

<sup>200</sup> The terms “republican” and “democratic” are used interchangeably in this paper. As described by Wood, “[I]n the several years following the Declaration of Independence, Americans came to think of all of their elected governmental institutions as representative of the people, and the term ‘republic,’ which meant government derived from the people, became identified

The drafters of the Constitution were aware that improper influences from foreign nations could corrupt our own leaders and lead to the decline of our country.<sup>201</sup> Timothy Snyder, Professor of History at Yale University, cautioned that the “history of modern democracy is also one of decline and fall.”<sup>202</sup> As an example, Snyder observed that “European democracies collapsed into right-wing authoritarianism and fascism in the 1920s and 1930s.”<sup>203</sup> Like the framers of the Constitution, who believed that humans were capable of abusing their political power,<sup>204</sup> Snyder cautioned that our democracy could be destroyed through unchecked power of those leading our country.<sup>205</sup> He warns that it is a “mistake to assume that rulers who came to power through institutions cannot change or destroy those very institutions—even when that is exactly what they have announced they will do.”<sup>206</sup>

Federal officials working in the field of national security are often faced with difficult and multi-faceted issues. They must

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with the term ‘democracy.’ By the first decade or so of the nineteenth century the two terms became interchangeable.” WOOD, *supra* note 2, at 191–92.

<sup>201</sup> Teachout, *The Anti-Corruption Principle*, *supra* note 179, at 353, 358, 361, 366, 371, 393.

<sup>202</sup> TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 10 (2017); see Roberto Foa & Yascha Mounk, *Across the Globe, a Growing Disillusionment With Democracy*, N.Y. TIMES (Sept. 15, 2015), <https://www.nytimes.com/2015/09/15/opinion/across-the-globe-a-growing-disillusionment-with-democracy.html> (“The future of democracy is uncertain. In the West, democratic systems have proved strong enough to weather the disappointments of the last decades. It’s perfectly possible that they can weather more. But to put off serious change because it is so easy to assume that democracy is here to stay is to put at risk the very stability of democratic government.”).

<sup>203</sup> SNYDER, *supra* note 202, at 11.

<sup>204</sup> MARC J. HETHERINGTON, WHY TRUST MATTERS: DECLINING POLITICAL TRUST AND THE DEMISE OF AMERICAN LIBERALISM 12 (2006).

<sup>205</sup> SNYDER, *supra* note 202, at 24. Snyder wrote that European history of the twentieth century demonstrates that “societies can break, democracies can fall, ethics can collapse, and ordinary men can find themselves standing over death pits with guns in their hands.” *Id.* at 11–12. He described that the democracies that arose after the First and Second World Wars “often collapsed when a single party seized power in some combination of an election and a coup d’état.” *Id.* at 27–28.

<sup>206</sup> *Id.* at 24.

evaluate matters that involve the safety and welfare of individuals, both in our country and around the world. It is imperative for officials deciding these vital issues to remain free from undue influences from foreign states, or even the perception of such influences. They must place the interests of the state above their own, and act for “the greater good of the state and community.”<sup>207</sup> As recognized by OLC, “[t]hose who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty.”<sup>208</sup> OLC cautioned that a federal official’s “judgment might be biased, and that loyalty divided, if [he or she] received financial benefits from a foreign government.”<sup>209</sup> Influenced by classical republican ideals, including the damaging effects of corruption, the Framers included the Emoluments Clause to ensure that officials act with “unclouded judgment” when making crucial decisions that affect the welfare of the American people and security of the United States.<sup>210</sup>

### *B. The Emoluments Clause Mandates Transparency and Accountability*

In addition to preventing undue influences from abroad, the Emoluments Clause promotes transparency and accountability.<sup>211</sup> Under the Emoluments Clause, if federal officials receive “any present, Emolument, Office, or Title” from foreign governments, they must seek congressional approval to retain them.<sup>212</sup> Congress has the authority to consent to the receipt of such benefits from

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<sup>207</sup> Savage, *supra* note 2, at 174.

<sup>208</sup> ACUS, *supra* note 32, at 122 (citing Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission, *supra* note 101, at 100).

<sup>209</sup> *Id.*

<sup>210</sup> Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, *supra* note 101, at 18; THE FEDERALIST NO. 22 (Alexander Hamilton).

