

**THE OLC EMOLUMENTS CLAUSE JURISPRUDENCE IN THE EXECUTIVE
BRANCH**

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

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INTRODUCTION

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

The OLC has issued more than twenty opinions on the applicability and purpose of the Emoluments Clause and has defined each of its prohibitions and enforcement within the executive branch. The two emoluments clauses⁵ of relevance to the executive branch are located in Article I and Article II of the Constitution: the first commonly referred to as the *Foreign Emoluments Clause* and the second as the *Domestic Emoluments Clause*. The majority of OLC opinions focus on the Foreign Emoluments Clause and this precedent provides a basis for defining the Domestic Emoluments Clause.

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

1 *Infra* Part I.

2 *Id.*

3 *Infra* Part II.

4 *Id.*

5 The third clause refers to Congress. *See infra* note 27.

6 *Infra* Part II.

7 *Id.*

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

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

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

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

8 *Id.*

9 U.S. CONST. art. II, § 3.

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

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

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

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

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

11 U.S. CONST. art. II, § 2, cl. 1.

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

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

Whereas, in order to avoid confusion in policies, duplication of effort, and conflicting interpretations of the law, unity of control in the administration of the legal affairs of the Federal Government is obviously essential, and has been so recognized by the acts of Congress creating and regulating the Department of Justice;

Now, therefore, I, Woodrow Wilson, President of the United States, by virtue of the authority vested in me as Chief Executive and by the act “authorizing the President to coordinate or consolidate executive bureaus, agencies and offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government,” approved May 20, 1918, do hereby order that all law officers of the Government . . . shall “exercise their functions under the supervision and control of the head of the Department of Justice,” in like manner as is now provided by law with respect to the Solicitors for the principal Executive Departments and similar officers; that all litigation in which the United States or any Department, executive bureau, agency or office thereof, are engaged shall be conducted under the supervision and control of the head of the Department of Justice; and that *any opinion or ruling by the Attorney General upon any question of law arising in any Department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus, agencies or offices therewith concerned.* This Order shall not be construed as affecting the jurisdiction exercised under authority of existing law by the Comptroller of the Treasury and the Judge Advocates General of the Army and Navy.¹⁴

This executive order was affirmed and continued by the Executive Order 6166 issued by President Franklin Delano Roosevelt on June 10, 1933, which placed all department solicitors, U.S. Attorneys, and U.S. Marshalls under the direction of the Justice Department.¹⁵ To further facilitate the authority of the Attorney General Congress created the position Assistant Solicitor General in 1933¹⁶ as head of the Justice Department Civil Division which was tasked with preparing legal opinions from the Attorney General and reviewing declarations that would be issued by the President.¹⁷ Under Executive Orders 6247 (on August 10, 1933) and 7298 (February 18, 1936) issued by President Franklin Roosevelt, all proposed executive orders and proclamations were to be submitted to the Assistant Solicitor General for review before final

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

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

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

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

consideration by the Attorney General for publication by the President.¹⁸ The Civil Division was subsequently disbanded and the Assistant Solicitor General was placed directly under the supervision of the Attorney General under the Office of the Assistant Solicitor General.¹⁹ In 1950, in compliance with the Reorganization Act of 1949, the Office of the Assistant Solicitor General was eliminated as part of the 1950 Justice Department reorganization plan and a new office, the Executive Adjudications Division under an Assistant Attorney General, was created, which in turn was renamed the Officer of Legal Counsel in 1953.²⁰

The daily operation of the power of the Attorney General to provide legal opinions to the President and other executive offices was transferred from the Attorney General to the Assistant Solicitor General in 1933 which was transferred to the OLC in 1953.²¹ While the final authority to deal with disputes of law remains with the Attorney General, in 1979 President Carter issued Executive Order 12146 which required any dispute between two or more executive agencies to be submitted to the Attorney General, and the OLC has subsequently determined that the executive order places a requirement for final adjudication by the OLC and that the OLC determination, exercising the authority of the Attorney General, is determinative and final.²²

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

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

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

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

20 *Id.* at 234-35.

