

ORAL ARGUMENT NOT YET SCHEDULED

Appeal No. 19-5237

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Senator RICHARD BLUMENTHAL, et al.
Plaintiffs/Appellees,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States of America,
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
THE HONORABLE EMMET G. SULLIVAN, JUDGE
CASE No. 17-1154

**BRIEF OF BIPARTISAN FORMER MEMBERS OF CONGRESS
AS AMICI CURIAE IN SUPPORT OF APPELLEES****WALTER E. DELLINGER III**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED
CASES PURSUANT TO CIRCUIT RULE 28(A)(1)**

A. Parties and Amici. All parties and amici who appeared before the district court appear in the appellee's brief. The parties and amici appearing in this Court include the parties listed in appellee's brief and the amici listed in this brief and other amicus briefs that may be filed.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the appellee's brief.

C. Related Cases. All related cases of which counsel are aware are identified in the appellee's brief.

STATEMENT OF COMPLIANCE

Both Appellant and Appellees have given their consent to the filing of this brief. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amici curiae and their counsel contributed money to fund the preparation or submission of this brief.

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STATUTES AND REGULATIONS

Pertinent materials are set forth in the addendum to this brief.

INTERESTS OF AMICI CURIAE

Amici are a bipartisan group of former members of Congress—Republicans and Democrats, Senators and Representatives—from across both the political spectrum and the nation. Together, they have nearly four centuries of combined congressional service. They have no personal stake in the outcome of this case; their interest is purely in assisting this Court in understanding why it is imperative that today’s officials comply with the anticorruption components, including the Foreign Emoluments Clause, of the Constitution that amici devoted so much of their lives to serving. As former members of Congress, they offer their perspective from decades of congressional experience into how the Constitution does and must apply, how important congressional approval of foreign government presents and emoluments offered to the President is in practice, and how vital this Court’s role is in protecting that part of the constitutional structure.

Amici are the following former members of Congress:

Michael Barnes (D-MD), H.R. 1979-87
Steve Bartlett (R-TX), H.R. 1983-91
Jeff Bingaman (D-NM), Sen. 1983-2013
Barbara Boxer (D-CA), H.R. 1983-93, Sen. 1983-2017
Bob Carr (D-MI), H.R. 1975-81 & 1983-95
Tom Coleman (R-MO), H.R. 1976-93
Mickey Edwards (R-OK), H.R. 1977-93
Lee Hamilton (D-IN), H.R. 1965-99
Tom Harkin (D-IA), H.R. 1975-85, Sen. 1985-2015
Gary Hart (D-CO), Sen. 1975-87
Bob Inglis (R-SC), H.R. 1993-99 & 2005-11
Jim Leach (R-IA), H.R. 1977-2007
Brad Miller (D-NC), H.R. 2003-13
George Miller (D-CA), H.R. 1975-2015
Philip Sharp (D-IN), H.R. 1975-95
Chris Shays (R-CT), H.R. 1987-2009
Peter Smith (R-VT), H.R. 1989-91
Mark Udall (D-CO), H.R. 1999-2009, Sen. 2009-15
Henry Waxman (D-CA), H.R. 1975-2015
Dick Zimmer (R-NJ), H.R. 1991-97

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not just about President Donald Trump. It is also about Richard Pearson, American Minister at Tehran, who around the turn of the 20th Century was given a diamond snuff box from the Shah of Persia as a “mark of regard.” It is about his contemporary Captain O.C. Hamlet of the United States Revenue-Cutter Service, given a gold cigarette case by the Czar of Russia. It is about Dr. Elisha K. Kane and a slew of explorers who ventured to the Arctic seas in the early 1850s and were

given a “token of thankfulness” from the government of Great Britain. These men, and hundreds of men and women like them across American history, held a federal office and requested congressional permission to accept an emolument from a foreign state. Congress granted some and refused others.

This case is also about the Imam of Muscat’s offer of horses and pearls to President Martin Van Buren. It is about the King of Siam’s promise of elephant tusks and a gilded sword to President Abraham Lincoln. It is about gifts from foreign heads of state to President Richard Nixon’s daughters, and President Barack Obama’s Nobel Peace Prize. Each of these Presidents and others from Andrew Jackson to Woodrow Wilson, from John Tyler to John F. Kennedy, acknowledged and strived to comply with the Foreign Emolument Clause’s clear directive.

And, yes, this case is also very much about President Donald Trump. For hundreds of years, Presidents and other federal office-holders have respected and scrupulously obeyed the express command in Article I, Section 9, Clause 8. Trump has shrugged it off.

It may be that other Presidents so readily complied with the Foreign Emoluments Clause because few corners of the Constitution are

so explicit and clear. From textualist, originalist, purposivist, and structuralist perspectives, the Clause unequivocally prohibits the President (and other “Person[s] holding any Office of Profit or Trust” of the United States) from accepting “any present [or] Emolument . . . of any kind whatever, from any . . . foreign State” unless Congress consents. The Founders were concerned most of all about a foreign power corrupting an elected President, so they provided an expansive, all-encompassing ban on the President’s receipt of anything of value—including any profit or business advantage—from a foreign state absent approval from Congress.

Like the silver watches given a couple of Massachusetts lighthouse-keepers by the Canadian government in 1910, which they too asked Congress for permission to accept, the Foreign Emoluments Clause turns on a simple mechanism: the Constitution’s requirement that the President disclose to Congress any “Emolument[s]” or “present[s]” a foreign state offers and obtain Congress’s consent before accepting it. Once the President discloses what he’s been offered, Congress has vast discretion whether and how to approve or disapprove the emolument.

Absent that disclosure and consent, however, no such foreign emoluments “of any kind whatever” may pass to private hands.

The text, history, purpose, and structure of the Foreign Emoluments Clause make clear it is not a “gotcha” game between the President and Congress. The Framers did not envision a cash-strapped legislature spending its time chasing after the President’s private foreign business dealings, catching those it can when its investigators get lucky, after deals have already been consummated, sometimes affirmatively disapproving and somehow unwinding those it dislikes. Rather, the Constitution’s supreme law unambiguously sets the default as barring the President from taking any personal benefit from a foreign state unless he first discloses it to Congress and obtains consent.

It is entirely Congress’s choice whether to authorize the President’s request before he can accept such a foreign emolument. Congress may indeed choose to approve the gift or business advantage after disclosure. But it is not, as the President would like, Congress’s affirmative disapproval of a benefit already accepted that then obligates him to return it.

The federal courts are empowered—and needed—to enforce this unambiguous constitutional requirement. Disclosure of emoluments to Congress before they are accepted is the condition precedent that allows Congress to perform its constitutional function. Without disclosure, Congress has no way to know what it needs to approve or how compromised the President’s loyalty might become. And Congress cannot give or withhold approval for something it doesn’t know exists.

Not only have prior Presidents complied with the Clause, but so too have military heroes like George Marshall and Douglas MacArthur, global explorers operating under federal commission, diplomats posted abroad and in warzones—foreign offerings from gold medals to pottery to jewel-laden marks of favor all went to Congress for approval. Indeed, over the past two centuries, hundreds of government officials have asked Congress for permission before personally accepting things of value offered by foreign states. Sometimes Congress approved and sometimes it didn’t, but the constitutional decree was followed—until now.

Accordingly, amici implore this Court to recognize that Congress cannot fulfill its constitutional duty under the Foreign Emoluments Clause, and meet the Framers’ goals of transparency, accountability, and

constraining presidential corruption, so long as the President is accepting foreign emoluments without first disclosing them to Congress and obtaining its consent.

ARGUMENT

I. From textualist, originalist, purposivist, and structuralist perspectives, the Constitution prohibits the President from obtaining profits or business advantages “of any kind whatever” from a foreign state unless he first acquires Congress’s approval.

A. The plain text of the Foreign Emoluments Clause is clear and unambiguous, as is the original meaning of the words used.

For a document frequently shrouded in ambiguities, the text of Article I, Section 9, Clause 8 of the Constitution is strikingly concrete. The Clause establishes a negative default position: that “no Person holding any Office” of the United States “shall . . . accept” any “present [or] Emolument . . . of any kind whatever” that comes from “any . . . foreign State.” That is pretty much as absolute as constitutional prohibitions come. The *only* exception that alters the office-holder’s inability to accept a present from a foreign state comes with the “Consent of the Congress.”

The Office of Legal Counsel has described the Clause as “both sweeping and unqualified,” *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 17 (1994), designed to ensure “the undivided loyalty of individuals occupying positions of trust under our government,” *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 100 (1986). Constitutional convention delegate Edmund Randolph thought the text, which “restrained [the President] from receiving any present or emoluments whatever,” made it utterly “impossible to guard better against corruption.” David Robertson, *Debates and other Proceedings of the Convention of Virginia* 345 (2d ed. 1805). It was language chosen to eliminate “foreign influence of every sort.” Joseph Story, *Commentaries on the Constitution of the United States* § 1352 (5th ed. 1891).