<sup>211</sup> BROOKINGS INST. Study, *supra* note 6, at 7.

<sup>212</sup> U.S. CONST. art. I, § 9, cl. 8. However, Congress has given blanket approval to retain gifts that are valued under a certain amount. 5 U.S.C. § 7342(b) (2012) (“An employee may not . . . accept a gift or decoration, other than in accordance with the provisions of” the Act.) *Id.*

foreign states.<sup>213</sup> Through this process, items received from foreign states by federal officials must be disclosed to Congress and vetted.<sup>214</sup> Informing Congress of the receipt of such benefits reduces the risk of an official acting with improper or corrupt motives, which is the purpose of the Emoluments Clause.<sup>215</sup> This congressional responsibility fosters transparency and accountability by permitting Congress to confer a meaningful check on those governing our country, preserving the integrity of our democracy and its institutions.<sup>216</sup>

In a Brookings Institution study, Eisen, Painter, and Tribe explain that the requirement of congressional consent gives transparency and accountability to transactions that might otherwise remain undisclosed, “forcing federal officeholders to examine their judgments and opening the entire arrangement to probing scrutiny.”<sup>217</sup> They assert that transfers of benefits from foreign states to federal officials become “regulated transactions and matters of vital public inquiry.”<sup>218</sup> Likewise, Teachout believes that the requirement for congressional approval provides Congress with the oversight responsibility, in order to ensure that government officials “are not being seduced from their obligations to the country.”<sup>219</sup> “[Such a] congressional requirement leads to a radical transparency and interrogation” that could prevent private transfers of benefits in exchange for favoritism toward a foreign state.<sup>220</sup>

In order for citizens to make knowledgeable, informed, and educated decisions in selecting their officials, and then hold those

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<sup>213</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>214</sup> *Id.*; see also BROOKINGS INST. Study, *supra* note 6, at 7 (“When Congress acts, it brings transparency and accountability to transactions that might otherwise remain buried, forcing federal officeholders to examine their judgments and opening the entire arrangement to probing scrutiny. Private and secretive transfers of wealth from foreign to federal officials are thereby reconfigured into regulated transactions and matters of vital public inquiry.”).

<sup>215</sup> BROOKINGS INST. Study, *supra* note 6, at 7.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Teachout, *Gifts, Offices, and Corruption*, *supra* note 25, at 36.

<sup>220</sup> *Id.*

officials accountable for their actions, citizens must be apprised, to the extent possible, of governmental actions and policies.<sup>221</sup> “Transparency allows the American people to better determine whether federal officials are properly and appropriately performing their elected or appointed tasks” and holds federal officials accountable for their actions.<sup>222</sup> The Emoluments Clause is a vehicle for mandating such transparency and accountability; it places the American public in a better position to make informed decisions about the motivations of federal officials, including whether they have received benefits from foreign states that might influence their actions.<sup>223</sup>

While transparency in the government serves an essential purpose, certain information must remain classified in order to safeguard our country’s national security interests.<sup>224</sup> In the

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<sup>221</sup> James Madison believed that access to information was “an essential cornerstone of democratic governance.” WENDY GINSBERG ET AL., *GOVERNMENT TRANSPARENCY AND SECRECY: AN EXAMINATION OF MEANING AND ITS USE IN THE EXECUTIVE BRANCH*, CONG. RESEARCH SERV. 1 (2012), <https://www.fas.org/sgp/crs/secrecy/R42817.pdf> (citing 3 JAMES MADISON, *LETTERS AND OTHER WRITINGS OF JAMES MADISON*, FOURTH PRESIDENT OF THE UNITED STATES 276 (Philadelphia, J.B. Lippincott & Co. 1867)).

<sup>222</sup> *Id.* at 32.

<sup>223</sup> See THE FEDERALIST NO. 22 (Alexander Hamilton); Hennessey, *supra* note 172 (stating that the disclosure requirements passed by Congress in furtherance of the Emoluments Clause result in transparency, which “allows for the public and other stakeholders to assess a government official’s judgment for indications of bias”). While the Emoluments Clause pertains to United States officials, Congress has passed legislation to mandate transparency and guard against foreign influence in the private sector as well. See, e.g., Foreign Agents Registration Act of 1938, 18 U.S.C. § 219; Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601; Agents of Foreign Governments, 18 U.S.C. § 951; Registration of Certain Organizations, 18 U.S.C. § 2386; Registration of Certain Persons, 50 U.S. Code § 851.

