

# The Text and History of the Foreign Emoluments Clause

America’s Founders believed that corruption and foreign influence were among the gravest threats to our nation. As a result, they included in our Constitution the Foreign Emoluments Clause. Written in sweeping and unqualified language, the Clause was designed to prevent these two evils from affecting the federal government. This document explores the text and history of the Clause, providing statements from the Founders themselves and the Department of Justice’s Office of Legal Counsel, which among other things provides “legal advice to the Executive Branch on all constitutional questions.”<sup>1</sup>

## **Text of the Foreign Emoluments Clause, U.S. Const. art. I, § 9, cl. 8.**

“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 State.”

## **The Founders Feared a Corrupt Government**

Because the Founders believed that corruption was one of the gravest threats to our nation, they viewed anti-corruption measures as essential to preserving an enduring democracy.

- Reflecting common sentiment at the Constitutional Convention, George Mason warned his fellow delegates that “if we do not provide against corruption, our government will soon be at an end.”<sup>2</sup> Thus, in drafting the Constitution, the Founders sought to ensure that “corruption was more effectually guarded against, in the manner this government was constituted, than in any other that had ever been formed.”<sup>3</sup> Alexander Hamilton explained that “[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.”<sup>4</sup>
- According to James Madison’s notes of the Convention, fifteen delegates used the word “corruption” more than fifty times,<sup>5</sup> and corruption was a topic of discussion on almost a quarter of the days that the Convention was in session.<sup>6</sup>

The Founders wanted to ensure that in the United States, unlike in Europe, the nation's leaders would be dependent on the people alone – not on those offering financial benefits – and would be motivated solely by the national interest, not their own personal interests.

- To promote that goal, the Founders included in the nation's new charter a number of safeguards against corruption. These safeguards took the form of “procedural devices and organizational arrangements” meant to ward off “dependency, cabals, patronage, unwarranted influence, and bribery.”<sup>7</sup>

## The Founders Feared Foreign Influence

The Founders were also deeply worried that foreign powers would interfere with America's internal affairs, undermining the nation's republican institutions and making its leaders subservient to foreign interests.

- Alexander Hamilton wrote that one of the vulnerabilities of republics “is that they afford too easy an inlet to foreign corruption.”<sup>8</sup> Eighteenth-century monarchs used lavish presents to ingratiate themselves with ambassadors and ministers from other nations.<sup>9</sup>
- During the Constitutional Convention, Elbridge Gerry warned that “[f]oreign powers will intermeddle in our affairs, and spare no expence to influence them,”<sup>10</sup> while Gouverneur Morris invoked “the melancholy picture of foreign intrusions as exhibited in the History of Germany,” and “urged it as a standing lesson to other nations.”<sup>11</sup>
- The Foreign Emoluments Clause was added to the draft of the new Constitution by unanimous agreement of the state delegations after Charles Pinckney “urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence.”<sup>12</sup>

Of particular concern to the Founders was the risk that benefits and rewards given by foreign states would subvert the President's undivided loyalty to the nation's best interests.

- As Hamilton noted, the personal interest of a hereditary monarch was “so interwoven with that of the Nation ... that he was placed above the danger of being corrupted from abroad.”<sup>13</sup>
- By contrast, as Madison observed, an elected President would lack “that permanent stake in the public interest which would place him out of the reach of foreign corruption.”<sup>14</sup>
- During the state debates over ratification of the Constitution, former delegate Charles Cotesworth Pinckney similarly explained that while “kings are less liable to foreign bribery and corruption ... because no bribe that could be given them could compensate the loss they must necessarily sustain for injuring their dominions ... the situation of a President would be very different.”
- The Founders believed that, as a temporary officeholder, the 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 [would be] no more interested in the prosperity of his country than any other patriotic citizen.”<sup>15</sup>

# The Founders Mandated Congressional Approval of Foreign Emoluments to Reduce Potential Corruption and Foreign Influence

Founding-era statesmen stressed that the dangers of foreign influence and divided loyalty would be reduced when officeholders obeyed the Constitution’s mandate by seeking the consent of Congress before accepting any foreign benefit.