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

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

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

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

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

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

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

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

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

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

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

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

Under the *Congressional Clause* of Article I of the U.S. Constitution, No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been 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.²⁷

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

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be 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.²⁸

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

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

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

26 U.S. CONST. art. I, § 9, cl. 8.

27 U.S. CONST. art. I, § 6, cl. 2.

28 U.S. CONST. art. I, § 6, cl. 2.

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

penalties, and forfeitures,” clearly implying that it shall comprehend all other ordinary sources of compensation³⁰

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

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

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

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

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

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

30 *Id.* at 54.

31 *Id.*

32 *Id.* at 55.

33 *Id.* at 56.

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

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

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

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

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

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

While these opinions were focused on statutory issues regarding emoluments, the office of the Attorney General has also issued opinions on the constitutional prohibition on officers of the United States receiving emoluments from foreign states and from within the United States. The first case in which the Attorney General opined on the *Foreign Emoluments Clause* was in 1902.⁴⁰ The clause has three parts: it prohibits (1) any “person holding any office of profit or trust under [the United States], (2) from “accept[ing] any present, emolument . . . of any kind”, (3) “from any king, prince or foreign state.”⁴¹ Attorney General Henry M. Hoyt was confronted with the question of whether the clause applies to a non-ruling prince of Germany who gave to the German embassy presents for the Navy Department, West Point, and the Naval Academy in appreciation to his visit to America.⁴² Specifically, General Hoyt said the question is, “whether the constitutional provision . . . may be construed as applying only to a reigning prince, in which case the authority of Congress for the delivery of these presents would not be required.”⁴³

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

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

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

39 *Id.*

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

41 U.S. CONST. art. I, § 9, cl. 8.

42 *Id.* at 117.

43 *Id.*

44 *Id.* at 117-18.

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

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

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

45 *Id.* at 118.

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

47 *Id.*

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

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

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

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

On February 3, 1911, General Wickersham opined as to whether, Prof. J. A. Udden, special assistant on the United States Geological Survey, may accept from the King of Sweden the order of the “Knighthood of the North Star,” which that Sovereign has conferred on him, in view of Article I, section 9, paragraph 8, of the Constitution of the United States.⁵¹

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

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

49 27 Op. Att’y Gen. at 220–21.

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

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

52 *Id.* at 599.

53 *Id.*

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

55 *Id.*

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

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

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

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

57 *Id.*

58 *Id.*

59 *Id.* at 514

60 *Id.* at 514-15.

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

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

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

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

The OLC confirmed that Ireland law conferring the honorary citizenship would not carry any duties or responsibilities regarding loyalty to the nation of Ireland⁶⁵ which affirmed the concern of General Clark in the aforementioned *Compensation of Employees Detailed to Assist Foreign Governments* opinion. “Consequently, the problems which might have arisen as a result of dual citizenship are no longer presented.”⁶⁶ In defining the meaning of the Foreign Emoluments Clause, the OLC held that the purpose of the clause was, “a means of preserving the independence of foreign ministers and other officers of the United States from external influences [P]articularly directed against every kind of influence by foreign *governments* upon officers of the United States, based on our historic policies as a nation.”⁶⁷ The OLC determined that although the award would be the functional equivalent to a decoration or medal, “medals and decorations have always been regarded as coming within the constitutional provision.”⁶⁸ Additionally, the 1881 federal law makes clear that:

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

62 *Id.*

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

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

65 *Id.* at 279.

66 *Id.*

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

68 *Id.* at 280.

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

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

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

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

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

71 *Id.* at 280.

72 U.S. CONST. art. II, § 1, cl. 7.

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

74 *Id.* at 187–88.

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

76 *Id.*

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

The OLC concluded that

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

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

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

77 *Id.* at 189.

78 *Id.*

79 *Id.* at 190.

80 *Id.* at 190-91.

81 *Id.* at 192.

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

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

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

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

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

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

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

86 *See generally supra* notes 34–35.

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

88 *Id.* at 120.