<sup>224</sup> See Classified National Security Information, 75 Fed. Reg. 707 (2009). The preamble to Executive Order 13526, *Classified National Security Information*, describes the dichotomy between secrecy and transparency as follows: “Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation’s progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect



national security context, due to the necessity of secrecy in certain situations, ensuring that federal officials are acting with proper motives becomes even more significant.<sup>225</sup> The American people must have confidence that federal officials—especially those taking actions that must remain classified—are not unduly pressured from foreign states. As described by Hennessey, due to the “necessary secrecy that surrounds a great many of these decisions, full vetting and transparency at the outset are critical to ensuring the Executive branch is, in fact, placing country first and also to maintaining basic integrity and legitimacy in the eyes of the people.”<sup>226</sup> While certain governmental actions must remain classified, the motives of the individuals who are involved in deciding such matters—especially those in high levels of the government—should be transparent and subject to scrutiny. Hennessey explains:

We ask for verification that our government officials are free from undue influence because it goes to the core of basic democratic legitimacy. There should be no questions regarding the purity of the motives of individuals we authorize to place our soldiers, foreign service officers, or intelligence agents in harm’s way.<sup>227</sup>

For federal officials to be held accountable for their actions, including making critical national security decisions, the American people should be assured that these decisions are not improperly influenced by foreign states. Because certain information cannot be publicly disclosed, to improve public trust in the national security context, the federal government has an even higher duty to demonstrate that its actions are not corrupted by improper motives. Under the Emoluments Clause, Congress has the authority to consent to the receipt of “any present, Emolument, Office, or Title” from foreign governments.<sup>228</sup> Giving Congress this constitutional responsibility fosters transparency and

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our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations.” *Id.* at 707.

<sup>225</sup> Hennessey, *supra* note 172.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> U.S. CONST. art. I, § 9, cl. 8.

accountability by conferring a vital check on federal officials who receive benefits from foreign governments. This congressional check brings such transactions into the public view, decreasing the risk that those governing our country might act with improper or corrupt motives.<sup>229</sup>

C. *The Emoluments Clause Fosters Trust of Federal Officials to Act for the Benefit of the American People*

1. The Framers of the Constitution Believed that No One Individual Can Be Trusted with Complete Power

Our constitutional republic was founded upon the belief that no one person or branch of government can be trusted with absolute power.<sup>230</sup> The Founders believed that the authority to govern could not be entrusted in the hands of a few individuals, but rather, should be placed in the hands of many.<sup>231</sup> They were concerned that it was human nature for some with political power to abuse it.<sup>232</sup> Through a system of checks and balances, the Founders created “institutions disparate enough to curb the worst human instincts while still sufficiently powerful to administer the affairs of the nation.”<sup>233</sup> Under the Madisonian system, no one individual had complete control over the direction of the country.<sup>234</sup> From the inception of the United States until today, distrust of unchecked power played, and continues to play, a critical role in the principles upon which our country was founded.<sup>235</sup> As noted by Mark

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<sup>229</sup> Hennessey, *supra* note 172.

<sup>230</sup> HETHERINGTON, *supra* note 204, at 12–13; THE FEDERALIST NO. 37 (James Madison).

<sup>231</sup> THE FEDERALIST NO. 37, *supra* note 230, at 234 (James Madison).

<sup>232</sup> HETHERINGTON, *supra* note 204, at 12.

<sup>233</sup> *Id.* at 12–13. To alleviate this concern, they “created a system that fragmented power throughout the government such that it would be difficult for one person or one faction to capture its reins.” *Id.* at 12.

<sup>234</sup> U.S. CONST. arts. I–III.

