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# The Emoluments Clauses and the Presidency: Background and Recent Developments

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## The Emoluments Clauses and the Presidency: Background and Recent Developments

Recent litigation involving the President has raised legal issues concerning formerly obscure constitutional provisions that prohibit the acceptance or receipt of “emoluments” in certain circumstances. First, the Foreign Emoluments Clause (Article I, Section 9, Clause 8 of the Constitution) prohibits any person “holding any Office of Profit or Trust under” the United States from accepting “any present, Emolument, Office, or Title, of any kind whatever” from a foreign government unless Congress consents. Second, the Domestic Emoluments Clause (Article II, Section 1, Clause 7) prohibits the President from receiving “any other Emolument [beyond a fixed salary] from the United States, or any of them.” These two provisions (collectively, the Emoluments Clauses) have distinct, but related, purposes. The purpose of the Foreign Emoluments Clause is to prevent corruption and limit foreign influence on federal officers. The Clause grew out of the Framers’ experience with the European custom of gift-giving to foreign diplomats, which the Articles of Confederation prohibited. The purpose of the Domestic Emoluments Clause is to preserve the President’s independence by preventing the legislature and the states from exerting influence over him “by appealing to his avarice.”

An important threshold issue in examining the Emoluments Clauses is determining who is subject to their terms. The scope of the Domestic Emoluments Clause is clear: it applies to “[t]he President.” The scope of the Foreign Emoluments Clause is less clear. By its terms, the Clause applies to any person holding an “Office of Profit or Trust under” the United States. The prevailing view is that this language reaches only federal, and not state, officeholders. According to the Department of Justice’s Office of Legal Counsel (OLC), which has a developed body of opinions on the Foreign Emoluments Clause, offices “of profit” include those that receive a salary, while offices “of trust” require discretion, experience, and skill. There is some disagreement over whether elected federal officers, such as the President, are subject to the Foreign Emoluments Clause. Some legal scholars have argued that, as a matter of original public meaning, the Foreign Emoluments Clause reaches only appointed officers (and not elected officials). Other legal scholars dispute that argument, however, and OLC has presumed that the Foreign Emoluments Clause applies to the President. A recent district court opinion on this issue came to the same conclusion.

Another key disputed issue over the scope of the Emoluments Clauses is what constitutes an “emolument.” This question has divided legal scholars, and federal courts have only recently addressed the issue. Debate has largely centered on whether the Emoluments Clauses restrict private, arm’s-length market transactions between covered officials and governments, or whether the Clauses are limited to office- or employment-based compensation. For its part, OLC has at times appeared to adopt a fact-specific, functional view of the Clauses, focusing on the purpose and potential effect of the specific payments or benefits at issue as they relate to the Clauses’ goals of limiting influence on the President and federal officers. The only two courts to decide the issue adopted a broad definition of “emolument” as reaching any benefit, gain, or advantage of more than *de minimis* value, but those decisions are not final.

Courts are divided over whether the Emoluments Clauses may be enforced through civil litigation. Among other things, the doctrine of standing may present a significant limitation on the ability of public officials or private parties to seek judicial enforcement of the Emoluments Clauses. Standing, grounded in Article III of the Constitution, requires a plaintiff to identify a personal injury (known as an “injury-in-fact”) that is actual or imminent, concrete, and particularized. The injury must also be “fairly traceable” to allegedly unlawful conduct of the defendant and “likely to be redressed by the requested relief.” Different plaintiffs in ongoing Emoluments Clause cases have relied on various theories to support standing, with mixed results. States and private parties, including business competitors to an office holder, have asserted injuries in the form of increased competition and loss of business from the alleged constitutional violations. Some Members of Congress have relied on the alleged deprivation of their opportunity to vote on the acceptance of emoluments under the Foreign Emoluments Clause to support their standing to sue. The lower courts have reached different conclusions on these standing issues, and the Supreme Court has yet to weigh in on the matter. If the courts lack jurisdiction to enforce the Emoluments Clauses, the political process would be the remaining avenue to enforce the provisions, such as through legislation or political pressure. The adequacy of those options is, however, disputed.

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The Constitution contains three provisions that mention the term “emolument”:

1. **The Foreign Emoluments Clause.** Article I, Section 9, Clause 8 provides that “no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”;<sup>1</sup>
2. **The Domestic Emoluments Clause.** Article II, Section 1, Clause 7 provides that “[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them”;<sup>2</sup> and
3. **The Ineligibility Clause.** Article I, Section 6, Clause 2 provides (among other things) that no Member of Congress shall “be appointed” during his or her term “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[.]”<sup>3</sup>

The first two of these Clauses are the focus of this report.<sup>4</sup> For most of their history, the Foreign and Domestic Emoluments Clauses (collectively, the Emoluments Clauses or the Clauses) were little discussed and largely unexamined by the courts.<sup>5</sup> Recent litigation involving the President, however, has led to multiple federal court decisions more fully addressing the Clauses’ scope and application.<sup>6</sup>

This report accordingly provides an overview of the Emoluments Clauses as they relate to the President, focusing on the legal issues that have been central to the recent litigation. More specifically, this report discusses (1) the history and purpose of the Clauses; (2) whether the President is a person holding an “Office of Profit or Trust under [the United States]” for purposes of the Foreign Emoluments Clause; (3) the scope of the Emoluments Clauses, focusing

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

<sup>2</sup> *Id.* art. II, § 1, cl. 7.

<sup>3</sup> *Id.* art. I, § 6, cl. 2. This provision is sometimes referred to by other names, such as the “Legislative Emoluments Clause.” *E.g.*, Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 658 (2017).

<sup>4</sup> The Ineligibility Clause is not at issue in ongoing litigation involving the President and is not further discussed in this report except as it relates to interpretation of the other Clauses.

<sup>5</sup> See Julie Bykovicz & Mark Sherman, *Why Conflict of Interest Rules Apply Differently to the President*, PBS NEWS HOUR (Jan. 9, 2016), <https://www.pbs.org/newshour/politics/conflict-interest-rules-apply-differently-president> (“Arthur Hellman, an ethicist at the University of Pittsburgh, said he does not believe any U.S. court, much less the Supreme Court, has ever interpreted the emoluments clause.”). Prior to the court cases discussed in this report, a few judicial decisions briefly discussed the Foreign Emoluments Clause without extensively analyzing its scope. *E.g.*, *U.S. ex rel. New v. Rumsfeld*, 350 F. Supp. 2d 80, 101-02 (D.D.C. 2004) (rejecting argument that order to wear U.N. insignia on uniform amounted to Foreign Emoluments Clause violation and noting apparent lack of “Supreme Court precedent defining the scope and application of the clause”), *aff’d*, 448 F.3d 403, 410 (D.C. Cir. 2006) (summarily affirming).

<sup>6</sup> See generally *In re Trump*, 928 F.3d 360 (4th Cir. 2019); *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131 (2d Cir. 2019); *Blumenthal v. Trump*, 382 F. Supp. 3d 77 (D.D.C. 2019); *Blumenthal v. Trump*, 373 F. Supp. 3d 191 (D.D.C. 2019); *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 878 (D. Md. 2018); *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018); *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018); *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017). Many of these decisions have been reversed or vacated on appeal, or are currently being reviewed on appeal. See *infra* “Enforcement of the Clauses”; see generally CRS In Focus IF11086, *The Emoluments Clauses of the U.S. Constitution*, by Kevin J. Hickey and Michael A. Foster (summarizing current posture of these cases).

specifically on disputes over the breadth of the term “emolument”; and (4) how the Clauses may be enforced.

## History and Purpose of the Emoluments Clauses

### Founding Era

#### Foreign Emoluments Clause

The Foreign Emoluments Clause’s basic purpose is to prevent corruption and limit foreign influence on federal officers. At the Constitutional Convention, Charles Pinckney of South Carolina introduced the language that became the Foreign Emoluments Clause based on “the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence.”<sup>7</sup> The Convention approved the Clause unanimously without noted debate.<sup>8</sup> During the ratification debates, Edmund Randolph of Virginia—a key figure at the Convention—explained that the Foreign Emoluments Clause was intended to “prevent corruption” by “prohibit[ing] any one in office from receiving or holding any emoluments from foreign states.”<sup>9</sup>

The Clause reflected the Framers’ experience with the then-customary European practice of giving gifts to foreign diplomats.<sup>10</sup> Following the example of the Dutch Republic, which prohibited its ministers from receiving foreign gifts in 1651,<sup>11</sup> the Articles of Confederation provided that “any person holding any office of profit or trust under the United States, or any of them” shall not “accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.”<sup>12</sup> The Foreign Emoluments Clause largely tracks this language from the Articles, although there are some differences.<sup>13</sup>

During the Articles period, American diplomats struggled with how to balance their legal obligations and desire to avoid the appearance of corruption, against prevailing European norms and the diplomats’ wish to not offend their host country.<sup>14</sup> A well-known example from this

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<sup>7</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Madison’s notes).

<sup>8</sup> *Id.*

<sup>9</sup> See 3 FARRAND’S RECORDS 327; accord JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 215-16 (1st ed. 1833) (“[The Foreign Emoluments Clause] is founded in a just jealousy of foreign influence of every sort.”)

<sup>10</sup> See generally Deborah Samuel Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & POL’Y 63, 69-72 (2018); Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. 1, 37, 43-45 (2017); Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U.L. REV. COLLOQUY 30, 33-35 (2012).

<sup>11</sup> See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 20-21 (2014) (citing 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 579 (1906)).

<sup>12</sup> ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

<sup>13</sup> Two differences are notable. First, unlike the corresponding provision in the Articles, the Foreign Emoluments Clause expressly provides that Congress may consent to a federal official’s receipt of emoluments. See U.S. CONST. art. I, § 9, cl. 8. Second, the Articles expressly reached *state* officeholders as well as federal ones, while the Foreign Emoluments Clause does not. See ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1. See also Natelson, *supra* note 10, at 37-38 (discussing these differences); Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 399, 405 (2015) (same).

<sup>14</sup> See generally TEACHOUT, *supra* note 11, 20-26; Natelson, *supra* note 10, at 43-45.

period, which appears to have influenced the Framers of the Emoluments Clause,<sup>15</sup> involved the King of France’s gift of an opulent snuff box to Benjamin Franklin.<sup>16</sup> Concerned that receipt of this gift would be perceived as corrupting and violate the Articles of Confederation, Franklin sought (and received) congressional approval to keep the gift.<sup>17</sup> Following this precedent, the Foreign Emoluments Clause prohibits federal officers from accepting foreign presents, offices, titles, or emoluments, unless Congress consents.<sup>18</sup>

## Domestic Emoluments Clause

The Domestic Emoluments Clause’s purpose is to preserve the President’s independence from Congress and state governments.<sup>19</sup> To accomplish this end, the Clause contains two key provisions. First, it provides that the President shall receive a compensation for his services, which cannot be increased or decreased during his term,<sup>20</sup> thus preventing Congress from using its control over the President’s salary to exert influence over him. To preserve presidential independence further, the Clause provides that, apart from this fixed salary, the President shall not receive “any other Emolument” from the United States or any state government.<sup>21</sup> In light of its purpose, the Domestic Emoluments Clause—unlike the Foreign Emoluments Clause—does not permit Congress to assent to the receipt of otherwise prohibited emoluments from the state or federal governments.

The Domestic Emoluments Clause, which drew upon similar provisions in state constitutions,<sup>22</sup> received little noted debate at the Constitutional Convention.<sup>23</sup> Its meaning, however, was

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<sup>15</sup> See 3 FARRAND’S RECORDS 327 (statement of Edmund Randolph) (“An accident which actually happened, operated in producing the [Foreign Emoluments Clause]. A box was presented to our ambassador by the king of [France]. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states. . . . [I]f at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence . . . .”). It is unclear whether Randolph was referring to the snuff box gifted to Franklin, or a similar gift made to Arthur Lee, an American envoy to France during this same period. See Teachout, *supra* note 10, at 35.

<sup>16</sup> See TEACHOUT, *supra* note 11, at 25-26.

<sup>17</sup> See *id.*; Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 16 n.4 (1994).

<sup>18</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>19</sup> See generally THE FEDERALIST NO. 73 (Alexander Hamilton).

<sup>20</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., MASS. CONST. of 1780, pt. II, ch. II, § 1, art. XIII (“As the public good requires that the governor should not be under the undue influence . . . it is necessary that he should have an honorable stated salary, of a fixed and permanent value . . . .”); MD. CONST. of 1776, art. XXXII (“That no person ought to hold, at the same time, more shall one office of profit, nor ought any person in public trust, to receive any present from any foreign prince or state, or from the United States, or any of them, without the approbation of this State.”); see generally Brianne J. Gorod et al., *The Domestic Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, CONST. ACCOUNTABILITY CTR. (2017), at 6-7, [https://www.theusconstitution.org/wp-content/uploads/2017/07/20170726\\_White\\_Paper\\_Domestic\\_Emoluments\\_Clause.pdf](https://www.theusconstitution.org/wp-content/uploads/2017/07/20170726_White_Paper_Domestic_Emoluments_Clause.pdf) (discussing state constitutional precedents for the Domestic Emoluments Clause); Natelson, *supra* note 10, at 24-27 (same).

<sup>23</sup> See Robert J. Delahunty, *Compensation*, THE HERITAGE GUIDE TO THE CONSTITUTION (last accessed Sept. 13, 2019), <https://www.heritage.org/constitution/#!/articles/2/essays/84/compensation> (“The Constitutional Convention hardly debated [the Domestic Emoluments Clause].”). Early in the Constitutional Convention, Benjamin Franklin proposed that the President should receive no compensation at all; this motion was politely postponed “with great respect, but rather for the author of it than from any apparent conviction of its expediency or practicability.” 1 FARRAND’S RECORDS 81-85 (Madison’s notes). The Convention unanimously agreed to the fixed salary provision for the President on July 20, 1787. 2 FARRAND’S RECORDS 69 (Madison’s notes). On September 15, 1787, Franklin and John Rutledge moved to

elucidated by Alexander Hamilton in *The Federalist No. 73*. Hamilton wrote that the Domestic Emoluments Clause was designed to isolate the President from potentially corrupting congressional influence: because the President’s salary is fixed “once for all” each term, the legislature “can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice.”<sup>24</sup> Similarly, Hamilton explained that because “[n]either the Union, nor any of its members, will be at liberty to give . . . any other emolument,” the President will “have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.”<sup>25</sup> Other Framers echoed this sentiment during the ratification debates.<sup>26</sup>

## Nineteenth and Twentieth Century Practice

The Foreign Emoluments Clause provides a role for Congress in determining the propriety of foreign emoluments, in that receipt of an emolument otherwise prohibited by the Clause is permitted with the consent of Congress.<sup>27</sup> Under this authority, Congress has in the past provided consent to the receipt of particular presents, emoluments, and decorations through public or private bills,<sup>28</sup> or by enacting general rules governing the receipt of gifts by federal officers from foreign governments.<sup>29</sup> For example, in 1966, Congress enacted the Foreign Gifts and Decorations Act, which provided general congressional consent for foreign gifts of minimal value, as well as conditional authorization for acceptance of gifts on behalf of the United States in some cases.<sup>30</sup>

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add the prohibition that the President should not receive “any other emolument” from the federal or state governments, which was approved by a 7-4 vote without noted debate. 2 FARRAND’S RECORDS 626 (Madison’s notes); *see also* Natelson, *supra* note 10, at 36 (“Although the [emoluments] ban was added to the [presidential] compensation feature without debate, the divided vote (7-4) suggests competing values were at stake.”).

<sup>24</sup> THE FEDERALIST NO. 73 (Alexander Hamilton).

<sup>25</sup> *Id.*

<sup>26</sup> *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES] (statement of James Wilson) (“[The Domestic Emoluments Clause was designed] to secure the President from any dependence upon the legislature as to his salary.”).

<sup>27</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>28</sup> *See generally* S. REP. NO. 89-1160, at 1-2 (1966) (“In the past, the approval of Congress, as required by [the Foreign Emoluments Clause], has taken the form of public or private bills, authorizing an individual or group of individuals to accept decorations or gifts.”).

<sup>29</sup> *See, e.g.*, Act of Jan. 31, 1881, ch. 32 § 3, 21 Stat. 603, 603-04 (1881) (authorizing certain named persons to accept presents from foreign governments, and requiring that “hereafter, any presents, 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”).

<sup>30</sup> *See* Pub. L. No. 89-673, 80 Stat. 592 (1966) (codified as amended at 5 U.S.C. § 7342).

Several Presidents in the 19th century—such as Andrew Jackson,<sup>31</sup> Martin Van Buren,<sup>32</sup> John Tyler,<sup>33</sup> and Benjamin Harrison<sup>34</sup>—notified Congress of foreign presents that they had received, and either placed the gifts at its disposal or obtained consent to their receipt. Other 19th century Presidents treated presents that they received as “gifts to the United States, rather than as personal gifts.”<sup>35</sup> Thus, in one instance, President Lincoln accepted a foreign gift on behalf of the United States and then deposited it with the Department of State.<sup>36</sup>

In the 20th century, some Presidents have sought the advice of the Department of Justice’s Office of Legal Counsel (OLC)<sup>37</sup> on whether acceptance of particular honors or benefits would violate the Emoluments Clauses. Three such OLC opinions addressed whether (1) President Kennedy’s acceptance of honorary Irish citizenship would violate the Foreign Emoluments Clause,<sup>38</sup> (2) President Reagan’s receipt of retirement benefits from the State of California would violate the Domestic Emoluments Clause,<sup>39</sup> and (3) President Obama’s acceptance of the Nobel Peace Prize would violate the Foreign Emoluments Clause.<sup>40</sup>

## Persons Subject to the Emoluments Clauses

An important threshold issue in examining the Emoluments Clauses is determining who is subject to their terms. The scope of the Domestic Emoluments Clause is clear: it applies to “[t]he President.”<sup>41</sup> The Clause prohibits the President from receiving emoluments from state or federal governments, aside from his fixed federal salary. The Foreign Emoluments Clause applies to any person holding an “Office of Profit or Trust under [the United States].”<sup>42</sup> OLC, which has developed a body of opinions on the Emoluments Clauses,<sup>43</sup> has opined that the President

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<sup>31</sup> A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1902, at 466-67 (James Richardson, ed., 1907) (January 19, 1830 letter from President Jackson to the Senate and House of Representatives, stating that the Constitution prohibited his acceptance of a medal from Simon Bolivar and therefore placing the medal “at disposal of Congress”).