- The Foreign Emoluments Clause was one of the few measures to be transferred from the Articles of Confederation to the new Constitution in 1787, but the Founders made one important change: they “institutionalized the practice” that federal officeholders could accept otherwise prohibited emoluments from foreign states if they first obtained the consent of Congress.<sup>16</sup>
- As Representative James Bayard explained, the Clause required officeholders “to make known to the world whatever presents they might receive from foreign Courts and to place themselves in such a situation as to make it impossible for them to be unduly influenced by any such presents.”<sup>17</sup>
- Representative Harrison Gray Otis likewise noted: “When 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.”<sup>18</sup>
- As Secretary of State Madison explained in 1803, “the Constitution of the United States has left with Congress the exclusive authority to permit the acceptance of presents from foreign governments by persons holding offices under the United States.”<sup>19</sup>
- In sum, “to exclude corruption and foreign influence,”<sup>20</sup> a federal officeholder must “make known to the world”<sup>21</sup> any benefit he wishes to accept from a foreign state and “come before his country to be judged”<sup>22</sup> by seeking “the Consent of the Congress.”<sup>23</sup>

## The Founders Drafted the Foreign Emoluments Clause with Sweeping and Unqualified Language

Because the Framers wanted to eliminate “foreign influence of every sort,” they drafted the Clause with language “both sweeping and unqualified,”<sup>24</sup> “prohibit[ing] those holding offices of profit or trust under the United States from accepting ‘any present, Emolument, Office, or Title, of any kind whatever’ from ‘any ... foreign State’ unless Congress consents.”<sup>25</sup>

- Consistent with that broad language, the Clause has been understood to be “‘directed against every kind of influence by foreign governments upon officers of the United States,’ in the absence of consent by Congress.”<sup>26</sup>

The Foreign Emoluments Clause applies to the acceptance of any benefits or advantages from foreign states—including payments arising from private business transactions.

- The word “emolument” was defined broadly in the eighteenth century to mean “profit,” “advantage,” “benefit,” and “comfort.”<sup>27</sup>

- Contemporary writers used the term to refer, among other things, to profits accruing from private commerce.<sup>28</sup>
- Founding-era statesmen including George Washington and James Madison likewise used the term when referring to “the consequences of ordinary business dealings.”<sup>29</sup>
- And Edmund Randolph’s comments at the Virginia Ratifying Convention, specifically addressing the Foreign Emoluments Clause, reflected this broad definition as well.<sup>30</sup>

When Congress was first called upon to give or withhold its consent under the Foreign Emoluments Clause,<sup>31</sup> lawmakers reaffirmed the views expressed a decade earlier during the Constitution’s ratification about the dangers of foreign manipulation and the importance of the Clause in guarding against it.

- Representative William Charles Cole Claiborne described the Clause as “intended to lock up every door to foreign influence, to the influence of Courts and Monarchies, which could not but prove baneful to every free country.”<sup>32</sup>
- Representative Bayard noted 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.”<sup>33</sup>
- Representative Matthew Lyon expressed a refusal to consent to the acceptance of any foreign emoluments, as “he should not be willing to lay this country under an obligation to a foreign country by our Ministers accepting presents.”<sup>34</sup>

By extending the reach of these important rules to everyone who holds “any Office of Profit or Trust” under the United States, the Founders ensured that the Foreign Emoluments Clause would apply to all federal officeholders and thus guard against corruption in the highest reaches of the nation’s government.<sup>35</sup>

- As noted, the Founders were especially afraid that foreign nations would use favors to subvert the loyalty of the President.
- Edmund Randolph explained at the Virginia Ratifying Convention that “[t]here is another provision against the danger ... of the president receiving emoluments from foreign powers ... I consider, therefore, that he is restrained from receiving any present or emoluments whatever. It is impossible to guard better against corruption.”<sup>36</sup>

## Endnotes

- 1 *Office of Legal Counsel: About the Office*, The United States Department of Justice (last visited May 16, 2017), <https://www.justice.gov/olc>.
- 2 1 *The Records of the Federal Convention of 1787*, at 392 (Max Farrand ed., 1911) (hereinafter “*Convention Records*”).
- 3 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 302 (Jonathan Elliot ed., 1836) (hereinafter “*Elliot’s Debates*”) (Charles Cotesworth Pinckney).
- 4 *The Federalist* No. 68, at 411 (Clinton Rossiter ed., 1961).
- 5 James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 *J. Pol.* 174, 181 (1994).
- 6 Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 352 (2009).
- 7 Savage, *supra*, at 181; see *id.* at 177-82 (describing how fear of corruption influenced the structure of the electoral college, Congress’s power to impeach, the prohibition on members of Congress holding other offices, and the prohibition on acceptance of foreign emoluments).
- 8 *The Federalist* No. 22, *supra*, at 145.
- 9 Such gifts were made up 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)).
- 10 2 *Convention Records*, at 268 (Gerry).
- 11 1 *Convention Records*, at 530 (Morris).
- 12 2 *Convention Records*, at 389; see *id.* at 384.
- 13 1 *Convention Records*, at 289 (Hamilton).
- 14 1 *Convention Records*, at 138 (Madison).
- 15 4 *Elliot’s Debates* 264 (Charles Cotesworth Pinckney).
- 16 See *Emoluments Clause*, *The Heritage Guide to the Constitution*, <http://www.heritage.org/constitution/#!/articles/1/essays/68/emoluments-clause> (last visited May 2, 2017) [hereinafter “*Emoluments Clause*, