

THE NONJUSTICIABLE EMOLUMENTS CLAUSE

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Scholarly conversations about the meaning of the Foreign Emoluments Clause have recently become more prevalent. Some, including Laurence Tribe, argue that “[t]he Emoluments Clause . . . operates categorically, governing transactions even when they would not necessarily lead to corruption, and establishing a clear baseline of unacceptable conduct.”

In my view, the Foreign Emoluments Clause is a nonjusticiable part of the Constitution which only Congress can, and was meant to, enforce. Under this theory, the Emoluments Clause creates a constitutional obligation for those bound by it to report to Congress any “present, Emolument, Office, or Title, of any kind, whatever,” that they receive from a foreign government. After this reporting obligation is complete, however, Congress, and only Congress, has discretion to determine if a constitutional violation has occurred and what may be done about it.

Part I of this Article argues that this view is consistent with history and an originalist interpretation of the Constitution. Part II demonstrates that the Clause itself is nonjusticiable due to Article III’s political question doctrine. Part III contends that this view is the most workable interpretation of the Emoluments Clause and also avoids the difficult problem of defining the outer limits as to whom the Clause applies.

INTRODUCTION

For over two centuries, quarrels over the meaning of our Constitution commonly centered around familiar areas such as the First Amendment, the Commerce Clause, and the Fourteenth Amendment. The Foreign Emoluments Clause, by contrast, managed to lay dormant for almost all of American history before causing trouble. The Clause says, “no person holding any Office of Profit or Trust under . . . [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign

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State.”¹ Like the Title of Nobility Clause directly preceding it, the Foreign Emoluments Clause “seem[ed] scarcely to require even a passing notice.”²

Recently, however, debates over the Clause’s meaning have become more prevalent.³ Some, including Laurence Tribe, argue that “[t]he Emoluments Clause . . . operates categorically, governing transactions even when they would not necessarily lead to corruption, and establishing a clear baseline of unacceptable conduct.”⁴ In my view, however, the Foreign Emoluments Clause is a nonjusticiable part of the Constitution which only Congress can, and was meant to, enforce. Under this theory, the Emoluments Clause creates a constitutional obligation for those bound by it to report to Congress any “present, Emolument, Office, or Title, of any kind whatever”⁵ that they receive from a foreign government. After this reporting obligation is complete, however, Congress, and only Congress, has discretion to determine if a constitutional violation has occurred and what may be done about it.

Part I of this Article argues that this view is consistent with history and an originalist view of the Constitution. Part II demonstrates that the Clause itself is nonjusticiable due to Article III’s political question doctrine. Part III contends that this view is the most workable interpretation of the Emoluments Clause and also avoids the difficult problem of defining the outer limits as to whom the Clause applies.

I. THE HISTORY OF THE FOREIGN EMOLUMENTS CLAUSE

A. *The Reporting Obligation*

A nonjusticiable, congressionally enforceable, Foreign Emoluments Clause with a constitutional obligation to report any gifts or emoluments to Congress is well-grounded in history. The phrase “without the Consent of the Congress”⁶ was specifically added to the Constitution to codify a reporting obligation, which had been the informal practice under the Articles of Confederation. The original Emoluments Clause in the Articles of

¹ U.S. CONST. art. I, § 9, cl. 8.

² Joseph Story, *Commentaries on the Constitution*, in 3 THE FOUNDER’S CONSTITUTION 390 (Philip B. Kurland & Ralph Lerner eds., 2000).

³ David A. Fahrenthold & Jonathan O’Connell, *What is the ‘Emoluments Clause?’ Does it Apply to President Trump?*, WASH. POST. (Jan. 23, 2017), https://www.washingtonpost.com/politics/what-is-the-emoluments-clause-does-it-apply-to-president-trump/2017/01/23/12aa7808-e185-11e6-a547-5fb9411d332c_story.html?utm_term=.c99cc6f19ddb.

⁴ NORMAN L. EISEN, RICHARD PAINTER & LAURENCE H. TRIBE, *THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP* 7 (2016) [hereinafter TRIBE].

⁵ U.S. CONST. art. I, § 9, cl. 8.

⁶ U.S. CONST. art. I, § 9, cl. 8.

Confederation stated, “[n]or shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any King, Prince, or foreign State.”⁷ In contrast, the version in the Constitution reads, “[n]o Person holding any Office of Profit or Trust under [the United States], shall, *without the Consent of the Congress*, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”⁸ The Emoluments Clause in the Constitution was thus an almost verbatim copy of the version in the Articles of Confederation. The only substantive change was that under the Constitution’s language Congress had the ability to consent to a U.S. official receiving an emolument. History shows that this key change created a constitutional obligation for federal officials to report anything they received from a foreign government to Congress and then abide by Congress’s decision regarding whether they could keep it. Under the Articles of Confederation, this was already the informal practice, but the Constitution codified what the Founders already did.