<sup>32</sup> S.J. Res. 4, 26th Cong., 5 Stat. 409 (1840) (joint resolution of Congress authorizing President Van Buren to dispose of presents given to him by the Imam of Muscat and deposit the proceeds in the Treasury).

<sup>33</sup> S. JOURNAL, 28th Cong., 2d Session 254 (1844) (authorizing sale of two horses presented to the United States by the Imam of Muscat); *see also* Teachout, *supra* note 10, at 42 (discussing the Van Buren and Tyler precedents); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. L. REV. COLLOQUY 180, 190 (2013) (same).

<sup>34</sup> Pub. Res. 54-39, 29 Stat. 759 (1896) (congressional resolution authorizing delivery of Brazilian and Spanish medals to former President Benjamin Harrison).

<sup>35</sup> *See* Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 281 (1963).

<sup>36</sup> *Id.*

<sup>37</sup> OLC is an office within the U.S. Department of Justice that provides legal advice to the President and executive branch agencies, including formal and informal opinions on legal matters. 28 C.F.R. § 0.25(a).

<sup>38</sup> *Id.* at 278 (concluding that acceptance of even “honorary” Irish citizenship would violate “the spirit, if not the letter” of the Foreign Emoluments Clause).

<sup>39</sup> President Reagan’s Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 189-92 (1981) (concluding that retirement benefits are not “emoluments” under the Domestic Emoluments Clause because they “are neither gifts nor compensation for services” and would not subject the President to improper influence).

<sup>40</sup> Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 4, 7-9 (2009) (concluding that acceptance of the Nobel Peace Prize does not violate the Foreign Emoluments Clause because it is awarded by a private organization, not a foreign government).

<sup>41</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>42</sup> *Id.* art. I, § 9, cl. 8.

<sup>43</sup> *See generally* Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC’s Little-Known*

“surely” holds an “Office of Profit or Trust” under the Constitution.<sup>44</sup> OLC opinions are generally considered binding within the executive branch.<sup>45</sup>

There has been significant academic debate about whether OLC’s conclusion comports with the original public meaning of the Foreign Emoluments Clause.<sup>46</sup> Some legal scholars have argued that the Foreign Emoluments Clause does not apply to *elected* officials such as the President, but only to certain appointed federal officers.<sup>47</sup> Other scholars support OLC’s view that the President holds an office of profit and trust under the United States under the original meaning of the Foreign Emoluments Clause.<sup>48</sup>

In addition to textual and structural arguments, these scholars debate the significance of Founding-era historical evidence. To support the view that the Foreign Emoluments Clause does not apply to the President, academics have observed that, among other things, (1) a 1792 list produced by Alexander Hamilton of “every person holding any civil office or employment under the United States” did not include elected officials such as the President and Vice President,<sup>49</sup> (2) George Washington accepted gifts from the Marquis de Lafayette and the French Ambassador while President without seeking congressional approval,<sup>50</sup> and (3) Thomas Jefferson similarly received and accepted diplomatic gifts from Indian tribes and foreign nations, such as a bust of Czar Alexander I from the Russian government, without seeking congressional approval.<sup>51</sup> On the other side of the debate, scholars have observed that, among other things, (1) during Virginia’s ratification debates, Edmund Randolph directly stated that the Foreign Emoluments Clause applies to the President,<sup>52</sup> (2) George Mason, another Framers, articulated a similar view in those

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*Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1 (2006); Sills, *supra* note 10, at 75-87 (reviewing OLC’s interpretation of the Foreign Emoluments Clause).

<sup>44</sup> See *Nobel Peace Prize*, 33 Op. O.L.C. at 4; see also *Honorary Irish Citizenship*, 1 Op. O.L.C. Supp. at 278 (assuming, without definitively stating, that the Foreign Emoluments Clause applies to the President).

<sup>45</sup> See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1711 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2011)) (“OLC’s legal opinions are treated as authoritative and binding within the executive branch unless ‘overruled’ by the Attorney General or the President.”); Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> (“OLC’s core function, pursuant to the Attorney General’s delegation, is to provide controlling advice to Executive Branch officials on questions of law.”).

<sup>46</sup> See, e.g., Natelson, *supra* note 10, at 12 (describing this issue as one of “sharp disagreement”); compare Tillman, *supra* note 33, at 185-95 (arguing that the Foreign Emoluments Clause does not apply to elected federal officials), with Teachout, *supra* note 10, at 39-48 (disputing Tillman’s view).

<sup>47</sup> See, e.g., Tillman, *supra* note 33, at 185; Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 1: The Constitution’s Taxonomy of Officers and Offices*, WASH. POST: THE VOLOKH CONSPIRACY (Sept. 25, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/25/the-emoluments-clauses-litigation-part-1-the-constitutions-taxonomy-of-officers-and-offices/> (“[T]he text and history of the Constitution, and post-ratification practice during the early republic, strongly support the counterintuitive view: The president does not hold an ‘Office . . . under the United States.’”).

<sup>48</sup> See, e.g., Teachout, *supra* note 10, at 48; Erik M. Jensen, *The Foreign Emoluments Clause*, 10 ELON L. REV. 73, 86-93 (2018).

<sup>49</sup> See Tillman, *supra* note 33, at 186-88.

<sup>50</sup> See *id.* at 188-90.

<sup>51</sup> See Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 2: The Practices of the Early Presidents, the First Congress and Alexander Hamilton*, WASH. POST: THE VOLOKH CONSPIRACY (SEPT. 26, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/26/the-emoluments-clauses-litigation-part-2-the-practices-of-the-early-presidents-the-first-congress-and-alexander-hamilton/>.

<sup>52</sup> See DAVID ROBERTSON, *DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA* 345 (2d ed. 1805) (1788) (statement of Edmund Randolph), <https://archive.org/details/debatesotherproc00virg/page/345> (“There is

same debates;<sup>53</sup> and (3) Alexander Hamilton, discussing the dangers of foreign influence on republics in *The Federalist No. 22*, stated that this concern extends to a republic's elected officials.<sup>54</sup>

Beyond examining contemporaneous historical evidence of the Foreign Emoluments Clause's original public meaning, other evidence (such as text, precedent, and settled practice) is often used—at least by some jurists—to inform constitutional meaning and interpretation.<sup>55</sup> As a textual matter, both the Constitution itself<sup>56</sup> and contemporaneous sources<sup>57</sup> refer to the Presidency as an “Office.”<sup>58</sup> The President receives compensation for his service in office (that is, “Profit”) and is tasked with many important constitutional duties (that is, “Trust”).<sup>59</sup> Furthermore, as discussed earlier, historical practice from the 19th and 20th centuries could support the view that the President is subject to the Foreign Emoluments Clause.<sup>60</sup> Unlike Washington's and Jefferson's actions, several 19th century Presidents notified Congress or sought congressional approval upon receipt of gifts by foreign governments.<sup>61</sup> Finally, the common practice among recent Presidents

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another provision against the danger mentioned by the honorable member, of the president receiving emoluments from foreign powers. [citing the Emoluments Clauses]. I consider, therefore, that he is restrained from receiving any present or emoluments whatever. It is impossible to guard better against corruption.”).

<sup>53</sup> 3 ELLIOT'S DEBATES 484-85 (statement of George Mason) (“[The President] may, by consent of Congress, receive a stated pension from European potentates. . . . It will, moreover, be difficult to know whether he receives emoluments from foreign powers or not.”).

<sup>54</sup> See THE FEDERALIST NO. 22 (Alexander Hamilton) (describing the danger of foreign influence on “persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power”) (emphasis added); accord Sills, *supra* note 10, at 77 (interpreting Hamilton's statement as supporting the applicability of the Foreign Emoluments Clause to elected officials).

<sup>55</sup> See generally CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill, at 1-4, 5-7, 10-15, 22-25.

<sup>56</sup> U.S. CONST. art. II, § 1, cl. 1 (“[The President] shall hold his Office during the Term of four Years . . . .”); *id.* cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .”); *id.* cl. 6 (“In Case of the Removal of the President from Office . . . .”).