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

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

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

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

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

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

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

89 *Id.* at 120–21.

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

91 *Id.* at 122.

92 *Id.*

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

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

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

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

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

95 *Id.* at 17.

96 *Id.* at 17-18.

97 *Id.* at 20.

98 *Id.* at 13.

99 *Id.* at 22.

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

101 *Id.* at 115-116.

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

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

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

103 *Id.* at 371.

104 *Id.*

105 *Id.*

106 *Id.* at 373.

107 *Id.* at 4.

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

109 Barron, *supra* note 102 at 379.

110 *Id.* at 380.

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

III. THE EMOLUMENTS CLAUSES AND THEIR APPLICABILITY TO PRESIDENT TRUMP

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

111 *Id.*

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

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

114 *Id.* at 382-84, 86.

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

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

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

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

Defendant has committed and will commit Foreign Emoluments Clause violations involving at least: (a) leases held by foreign-government-owned entities in New York’s Trump Tower; (b) room reservations and the use of venues and other services and goods by foreign governments and diplomats at Defendant’s Washington, D.C. hotel; (c) hotel stays, property leases, and other business transactions tied to foreign governments at other domestic and international establishments owned, operated, or licensed by Defendant; (d) payments from foreign-government-owned broadcasters related to rebroadcasts and foreign versions of the television program “The Apprentice” and its spinoffs; and (e) property interests or other business dealings tied to foreign governments in numerous other countries

Defendant owns and controls hundreds of businesses throughout the world, including hotels and other properties he owns or controls, in whole or in part, operating in the United States and 20 or more foreign countries Defendant also has several licensing agreements that provide streams of income that continue over time. Through these entities and agreements, Defendant personally benefits from business dealings, and Defendant is and will be enriched by any business in which they engage with foreign governments and officials.

. . . .

Through the use of various entities, Defendant owns and controls Trump Tower. Among the largest tenants of Trump Tower is the Industrial and Commercial Bank of China (ICBC), which is owned by a foreign nation, China. The ICBC’s lease is set to expire during Defendant’s term as President. In addition, the Abu Dhabi Tourism & Culture Authority, an entity owned by the foreign nation of the United Arab Emirates, leases office space in Trump Tower

. . . .

The Trump International Hotel Washington, D.C. . . . is located . . . just blocks from the White House [F]oreign diplomats have been flocking to Defendant’s D.C. hotel, eager to curry favor with Defendant and afraid of what Defendant may think or do if they send their business elsewhere in Washington. One week after the election, the hotel held a special event for the diplomatic community. About 100 foreign diplomats attended; they were greeted with champagne, food, a tour, a raffle for overnight stays at properties belonging to Defendant around the world, and a sales pitch about the new D.C. hotel.

. . . .

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

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

A second lawsuit¹²¹ was filed on June 12, 2017 by the District of Columbia and the state of Maryland, *District of Columbia and State of Maryland v. Trump*, in which the plaintiffs asserted similar financial dealings by President Trump in which the

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

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

119 *Id.* at 3, 9–10, 12–14.

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

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

122 *Id.* at 5–6.

defendant and his business enterprises due to his ongoing constitutional violations.”¹²³

The third lawsuit was filed on June 14, 2017 by one hundred ninety-six members of Congress¹²⁴ who sought “relief from the President’s continuing violation of the Foreign Emoluments Clause” and asserted that his accepting of emoluments through his multiple businesses were in violation the Clauses due to his failure to abide by the power invested in the Congress which required the President to seek approval from Congress to receive emoluments.¹²⁵ The complaint asserted,

Defendant has chosen to accept numerous benefits from foreign states without first seeking or obtaining congressional approval. Indeed, he has taken the position that the Foreign Emoluments Clause does not require him to obtain such approval before accepting benefits arising out of exchanges between foreign states and his businesses By accepting these benefits from foreign states without first seeking or obtaining congressional approval, Defendant has thwarted the transparency that the “Consent of the Congress” provision was designed to provide.

Moreover, by accepting these benefits from foreign states without first seeking or obtaining congressional approval, Defendant has also denied Plaintiffs the opportunity to give or withhold their “Consent” to his acceptance of individual emoluments and has injured them in their roles as members of Congress.

To redress that injury, Plaintiffs seek declaratory relief establishing that Defendant violates the Constitution when he accepts any monetary or nonmonetary benefit—any “present, Emolument, Office, or Title, of any kind whatever”—from a foreign state without first obtaining “the Consent of the Congress.” Plaintiffs also seek injunctive relief ordering Defendant not to accept any such benefits from a foreign state without first obtaining “the Consent of the Congress.”¹²⁶

The third lawsuit was dismissed by the D.C. Court of Appeals (February 7, 2020)¹²⁷ and the second was dismissed by a panel of the Fourth Circuit Court of Appeals (July 10, 2019) for lack of standing¹²⁸ but the Fourth Circuit granted

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

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

125 *Id.* at 18–19.

126 *Id.* at 19.

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

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

an appeal for an *en banc* hearing which occurred on December 12, 2019.¹²⁹ On May 14, 2020 the Fourth Circuit *en banc* reversed the panel decision.¹³⁰ In the first lawsuit, on September 13, 2019, the Second Circuit Court of Appeals reversed the District Court's decision that the plaintiffs lacked standing and remanded the case for further proceedings.¹³¹ On October 28, 2019, President Trump filed a petition for an *en banc* rehearing by the Second Circuit.¹³² On August 17, 2020 the Second Circuit denied President Trump's petition for an *en banc* rehearing.¹³³

On July 6, 2020 the plaintiffs in *Richard Blumenthal, et. al. v Donald Trump* filed a writ of certiorari with the Supreme Court for review of the D.C. Court of Appeals holding dismissing the congressional lawsuit for lack of standing.¹³⁴ On September 9, 2020 President Trump filed a writ of certiorari with the Supreme Court for review of the Second Circuit Court¹³⁵ and the Fourth Circuit Court holdings that the plaintiffs had standing.¹³⁶ On October 13, 2020 the Supreme Court denied certiorari in the *Richard Blumenthal, et. al. v. Donald Trump*¹³⁷ effectively ending the attempt of members of Congress to enforce the emoluments clause in the courts. On January 25, 2021 the Supreme Court granted certiorari in both the *Trump v. District of Columbia* and *Trump v. Citizens for Responsibility and Ethics in Washington* cases with

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

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

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

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

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

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

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

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

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

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

orders that the judgments of the United States Court of Appeals for the Second and Fourth Circuit were vacated and the cases remanded with directions to dismiss the cases as moot¹³⁸ affirming the arguments submitted by District of Columbia and CREWS that the petitions of certiorari should not be granted due to the fact that Donald Trump lost the November 2020 presidential election and would not be president on January 20, 2021.¹³⁹ Although the question of whether the plaintiffs had standing to enforce the emoluments clause was not finally settled by the Supreme Court, in two of the three cases standing was affirmed,¹⁴⁰ and two courts had formally held that the emoluments clause applies to the financial activities of President Trump.¹⁴¹

138 See *Supreme Court Orders*, at 2 (January 25, 2021),

https://www.supremecourt.gov/orders/courtorders/012521zor_3f14.pdf.

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

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

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

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

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

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

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

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

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

chooses to permit an exception. The Constitution of the United States has left with Congress the exclusive authority to permit the acceptance of presents from foreign Governments by persons holding Offices under the United States. And the President may not accept any emolument until Congress votes to give its consent.

The Clause was intended by the Framers to guard against corruption and foreign influence. Historically, Presidents have complied with the Clause by either seeking and obtaining congressional consent prior to accepting foreign presents or emoluments, or by requesting an opinion from the Executive or Legislative Branch's advisory office as to whether the Clause applies.

Modern Presidents, except for President Trump, have sought advice from the Department of Justice Office of Legal Counsel ("OLC") prior to accepting potentially covered emoluments. For example, President Kennedy requested an opinion on whether the offer of an "honorary Irish citizenship" would fall within the scope of the Clause. And prior to his acceptance of the Nobel Peace Prize in 2009, President Obama requested an opinion from OLC as to whether accepting the prize would conflict with the Clause.