<sup>235</sup> MARK E. WARREN ET AL., DEMOCRACY AND TRUST 310 (Mark E. Warren ed. 1999); see THE FEDERALIST NO. 51, at 349 (Alexander Hamilton or James Madison) (“If men were angels, no government would be necessary. If

Warren, Professor at Georgetown University, distrust creates a “healthy suspicion of power upon which the vitality of democracy depends.”<sup>236</sup>

Yet, though distrust of unchecked power is fundamental to the tenets of our country, trust in our democratic institutions and processes is also important. Judicial trust is essential for the “stability, viability, and vitality” of our democracy.<sup>237</sup> Marc Hetherington, in *Why Trust Matters*, explains the importance of trust to the health of our democracy.<sup>238</sup> He writes: “[S]ince most democracies are representative in nature, their functioning depends heavily on public trust.”<sup>239</sup>

## 2. Lack of Trust Harms our National Security Interests

Lack of trust has concrete consequences for the national security interests of our country.<sup>240</sup> For example, Edward Snowden’s illegal disclosures increased the levels of distrust of the federal government’s ability to protect individual privacy interests

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angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”).

<sup>236</sup> WARREN ET AL., *supra* note 235, at 310.

<sup>237</sup> *Id.*

<sup>238</sup> HETHERINGTON, *supra* note 204, at 12.

<sup>239</sup> *Id.*

<sup>240</sup> See ADAM KLEIN ET AL., CTR. FOR A NEW AM. SEC., SURVEILLANCE POLICY: A PRAGMATIC AGENDA FOR 2017 AND BEYOND 3, 18 (2016), <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report-Surveillance-Final-170928.pdf?mtime=20170928170720>. “The post-Snowden backlash has impeded law enforcement and intelligence gathering, harmed the U.S. technology industry’s competitiveness in international markets, and created diplomatic friction with important allies. Most importantly, many Americans remain skeptical that their government respects their digital privacy.” *Id.* at 3. “Perhaps the most visible manifestation has been Apple’s decision to introduce on iOS devices full-disk encryption keyed only to the user’s password. This change meant that Apple could no longer extract user data directly from devices running iOS 8 or later. This became the subject of a high-profile national debate in the wake of the San Bernardino shootings earlier this year.” *Id.* at 18.

while collecting law enforcement and intelligence information.<sup>241</sup> This distrust has encumbered the government's ability to collect needed information.<sup>242</sup> Based in part upon this lack of trust, companies are increasing the use of encryption and inhibiting the government's capability to access certain information, even when the government has the legal authority to collect it.<sup>243</sup> In October 2017, Rod Rosenstein, Deputy Attorney General, noted that due to the increased use of encryption, during the year preceding his remarks, the FBI was "unable to access about 7,500 mobile devices" despite having the legal authority to do so.<sup>244</sup> Further, some companies have decided against voluntarily assisting the government even when legally permissible to provide such assistance.<sup>245</sup> Companies have also been opposed to providing the

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<sup>241</sup> The House Permanent Select Committee on Intelligence ("HPSCI") conducted a comprehensive review of Snowden's unauthorized disclosures and concluded that "Snowden caused tremendous damage to national security, and the vast majority of the documents he stole have nothing to do with programs impacting individual privacy interests—they instead pertain to military, defense, and intelligence programs of great interest to America's adversaries." HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, EXECUTIVE SUMMARY OF REVIEW OF THE UNAUTHORIZED DISCLOSURES OF FORMER NATIONAL SECURITY AGENCY CONTRACTOR EDWARD SNOWDEN 1 (2016), [https://lawfare.s3-us-west-2.amazonaws.com/staging/2016/hpsci\\_snowden\\_review\\_-\\_unclass\\_summary\\_-\\_final.pdf](https://lawfare.s3-us-west-2.amazonaws.com/staging/2016/hpsci_snowden_review_-_unclass_summary_-_final.pdf).

<sup>242</sup> KLEIN ET AL., *supra* note 240, at 17–18.

<sup>243</sup> *Id.* at 41.

<sup>244</sup> Rod J. Rosenstein, Deputy Att'y Gen., Remarks on Encryption at the United States Naval Academy (Oct. 10, 2017) in U.S. DEP'T OF JUSTICE NEWS, OCT. 2017, <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-encryption-united-states-naval>. "Encrypted communications that cannot be intercepted and locked devices that cannot be opened are law-free zones that permit criminals and terrorists to operate without detection by police and without accountability by judges and juries. When encryption is designed with no means of lawful access, it allows terrorists, drug dealers, child molesters, fraudsters, and other criminals to hide incriminating evidence. Mass-market products and services incorporating warrant-proof encryption are now the norm. Many instant-messaging services employ default encryption designs that offer police no way to read them, even if an impartial judge issues a court order." *Id.*