<sup>57</sup> See, e.g., THE FEDERALIST NO. 39 (James Madison) (“The President is to continue in office for the period of four years . . . .”); *id.* NO. 69 (Alexander Hamilton) (“The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office . . . .”).

<sup>58</sup> It should be noted that commentators who dispute that the Foreign Emoluments Clause applies to the President do not deny that the Presidency is an “office,” but argue more narrowly that the President does not hold an office *under* the United States. See *supra* note 47.

<sup>59</sup> See Sills, *supra* note 10, at 81 (“The term ‘Office of Profit’ refers to an office in which a person in office receives a salary, fee, or compensation. The term ‘Office of Trust,’ refers to offices involving ‘duties of which are particularly important’ and requiring ‘the exercise of discretion, judgment, experience and skill.’” (quoting Application of the Emoluments Clause to a Member of the President's Council on Bioethics, 29 Op. O.L.C. 55, 61-62 (2005))).

<sup>60</sup> See, e.g., Teachout, *supra* note 10, at 42; see generally NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) (“[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . . .”) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)).

<sup>61</sup> See *supra* notes 31-36 and accompanying text.

of placing their financial interests in a blind trust or its equivalent<sup>62</sup> could reflect a concern that presidential financial holdings may implicate the Foreign Emoluments Clause.<sup>63</sup>

The parties in recent litigation involving the Emoluments Clauses have not disputed that the Foreign Emoluments Clause applies to the President.<sup>64</sup> A single district court decision has reached the merits of this issue. Weighing the evidence discussed above, that court held that “the text, history, and purpose of the Foreign Emoluments Clause, as well as executive branch precedent interpreting it, overwhelmingly support the conclusion” that the Foreign Emoluments Clause applies to the President.<sup>65</sup> This case is currently on appeal before the full Fourth Circuit.<sup>66</sup>

## The Meaning of “Emolument”

A key disputed issue regarding the scope of the Emoluments Clauses is what constitutes an “emolument.”<sup>67</sup> This question has divided legal scholars and has only recently been addressed by any federal courts.

Scholars, courts, and executive branch agencies have offered several potential definitions of “emolument”:

1. **Office-related definitions.** *Black’s Law Dictionary* defines an “emolument” as an “advantage, profit, or gain received as a result of one’s employment or one’s

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<sup>62</sup> Several recent Presidents have voluntarily placed their financial interests in a blind trust or limited their investments to assets like diversified mutual funds. See Michael D. Shear & Eric Lipton, *Ethics Office Praises Donald Trump for a Move He Hasn’t Committed To*, N.Y. TIMES, Nov. 30, 2016, <https://www.nytimes.com/2016/11/30/us/politics/donald-trump-business-president-elect.html> (citing “four decades” of presidential practice); Timothy L. O’Brien, *Conflicts of Interest? President Trump’s Would Be Amazing*, BLOOMBERG, June 2, 2016, <https://www.bloomberg.com/opinion/articles/2016-06-02/donald-trump-might-make-the-white-house-a-walmart> (citing presidential “tradition” of using blind trusts between the Lyndon B. Johnson Administration and President Trump).

<sup>63</sup> See Norman L. Eisen, et al., *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS INSTITUTION 10 (Dec. 16, 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_121616\\_emoluments-clause1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf) (“[Some recent Presidents’] recognized purpose for [putting financial holdings in a blind trust] has been to avoid an array of conflicts, including with the Emoluments Clause.”).

<sup>64</sup> *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 196 n.3 (D.D.C. 2019) (“The parties do not dispute that the [Foreign Emoluments] Clause applies to the President.”), *motion to certify appeal granted*, No. CV 17-1154 (EGS), 2019 WL 3948478 (D.D.C. Aug. 21, 2019); *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 880 (D. Md. 2018) (“Although the President himself does not make the argument, as a preliminary matter one of the *Amici Curiae* suggests that the President is not covered by the Foreign Emoluments Clause.”).

<sup>65</sup> *District of Columbia*, 315 F. Supp. 3d at 883-85.

<sup>66</sup> See *In re Trump*, 928 F.3d 360, 374-79 (4th Cir. 2019) (holding that the District of Columbia and the State of Maryland lacked standing under Article III to pursue their Emoluments Clauses claims against the President), *reh’g en banc granted*, No. 18-2486, 2019 WL 5212216, at \*1 (4th Cir. Oct. 15, 2019). This report references several decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Fourth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

<sup>67</sup> The Foreign Emoluments Clause may additionally be violated by accepting without the consent of Congress a “present, . . . Office, or Title.” U.S. CONST. art. I, § 9, cl. 8. Scholarship generally has not focused as much on these aspects of the provision, however. See, e.g., Sills, *supra* note 10, at 82-83 (“There is general agreement to the meaning of the terms, ‘present,’ ‘office,’ and ‘title.’ As such, these terms will not be further discussed.”). As noted above, Congress has also consented by statute to the acceptance of certain foreign gifts (i.e., “present[s]”), including by the President, in limited circumstances. See 5 U.S.C. § 7342. The two recent court decisions addressing the substance of the Foreign Emoluments Clause in relation to the President have considered the relationship between “present” and “emolument,” as described in more detail below.

holding of office.”<sup>68</sup> Some scholars argue that this employment- or office-centric definition of the term is the definition encompassed by the Emoluments Clauses, meaning that the Clauses prohibit covered officials from receiving compensation “for the personal performance of services” as an officer or employee but do not bar “ordinary business transactions” between a covered official and government.<sup>69</sup>

2. **Any “profit, gain, advantage, or benefit.”** Others argue that the term “emolument” is broader in scope, applying to any profit, gain, advantage, or benefit.<sup>70</sup> Under this broader conception, even “ordinary, fair market value transactions” between a covered official and foreign or domestic governments would be prohibited.<sup>71</sup> Two recent district court decisions adopted this broader definition of “emolument.”<sup>72</sup>
3. **Functional or purpose-based definitions.** Both the Department of Justice’s OLC and the Comptroller General of the United States, on behalf of the Government Accountability Office (GAO),<sup>73</sup> have issued opinions on whether the acceptance of particular payments, benefits, or positions would implicate the Emoluments Clauses. These opinions have at times appeared to adopt a fact-specific, functional view of the Clauses, focusing on the purpose and potential effect of the specific payments or benefits at issue as they relate to the Clauses’ goals of limiting influence on the President and federal officers. The relevant assessment in some of these opinions has appeared to be whether the payments or benefits are intended to or could “influence . . . the recipient as an officer of the United States” under the totality of the circumstances.<sup>74</sup> At least one

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<sup>68</sup> *Emolument*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>69</sup> Grewal, *supra* note 3, at 642; *see also* Natelson, *supra* note 10, at 55 (“[T]he word ‘emolument(s)’ in the Constitution meant compensation with financial value, received by reason of public office. . . . Proceeds from unrelated market transactions were outside the scope of the term.”). Much of the scholarship has focused specifically on the meaning of “emolument” in the Foreign Emoluments Clause. However, as discussed *infra*, similar arguments have been raised regarding both the Foreign and Domestic Emoluments Clauses in the recent litigation involving the President.

<sup>70</sup> *See* John Mikhail, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 VAL. U. L. REV. 631, 666 (2019) (“When the Constitution was written, ‘emolument’ was a flexible term that generally meant ‘profit,’ ‘gain,’ ‘advantage,’ or ‘benefit.’ It was commonly used in ordinary English to refer to advantages or benefits of different types. Not only government salaries, but also payments on contracts, interest on loans, and profits from ordinary commercial transactions were all referred to as ‘emoluments.’”); Eisen, et al., *supra* note 63, at 11 (“[T]he [Foreign Emoluments] Clause unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state.”).

<sup>71</sup> Eisen, et al., *supra* note 63, at 11; *see also* OCE Report, Review No. 17-1147, at 12 (June 2, 2017), [https://ethics.house.gov/sites/ethics.house.gov/files/OCE%20Report%20and%20Findings\\_6.pdf](https://ethics.house.gov/sites/ethics.house.gov/files/OCE%20Report%20and%20Findings_6.pdf) (“[T]he House Ethics Manual unambiguously defines ‘emolument’ to include any ‘profit, gain, or compensation for services rendered.’ There is no exception or limitation under this definition in the House Ethics Manual for when the Member generates the profit from a fair market value commercial transaction.”).

<sup>72</sup> *See infra* notes 85-94 and accompanying text.

<sup>73</sup> GAO, headed by the Comptroller General, is a legislative branch agency that “carries out audit, evaluative, and investigative assignments, provides legal analyses to Congress, and issues legal decisions.” *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 900 n.37 (D. Md. 2018).

<sup>74</sup> *President Reagan’s Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 188 (1981) (citing Assistant Comptroller General Weitzel to the Attorney General, 34 Comp. Gen. 331, 335 (1955)); *see also* Emoluments Clause Questions Raised by NASA Scientist’s Proposed Consulting Arrangement with the University of New South Wales, 1986 WL 1239553 (O.L.C.) at \*2 (1986) (considering whether specific factual scenario “would raise the kind of concern (viz., the potential for ‘corruption and foreign influence’) that motivated the Framers in

commentator has asserted that the OLC and GAO opinions support a middle view that Presidents or other federal officers may receive “certain fixed benefits” without those benefits being considered emoluments so long as they are not “subject to foreign or domestic government manipulation or adjustment in connection with” the office.<sup>75</sup>

Debates over the scope of the Clauses have largely centered on their text, their history and purpose, and historical practice.<sup>76</sup> With respect to text, for instance, proponents of a broad definition emphasize the use of the word “any” in both Clauses and the phrase “any kind whatever” in the Foreign Emoluments Clause.<sup>77</sup> They also contrast those provisions with the limiting term “whereof” that links emoluments to “civil Office” in the Ineligibility Clause (the provision that limits the ability of Members of Congress to hold dual positions).<sup>78</sup> But proponents of a narrower, office- or employment-limited definition note that the word “any” in the Clauses may simply be read as extending coverage to multiple *forms* of emoluments (beyond just monetary remuneration).<sup>79</sup> They further assert that the use of “emolument” in the Ineligibility Clause is clearly tied to an office-based definition and supports applying the same definition to the other provisions.<sup>80</sup> As for the Clauses’ history and purpose, both sides point to dictionary definitions and other uses of the word (including by Framers) contemporaneous with the Constitution’s drafting to support their preferred definition.<sup>81</sup> Proponents of a broad definition

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enacting the constitutional prohibition”).

Other OLC and GAO opinions contain statements that could support either a broad or a narrower reading of the Clauses’ scope. *Compare* Authority of Foreign Law Enforcement Agents to Carry Weapons in the United States, 12 Op. O.L.C. 67, 68 (1988) (“The Emoluments Clause must be read broadly in order to fulfill [its underlying] purpose.”) *and* To the Secretary of the Air Force, 49 Comp. Gen. 819, 821 (1970) (“It seems clear from the wording of the constitutional provision that the drafters intended the prohibition to have the broadest possible scope and applicability.”), *with* Letter Opinion of the Comptroller General, B-180472 (May 9, 1974) (“‘Emolument’ has been defined as profit, gain, or compensation received for services rendered.”) *and* Authority of Foreign Law Enforcement Agents, *supra*, at 69 (“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.”).

<sup>75</sup> Jane Chong, *Reading the Office of Legal Counsel on Emoluments: Do Super-Rich Presidents Get a Pass?*, LAWFARE (July 1, 2017), <https://www.lawfareblog.com/reading-office-legal-counsel-emoluments-do-super-rich-presidents-get-pass>.

<sup>76</sup> See generally CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill, at 1-4, 5-7, 10-15, 22-25.

<sup>77</sup> Eisen, et al., *supra* note 63, at 11 (“[T]he clause, by referring to ‘any kind whatever,’ instructs that it be given a broad construction.”).

<sup>78</sup> See Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 35, *Blumenthal v. Trump*, 373 F. Supp. 3d 191 (D.D.C. 2019) (No. 17-1154).

<sup>79</sup> See Grewal, *supra* note 3, at 660-61 (maintaining that “a phrase like ‘of any kind whatever’ should not affect the threshold definition of a word that precedes it”).

<sup>80</sup> See *id.* (arguing that reading the three constitutional provisions referencing emoluments “together supports” the narrower interpretation); Memorandum of Law in Support of Defendant’s Motion to Dismiss at 28-30, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17-458) (arguing that under Domestic Emoluments Clause, allowance of presidential compensation “for his Services” and prohibition on “any other Emolument” supports narrower reading).

<sup>81</sup> One study examined English language dictionaries published from 1604 to 1806 and English legal dictionaries published from 1523 to 1792 and concluded that over 92% of the dictionaries defined “emolument” exclusively using one or more terms favored by proponents of the broad definition (i.e., “profit,” “advantage,” “gain,” or “benefit”), while only 8% of dictionaries contained a definition tied to “office or employ.” Mikhail, *supra* note 70, at 655. By contrast, another scholar focused specifically on references to emoluments in constitutional-convention and ratification-debate records and concluded that usage was mainly limited in those contexts “to emoluments by reason of public office.” Natelson, *supra* note 10, at 29, 39.

also argue that statements about the general anti-corruptive purpose of the Clauses support reading it expansively,<sup>82</sup> while proponents of an office- or employment-limited definition assert that the Clauses were the product of a “balancing of values” that included attracting candidates for federal service who may have had conflicting commercial interests.<sup>83</sup> As for the corpus of OLC and GAO opinions interpreting the Clauses, proponents of the broader and narrower definitions both cite opinions that they argue support their favored definitions.<sup>84</sup>

In 2018 and 2019, two federal district courts substantively addressed the Emoluments Clauses’ scope for the first time. Both courts concluded that the term “emolument” as used in the Clauses “is broadly defined as any profit, gain, or advantage.”<sup>85</sup> As to the Clauses’ text, the courts found significant the use of “expansive modifiers” like “any other” and “any kind whatever,”<sup>86</sup> and rejected the proposition that the term’s office-related use in the Ineligibility Clause should control its use in the other Clauses.<sup>87</sup> With respect to the Clauses’ history and purpose, the courts, while acknowledging that broader and narrower definitions of “emolument” both existed at the time of ratification,<sup>88</sup> found the weight of the historical evidence and the Clauses’ “broad anti-corruption” purpose supported the more expansive definition.<sup>89</sup> Finally, the courts viewed executive branch

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<sup>82</sup> Brief of *Amici Curiae* by Certain Legal Historians on Behalf of Plaintiffs at 14, *Blumenthal v. Trump*, 373 F. Supp. 3d 191 (D.D.C. 2019) (No. 17-1154) (arguing that a “narrow definition of ‘emolument’ limited to official services is inconsistent with the [Foreign Emoluments Clause’s] basic purposes,” which include “seek[ing] to prevent activities that have the potential to influence or corrupt the person who profits from them”).

<sup>83</sup> *E.g.*, Natelson, *supra* note 10, at 54 (“That the founders sought to encourage active members of the private sector to public service provides further support for the Constitution’s emoluments provisions applying only to those emoluments received by reason of office.”).

<sup>84</sup> Compare Marty Lederman, *How the DOJ Brief in CREW v. Trump Reveals that Donald Trump is Violating the Foreign Emoluments Clause*, TAKE CARE (June 12, 2017), <https://takecareblog.com/blog/how-the-doj-brief-in-crew-v-trump-reveals-that-donald-trump-is-violating-the-foreign-emoluments-clause> (asserting that OLC opinion concluding partner at a private law firm could not accept partnership profits derived from foreign-government clients he did not personally represent is “difficult to reconcile” with office- or employment-limited definition), with Grewal, *supra* note 3, at 641 n.10, 655 (citing, among other opinions, Emoluments Clause and World Bank, 25 Op. O.L.C. 113, 114 (2001), which itself cited other OLC opinions for the proposition that the term “emolument” covers “compensation of any sort arising out of an employment relationship with a foreign state”).

<sup>85</sup> *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 207 (D.D.C. 2019); *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 904 (D. Md. 2018) (“[T]he term ‘emolument’ in both Clauses extends to any profit, gain, or advantage, of more than *de minimis* value, received by [the President], directly or indirectly, from foreign, the federal, or domestic governments.”). As discussed *infra*, a third court considering a lawsuit involving the Clauses did not reach the interpretive question because it concluded the claims should be dismissed on standing grounds. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017). However, now that an appellate court has reversed that judgment, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131, 160 (2d Cir. 2019), the lower court may need to interpret the term “emolument.” See *infra* “Enforcement of the Clauses.”

<sup>86</sup> *District of Columbia*, 315 F. Supp. 3d at 887-88; see also *Blumenthal*, 373 F. Supp. 3d at 201.

<sup>87</sup> *Blumenthal*, 373 F. Supp. 3d at 201; *District of Columbia*, 315 F. Supp. 3d at 888. The courts instead viewed the context to support the broader view, as “when the Founders intended for an Emolument to refer to an official’s salary or payment associated with their office, they said so explicitly.” *Blumenthal*, 373 F. Supp. 3d at 201; see also *District of Columbia*, 315 F. Supp. 3d at 888. Additionally, the courts rejected the proposition that adopting a broad definition of “emolument” would make the prohibition on “present[s]” in the Foreign Emoluments Clause unnecessary, reasoning that including “present[s]” simply makes clear that gratuitous benefits are also covered. *Blumenthal*, 373 F. Supp. 3d at 201; *District of Columbia*, 315 F. Supp. 3d at 889.