The idea of a constitutional obligation to report the receipt of an emolument followed by congressional decision on consent began as a practice with Benjamin Franklin in the Articles of Confederation era. In 1790, Thomas Jefferson wrote to William Temple Franklin, Benjamin Franklin’s grandson, and explained, “We are now about making up our minds as to the presents which it would be proper for us to give to diplomatic characters which take leave of us. For this purpose, it is important to know what are given by other nations.”⁹ In other words, Jefferson sought advice as to what kind of parting gift would be appropriate to give foreign ambassadors. The younger Franklin explained to Jefferson the customs of European governments on this matter but also told him a fascinating story from the time of the Articles of Confederation.¹⁰ He explained that, when his grandfather departed the court of France, the King gave Dr. Franklin a present that “consisted in a large Miniature of the King, set with four hundred and eight Diamonds, of a beautiful Water, forming a Wreath round the Picture and a Crown on the Top.”¹¹ The younger Franklin continued that “[t]his is the form of the Presents usually given to Ambassadors and

⁷ TRIBE, *supra* note 4, at 4.

⁸ U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

⁹ Letter from Thomas Jefferson to William Temple Franklin (Apr. 20, 1790), in 3 THE FOUNDER’S CONSTITUTION 385 (Philip B. Kurland & Ralph Lerner eds., 2000).

¹⁰ Letter from William Temple Franklin to Thomas Jefferson (Apr. 27, 1790), in 3 THE FOUNDER’S CONSTITUTION 385 (Philip B. Kurland & Ralph Lerner eds., 2000).

¹¹ *Id.*

Ministers Plenipotentiary”¹² He then recalled that his grandfather, and two others named Silas Deane and Dr. Lee, “received each a gold snuff box with the king’s pictures set in brilliants in the lid. On signing the treaty with France, Dr. Lee on his return consulted Congress whether he should return the present. They decided negatively and this formed the subsequent rule.”¹³ The Articles Congress also allowed Franklin to keep his snuff box.¹⁴ Around the same time, John Jay followed a similar procedure of reporting a gift to Congress and receiving consent. “On March 3, 1786, the Articles Congress permitted John Jay to accept a horse from the King of Spain.”¹⁵

These stories, from the time of the Articles Congress,¹⁶ show a practice, despite no language in the Articles of Confederation explaining such a procedure, of reporting foreign gifts to Congress and Congress then deciding what should be done. When it came time to ratify the Constitution, the founders codified this procedure by inserting the phrase “without the consent of the Congress” into the Emoluments Clause.

Indeed, the addition of the words “without the consent of the Congress” was no mere drafting decision. Rather, it was an intentional and debated change to codify the Framers’ practice. During the ratification process, four state ratifying conventions wanted the phrase removed, meaning that they wanted to keep the Articles of Confederation version of the Emoluments Clause.¹⁷ However, those states lost, showing that a majority of states consciously decided to insert the phrase “without the consent of the Congress” into the Constitution. The states were familiar with the practices of Dr. Franklin and John Jay. In fact, Edmund Randolph even told the story of Dr. Franklin’s golden snuff box at the Virginia ratifying convention.¹⁸ Thus, when the majority of states voted to insert the phrase “without the consent of the Congress” into the Constitution, they were voting to turn the Founders’ practice of reporting foreign gifts for congressional approval into a constitutional requirement.

This constitutional procedure continued past the founding era. “[W]hen Simon Bolivar presented President Andrew Jackson with a gold medal,

¹² *Id.*

¹³ *Id.* at 386.

¹⁴ Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 204 (2013).

¹⁵ *Id.*

¹⁶ Letter from William Temple Franklin to Thomas Jefferson (Apr. 27, 1790), in 3 THE FOUNDER’S CONSTITUTION 386 (Philip B. Kurland & Ralph Lerner eds., 2000).

¹⁷ Tillman, *supra* note 14, at 205.

¹⁸ TRIBE, *supra* note 4, at 5.

Jackson asked Congress whether he could keep it—and Congress said no.”¹⁹ Further, “[i]n 1840, President Martin Van Buren was offered horses, pearls, a Persian rug, shawls, and a sword by Ahmet Ben Haman, the Imam of Muscat.”²⁰ Like his predecessors, Van Buren reported these gifts to Congress, and Congress “authorized him to dispose of the presents by giving some to the Department of State and giving the proceeds of the rest to the Treasury.”²¹ John Tyler did the same thing. “[W]hen President Tyler was given two more Arabian horses from the Sultan, he submitted them to Congress, which authorized him to auction them off and give the proceeds to the Treasury.”²²

Such a lengthy history of presidents and other officials reporting gifts to Congress followed by congressional decision, combined with the specific addition of the phrase “without the consent of the Congress,” demonstrates that early Americans believed that the Emoluments Clause created a constitutional reporting obligation.

There is, admittedly, a flaw in the historical record. Although many officials from early America reported foreign gifts to Congress as though the Emoluments Clause bound them to do so, there was a notable exception. Somehow, George Washington did not get the memo. As President, George Washington received two foreign gifts.²³ “Lafayette gave Washington the key to the Bastille, and the French ambassador gave Washington a picture frame and full-length portrait of Louis XVI. Washington accepted and kept both without asking for or receiving congressional consent.”²⁴ At first glance, this seems to contradict any rule in the Emoluments Clause requiring reporting gifts to Congress. If George Washington himself did not think such a rule existed, then the practice of less notable figures becomes less indicative of the actual meaning of the Emoluments Clause.

However, there is more to this story than meets the eye. Many congressmen must have known about the Bastille key as it was reported widely in the newspapers at the time.²⁵ Furthermore, they would have been aware that the portrait “was on display in Washington’s anteroom, beyond which he entertained official visitors.”²⁶ Since Washington was President before the White House was built, many congressmen likely visited his

¹⁹ TRIBE, *supra* note 4, at 9.

²⁰ Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30, 42 (2012).

²¹ *Id.*

²² *Id.*

²³ Tillman, *supra* note 14, at 188.

²⁴ *Id.*

²⁵ Tillman, *supra* note 14, at 188 n.21.

²⁶ Tillman, *supra* note 14, at 188.

home for various meetings and social events and saw the portrait. Hence, Washington may have thought that he had fulfilled his obligation to report his gifts to Congress because Congress surely knew about them either by seeing them or reading about them in the newspaper. Washington would have known the story of Benjamin Franklin's golden snuffbox and he was familiar with the insertion of the phrase "without the consent of the Congress" into the Emoluments Clause because he presided over the Constitutional Convention. Thus, Washington probably knew about, and fulfilled, his reporting obligation just like Franklin, Jackson, Van Buren, and Tyler. Washington just did it informally.

In short, there exists a strong historic practice of a constitutional reporting obligation followed by congressional decision spanning the times of Franklin, Jay, Jackson, Tyler, Van Buren, and even George Washington.

B. The History of Sole Congressional Enforcement

History also shows that the Emoluments Clause was never meant to be justiciable. Rather, it was meant to be enforced solely by Congress. During the Virginia ratifying convention, Edmund Randolph explained how the Clause would operate:

There is another provision against the danger mentioned by the honorable member, of the president receiving emoluments from foreign powers. If discovered he may be impeached. If he be not impeachable he may be displaced at the end of the four years I consider, therefore, that he is restrained from receiving any present or emoluments whatever. It is impossible to guard better against corruption.²⁷

Edmund Randolph thus viewed congressional impeachment and, failing that, the ballot box, as the vehicles through which to enforce the Emoluments Clause, rather than litigation. Apparently, it was "impossible to guard better against corruption"²⁸ than by utilizing these two methods. Randolph notably did not mention the courts when explaining how to enforce the Emoluments Clause, only Congress and the voters.

Indeed, there is simply no historical record suggesting that the Foreign Emoluments Clause could be enforced via the judicial process. Neither

²⁷ TRIBE, *supra* note 4, at 5.

²⁸ *Id.*

Edmund Randolph nor his contemporaries made such a suggestion. Joseph Story, discussing the Clause, wrote, “whether, in a practical sense, it can produce much effect, has been thought doubtful.”²⁹ The fact that Joseph Story, one of the early Supreme Court Justices, did not mention that litigation could give the Clause “much effect” is telling.

Further, in the two centuries since Randolph and Story’s lifetimes, there have been no cases, until recently, in which a high-level federal official was sued over an alleged violation of the Foreign Emoluments Clause. But there could have been. In 1974, after Watergate, Gerald Ford found himself in the Oval Office and asked Nelson Rockefeller to be his Vice President. Rockefeller “was an heir to a fortune and industrial empire far more substantial and consequential than anything Trump has ever overseen.”³⁰ To get confirmed as Vice President, “Rockefeller sat through congressional hearings in which strangers scoured his family’s business dealings and finances.”³¹ Through this process, the public learned the details of his great wealth, including the fact that he had many foreign investments. In fact, Nelson Rockefeller founded a company called the International Basic Economy Corporation, which, at the time of his confirmation hearings, was “a multinational conglomerate worth several hundred million dollars.”³² This company was filled with foreign investments, including “interests in the United States, Canada, Western Europe, Africa, and Asia as well as South America.”³³

Yet, despite the fact that the details of Rockefeller’s massive wealth and foreign investments had become public record via his confirmation hearings, there was no lawsuit filed against him when he became Vice President for any alleged violation of the Foreign Emoluments Clause. In fact, the possibility of such a lawsuit did not even seem to be on the list of congressional concerns during Rockefeller’s confirmation. Senator Howard Cannon, the chairman of the Senate committee that held Rockefeller’s confirmation hearings, asked Acting Attorney General Laurence Silberman for a “summary and analysis of the federal conflict of interest law, 18 U.S.C. § 208, and of any other statutes which might apply to Mr. Rockefeller if he

²⁹ Joseph Story, *Commentaries on the Constitution*, in 3 THE FOUNDER’S CONSTITUTION 390 (Philip B. Kurland & Ralph Lerner eds., 2000).

³⁰ Timothy L. O’Brien, *Conflicts of Interest? President Trump’s Would be Amazing*, BLOOMBERG (June 2, 2016), <https://www.bloomberg.com/view/articles/2016-06-02/donald-trump-might-make-the-white-house-a-walmart>.

³¹ *Id.*

³² G. WILLIAM DOMHOFF & CHARLES L. SCHWARTZ, PROBING THE ROCKEFELLER FORTUNE (Nov. 1974), <https://www.ocf.berkeley.edu/~schwartz/Rockefeller.html>.

³³ *Id.*

were confirmed as Vice President.”³⁴ Silberman discussed the Twenty-Fifth Amendment, the mechanism that President Ford used to nominate Rockefeller, as well as two federal conflict of interest statutes.³⁵ Yet, nowhere did the Acting Attorney General discuss the Foreign Emoluments Clause. Since the public knew about Rockefeller’s foreign investments, if anyone thought the Emoluments Clause was justiciable, one would think that Silberman would have been worried about a potential Emoluments Clause lawsuit. Yet, Silberman was wholly unconcerned.³⁶

If any high-profile federal official in American history was going to be sued under the Foreign Emoluments Clause, it would have been Nelson Rockefeller because of his astronomical wealth and foreign investments. Yet it never happened. Edmund Randolph and Joseph Story never contemplated that the Foreign Emoluments Clause was justiciable, and it appears that no one did in Rockefeller’s time. History thus shows that this part of the Constitution was never meant to be justiciable, but instead only to be enforced by Congress.