<sup>245</sup> KLEIN ET AL., *supra* note 240, at 18 (citations omitted) ("Many companies now refuse to give customer data to the government until presented with binding legal process, even where the law permits them to do so, except

government with law enforcement or intelligence information when served with proper legal processes.<sup>246</sup>

The inability to collect necessary information has adverse implications on national security and law enforcement investigations.<sup>247</sup> As one example, following the attack in San Bernardino, California in December 2015, in which fourteen people were killed by two assailants who had pledged allegiance to ISIS, the FBI sought data from one of the assailant's encrypted iPhones.<sup>248</sup> In February 2016, a judge ordered Apple to comply with the FBI's request and to help investigators obtain information from the phone.<sup>249</sup> Apple declined to comply with the court order, arguing that compliance would weaken privacy protections.<sup>250</sup> Ultimately, the dispute ended after the FBI was able to unlock the

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where immediate access is needed 'to prevent death or serious physical harm.' This forces law enforcement to expend more time and resources to obtain needed information.”).

<sup>246</sup> *Id.* at 3 (“The post-Snowden backlash has impeded law enforcement and intelligence gathering.”); see Katie Benner & Nicole Perlroth, *How Tim Cook, in iPhone Battle, Became a Bulwark for Digital Privacy*, N.Y. TIMES (Feb. 18, 2016), [http://www.nytimes.com/2016/02/19/technology/how-tim-cook-became-a-bulwark-for-digital-privacy.html?emc=eta1&\\_r=0](http://www.nytimes.com/2016/02/19/technology/how-tim-cook-became-a-bulwark-for-digital-privacy.html?emc=eta1&_r=0) (explaining Apple's process in terms of complying with court orders and addressing the court order issued due to the San Bernardino attack where Tim Cook refused to comply and argued that the government was setting a “dangerous precedent for a company to be forced to build tools for the government that weaken security”).

<sup>247</sup> *Going Dark*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/operational-technology/going-dark> (last visited Dec. 20, 2017). Former FBI Director James Comey has expressed deep concern that “[a]rmed with lawful authority, we increasingly find ourselves simply unable to do that which the courts have authorized us to do, and that is to collect information being transmitted by terrorists, by criminals, by pedophiles, by bad people of all sorts.” *Id.*

<sup>248</sup> Benner & Perlroth, *supra* note 246; see Mark Berman, *Justice Dept.: Apple Won't Help Unlock iPhone Due to Worry about 'Impact on its Reputation'*, WASH. POST (Feb. 19, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/justice-dept-says-apples-refusal-to-unlock-iphone-is-due-to-worry-about-impact-on-its-reputation/?tid=sm\\_fb](https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/justice-dept-says-apples-refusal-to-unlock-iphone-is-due-to-worry-about-impact-on-its-reputation/?tid=sm_fb).

<sup>249</sup> Benner & Perlroth, *supra* note 246.

<sup>250</sup> *Id.*

iPhone without Apple's help.<sup>251</sup> Apple's refusal to comply with the court's order was based, in part, on a lack of trust in the government's ability to safeguard privacy interests following Snowden's disclosures.<sup>252</sup> Such lack of trust leads to concrete consequences, such as inhibiting the ability to collect information that is essential to the protection of our country and individuals.<sup>253</sup>

### 3. Trust of the Federal Government is at a Historic Low<sup>254</sup>

In a 2015 survey, the Pew Research Center found that only 19 percent of Americans trust the United States government "to do what is right" most or all of the time.<sup>255</sup> This lack of trust in our federal government is a far cry from what it used to be. In contrast to the low levels of trust today, in 1958, when questions about public trust were first asked, 73 percent of the American public stated that they could trust the federal government most or all of the time.<sup>256</sup> From 1964 to the end of the 1970s, trust of the federal

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<sup>251</sup> Alina Selyukh, *The FBI Has Successfully Unlocked The iPhone Without Apple's Help*, NAT'L PUB. RADIO (Mar. 28, 2016), <http://www.npr.org/sections/thetwo-way/2016/03/28/472192080/the-fbi-has-successfully-unlocked-the-iph-one-without-apples-help>.