Nor is there reasonable dispute about the original meanings of the words the Framers chose. “No” had the same meaning in 1787 as it does today.

The word “emolument” had an especially broad meaning—in the late 18th century, the word was defined expansively to include any

“profit” or “advantage.” Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785). An “emolument” was understood to include any type of benefit, including financial profits accruing from a private business. Samuel Johnson wrote, for example, that “[a] merchant’s desire is not of glory, but of gain; not of publick wealth, but of private *emolument*.” Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress* 9 (1775) (emphasis added).

“Consent” in early America was understood much as it is today, as “[a]greement of the mind to what is proposed or state[d] by another” or “a yielding of the mind or will to that which is proposed.” Noah Webster, *An American Dictionary of the English Language* (1828), available at <https://tinyurl.com/yyqx87hq>. Critically, consent in the era was understood to arise, necessarily, in response to another’s proposal.

Thus, the text of the Foreign Emoluments Clause is about as clear as the Constitution’s text gets: The President can accept all the gifts, emoluments, profits, and business advantages from foreign governments he wants, but he needs to request and receive congressional approval first. “The decision whether to permit exceptions that qualify the

Clause’s absolute prohibition or that temper any harshness it may cause is textually committed to *Congress*, which may give consent to the acceptance of offices or emoluments otherwise barred by the Clause.” *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114, 121 (1993) (“ACUS”) (original emphasis). Without Congress’s consent to the President’s request, the ban is absolute; the Foreign Emoluments Clause “lays down a stark and unqualified rule, and leaves it to the legislative process to work out any needed qualifications.” *Id.* at 123 n.10; *see also Foreign Public Universities*, 18 Op. O.L.C. at 16 n.4, 17 (“The Clause in terms prohibits . . . accepting ‘any present, Emolument, Office, or Title, of any kind whatever’ from ‘any . . . foreign State’ unless Congress consents.” (quoting U.S. Const., art. I, § 9, cl. 8)).

The President would take a red quill to the Clause and rewrite it.

Constitution: “[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.”

President’s Rewrite: “[A]ny Person holding any Office of Profit or trust under [the United States], may, unless Congress affirmatively Objects, accept of any present,

Emolument, Office, or Title, from any King, Prince, or foreign State.”

The President’s version might be a fine clause to some, but it wasn’t to the Framers—and it certainly isn’t in the Constitution. While Congress might choose to approve all emoluments and presents the President receives, the President may not receive any without first obtaining Congressional consent.

B. A purposivist analysis of the Foreign Emoluments Clause establishes the Framers’ intent to provide a sweeping, expansive bulwark against foreign corruption of the President.

In 1787, when the United States was a poor, agrarian, unstable, but strategically located country, the corrupting influence of foreign governments was a major concern for the Constitution’s Framers. “Foreign powers will intermeddle in our affairs, and spare no expen[s]e to influence them,” worried Elbridge Gerry. ² *The Records of the Federal Convention of 1787* 268 (Max Farrand ed., 1911) (hereinafter “*Convention Records*”). “[I]f we do not provide against corruption, our government will soon be at an end,” feared George Mason. ¹ *id.* at 392.

An elected President was thought to be at special risk of foreign corruption. Charles Cotesworth Pinckney, a South Carolina delegate,

observed that “kings are less liable to foreign bribery and corruption” than Presidents, “because no bribe that could be given them could compensate the loss they must necessarily sustain for injuring their dominions” whereas “the situation of a President would be very different.”⁴ Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 264 (1836). As a temporary officeholder, a President “might receive a bribe which would enable him to live in greater splendor in another country than his own; and when out of office, he was no more interested in the prosperity of his country than any other patriotic citizen.” *Id.* In Federalist No. 22, Alexander Hamilton warned that “persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust, which, to any but minds animated and guided by superior virtue, may appear . . . to overbalance the obligations of duty.” *The Federalist* No. 22, at 149 (Clinton Rossiter ed., 1961).

Hamilton also noted that the personal interest of a hereditary king was “so interwoven with that of the Nation . . . that he was placed above the danger of being corrupted from abroad.”¹ *Convention Records* 289.

On the other hand, as James Madison pointed out, an elected President would lack “that permanent stake in the public interest which would place him out of the reach of foreign corruption.” *Id.* at 138.