II. THE FOREIGN EMOLUMENTS CLAUSE IS NONJUSTICIABLE UNDER ARTICLE III

The history described above reveals that the Emoluments Clause was never meant to be justiciable. The modern political question doctrine confirms what history shows.

A. Textually Committed to Congress

The modern understanding of the political question doctrine originated in *Baker v. Carr*.³⁷ There, the Supreme Court laid out the *Baker* factors which determined (at least at the time) whether a case is a nonjusticiable political question. Those factors included:

³⁴ Letter from Laurence H. Silberman, Acting Attorney General, to The Honorable W. Cannon, Chairman, Committee on Rules and Administration, United States Senate (Sept. 20, 1974), <https://fas.org/irp/agency/doj/olc/092074.pdf>.

³⁵ *Id.*

³⁶ Of course, any potential concerns about Rockefeller’s foreign investments giving rise to an Emoluments Clause lawsuit would have depended on him continuing to hold his assets while in office. Concerns would also hinge on whether ordinary business transactions between the Vice President and a foreign government are viewed as an Emoluments Clause violation. Given that the Supreme Court has never ruled on this issue, and that arguments exist suggesting such a violation, see *TRIBE supra* note 5, at 11-12, one would have expected Silberman at least to have raised an Emoluments Clause question in discussing Rockefeller’s potential conflicts of interest if anyone thought the Clause was justiciable.

³⁷ 369 U.S. 186, 217 (1962).

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; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁸

In more recent times, however, the Court has focused primarily on the first two factors. In *Nixon v. United States*, the Court held that “[a] controversy is nonjusticiable—i.e., involves a political question—where there is ‘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’”³⁹ More recently, in *Zivotofsky*, the Court also focused on the first two *Baker* factors with little regard for the others.⁴⁰

The two *Baker* factors in use today show that the Foreign Emoluments Clause is a nonjusticiable political question. First, as Professor Blackman mentions,⁴¹ the Emoluments Clause contains “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁴² In *Nixon*, the Court held that the Impeachment Trial Clause was a nonjusticiable political question.⁴³ In concluding that the Clause contained a “textually demonstrable constitutional commitment . . . to a coordinate political department,” the Court explained that the Impeachment Trial Clause’s opening—“The Senate shall have the sole Power to try all Impeachments”⁴⁴—was a “grant of authority to the Senate.”⁴⁵ Similarly, the

³⁸ *Id.*

³⁹ 506 U.S. 224, 228 (1993).

⁴⁰ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

⁴¹ Josh Blackman, *CREW's Self-Inflicted Injury in the Emoluments Clause Challenge*, JOSH BLACKMAN'S BLOG (Jan. 22, 2017), <http://joshblackman.com/blog/2017/01/22/crews-self-inflicted-injury-in-the-emoluments-clause-challenge/>.

⁴² *Baker*, 369 U.S. at 217.

⁴³ *Nixon*, 506 U.S. at 238.

⁴⁴ U.S. CONST. art. I, § 3, cl. 6.

⁴⁵ *Nixon v. United States*, 506 U.S. 224, 229 (1993).

deliberate insertion of the phrase “without the consent of the Congress” into the Articles of Confederation version of the Emoluments Clause was a “grant of authority” to Congress. Just as the Senate has the authority over impeachment trials by being textually assigned that duty in the Impeachment Trial Clause, Congress has the authority over emoluments by being textually assigned that duty in the Foreign Emoluments Clause.

Further, a key reason in *Nixon* that the Impeachment Trial Clause was textually committed to Congress was that “[t]he Framers labored over the question of where the impeachment power should lie. Significantly, in at least two considered scenarios the power was placed with the Federal Judiciary.”⁴⁶ “Despite these proposals, the Convention ultimately decided that the Senate would have ‘the sole Power to try all Impeachments.’”⁴⁷ The *Nixon* Court thus gave significant weight to the fact that the Framers made a deliberative decision to give the Senate, and not another branch of government, the power to try impeachments. The same is true regarding the Foreign Emoluments Clause. The Framers also made a deliberative decision to give Congress the power over foreign emoluments. As explained above, four state ratifying conventions fought to keep the phrase “without the consent of the Congress” from being added to the Articles of Confederation version of the Foreign Emoluments Clause.⁴⁸ Those four states, however, lost, and the phrase was inserted. Thus, just as a deliberative decision by the Framers to give the Senate the power to try impeachments textually committed impeachment trials to the Senate, a deliberative decision by the Framers to give Congress the power to consent to foreign emoluments textually committed the Foreign Emoluments Clause to Congress.

Admittedly, one could argue that the Impeachment Trial Clause in *Nixon* is distinguishable from the Emoluments Clause due to *Nixon*’s emphasis on the word “sole.” Specifically, in expounding on the Impeachment Trial Clause, which reads “The Senate shall have the sole Power to try all Impeachments,”⁴⁹ the Court emphasized that “the word ‘sole’ indicates that this authority is reposed in the Senate and nowhere else.”⁵⁰ One could thus conclude that because the Foreign Emoluments Clause does not say “without the sole consent of Congress,” the Clause is not textually committed to Congress like the Impeachment Trial Clause was in *Nixon*. Such an argument, however, is misplaced. The importance of the word “sole” in

⁴⁶ *Id.* at 233.