<sup>252</sup> See KLEIN ET AL., *supra* note 240, at 18 ("While companies' business models have precluded them from using encryption to deny the government access to all user data, the post-Snowden move toward encryption has gone far enough to create serious problems for law enforcement.").

<sup>253</sup> *Id.* at 17–18; Rosenstein, *supra* note 244 ("Today, thousands of seized devices sit in storage, impervious to search warrants.").

<sup>254</sup> Michael Dimock, *How America Changed During Barack Obama's Presidency*, PEW RESEARCH CTR. (Jan. 10, 2017), <http://www.pewresearch.org/2017/01/10/how-america-changed-during-barack-obamas-presidency/> (noting that views of trust of the government did not change during the Obama Administration because "Americans trust in the federal government remained mired at historic lows. Elected officials were held in such low regard, in fact, that more than half of the public said in a fall 2015 survey that "ordinary Americans" would do a better job of solving national problems.").

<sup>255</sup> PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 4 (Nov. 23, 2015), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2015/11/11-23-2015-Governance-release.pdf> [hereinafter PEW RESEARCH CTR., BEYOND DISTRUST].

<sup>256</sup> *Id.* Surveys of public trust in the federal government began in 1958. *Id.*

government dropped by more than 50 percent, from 77 percent to approximately 25 percent.<sup>257</sup>

Another Pew Research Center study found a strong correlation between the number of people who trust the government and the number of people who believe that the government is “run for the benefit of all Americans.”<sup>258</sup> For example, this study found that in 1964, when trust in the federal government was at an all-time high, 64 percent of the American public believed that the federal government was “run for the benefit of all the people.”<sup>259</sup> However, during the next decade, from the mid-1960s to the mid-1970s, as trust in the federal government dropped at a dramatic rate, those who believed that the government was run for the benefit of the people fell sharply as well, from 64 percent in 1964 to 25 percent in 1974.<sup>260</sup> Over the course of the past half-century, these two measures—(1) trust in the government and (2) the belief that the government is run for the benefit of all Americans—have mapped very closely. In November 2015, only 19 percent of

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<sup>257</sup> *Id.* at 27. This steep decline in trust of the federal government from 1964 to the end of the 1970s can be attributed to a tumultuous period in our history. *Id.* at 18. During these years, our country experienced the Vietnam War, civil unrest, the assassination of Martin Luther King, Jr., the Watergate scandal, escalating inflation and unemployment rates, and a deep recession. Natalie Angley, *Careening from Crisis to Crisis in 'The Seventies'*, CNN (Aug. 17, 2015), <http://www.cnn.com/2015/07/14/living/seventies-crisis-ford-carter-time/>. As recognized by President Carter, the “assassination of great political leaders, a tragic war, a national scandal - all of these things and others made millions of American people lose faith and trust in our government.” *Jimmy Carter on Principles & Values*, ONTHEISSUES, [http://www.ontheissues.org/celeb/Jimmy\\_Carter\\_Principles\\_+\\_Values.htm](http://www.ontheissues.org/celeb/Jimmy_Carter_Principles_+_Values.htm) (quoting Jimmy Carter, Address to Democratic Party (Oct. 19, 1976), in JIMMY CARTER, A GOVERNMENT AS GOOD AS ITS PEOPLE 236 (Simon & Schuster 1977)). During his acceptance speech for the Republican nomination, President Reagan promised to restore some of this lost trust, remarking: “My view of government places trust not in one person or one party, but in those values that transcend persons and parties. The trust is where it belongs—in the people. The responsibility to live up to that trust is where it belongs, in their elected leaders.” Address Accepting the Presidential Nomination at the Republican National Convention in Detroit (July 17, 1980), <http://www.presidency.ucsb.edu/ws/?pid=25970>.

<sup>258</sup> PEW RESEARCH CTR., BEYOND DISTRUST, *supra* note 255, at 26.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

Americans believed that the government was run for the benefit of the American people, the same percentage as those who said that they could trust the federal government almost all or most of the time.<sup>261</sup>

#### 4. Adherence to the Emoluments Clause Can Help Restore Trust in the Government

As seen from these surveys, a decrease in the number of people who believe that the government is run for the benefit of the public correlates to a decrease in the number of people who trust the federal government.<sup>262</sup> Restoring the American public's trust of the federal government is a difficult task. James Comey, former FBI Director, has stated that "it's become enormously challenging for people in institutions that depend upon the trust of the citizens to recapture trust where it's been lost."<sup>263</sup> However, it is not impossible. Warren, in his book *Democracy and Trust*, describes how trust between democratic institutions and the public may be improved.<sup>264</sup>

Interestingly, the first prong of Warren's framework—to improve trust, "align the interests of truster and trusted"—correlates with the findings of the Pew Research Center.<sup>265</sup> It also correlates with the classical republican belief that government officials must place "the greater good of the state and community" above their own interests.<sup>266</sup> If the American public had confidence that the interests of the government and public were aligned, and that the federal government was run for the benefit of the

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> James Comey, Director, Federal Bureau of Investigation, Keynote Address at Center for Strategic and International Studies, The National Security Division at 10: Past, Present, and Future (Sept. 14, 2016), [https://csis-prod.s3.amazonaws.com/s3fs-public/event/160914\\_Comey\\_Keynote.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/event/160914_Comey_Keynote.pdf).

<sup>264</sup> WARREN ET AL., *supra* note 235, at 328–29.

<sup>265</sup> *Compare id.* (stating that shared interests between government and the people improve trust) with PEW RESEARCH CTR., BEYOND DISTRUST, *supra* note 255, at 35 (noting that public views on whether government is run with the nation's best interest in mind correlate with changes in public trust).

<sup>266</sup> Savage, *supra* note 2, at 174.



American people, public trust may increase. This objective could be accomplished, for example, through effective and efficient oversight, and when permissible, more transparency and accountability, and an increased dialogue between the private and public sectors. Even the perception that the government is acting with corrupt or improper motives can damage the trust that the public has placed in its government.<sup>267</sup> If the public perceived that the government's interests were not aligned with their interests—and that the government was not run for their benefit—trust in the federal government would continue to decline.

The second prong of Warren's framework states that to increase the levels of trust, the one seeking trust must "enable and facilitate democratic deliberation and challenge."<sup>268</sup> In other words, democratic discourse between government officials and the American public would improve trust.<sup>269</sup> As previously discussed, under the Emoluments Clause, Congress has the authority to consent to the receipt of "any present, Emolument, Office, or Title" from foreign governments.<sup>270</sup> This provision mandates disclosure to Congress of any such benefit which, if done so openly, allows the American public to question and discuss potential influences on those governing our country.<sup>271</sup> This, in turn, likely would lead to "democratic deliberation and challenge," potentially improving the trust of the government.<sup>272</sup>

Further bringing the Emoluments Clause into Warren's framework, if the public were to learn that a federal official's actions were improperly influenced by the receipt of a benefit from a foreign state, or if the public were to learn that the official was acting for private gain, the interests of the American public and the

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<sup>267</sup> Liz Kennedy & Danielle Root, TOP 10 RISKS AND REMEDIES FOR TRUMP'S CONFLICTS OF INTEREST, CTR. FOR AMERICAN PROGRESS (Feb. 24, 2017), <https://www.americanprogress.org/issues/democracy/reports/2017/02/24/426939/top-10-risks-and-remedies-for-trumps-conflicts-of-interest/>. As noted by the Center for American Progress, the "appearance of corruption undermines trust in government almost as much as clear and continuing corruption." *Id.*

<sup>268</sup> WARREN ET AL., *supra* note 235, at 328–29.

<sup>269</sup> *See id.*

<sup>270</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>271</sup> *See id.*; *supra* notes 217–23 and accompanying text.

<sup>272</sup> *See* WARREN ET AL., *supra* note 235, at 328–29.

government would not be aligned. The federal official would be acting, either consciously or subconsciously, for the welfare of the foreign government, or for his or her self-interest, rather than for the American people. Such actions would further erode public trust in the federal government. The perception of corrupt motives would yield the same result. The mere perception of improper influences or greed can undermine trust that government officials are acting in the best interest of the American public and the United States. Conversely, if the public had confidence that their interests were aligned with those governing our country—such as through oversight, transparency, and open dialogue—then trust in government officials may improve, strengthening the foundation of our democracy.