<sup>88</sup> *Blumenthal*, 373 F. Supp. 3d at 201; *District of Columbia*, 315 F. Supp. 3d at 889.

<sup>89</sup> *Blumenthal*, 373 F. Supp. 3d at 202-04; *District of Columbia*, 315 F. Supp. 3d at 889-900. In support of the narrower definition, the defendant had pointed to the possible business dealings of George Washington, among other presidents, with foreign and domestic governments and to a failed constitutional amendment that would have extended the Foreign Emoluments Clause to all U.S. citizens. See, e.g., *Blumenthal*, 373 F. Supp. 3d at 202-04. The courts did not accord significant weight to this historical evidence, however, essentially viewing it as speculative. *Id.* at 204; *District of Columbia*, 315 F. Supp. 3d at 894, 899. The courts also rejected the contention that adopting the broad definition would

precedent and practice as “overwhelmingly consistent with . . . [an] expansive view of the meaning of the term ‘emolument,’”<sup>90</sup> observing that “OLC pronouncements repeatedly cite the broad purpose of the Clauses and the expansive reach of the term ‘emolument.’”<sup>91</sup>

The recent court decisions construing the Emoluments Clauses are not final, however. In fact, as discussed below, one of the decisions was reversed by a panel of the Fourth Circuit on a separate issue regarding the standing of the plaintiffs to sue,<sup>92</sup> and the full Fourth Circuit has agreed to consider the district court’s rulings.<sup>93</sup> The other decision has been certified for an immediate appeal to the District of Columbia Circuit.<sup>94</sup> Thus, the import of these decisions is uncertain.

## Enforcement of the Clauses

Separate from issues regarding the scope of the Emoluments Clauses is how the provisions’ mandates are enforced, including whether and to what extent the federal courts and Congress have a role in addressing violations of the Clauses.<sup>95</sup> A principal hurdle in recent litigation involving the President has been the doctrine of standing. Standing is a threshold limitation concerning whether the person or entity suing in federal court has a “right to make a legal claim or seek judicial enforcement of a duty or right.”<sup>96</sup> The limitation includes a constitutional component stemming from Article III of the U.S. Constitution, which limits the exercise of federal judicial power to “Cases” or “Controversies.”<sup>97</sup> The Supreme Court has interpreted this

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lead to “absurd consequences” such as mutual fund holdings being prohibited, *e.g.*, *District of Columbia*, 315 F. Supp. 3d at 899, noting that the broad definition could still account for “context” and *de minimis* exceptions. *Id.*; *Blumenthal*, 373 F. Supp. 3d at 204.

<sup>90</sup> *District of Columbia*, 315 F. Supp. 3d at 901; *see Blumenthal*, 373 F. Supp. 3d at 206 (“[A]dopting the President’s narrow definition of ‘Emolument’ would be entirely inconsistent with Executive Branch practice defining ‘Emolument’ and determining whether the Clause applies.”).

<sup>91</sup> *District of Columbia*, 315 F. Supp. 3d at 902; *see also Blumenthal*, 373 F. Supp. 3d at 206 (“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.”). The court in *District of Columbia* also cited a 2017 opinion from the House of Representatives’ Office of Congressional Ethics, which applied the Foreign Emoluments Clause to a Delegate’s receipt of profits from a rental home, noting that the House Ethics Manual defines “emolument” broadly with “no exception or limitation . . . for when the Member generates the profit from a fair market value commercial transaction.” OCE Report, Review No. 17-1147, at 12 (June 2, 2017), [https://ethics.house.gov/sites/ethics.house.gov/files/OCE%20Report%20and%20Findings\\_6.pdf](https://ethics.house.gov/sites/ethics.house.gov/files/OCE%20Report%20and%20Findings_6.pdf).

<sup>92</sup> *In re Trump*, 928 F.3d 360, 380 (4th Cir. 2019), *reh’g en banc granted*, *In re Trump*, No. 18-2486, 2019 WL 5212216, at \*1 (4th Cir. Oct. 15, 2019).

<sup>93</sup> *In re Trump*, No. 18-2486, 2019 WL 5212216, at \*1 (4th Cir. Oct. 15, 2019).

<sup>94</sup> *Blumenthal v. Trump*, No. 17-1154, 2019 WL 3948478, at \*3 (D.D.C. Aug. 21, 2019).

<sup>95</sup> There is no criminal prohibition on receiving or accepting emoluments from foreign or domestic governments that would apply to the President, though accepting something of value in return for “being influenced in the performance of [an] official act” could, theoretically, be prosecuted as bribery under federal law. *See* 18 U.S.C. § 201(b)(2) (prohibiting bribery of public officials and defining “public official” in a way that would appear to include the President); Andy Grewal, *Trump’s Obstruction of Justice Defense and the Bribery Counterargument*, NOTICE & COMMENT: YALE J. REG. (Dec. 14, 2017), <http://yalejreg.com/nc/trumps-obstruction-of-justice-defense-and-the-bribery-counterargument/> (treating 18 U.S.C. § 201 as applying to the president).

<sup>96</sup> *Standing*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>97</sup> U.S. CONST. art. III, § 2, cl. 1. Constitutional standing is a matter of a federal court’s subject-matter jurisdiction that it may raise and decide before reaching a lawsuit’s merits, whether or not the parties contest standing. *See* *United States v. Windsor*, 570 U.S. 744, 756 (2013) (referring to “the jurisdictional requirements of Article III”); *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (“When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.”).

“case-or-controversy limitation”<sup>98</sup> to require, among other things, that a litigant have “a personal stake in the outcome of the controversy” before the court.<sup>99</sup> At a minimum, a plaintiff must establish that he or she has suffered a personal injury (often called an “injury-in-fact”) that is actual or imminent and concrete and particularized.<sup>100</sup> In other words, the injury cannot be “abstract,”<sup>101</sup> must affect the plaintiff in a “personal and individual way,”<sup>102</sup> and must actually exist or at least be “certainly impending” rather than merely possible in the future.<sup>103</sup> The plaintiff must also show “a sufficient causal connection between the injury and the conduct complained of” (causation) and “a likelihood that the injury will be redressed by a favorable decision” (redressability).<sup>104</sup>

Recent lawsuits over the Emoluments Clauses have been filed in three federal courts by (1) private parties who argue they compete for business with properties related to the alleged violations of the Clauses, as well as a public interest organization (the “SDNY litigation”); (2) the State of Maryland and the District of Columbia (the “Maryland litigation”); and (3) over 200 Members of Congress (the “Congressional litigation”). Each set of plaintiffs implicate distinct legal issues and precedents related to standing. Private-party competitor plaintiffs rely on the notion of “competitor standing,”<sup>105</sup> which holds that an economic actor may have standing to challenge unlawful action that benefits a direct competitor in a way that increases competition in the relevant market.<sup>106</sup> State plaintiffs also rely on a competitor standing theory and additionally assert harms to certain sovereign and “quasi-sovereign” interests of the state related to tax revenue, diminution of their sovereign authority,<sup>107</sup> and the economic well-being of state residents in general.<sup>108</sup> Finally, Members of Congress assert standing stemming from the alleged

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<sup>98</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006).

<sup>99</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>100</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>101</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016).

<sup>102</sup> *Lujan*, 504 U.S. at 560 n.1.

<sup>103</sup> *Clapper v. Amnesty Int’l*, 568 U.S. 398, 410 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

<sup>104</sup> *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Lujan*, 504 U.S. at 560-61) (alteration and quotation marks omitted). Beyond constitutional requirements, courts have also sometimes looked to certain “prudential” considerations in assessing standing. These considerations have traditionally included (1) whether a plaintiff is asserting his or her own legal rights and interests (rather than those of a third party); (2) whether the plaintiff’s complaint falls within the “zone of interests” covered by the legal provision at issue; and (3) whether the plaintiff is merely asserting a “generalized grievance[.]” that is more appropriate for the representative branches of government to resolve. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982) (citations omitted). However, in recent years, the Supreme Court has appeared to move away from the concept of prudential standing, indicating that whether a case asserts a “generalized grievance” is part of the constitutional analysis and the “zone of interests” test (at least in the statutory context) is actually a question of whether a plaintiff “has a cause of action” because he or she “falls within the class of plaintiffs . . . authorized to sue.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3, 128 (2014).

<sup>105</sup> *See Citizens for Responsibility & Ethics in Wash. v. Trump (CREW)*, 276 F. Supp. 3d 174, 184 (S.D.N.Y. 2017) (“The Hospitality Plaintiffs attempt to rely on the competitor standing doctrine to establish injury in fact.”).

<sup>106</sup> *E.g.*, *Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993) (surveying Supreme Court cases finding standing “premised on a plaintiff’s status as a direct competitor whose position in the relevant marketplace would be affected adversely by the challenged governmental action” (emphasis omitted)). The public interest organization involved in the SDNY litigation also claimed harm in the form of diversion of its resources to combat alleged violations of the Clauses, *CREW*, 276 F. Supp. 3d at 189, but it has since dropped out of the lawsuit. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131, 138 n.1 (2d Cir. 2019).

<sup>107</sup> *See District of Columbia v. Trump*, 291 F. Supp. 3d 725, 738-42 (D. Md. 2018).

<sup>108</sup> *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (recognizing that a state may sue in certain circumstances to protect its interests in “the health and well-being—both physical and economic—of

deprivation of their constitutionally prescribed opportunity to vote on the permissibility of particular emoluments under the Foreign Emoluments Clause, which implicates a unique set of standing principles that apply specifically to legislative plaintiffs.<sup>109</sup> More broadly, regardless of the status or classification of the plaintiffs, the fact that a lawsuit involving the Emoluments Clauses seeks a court ruling on the constitutionality of the conduct of an official within another branch of the federal government means that courts must conduct an “especially rigorous” standing inquiry given underlying separation-of-powers concerns.<sup>110</sup>

Attempts by these various plaintiffs to sue for alleged violations of the Emoluments Clauses have thus far met with mixed results. With respect to private-party competitor plaintiffs, the district court in the SDNY litigation concluded that several such plaintiffs lacked standing because it was “wholly speculative” that any loss of business or increase in competition could be traced to alleged violations of the Emoluments Clauses rather than “government officials’ independent desire to patronize [the] businesses” allegedly involved in those violations based on factors such as service and location.<sup>111</sup> But the Second Circuit recently reversed the district court’s ruling regarding the competitor plaintiffs,<sup>112</sup> concluding that “a plaintiff-competitor who alleges a competitive injury caused by a defendant’s unlawful conduct that skewed the market in another competitor’s favor [has standing] notwithstanding other possible, or even likely, causes for the benefit going to the plaintiff’s competition.”<sup>113</sup>

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its residents in general”); *but cf.* *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) (“While the state, under some circumstances, may sue . . . for the protection of its citizens . . . , it is no part of its duty or power to enforce their rights in respect of their relations with the federal government.”).

<sup>109</sup> For a fulsome discussion of those principles, see CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Wilson C. Freeman and Kevin M. Lewis.

<sup>110</sup> *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (“[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”).

<sup>111</sup> *CREW*, 276 F. Supp. 3d at 186. The district court in that case also concluded the asserted injuries were unlikely to be redressed by the requested relief—an injunction preventing further Emoluments Clause violations, among other things—because it was speculative whether such relief would “lessen the competition inherent in any patron’s choice of hotel or restaurant.” *Id.* Moreover, the court applied another doctrine governing judicial review, “ripeness,” which is “designed to prevent courts from prematurely adjudicating cases,” to conclude that the plaintiffs’ Foreign Emoluments Clause claims were not ripe for review. *Id.* at 194 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1976)). In the court’s view, the “conflict between two co-equal branches of government” had “yet to mature” because Congress had not “asserted its authority and taken some sort of action with respect to” the “alleged constitutional violations of its consent power.” *Id.* at 194-95.

<sup>112</sup> The lower court had also determined that a public interest organization involved in the suit did not suffer a cognizable injury for standing purposes by having to expend its resources to combat the alleged violations of the Emoluments Clauses, reasoning that the organization’s decisions about how to expend finite resources were “entirely self-inflicted and not borne out of [the organization’s] need to remedy any particular adverse consequence or harmful effect of” the challenged conduct. *Id.* at 191 n.6. The public interest organization opted not to appeal the district court’s judgment that it lacked standing. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131, 138 3 n.1 (2d Cir. 2019).

<sup>113</sup> *CREW*, 939 F.3d at 146. The appellate court also rejected the lower court’s conclusions that the asserted injuries were unlikely to be redressed by the requested relief and that the ripeness doctrine posed a barrier to maintaining suit, reasoning that (1) standing is not defeated by the “mere possibility that customers might continue to favor” one product or service over another after a court enjoins violations of law contributing to that favoritism, and (2) deferring adjudication would not necessarily lead to further ripening but would likely simply allow the challenged conduct to continue “because of the absence of an adjudicator to tell the President whether his conduct is, or is not, permitted by the Constitution he serves.” *Id.* at 152, 160. One judge dissented, arguing that the majority applied an unbounded theory of competitor standing based on speculative assertions of harm, causation, and redressability. *Id.* at 163-70 (Walker, J., dissenting).

As for state plaintiffs, a different district court concluded in the Maryland litigation that the State of Maryland and the District of Columbia (D.C.) had standing to sue as competitors based on their interests, along with the interests of their citizens, in hotels and event spaces that competed with a hotel in D.C. related to the alleged unconstitutional conduct.<sup>114</sup> The court reasoned that, based on specific factual allegations regarding diversion of business to that hotel, the plaintiffs were “placed at a competitive disadvantage” because of violations of the Clauses that “unfairly skew[ed] the hospitality market” against them.<sup>115</sup> Yet a panel of the Fourth Circuit reversed this decision, concluding that the theory of standing hinged on the proposition that government customers were patronizing the relevant hotel “because the [h]otel distributes profits or dividends” in violation of the Clauses “rather than due to any of the [h]otel’s other characteristics.”<sup>116</sup> In the panel’s view, such a proposition required “speculation into the subjective motives of independent actors . . . not before the court, undermining a finding of causation.”<sup>117</sup> The Fourth Circuit panel’s decision has itself now been vacated, however, with the full Fourth Circuit agreeing to hear the case.<sup>118</sup>

Finally, as to Members of Congress, the district court in the Congressional litigation determined in 2018 that over 200 Members had standing to sue under the Foreign Emoluments Clause based on the deprivation of their “opportunity to exercise their constitutional right to vote on whether to consent prior to . . . acceptance of prohibited emoluments.”<sup>119</sup> Faced with Supreme Court precedent indicating that individual legislators generally lack standing to sue for institutional injuries that amount to “abstract dilution of institutional legislative power,” but may have standing when their votes on specific items “have been completely nullified,”<sup>120</sup> the district court concluded that the Members alleging violations of the Foreign Emoluments Clause fell into the latter category.<sup>121</sup> Central to the district court’s decision in the Congressional litigation was its

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<sup>114</sup> *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 757 (D. Md. 2018). Regarding the interests of citizens, the court concluded that Maryland and the District of Columbia could sue as *parens patriae*, based on their own “quasi-sovereign” interests in the economic well-being of the citizens. *Id.* at 748; see *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600-02 (1982) (describing quasi-sovereign interests and contrasting them with sovereign and “other kinds of interests that a State may pursue”). In so doing, the court distinguished cases casting “doubt on a State’s standing to assert a quasi-sovereign interest . . . against the Federal Government,” *Massachusetts v. EPA*, 549 U.S. 497, 539 (2007) (Roberts, C.J., dissenting), as involving challenges to “the operation of federal statutes” rather than asserting a state’s “rights under federal law (which it has standing to do).” *District of Columbia*, 291 F. Supp. 3d at 747 (quoting *Massachusetts*, 549 U.S. at 520 n.17).

<sup>115</sup> *District of Columbia*, 291 F. Supp. 3d at 745. The court also determined that Maryland and the District of Columbia had standing stemming from injuries to a distinct “quasi-sovereign” interest, see *Snapp & Son*, 458 U.S. at 600-02, in equal status and participation in the federal system, based on allegations that they felt “effectively ‘coerced’” to stay at or grant special concessions to the hotel allegedly involved in violations of the Clauses to “help them obtain federal favors.” *District of Columbia*, 291 F. Supp. 3d at 742.

<sup>116</sup> *In re Trump*, 928 F.3d 360, 376, 377 (4th Cir. 2019), *reh’g en banc granted*, *In re Trump*, No. 18-2486, 2019 WL 5212216, at \*1 (4th Cir. Oct. 15, 2019).

<sup>117</sup> *Id.* The appellate court further determined that the alleged injuries were not redressable because there was a likelihood that an injunction “would not cause government officials to cease patronizing” the hotel allegedly involved in violations of the Clauses, *id.* at 377, and the court dismissed alleged injuries to the plaintiffs’ other quasi-sovereign interests as “amount[ing] to little more than a general interest in having the law followed.” *Id.* at 378.

<sup>118</sup> See *In re Trump*, No. 18-2486, 2019 WL 5212216, at \*1 (4th Cir. Oct. 15, 2019); 4TH CIR. R. 35(c) (“Granting of rehearing en banc vacates the previous panel judgment and opinion[.]”).

<sup>119</sup> *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 63 (D.D.C. 2018).

<sup>120</sup> *Raines v. Byrd*, 521 U.S. 811, 823, 826 (1997); see also *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019) (observing that “individual members lack standing to assert the institutional interests of a legislature” and concluding that one house of a bicameral state legislature lacked standing where the case “[did] not concern the results of a legislative chamber’s poll or the validity of any counted or uncounted vote”).

<sup>121</sup> *Blumenthal*, 335 F. Supp. 3d at 62-64.

view that the Member-plaintiffs lacked an adequate legislative remedy for the alleged violations without court intervention.<sup>122</sup> According to the court, although Congress as a whole could pass “legislation on the emoluments issue” to consent to or reject perceived emoluments, the political process would do nothing to address the deprivation of the Members’ opportunity to give advance approval or disapproval of particular emoluments in the first instance.<sup>123</sup>

As with the court rulings on the definition of the term “emolument,” the judicial decisions on standing to enforce the Emoluments Clauses are all subject to further review by the respective circuit courts.<sup>124</sup> It is thus possible that the outcomes in some or all the opinions just described could change. If the effective split between the Second and Fourth Circuits on the viability of competitor standing theories as they relate to alleged violations of the Emoluments Clauses endures, Supreme Court review is also possible.<sup>125</sup>

Beyond standing, other doctrines may present potential roadblocks to judicial enforcement of the Clauses. For instance, though its continued vitality is questionable,<sup>126</sup> the Supreme Court has traditionally applied a “zone of interests” test as a prudential aspect of the standing inquiry, which “denies a right of review if the plaintiff’s interests are marginally related to or inconsistent with the purposes implicit in the constitutional provision” at issue.<sup>127</sup> Applying this test in the context of the Emoluments Clauses, the district court in the SDNY litigation involving private competitors concluded that such competitors fell outside the zone of interests of the Clauses, because the Emoluments Clauses stemmed from “concern with protecting the . . . government from corruption and undue influence” and were not “intended . . . to protect anyone from competition.”<sup>128</sup> Another potential barrier is the political question doctrine, a separation-of-powers-based limitation on the ability of courts to hear disputes where there is, among other things, a “textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”<sup>129</sup> In the SDNY litigation, the district court concluded that Congress’s authority to “consent to violations” of the Foreign Emoluments Clause meant that Congress, rather than the judiciary, would be “the appropriate body to determine whether” the alleged conduct “infringes on that power.”<sup>130</sup>

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<sup>122</sup> *Id.* at 66.

<sup>123</sup> *Id.* at 66-68.

<sup>124</sup> See *In re Trump*, No. 18-2486, 2019 WL 5212216, at \*1 (4th Cir. Oct. 15, 2019) (granting rehearing *en banc*); Petition for Rehearing En Banc, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131 (2d Cir. 2019) (No. 18-474); *Blumenthal v. Trump*, No. , 2019 WL 3948478, at \*3 (D.D.C. Aug. 21, 2019) (staying case and granting immediate appeal in response to D.C. Circuit order).

<sup>125</sup> See SUP. CT. R. 10 (indicating that, in deciding whether to grant certiorari, the Supreme Court may consider the fact that one federal “court of appeals has entered a decision in conflict with the decision of another [federal] court of appeals on the same important matter”).

<sup>126</sup> See *supra* note 104.

<sup>127</sup> *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 394, 399 (1987)) (alterations omitted).

<sup>128</sup> *Citizens for Responsibility & Ethics in Wash. v. Trump* (CREW), 276 F. Supp. 3d 174, 187 (S.D.N.Y. 2017).

<sup>129</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

<sup>130</sup> *CREW*, 276 F. Supp. 3d at 193.

Reversing both these rulings, however, the Second Circuit recently concluded that (1) “a plaintiff who sues to enforce a law that limits the activity of a competitor satisfies the zone of interests test even though the limiting law was not motivated by an intention to protect entities such as plaintiffs from competition,”<sup>131</sup> and (2) the judiciary’s responsibility to adjudicate alleged violations of the Constitution was not lessened by the “mere possibility that Congress *might* grant consent” to particular emoluments.<sup>132</sup> The district courts in the Maryland litigation and the Congressional litigation likewise agreed that the zone of interests test and political question doctrine did not bar those suits.<sup>133</sup> But like the other issues raised in recent litigation involving the Emoluments Clauses, further review of the application of these doctrines is possible.<sup>134</sup> Ultimate resolution of the issues is thus uncertain and will likely depend on the nature of the plaintiff involved.

If the courts lack jurisdiction to enforce the Emoluments Clauses, the political process would be the remaining avenue for enforcement. In this vein, Congress could seek to enforce the Emoluments Clauses through legislation, political pressure, or potentially impeachment and removal.<sup>135</sup> For instance, given that the Foreign Emoluments Clause explicitly provides a role for Congress in evaluating the propriety of the receipt of foreign emoluments by federal officers, Congress may be empowered to create civil or criminal remedies for violations or establish prophylactic reporting requirements through legislation.<sup>136</sup> Indeed, one bill from the 115th Congress would have required certain reports and divestiture of personal financial interests of the President posing a potential conflict of interest, among other things.<sup>137</sup> Resolutions have also been introduced in the 115th and 116th Congresses objecting to perceived violations of the Foreign Emoluments Clause, as well as calling on the President to take certain actions based on alleged potential violations.<sup>138</sup> That said, it is unclear whether legislative actions would provide an

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<sup>131</sup> *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131, 154 (2d Cir. 2019).

<sup>132</sup> *Id.* at 158-59.

<sup>133</sup> Among other things, the district court in the Congressional litigation reasoned that Congress’s interests are explicitly contemplated in the text of the Foreign Emoluments Clauses. *Blumenthal*, 373 F. Supp. 3d at 209-10. The district court in the Maryland litigation viewed the Clauses as “protect[ing] all Americans” and determined that without congressional approval of emoluments, sufficient standards existed for the judiciary to review the legality of the actions at issue. *District of Columbia*, 291 F. Supp. 3d at 755, 757.

<sup>134</sup> The President has also raised other arguments in the litigation involving the Emoluments Clauses, including that the requested relief of an injunction would impermissibly interfere with his constitutional duties and is unavailable in the Emoluments Clause context. *E.g.*, *Blumenthal*, 373 F. Supp. 3d at 208-12. Thus far, none of the courts considering the Clauses have accepted these arguments, *e.g.*, *id.*, though one appellate court has indicated that the arguments are “substantial” and another has noted that whether the Foreign Emoluments Clause supports a cause of action against the President is “unsettled.” *In re Trump*, 928 F.3d 360, 374 (4th Cir. 2019); *In re Trump*, No. 19-5196, 2019 WL 3285234, at \*1 (D.C. Cir. July 19, 2019).

<sup>135</sup> *See* U.S. CONST. art. I, § 2, cl. 5 (according the House of Representatives “sole Power” to impeach federal government officials); *id.* § 3, cl. 6 (according the Senate “the sole Power to try all Impeachments”); *id.* art. II, § 4 (providing that the President, Vice President, and other federal officers “shall be removed from Office” on impeachment and conviction); 116th Cong. (2019) (referencing Domestic and Foreign Emoluments Clauses in resolution seeking to formally authorize impeachment inquiry). This report does not assess whether a violation of the Emoluments Clauses might be deemed to constitute an impeachable offense. Beyond congressional action, political accountability to voters through the election process would also be available.

<sup>136</sup> *See* U.S. CONST. art. I, § 8, cl. 18 (enabling Congress to “make all Laws which shall be necessary and proper for carrying into Execution . . . all other [governmental] Powers”); *United States v. Comstock*, 560 U.S. 126, 134 (2010) (recognizing that Congress may employ means that are “rationally related to the implementation of a constitutionally enumerated power”); *Burroughs v. United States*, 290 U.S. 534, 548-49 (1934) (upholding reporting requirements for political contributions as necessary and proper to Congress’s power to safeguard presidential elections).

<sup>137</sup> *See* H.R. 371, 115th Cong. (2017).

<sup>138</sup> *E.g.*, H.Con.Res. 51, 116th Cong. (2019); H.J.Res 26, 115th Cong. (2017); S.Con.Res. 8, 115th Cong. (2017).

effective means to enforce the Emoluments Clauses against the President, given the possibility of veto and potential separation-of-powers objections.<sup>139</sup> As noted above, the adequacy of these legislative options has been a central issue in the Congressional litigation as it relates to Members' standing, and the issue is subject to further review at the appellate level.<sup>140</sup>

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<sup>139</sup> A 1974 opinion letter of Laurence Silberman, then the Acting Attorney General, articulated separation-of-powers concerns with applying 18 U.S.C. § 208, an existing conflict-of-interest statute, to the President, arguing that it would disable him from performing some constitutionally prescribed functions and would establish a qualification for office beyond those contained in the Constitution. Letter from Laurence H. Silberman, Acting Attorney General, U.S. DOJ, to the Hon. Howard W. Cannon, Chairman, Senate Committee on Rules and Administration, at pp. 4-5 (Sept. 20, 1974), <https://fas.org/irp/agency/doj/olc/092074.pdf>. Whether such arguments would apply to particular legislation or could prevail in court are questions beyond the scope of this report.

<sup>140</sup> See *supra* notes 119-123 and accompanying text.

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