Seeking to create a new kind of order that broke with Europe’s corrupt past, the Framers intentionally designed the Constitution to avoid the blatant influence peddling they saw in European governments. Europe embraced lavish gift-giving from host governments to diplomats, openly offering presents of “jewels, plate, tapestry, or porcelain, or sometimes of money.” 4 John Bassett Moore, *A Digest of International Law* 578 (1906) (quoting Letter from William Temple Franklin to Thomas Jefferson (Apr. 27, 1790)). Delaware Representative James Bayard noted that “in Holland, it was customary to give a gold chain and medal; in France, a gold snuff-box; and in Spain, a picture.” 8 *Annals of Cong.* 1589 (1798); *id.* at 1587 (Venable) (“these presents were sometimes made in pictures, sometimes in snuff-boxes, and sometimes in money”).

The Conventioneers sought to ban these gifts. Even “trifling presents” were of concern. *Id.* at 1587 (Bayard). North Carolina Representative Joseph McDowell “objected to the principle of these presents,” asking suspiciously, “[w]hat are they given for?” and

concluding, “to gain their friendly offices and good wishes towards the country who gave them.” *Id.* at 1583. McDowell “thought this improper[.]” *Id.* Likewise, Bayard expressed concern that “[i]f presents were allowed to be received without number, and privately, they might produce an improper effect, by seducing men from an honest attachment for their country, in favor of that which was loading them with favors.” *Id.* Vermont Representative Matthew Lyon declared that “he should not be willing to lay this country under an obligation to a foreign country by our Ministers accepting presents.” *Id.* at 1589.

At the Virginia Ratifying Convention, Randolph explained that the Constitution’s authors thought it “proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.” 3 *Convention Records* 327; *see also* James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174, 177-82 (Feb. 1994) (describing how fear of corruption influenced the structure of the electoral college, Congress’s power to impeach, the prohibition on members of Congress holding additional offices, and the prohibition on acceptance of foreign emoluments).

Notably, the Foreign Emoluments Clause was one of the only provisions of the Articles of Confederation imported into the Constitution wholesale, indicating its importance to political thinking in the late 18th century. *See 2 Convention Records* 384, 389; Articles of Confederation of 1781, art. VI, § 1 (prohibiting “any person holding any office of profit or trust under the United States, or any of them” from “accept[ing] any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign State”). In the process, though, the Founders added the congressional approval mechanism, which reflected the actual practice under the Articles. *See Foreign Public Universities*, 18 Op. O.L.C. at 16 n.4 (examples under the Articles in which Congress approved gifts from foreign sovereigns, including art and a horse); 8 *Annals of Cong.* 1585 (1798) (Otis) (officials were offered gifts from foreign governments and “communicated the fact to Congress” for approval).

That mechanism makes sense. The Framers understood “in the course of events, a case might exist in which it might be proper for a citizen of the United States to receive a present from a foreign Government.” 8 *Annals of Cong.* 1584 (Claiborne). They thought that in an electoral government, an approval mechanism would be sufficient to

prevent corruption primarily because it would make foreign emoluments public through congressional disclosure. In “mak[ing] known to the world whatever presents they might receive from foreign Courts,” officials would “place themselves in such a situation as to make it impossible for them to be unduly influenced by any such presents.” *Id.* at 1583 (Bayard). Public disclosure was essential: As Representative Harrison Gray Otis of Massachusetts opined, “[w]hen every present to be received must be laid before Congress, no fear need be apprehended from the effects of any such presents. For, it must be presumed, that the gentleman who makes the application has done his duty, as he, at the moment he makes the application, comes before his country to be judged.” *Id.* at 1585.

Accordingly, the Foreign Emoluments Clause was adopted, in the words of Tennessee Representative William C.C. Claiborne, “to lock up every door to foreign influence,” which “could not but prove baneful to every free country.” *Id.* at 1584. That’s why the Founders gave Congress alone authority to permit “the acceptance of presents from foreign governments by persons holding offices under the United States.” Moore, *supra*, at 579 (quoting Letter from James Madison to David Humphreys

(Jan. 5, 1803)). Authority to approve emoluments also promotes Congress's own accountability, in that elected representatives must weigh the risks of corruption against the opprobrium of voters, and indeed their own party politics, when making their decision.

C. The Constitution's structure relies on the President disclosing to Congress any financial gain or valuable asset he receives from a foreign state, and past Presidents have understood and followed that command.