Since the Clause prohibits the President from accepting a prohibited foreign emolument unless Congress votes to consent, the Constitution gives each individual Member of Congress a right to vote before the President accepts. That Congress acts as "the body as a whole" in providing or denying consent does not alter each Member's constitutional right to vote before the President accepts a prohibited foreign emolument because the body can give its consent only through a majority vote of its individual members.

Accordingly, the Court finds that plaintiffs have standing to sue the President for allegedly violating the Foreign Emoluments Clause.

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

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

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

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

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

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

1. Whether the president is a “Person holding any Office of Profit or Trust under [the United States].”
2. Whether profits, fees, or payments from his hotels or other financial business patronized by foreign diplomats or governments are “Emolument[s] . . . from any King, Prince, or foreign State.”
3. Whether profits, fees, or payments from his hotels of other business patronized by officials from various states within the United States is receiving “any other Emolument from the United States, or any of them.”

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

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

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

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

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

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

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

As a matter of general principle, anyone exercising law enforcement powers on behalf of the United States must be viewed as holding an office of trust under the Emoluments Clause. Federal law enforcement agents, by the nature of their office, are frequently granted an array of powers that are denied to the private citizen; in turn, citizens look to such officers to perform a host of dangerous but necessary tasks to the best of their ability and with undivided loyalty to the United States.

These same characteristics of office—the reposing of trust, the importance of the task performed by those who hold the office, the necessity for undivided loyalty—have been cited in other contexts in support of a determination that an office is an “office of profit or trust” under the United States for purposes of the Emoluments Clause. Moreover, as the text of the Emoluments Clause suggests, one can hold an “office of trust” for purposes of the Emoluments Clause even if the office entails no compensation. 15 Op. Att’y Gen. 187, 188 (1877) (members of Centennial Commission who receive no compensation may nonetheless hold “offices of trust” under the Emoluments Clause). Accordingly, those who possess federal law enforcement powers, whether paid or unpaid, hold offices of trust under the United States.¹⁴⁶

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

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

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

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

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

[W]e have consistently concluded that a purely advisory position is neither a “civil Office under the Authority of the United States” nor an “Office under the United States,” because it is not an “office” at all. To be an “office,” a position must at least involve some exercise of governmental authority, and an advisory position does not.¹⁴⁹

. . . .

The legal definitions of a public office have been many and various. The idea seems to prevail that it is an employment to exercise some delegated part of the sovereign power; and the Supreme Court appears to attach importance to the ideas of ‘tenure, duration, emolument, and duties,’ and suggests that the last should be continuing or permanent, not occasional or temporary.¹⁵⁰

. . . .

Finally, the uncontradicted weight of judicial authority confirms that a purely advisory position is not a public “office.” These authorities list several factors relevant to determining whether a position amounts to a public “office,” including whether it involves the delegation of sovereign functions, whether it is created by law . . . , whether its occupant is required to take an oath, whether a salary or fee is attached, whether its duties are continuing and permanent, the tenure of its occupant, and the method of appointment. But they likewise make clear that the sine qua non of a public “office” is the exercise of some portion of delegated sovereign authority.¹⁵¹

. . . .

[A]n individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. . . . *The most important characteristic . . . the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public.*¹⁵²

. . . .

[W]e have not found a single case in which an individual was deemed to hold such an “office,” including one “of profit or trust,” where he was invested with no delegated sovereign authority, significant or otherwise.¹⁵³

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

149 *Id.* at 64.

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

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

152 *Id.* at 68.

153 *Id.* at 69.

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

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

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

154 *Id.* at 68.

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

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

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

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

159 *Id.* at 51.

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

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

Thus, if asked¹⁶⁰ and if the OLC affirmed its jurisprudence, the OLC would advise the White House that the President Trump would be in violation of the foreign emoluments clause if he received payments, fees, profits from business ventures with foreign governments through his national and international businesses without approval from Congress.¹⁶¹ The OLC would conclude that the purpose of the clause was to prevent corruption and the possibility of corruption and that broader purpose defines the meaning of the

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

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

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

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

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

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

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

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

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

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

164 U.S. CONST. art. II, § 1, cl. 7.

subject to the state changing or in any way affecting his receipt of them.¹⁶⁵ Although it is clearly established that the clause applies to fees, payments, profits¹⁶⁶ from states and their instrumentalities or from the United States it does not apply to such emoluments from private parties.¹⁶⁷ The OLC concluded in the *Nobel Prize*¹⁶⁸ and in the *Goteborg Award*¹⁶⁹ opinions that the

165 Simms, *supra* note 73.

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

167 *See id.* at 899 (“In any event, it must be remembered that the Emoluments Clauses only prohibit profiting from transactions with foreign, the federal, or domestic *governments*; they do not prohibit all private foreign or domestic transactions on the part of a federal official.”). The court concluded, Executive branch precedent and practice have clearly and consistently held, apart from *de minimis* instances, that both Emoluments Clauses prohibit Presidents from receiving any profit, gain, or advantage from foreign, the federal, or domestic governments, except in the case of the Foreign Clause, where Congress approves. Based on precedent from the OLC and Comptroller General, there would be an exception, at least under the Domestic Emoluments Clause, where the thing of value received by the federal office holder, after the fashion of the Reagan-California pension precedent, was fully vested and indefeasible before the federal official became a federal official, the rationale being that the benefit would lack any potential to influence the federal office-holder in his decision-making.

Id. at 904.

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Although courts and presidential practice and tradition as well as the letter of the law all have a role in defending the principle that no man is above the law and all are subject to it; this maxim must also be defended by the people themselves; as James Garfield warned during the centennial celebration of the writing of the Declaration of Independence¹⁷⁸ before he was elected president.

[T]he people are responsible for the character of their [Government]. . . . If it be intelligent, brave, and pure, it is because the people demand those high qualities. . . .

The most alarming feature of our situation is the fact that so many citizens . . . allow the less intelligent and the more selfish and corrupt members of the community to make the slates and “run the machine” of politics. They wait until the machine has done its work, and then, in surprise and horror at the ignorance and corruption in public office, sigh for the return of that mythical period called the “better and purer days of the republic.” It is precisely this neglect of the first steps in our political processes that has made possible the worst evils of our system.

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

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

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

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

of the Executive Branch, but this duty to obey neither constitutes an official executive prerogative nor impedes any official executive function.

Moreover, even if obeying the law were somehow an official executive duty, such a duty would not be “discretionary,” but rather a “ministerial” act.¹⁷⁹

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

This article has asserted that if the OLC had been consulted, it would rule that the clauses apply to financial activities of President Trump and his accepting of payments from foreign governments for the use of his facilities is a foreign emolument and payments by the federal government or states for use of his facilities is a domestic emolument. The purpose of the payments is not the concern of the clauses, it is the receipt of enrichment and the threat or perception of corruption that is the point. As President Roosevelt made clear, “Every man must be guaranteed his liberty and his right to do as he likes with his property or his labor, so long as he does not infringe the rights of others.”¹⁸⁰ But as president, the holder of the office must hold fidelity to the constitution and the laws and the traditions of the office¹⁸¹ that govern actions while in that office even when they infringe on the holder’s rights as businessman. As the *en banc* Fourth Circuit made clear regarding the purpose and applicability of the emoluments clauses of the Constitution, such

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

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

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

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

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

But neither of the clauses apply if the payments or profits are sourced from private entities, foreign or domestic. Exercising its role¹⁸³ as the neutral arbiter and defender of the law within the executive branch,¹⁸⁴ the OLC would have opined that any financial gain secured by President Trump that was from private hands would be lawful and not subject to congressional approval under the foreign emoluments clause or prohibited outright by the domestic clause because both only focus on government sourced enrichment, not private enrichment.

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

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