⁴⁷ *Id.*

⁴⁸ Tillman, *supra* note 14, at 205.

⁴⁹ U.S. CONST. art. I, § 3, cl. 6.

⁵⁰ *Nixon*, 506 U.S. at 229.

Nixon was not to establish a general rule that something is textually committed to another branch of government by the use of that word. Rather, the word “sole” was important to textually committing the Impeachment Trial Clause to the Senate because the phrase “the sole Power to try all Impeachments” includes the word “try.” The issue in *Nixon* was whether Senate impeachment proceedings were subject to judicial review.⁵¹ Thus, the petitioner argued that the word “try” in the Impeachment Trial Clause implied that the Senate conducted a trial and that trials are generally subject to judicial review.⁵² This argument by the petitioner, combined with the fact that early proposals at the Constitutional Convention would have provided that the federal judiciary try impeachments,⁵³ explains why the *Nixon* court emphasized the word “sole.” Because these circumstances are not relevant to the Foreign Emoluments Clause, the Clause does not need language such as “without the sole consent of the Congress” or “only with the consent of the Congress” to be textually committed to Congress.

Finally, another part of the Constitution besides the Foreign Emoluments Clause discusses a congressional “consent” process. It says that when the President nominates someone to an office, that person can be confirmed via the “Advice and Consent of the Senate.”⁵⁴ No one would suggest that the Senate confirmation process should be subject to judicial review because the Clause does not say “without the Advice and sole Consent of the Senate.” Instead, because the Constitution says that the Senate’s job is to perform the confirmation process it textually commits that function to the Senate. Likewise, the Foreign Emoluments Clause is textually committed to Congress.

B. A Lack of Judicially Manageable Standards but Clear Congressional Standards

A piece of the Constitution also becomes a political question if there are “a lack of judicially discoverable and manageable standards for resolving it.”⁵⁵ The Foreign Emoluments Clause contains no judicially manageable standards. Congress, however, has created a statutory scheme with clear standards for policing situations implicating the Foreign Emoluments Clause. Because Congress is capable of creating statutory standards that

⁵¹ *Id.* at 226.

⁵² *See id.* at 229.

⁵³ *Id.* at 233.

⁵⁴ U.S. CONST. art. II, § 2.

⁵⁵ *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

protect American foreign relations which the courts could not legitimately derive from the Foreign Emoluments Clause itself, policing the Clause should be left to Congress.

The Supreme Court has always considered foreign affairs “a domain in which the controlling role of the political branches is both necessary and proper.”⁵⁶ “In a world that is ever more compressed and interdependent, it is essential [that] the congressional role in foreign affairs be understood and respected.”⁵⁷ In the political question context, the Court has noted that foreign relations decisions “frequently turn on standards that defy judicial application.”⁵⁸

Indeed, the historical examples of Foreign Emoluments Clause problems could not have been managed judicially. As Tribe explains, when the Articles of Confederation adopted the original Foreign Emoluments Clause, “[i]t soon became clear that imposing this requirement on American ministers was far easier than persuading foreign sovereigns to respect it.”⁵⁹ “Torn between American law and European protocol, several American emissaries to the court of King Louis XVI were forced into tortured, no-win, and intensely public contortions”⁶⁰ when the King offered them lavish gifts. In other words, American diplomats knew that the Foreign Emoluments Clause prohibited them from accepting a gift from a foreign government, but were afraid that if they refused a gift, they might offend a European sovereign and damage the foreign relations of the United States. While Congress can police this type of situation via the consent process, the courts cannot. Indeed, Congress has created a statutory scheme that easily manages the types of situations that diplomats once faced in the court of Louis XVI, and much more. Courts, however, could not legitimately duplicate this scheme as an interpretation of the Emoluments Clause without engaging in pure judicial policymaking.

The Foreign Gifts and Decorations Act applies to federal “employees,” who are broadly defined to include the President and Vice President, members of the military, Members of Congress, diplomats appointed by the President, the spouses of those enumerated, and other categories of people.⁶¹ The statute then defines “gift” as “a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government”⁶² and

⁵⁶ *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016).

⁵⁷ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

⁵⁸ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

⁵⁹ TRIBE, *supra* note 4, at 4.

⁶⁰ TRIBE, *supra* note 4, at 4.

⁶¹ 5 U.S.C. § 7342(a)(1)(A)-(G).

⁶² *Id.* § 7342(a)(3).

defines “decoration” as “an order, device, medal, badge, insignia, emblem, or award tendered by, or received from, a foreign government.”⁶³

The operative part of the statute states that a federal employee may not “accept a gift or decoration” from a foreign government.⁶⁴ However, Congress has created several exceptions to this rule precisely to address diplomatic problems such as the ones American ambassadors faced with Louis XVI. A federal employee may accept a gift “when it appears that to refuse the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States.”⁶⁵ Further, federal employees may also accept gifts “of minimal value tendered and received as a souvenir or mark of courtesy,”⁶⁶ with “minimal value” defined as “retail value in the United States at the time of acceptance of \$100 or less.”⁶⁷

This statutory scheme, defining which federal employees the statute applies to, which types of gifts cannot be received, and exceptions to those rules for foreign policy reasons, creates solid congressional standards to prevent corruption while also avoiding damage to American foreign relations. While Congress obviously has the power to create this statutory scheme, courts would be legislating if they read these necessary rules into the Emoluments Clause. There is no “don’t offend the King exception” or “\$100 exception” in the Foreign Emoluments Clause. (At the very least a “\$100 exception” would have Justice Scalia turning in his grave). Congress, however, is constitutionally empowered to create these exceptions, but it would be pure judicial policymaking for the courts to do so.

Worse, if the federal judiciary had to decide whether someone like the president could keep a gift from a foreign government, courts might have to balance the benefits the United States would receive from keeping the gift against the gift’s potential to cause corruption or other harm. Such balancing has no judicially manageable standard. For example, Teachout suggests that President Washington might have kept the portrait he received from France, as discussed above, because he “considered it an important political choice that outweighed the importance of following the rule because of the foreign relations at the time.”⁶⁸ Such balancing would be impossible for a court to do. George Washington had to decide which side of the French Revolution the United States would join. Washington eventually decided that the U.S.

⁶³ *Id.* § 7342(a)(4).

⁶⁴ *Id.* § 7342(b)(2).

⁶⁵ *Id.* § 7342(c)(1)(B).

⁶⁶ *Id.* § 7342(c)(1)(A).

⁶⁷ *Id.* § 7342 (a)(5).

⁶⁸ Teachout, *supra* note 20, at 41.

would remain neutral.⁶⁹ However, “[t]he British harassed neutral American merchant ships, while the French Government dispatched a controversial Minister to the United States, Edmond-Charles Genêt, whose violations of the American neutrality policy embroiled the two countries in the Citizen Genêt Affair until his recall in 1794.”⁷⁰ Washington had to maintain American neutrality despite the British attacks and the Citizen Genêt Affair, and part of implementing such a decision would have been not returning the portrait of Louis XVI that the King had given him. If Washington had returned the portrait during the political chaos in France, it may have been tantamount to announcing that the United States no longer recognized King Louis XVI as the head of France. In short, returning the royal portrait could have altered American policy regarding the French Revolution. If a court, instead of Washington or Congress, had to decide what to do with the portrait under the Foreign Emoluments Clause, the court would have had to balance the value of America’s neutrality in the French Revolution against something like the potential constitutional harm the painting could cause. There is no judicially manageable standard with which to balance the value of American neutrality in a war versus the harm of keeping a politically sensitive painting.

By contrast, if Washington’s problem had arisen today, and the Emoluments Clause was viewed as a nonjusticiable political question, Washington would not have to worry about courts potentially damaging American foreign relations with some standard that “def[ies] judicial application.”⁷¹ Instead, Washington could simply look at the Foreign Gifts and Decorations Act and decide that he could keep the portrait because “refus[ing] the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States.”⁷² In short, Congress’s existing statutory scheme is well-equipped to manage emoluments that federal officials receive from foreign governments, but courts could not craft similar judicially manageable standards. Because the Foreign Emoluments Clause is both textually committed to Congress and contains no judicially manageable standards, the Clause is a nonjusticiable political question. “Courts ought not to enter this political thicket.”⁷³

⁶⁹ *The United States and the French Revolution, 1789-1799*, OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1784-1800/french-rev>.

⁷⁰ *Id.*

⁷¹ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

⁷² 5 U.S.C. § 7342(e)(1)(B).

⁷³ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

III. THE MOST WORKABLE INTERPRETATION

A nonjusticiable, congressionally enforced Foreign Emoluments Clause is also the most workable interpretation because it avoids flaws in other commentators' theories and evades difficult constitutional questions. Specifically, Professor Tribe's view of the Clause is too broad. Further, a nonjusticiable view has the benefit of evading difficult questions such as defining the outer limits as to whom the Foreign Emoluments Clause applies.

A. Tribe's Theory

Professor Tribe's interpretation of the Clause is unworkable because it is too broad. Under Tribe's view, "[t]he Emoluments Clause . . . operates categorically, governing transactions even when they would not necessarily lead to corruption, and establishing a clear baseline of unacceptable conduct."⁷⁴ He adds that "while there is not yet a firm consensus on this point, the best reading of the Clause covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder."⁷⁵

Admittedly, this view does have some historical grounding. Edmund Randolph clearly stated, referring to the Emoluments Clause, that "[t]his restriction is provided to prevent corruption."⁷⁶ Tribe's categorical approach to the Clause greatly helps to prevent corruption. However, it is simply unworkable.

Tribe's views regarding to whom the Foreign Emoluments Clause applies and the types of transactions the Clause prohibits are overbroad. Combined, these problems render his interpretation unworkable. Tribe explains that the Clause applies to the president⁷⁷ and to diplomats.⁷⁸ This may be true, as these are the people most involved in foreign policy. But, Tribe then argues that "the Emoluments Clause reflects the Framers' determined effort to ensure that *no federal officeholder* in the United States ever could be influenced by gifts of any kind from a foreign government."⁷⁹ This interpretation is too broad. There are hundreds, of federal officeholders, many of whom have nothing to do with foreign affairs. Under Tribe's view,

⁷⁴ TRIBE, *supra* note 4, at 7.

⁷⁵ TRIBE, *supra* note 4, at 11.

⁷⁶ TRIBE, *supra* note 4, at 5.

⁷⁷ TRIBE, *supra* note 4, at 7.

⁷⁸ TRIBE, *supra* note 4, at 5.

⁷⁹ TRIBE, *supra* note 4, at 6 (emphasis added).

the Foreign Emoluments Clause applies to the Postmaster General, the Deputy Secretary of the Interior, the head of the U.S. Fish and Wildlife Service, and many others. If one believes in ultra-prophylactic rules, maybe this result is acceptable. But, when coupled with Tribe's view as to the types of transactions the Emoluments Clause prohibits, this theory is unworkable. Tribe argues that "the best reading of the Clause covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder."⁸⁰ According to Tribe, "since emoluments are properly defined as including 'profit' from any employment as well as 'salary,' it is clear that even remuneration fairly earned in commerce can qualify."⁸¹ Tribe continues that "the Framers sought to prohibit even reasonable money-for-services arrangements between officeholders and foreign states, which would result in profit to the officeholder."⁸² He even goes so far as to say that "everything about the Emoluments Clause militates in favor of giving the broadest possible construction to the payments it encompasses. For that reason, the Clause unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state."⁸³ Thus, Tribe's view of the Foreign Emoluments Clause covers hundreds of federal officeholders when they engage in any ordinary fair market transactions with a foreign government. The following hypotheticals illustrate the unworkability of Tribe's view.

Suppose that the head of the U.S. Fish and Wildlife Service decides to take a vacation. He recently learned of a very exotic fish that lives off the coast of Russia, and his wife has always wanted to go to Moscow and St. Petersburg to see the sites. Our federal officeholder books his plane tickets on Aeroflot, the state-owned Russian airline.⁸⁴ He does not ask for any special favors from the Russian government. Rather, he simply purchases the tickets on Aeroflot's website for the ordinary price. After finding his exotic fish, and taking a selfie in front of the Kremlin, the head of the U.S. Fish and Wildlife Service returns to the United States, only to realize that he has violated the Constitution! In Tribe's view, the head of the U.S. Fish and Wildlife Service is a federal officeholder who has engaged in an ordinary business transaction with a foreign government. Such a transaction certainly qualifies as "any situation in which a federal officeholder receives money,

⁸⁰ TRIBE, *supra* note 4, at 11.

⁸¹ TRIBE, *supra* note 4, at 11.

⁸² TRIBE, *supra* note 4, at 11.

⁸³ TRIBE, *supra* note 5, at 11.

⁸⁴ Press Release, Aeroflot-Russian Airlines, JSC Becomes Starting (Dec. 7, 2005), <http://www.aeroflot.ru/fr-en/new/995>.

items of value, or services from a foreign state.”⁸⁵ Thus, Tribe’s theory suggests that a federal officeholder who purchases plane tickets on a foreign state-owned airline to go on vacation has acted unconstitutionally.

As another example, suppose this time that former Texas Governor and current Secretary of Energy Rick Perry needs a new house in Washington. When he and his wife, Anita, first moved to Washington they were in a hurry to find a house and settled on the first pristine Georgetown townhouse that they could find. But after a while, Anita issues an ultimatum to Rick that they need a bigger house or else she will leave him and return to Texas. Secretary Perry quickly Googles and buys a new house. When it comes time to sell the old one, Perry learns that the government of Madagascar needs a new official residence for its ambassador. Secretary Perry meets the ambassador from Madagascar and sells his old house for the ordinary fair market value, making some level of profit because Georgetown real estate values have increased. But, when Perry walks into work the next day, he finds out that he too violated the Constitution. Under Tribe’s view, the Secretary of Energy is surely a federal officeholder and, here, he has engaged in a market value business transaction with a foreign government and made a profit. Therefore, just like the case of the Russian airline tickets, selling the house to Madagascar was unconstitutional.

These hypotheticals illustrate that Tribe’s theory of the Foreign Emoluments Clause is too broad, and consequently, unworkable. By contrast, under a theory of sole congressional enforcement, the troubled federal officeholders described above would have nothing to fear because Congress obviously would not sanction or impeach the head of Fish and Wildlife for going on vacation via a Russian airline or Rick Perry for selling a house to the government of Madagascar.

B. To Whom the Clause Applies

Giving Congress sole discretion over the Foreign Emoluments Clause also avoids having to discern the outer limits as to whom the Clause applies. Exactly who the Clause applies to is the threshold question in any Emoluments Clause analysis, but there is no clear constitutional answer to this question. Tribe makes a well-grounded historical argument that the Clause applies to the president, in key part because Edmund Randolph explicitly stated that it does.⁸⁶ Indeed, it is hard to quarrel with an express statement by a Founding Father. Randolph was there when the Constitution

⁸⁵ TRIBE, *supra* note 5, at 11.

⁸⁶ TRIBE, *supra* note 4, at 9.

was drafted and adopted. However, even the applicability of the Clause to the president may not be that easy.

There is an historical argument suggesting that the Clause does not apply to the president. “[T]he Framers may very well have believed that only appointed officers, like ambassadors, would make the types of extended visits abroad that could subject them to improper foreign influences.”⁸⁷ For this reason, “The President, they may have thought, would remain stateside to tend to the needs of the nation, and potential corruption would be best addressed through the Domestic Emoluments Clause.”⁸⁸

The Domestic Emoluments Clause—“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”⁸⁹—specifically names the president, unlike the Foreign Emoluments Clause. The president’s mention in the Domestic Emoluments Clause, but not in the Foreign Emoluments Clause, may well suggest that the Domestic Emoluments Clause was meant to cover the president, while the Foreign Emoluments Clause was meant to cover people whom the Founders envisioned would most often go abroad, like ambassadors. For these reasons, despite Randolph’s statement, the Foreign Emoluments Clause’s applicability to the president is not absolutely clear.

Even if the Clause applies to the president, which it might, it remains uncertain to whom else in the federal system the Clause applies. Textually, the Clause applies to anyone holding an “Office of Profit or Trust.”⁹⁰ What these terms mean is unclear, though Professor Grewal and the Office of Legal Counsel suggest that “an office of profit historically referred to a salaried office in which the holder had a proprietary interest, such that the office could be inherited or sold.”⁹¹ In contrast, an Office of Trust, “required ‘the exercise of discretion, judgment, experience and skill,’ such that the office itself or its assigned duties could not be transferred.”⁹² Under these definitions, the term “Office of Profit” is probably not relevant today because, unlike in the England of centuries ago, offices are no longer inherited or sold.

⁸⁷ Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 646 (2017).

⁸⁸ *Id.* at 646-47.

⁸⁹ U.S. CONST. art. II, § 1, cl. 7.

⁹⁰ U.S. CONST. art. I, § 9, cl. 8.

⁹¹ Grewal, *supra* note 88, at 645.

⁹² Grewal, *supra* note 88, at 645.

The trick, however, is figuring out who holds an “Office of Trust” today. One definition—an office that “require[s] ‘the exercise of discretion, judgment, experience and skill,’ such that the office itself or its assigned duties . . . [can] not be transferred”—is ambiguous. Conjuring judicially manageable standards to decide when an office requires sufficient judgment and discretion that it cannot be transferred would prove difficult. An elected official likely cannot transfer his duties, but there are hundreds of deputies and underlings throughout the federal bureaucracy who may or may not be able to do so.

The point is not that courts could never craft some definition of “Office of Profit or Trust,” but rather that this is a difficult question which courts, under a nonjusticiable approach, do not have to answer because Congress has already done so. As explained above, the Foreign Gifts and Decorations Act provides clear and specific definitions as to who may not receive gifts from foreign governments. Among those enumerated are the President and Vice President, as well as different types of federal employees, Members of Congress, and the spouses of all people listed.⁹³ This statutory scheme protects against corruption, and indeed can do so more thoroughly than a judicially created rule because Congress can cover more people than just those holding an “Office of Profit or Trust,” such as spouses.⁹⁴ Under a congressionally enforced Emoluments Clause, courts do not have to wrestle as to whom the Clause applies because Congress has already done so, and in the process has covered more people than the courts could.

A retort to resting on the Foreign Gifts and Decorations Act would be that while the statute broadly covers a range of people, the activities that the statute prohibits may be narrower than what the Emoluments Clause might ban. This may be true. The Foreign Gifts and Decorations Act only prohibits a covered federal employee from “request[ing] or otherwise encourag[ing] the tender of a gift or decoration; or accept[ing] a gift or decoration, other than in accordance with” a list of exceptions.⁹⁵ The Foreign Emoluments Clause, however, prohibits a covered individual from accepting “any present, Emolument, Office, or Title, of any kind whatever.”⁹⁶ The constitutional language certainly sounds broader than the statute. For this reason, some may suggest that the courts must create rules deciding to whom the Clause applies in order to get the broader anti-corruption benefits of the Clause.

⁹³ 5 U.S.C. § 7342(a)(1)(A)-(G).

⁹⁴ Grewal, *supra* note 88, at 645.

⁹⁵ 5 U.S.C. § 7342(b)(1)-(2).

⁹⁶ U.S. CONST. art. I, § 9, cl. 8.

However, if one's goal is to prevent corruption as much as possible, the best course of action would not be to interpret the Foreign Emoluments Clause broadly. Rather, it would be to ask Congress to broaden the Foreign Gifts and Decorations Act's list of prohibited activities. This is because even though the types of activities that the Emoluments Clause prohibits may be broader than the statute, the statute covers more people than the Emoluments Clause legitimately could. The Clause itself applies to someone holding an "Office of Profit or Trust." That phrase could not reasonably be interpreted to cover important non-officeholders who may be corrupted, such as the spouse or family member of someone holding an "Office of Profit or Trust." The statute, however, does cover spouses of officeholders and certainly could include other family members if Congress so desired. Because the statute can cover more people than the Emoluments Clause, if one wants to prevent as much corruption as possible, one should ask Congress to broaden the types of activities prohibited under the statute, rather than attempt to broaden the definition of "Office of Profit or Trust." For these reasons, it is unnecessary for courts to grapple with the tricky constitutional question as to whom the Foreign Emoluments Clause applies.

CONCLUSION

The Foreign Emoluments Clause is best viewed as nonjusticiable and congressionally enforceable. Such an interpretation is well-grounded in history. Further, the modern political question doctrine precludes litigation over the Clause. Finally, such a view is also the most workable. Understandably, many people may not like this result because lawyers are taught that litigation is the best way to achieve desired results. While this may often be true, the political process plays an equally important role in our democracy, and sometimes a policy solution is more workable than a legal one.