From a structural perspective, the Foreign Emoluments Clause is similar to the Appointments Clause, Article II, Section 2, Clause 2, which states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." Both clauses invoke the mandatory directive "shall," and both clauses provide for a discretionary determination by the Legislature once the President transmits notice to Congress. Under the Appointments Clause, it is up to the President whether he wishes to transmit the name of a potential judge or ambassador to the Senate for approval, but his choice cannot fill the position until he does so and the Senate approves. Likewise, under the

Foreign Emoluments Clause, it is up to the President whether he wishes to transmit information about presents and emoluments given him by foreign governments, but he cannot accept the benefit of them until he does so and Congress approves.

Presidents and federal office-holders have long complied with the disclosure requirement. As early as 1798, Washington's minister to Great Britain, Thomas Pinckney, was offered "the customary presents" by the kings of England and Spain, but following the Foreign Emoluments Clause, he "declined receiving them, saying, that he would lay the matter before Congress." 8 *Annals of Cong.* 1590 (1798) (Rutledge).

This has long been the practice when Presidents have faced dilemmas involving emoluments and presents:

- In 1830, President Andrew Jackson reported to Congress a commemorative gold medal offered to him by Simón Bolívar. Congress directed that the medal be "deposited in the Department of State." See *Message from the President of the United States* 3 (Jan. 22, 1834), in *Message from the President of the United States to the Two Houses of*

Congress at the Commencement of the First Session of the Twenty-Third Congress 259 (1833).

▪ In 1840, the Imam of Muscat offered President Martin Van Buren two horses, a case of rose oil, five bottles of rose water, a package of cashmere shawls, a Persian rug, a box of pearls, and a sword. 14 *Abridgment of the Debates of Congress from 1789 to 1856* 140-41 (Thomas Hart Benton ed., 1860). Van Buren told the Imam of “a fundamental law of the Republic which forbids its servants from accepting presents from foreign States or Princes, [that] precludes me from receiving” the items without Congress’s approval. *Id.* at 141 (reprinting *Letter from Martin Van Buren to Syed Bin Sutan, Imaum [sic] of Muscat* (May 8, 1840)). Van Buren informed Congress of the presents, writing: “I deem it my duty to lay the proposition before Congress, for such disposition as they may think fit to make of it.” *Id.* at 140 (reprinting *Letter from Martin Van Buren to the Senate* (May 21, 1840)). Congress directed him to deposit the items with the State Department or sell the items and place the proceeds with the U.S. Treasury. S.J. Res. 4, 26th Cong., 5 Stat. 409 (1840) (enacted).

- In 1843, the Imam of Muscat (perhaps forgetting his experience with President Van Buren) offered President John Tyler two horses. Moore, *supra*, at 582. Tyler notified Congress, which instructed Tyler to sell the horses and give the money to the Treasury. See Act of Mar. 1, 1845, ch. 38, 5 Stat. 730.

- In 1862, President Abraham Lincoln wrote to the King of Siam to decline a series of presents that included two elephant tusks, an ornate sword, and a photograph of the King, at least without Congress's approval. Lincoln told the King that "our laws forbid the President from receiving these rich presents as personal treasures. . . . Congress being now in session at this capital, I have had great pleasure in making known to them this manifestation of Your Majesty's munificence and kind consideration." *Letter from Abraham Lincoln, President of the United States of America, to His Majesty Somdetch Phra Paramendr Maha Mongut, King of Siam* (Feb. 3, 1862), reprinted at <https://tinyurl.com/y8cvv386>. Despite the raging Civil War, Lincoln took time to then write Congress about the gifts and his response. S. Exec. Doc. No. 37-23, at 1 (1862). Congress directed that the items be deposited with the

Department of the Interior. *See* S.J. Res. 20, 37th Cong., 12 Stat. 616 (1862) (enacted).

By the late-19th century, Congress began legislating to require that presents to United States officials from foreign governments be automatically turned over to the Department of State absent a congressional Act. *See* 5 U.S.C. § 115 (1881) (“Any present, decoration, or other thing which shall be conferred or presented to any officer of the United States, civil, naval, or military, shall be tendered through the Department of State, and not to the individual in person, but such present, decoration, or other thing shall not be delivered by the Department of State unless so authorized by an act of Congress.”).

Thus, in 1896, President Benjamin Harrison asked Congress for approval to accept “certain medals presented to him by the Governments of Brazil and Spain during the term of his service as President of the United States.” S.J. Res. 39, 54th Cong., 29 Stat. 759 (1896) (enacted). Congress authorized him to personally accept the medals.

As the 20th century rolled on, with a statutory requirement that nearly all presents and emoluments must automatically be conveyed to the United States, Presidents generally sought to avoid any appearance

of foreign corruption rather than request permission from Congress to accept every gift. To that end, they followed the statutory procedure or refused emoluments outright, often simply following the advice of the Office of Legal Counsel.

- President Woodrow Wilson refused all foreign decorations while in office and during World War I. *See Memorandum for the Honorable McGeorge Bundy, Special Assistant to the President, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Re: Proposal that the President Accept Honorary Irish Citizenship* 10 n.5 (May 10, 1963) (unpublished), citing Edith Bolling Wilson, *My Memoir* 343 (1938), available at <https://tinyurl.com/yytvj9xs>.

- In 1963, President John Kennedy sought guidance from the Office of Legal Counsel about whether his acceptance of an offer of honorary citizenship from Ireland without congressional consent would implicate the Foreign Emoluments Clause. The OLC concluded it would and advised President Kennedy to deposit the “warrant” for the honorary citizenship with the Department of State until Congress approved or he left office. *Id.* at 7. Plans for Kennedy’s honorary citizenship were later shelved.

▪ In 1978, the General Counsel of the General Services Administration requested advice from the Office of Legal Counsel about whether gifts to President Richard Nixon's daughters at their weddings from heads of foreign states required Congress's blessing to accept. The OLC concluded gifts to one of Nixon's daughters during his presidency from foreign governments required congressional consent under the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342. *Letter for Allie B. Latimer, General Counsel, General Services Administration, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel* 5-6 (Feb. 8, 1978) (unpublished), *available at* <https://tinyurl.com/y45rx2uh>. The presents were in possession of the GSA because President Gerald Ford ordered them withheld from shipment to the Nixon family estate after Nixon resigned. Maxine Cheshire, *Unraveling the Nixons' Jewel Tangle*, *Washington Post*, Sept. 23, 1974, at A1.

One of Congress's modern regulations restricting foreign gifts to public officials is the Foreign Gifts and Decorations Act. It requires all employees of the United States, including the President and Vice President, to convey foreign gifts to the government except souvenirs

worth less than \$100, educational scholarships, or certain emergency medical care and foreign travel expenses, absent congressional approval.

So in 2009, President Barack Obama asked the Office of Legal Counsel whether he could accept the Nobel Peace Prize without congressional consent and without violating the Foreign Emoluments Clause or Foreign Gifts and Decorations Act. *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 (2009). The OLC concluded Obama could accept the prize without congressional consent because the Nobel committee is not a foreign state and no prior President who received the Nobel prize considered it to fall within the Clause. *Id.* at 6, 9.

Accordingly, past Presidents considered even small gifts and trinkets subject to disclosure, or followed the Office of Legal Counsel's advice about disclosure. Due to his unique role as head of state, potential corruption of the President by a foreign power through money or things of value is an existential concern of the republic, and ensuring disclosure and accountability are fundamental priorities for the Constitution. If the allegations in Appellees' complaint are correct and the President has

accepted or will accept money, rights, or things of value from foreign governments without congressional approval, the constitutional structure has been thrown out of balance.

D. Lesser federal office-holders also historically complied with the Foreign Emoluments Clause by disclosing to Congress anything of value received from a foreign government and awaiting approval before accepting it.

The Foreign Emoluments Clause applies to any person holding an “Office of Profit or Trust” of the United States, not just Presidents. Hundreds of lesser office-holders have complied with the Constitution’s requirement over the centuries and sought congressional approval before accepting items of value from foreign governments.

They include Naval Lieutenant M.F. Maury, whose research into ocean and wind patterns reduced travel time across the Atlantic, and who was awarded gold medals by the King of Sweden and governments of Prussia, Holland, and the Republic of Bremen. S.J. Res. 14, 33d Cong., 10 Stat. 830 (1854) (enacted); S.J. Res. 2, 34th Cong., 11 Stat. 151 (1856) (enacted). They also include Doctor Elisha K. Kane, who led a team of Naval explorers to the Arctic Sea and received a “token of thankfulness” from Great Britain for his trouble. S.J. Res. 3, 34th Cong., 11 Stat. 152 (1856) (enacted). They include Lieutenant Z.L. Tanner, commander of

the *City of Peking*, who was awarded a pair of flower vases and lacquered box from the Japanese Government for rescuing four Japanese seamen in a wreck. Act of Jan. 31, 1881, ch. 32, 21 Stat. 603-04.

Tanner's congressional permission came in a batch that included Army General Francis A. Walker (Ret.), later superintendent of the Census, whom Congress allowed to join the Swedish Order of Wasa and the Spanish Order of Isabella. *Id.* Congress restricted its approval, however, preventing Tanner, Walker, and the like from showing or wearing their gifts without further authorization.