#### IV. CONCLUSION

Classical republican ideals, including deep concerns about corruption and self-interest, played an important role in the formation of the United States.<sup>273</sup> Those who shaped our republic were profoundly aware that corrupt influences from foreign states could damage, and even destroy, a nation.<sup>274</sup> Heedful of the need to curtail such influences from undermining our newly-created nation, the Founders emulated classical republican concepts in the establishment of the United States.<sup>275</sup> Elements of the classical republican philosophy were incorporated into the Constitution, including the Emoluments Clause, to prevent corrupt forces from destroying our constitutional republic.<sup>276</sup>

Preserving the integrity and survival of our country—the predominant purpose of the Emoluments Clause—remains central to our national security interests.<sup>277</sup> Adherence to the Emoluments Clause protects our national interests by ensuring that federal

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<sup>273</sup> WOOD, *supra* note 2, at 57–61.

<sup>274</sup> *Id.* at 69.

<sup>275</sup> *Id.* at 72.

<sup>276</sup> Savage, *supra* note 2, at 174–75, 181–82.

<sup>277</sup> Chong *Distributed Risk*, *supra* note 120 (describing the Emoluments Clause as a provision to help protect officers of the country with becoming too entangled with foreign interests); Hennessey, *supra* note 172 (commenting on transparency with ethics as essential to a country's national security).

officials act for the benefit of the American people and the United States.<sup>278</sup> It promotes transparency and accountability in that certain benefits or gifts received from foreign states must be reported to and approved by Congress, conferring a meaningful check on those governing our country.<sup>279</sup> And, it fosters trust by promoting the alignment of the interests of the American public and the government, which when lacking, has concrete consequences for the national security interests of our country.<sup>280</sup> These national security implications should be considered in interpreting the scope of the Emoluments Clause.

Moreover, in defining this constitutional provision's parameters, OLC's definition of "emolument" should be given serious consideration. OLC has held that the intent of the Emoluments Clause was "'particularly directed against every kind of influence by foreign governments upon officers of the United States.'"<sup>281</sup> Under OLC's definition, an "emolument" includes every kind of benefit from a foreign state that has the potential to unduly influence or pressure the actions of a federal official regardless of whether the benefit is associated with a governmental office.<sup>282</sup> OLC's interpretation is consistent with the political philosophy and contemporaneous documents during the time the Constitution was drafted. OLC's definition echoes the classical republican ideology of the need to prevent undue influence, corruption, and self-interest of those in power in order to preserve our republic.<sup>283</sup>

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<sup>278</sup> THE FEDERALIST NO. 22, *supra* note 5, at 142 (Alexander Hamilton).

<sup>279</sup> BROOKINGS INST. Study, *supra* note 6, at 7.

<sup>280</sup> See KLEIN ET AL., *supra* note 40, at 17–18 (2016); WARREN ET AL., *supra* note 235, at 328–29.

<sup>281</sup> President Reagan's Ability to Receive Retirement Benefits, *supra* note 35, at 187, 189 (quoting 24 Op. Att'y Gen. 116, 117 (1902)).

<sup>282</sup> See sources cited *supra* note 101, and accompanying text; Emoluments Clause and World Bank, 25 Op. O.L.C. 133, *supra* note 113, at 114 (OLC used the term "emoluments"—as used in the Emoluments Clause—to include compensation received in connection to a governmental office); ACUS, *supra* note 32, at 114 (OLC used the term "emoluments"—as used in the Emoluments Clause—to include compensation *not* received in connection to a governmental office).

<sup>283</sup> WOOD, *supra* note 2, at 60–62; see also Savage, *supra* note 2 at 175; Bioethics, *supra* note 34, at 57–58 (quoting 3 THE RECORDS OF THE FEDERAL

United States officials in positions of trust, who make critical decisions affecting the interests of our country, must do so with the welfare of the American people and the security of the United States as their principal considerations.<sup>284</sup> Extraordinary care must be taken to comply with the Emoluments Clause to ensure that the interests of the American people and the United States—not the self-interests of government officials or foreign powers—determine the way in which our country is governed.

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CONVENTION OF 1787, *supra* note 35, at 327; THE FEDERALIST NO. 22 (Alexander Hamilton).

<sup>284</sup> Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, *supra* note 76, at 157–58 (1982) (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 35, at 327); *see* ACUS, *supra* note 32, at 122.