As time went on, Congress took its authority over emolument requests for lesser federal office-holders seriously even as the number of requests increased. A 1910 Report from the Senate Foreign Relations Committee listed hundreds of requests, including Richard Pearson's Persian snuff box, O.C. Hamlet's Russian cigarette case, E.C. Hadley and Albert Whitten's Canadian watches, a gold cup given to Leslie M. Combs, Esq., the American Minister to Peru, and a silver inkstand given to George H. Bridgeman, U.S. Consul at Kingston, Jamaica.

Among these, the Report recommended approving the gifts given to Hadley and Whitten, Hamlet, and Bridgeman, but not Pearson or Combs.

The Report explained the Committee's ambivalence by noting that "[t]he existence of the prohibition in the Constitution indicates that the presumption is against the acceptance of the present, emolument, office, or title." S. Rep. No. 61-373, at 1 (1910). Thus, "[a] habit of general and indiscriminate consent by Congress upon such application would tend practically to nullify the constitutional provision, which is based upon an apprehension, not without foundation, that our officers may be affected in the performance of their duties by the desire to receive such recognition from other governments." *Id.* Moreover, "no presents should be received except such articles as are appropriate for souvenirs and marks of courtesy and appreciation and having an intrinsic value not disproportionate to such a purpose." *Id.* at 2.

Similarly, a 1918 House Report made clear that Congress jealously guards its right to approve, vel non, acceptance of foreign emoluments. "Congress has in recent years rather infrequently granted its consent to the reception of gifts or decorations tendered by foreign powers to its officials," the Committee on Foreign Affairs wrote. H.R. Rep. No. 65-695, at 4 (1918). The Report went on to recommend granting President Woodrow Wilson's request that certain members of the State Department

attached to the U.S. Embassy at Berlin during World War I be permitted to accept “pieces of plate” from the British government—but specifically because “[t]he intrinsic value of the articles in question is so small as to be not fairly an issue.” *Id.* at 5. The Report noted that even powerful American officers had requested (and received) Congress’s approval before taking gifts from foreign powers, including Naval Commander Edmund O. Matthews, given a gilt teapot from the Emperor of Siam. *Id.* at 8.

As America rose to become a world power, foreign governments granted prizes to American officials more and more. In 1934, Congress approved 48 members of government, including members of Congress, cabinet officers, State Department functionaries, and military personnel (including General John J. Pershing) to accept medals and gifts from foreign governments after they all requested permission. H.R.J. Res. 330, 73d Cong., 48 Stat. 1267 (1934) (enacted).

Decades later, as the Cold War raged, Congress approved hundreds more awards, from medals to gold watches, given by foreign governments to executive agency and military personnel. Act of Aug. 27, 1958, Priv. L. No. 85-704, 72 Stat. A159. Congress approved foreign medals to World

War II heroes George Marshall, Douglas MacArthur, and Omar Bradley in 1959, all of whom sought approval before accepting them. Act of Aug. 7, 1959, Priv. L. No. 86-94, 73 Stat. A45. Likewise, when the Portuguese and French governments awarded decorations to two members of Congress in 1965, both sought (and received) Congress's approval to accept them. Act of Sept. 1, 1965, Priv. L. No. 89-61, 79 Stat. 1356; Act of Sept. 11, 1965, Priv. L. No. 89-64, 79 Stat. 1357.

The need for regular congressional action for gifts to lesser federal office-holders dwindled after passage of the Foreign Gifts and Decorations Act in 1966, with its express directions about what gifts and decorations may be accepted without case-by-case evaluations. Although that Act encompassed most of the honorary awards that tend to arise, it says nothing about the types of huge business profits Appellees allege Trump regularly receives from foreign governments today.

II. To perform its constitutional duty, Congress needs the federal courts to engage in the limited and modest task of enforcing the Foreign Emoluments Clause's clear directive.

Congress needs the federal courts to enforce the Foreign Emoluments Clause to address unprecedented alleged violations of the Clause.

The threat of undue foreign influence of the President remains as great now as when the Constitution was written. Indeed, the threat may be even greater today. Whereas once America's poverty and weakness formed the basis for fear of presidential corruption, it is precisely America's wealth and power that make the President so prime a target for foreign corruption in the early 21st century. Foreign states with adverse interests have little reason not to try to hold outsized sway over American policy, since the benefit to them could be so great. In the globalized age, where transcontinental travel and business ownership are commonplace and seamless, the President even more lacks "that permanent stake in the public interest which would place him out of the reach of foreign corruption" than at the nation's founding. 1 *Convention Records* 138; see also *Donald Trump's Many, Many Business Dealings in 1 Map*, Time Magazine, Jan. 10, 2017, available at <https://tinyurl.com/y6jk7y1b> (identifying nearly 25 countries in which businesses owned by the President operate).

That is why the Constitution's structure and text require the President to disclose emoluments or presents to Congress *before* accepting them. Disclosure by the President before acceptance allows

Congress to exercise its approval authority. If the President does not initiate disclosure—and the text puts the onus unquestionably on him—Congress can't approve any gifts given him. It has no way to know whether he's on a foreign government's payroll or how much these gifts could compromise his loyalty.

Indeed, Congress need never reject a presidential request for emoluments to prevent the President from taking them—it merely need not *approve* one. Under the Constitution's plain text, rejection is automatic until affirmative approval comes through. While this structure of congressional consent may be inconvenient for the President's private business interests, it is one of the compromises he must accept when he agrees to put the interests of hundreds of millions of Americans before his own.

The President, however, sees the Foreign Emoluments Clause as setting up a “gotcha” game between the executive and legislative branches. But the Constitution does not direct Congress to constantly track and investigate the President's international business dealings and affirmatively issue a disapproval when it decides it doesn't like one. Such a regime is antithetical to the Clause's unambiguous default presumption

that the President may not accept any foreign emoluments *unless* approved by Congress. Such an interpretation of the Clause would also undermine the Framers' clearly expressed anti-corruption goals, because it would substantially increase the likelihood that emoluments would slip through undisclosed and unreviewed, in contradiction of the firewall they sought. It would also virtually guarantee that any emolument discoveries by Congress would come months or years after the emolument was already accepted, with the damage quite possibly already done.

The Constitution creates, instead, an "opt in" rule: Congress must "opt in" to the President's request, and unless it does, the President cannot accept presents or emoluments without violating the Constitution. Period. Of course, Congress can streamline its review procedures, approve the emolument without debate, or hold hearings and investigate, as it sees fit. But the initial triggering event is the President's disclosure.

That's why Congress legislates in advance to exercise its power of consent only when it knows in advance what it's consenting to. Thus, Congress pre-approved accepting certain military honors, 5 U.S.C. § 7342(d) (permitting government employees to retain certain foreign

medals or decorations and requiring reporting), taking some jobs with foreign governments, 37 U.S.C. § 908 (requiring reporting and approval from the Secretary of State), and accepting low-value souvenirs, emergency medical treatment, and educational scholarships, 5 U.S.C. § 7342(c)(1). These are all items unlikely to have a corrupting influence and offered with great frequency. (Indeed, for government jobs and military honors, Congress still requires specific disclosure even though it has pre-consented.) So, for example, if the President wants his business to receive valuable trademark approvals from foreign states, Congress might approve him doing so in advance, but only after he discloses which trademarks he is seeking from which countries. Congress needs to know what it's approving before it can make an informed decision about the risk of corruption from its consent.

Appellees' goals in this lawsuit are modest. They merely seek compliance with the Constitution's unambiguous requirement that the President disclose whatever he is offered from a foreign state and get Congress's okay before he accepts it. This Court is well-suited to helping that occur, and amici implore it to. Doing so will help restore functioning to the Constitution's most essential protection against foreign corruption.

CONCLUSION

Thus, this case is not just about President Donald Trump. It is also about former Secretary of State John Kerry, who oversaw diplomatic negotiations with Iran during the administration of President Barack Obama and could have—hypothetically—been offered a “mark of regard” by the Iranian government. It is about former Special Counsel Robert Mueller, who could have—hypothetically—been offered a gold-filled briefcase by the President of Russia. It is about every officer of the American government whom the Constitution’s Framers feared could be offered—hypothetically—a “token of thankfulness” from a foreign state. And for that reason, it is indeed very much about President Donald Trump.

Accordingly, amici respectfully request that this Court affirm the district court’s orders denying Appellant’s motion to dismiss.

Respectfully submitted,

Date: October 28, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,486 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Date: October 28, 2019

By: */s/ Walter Dellinger*

CERTIFICATE OF SERVICE

I certify that on October 28, 2019, I caused a true and correct copy of the foregoing to be served on all counsel of record through the Court's CM/ECF system.

Date: October 28, 2019

By: /s/ Walter Dellinger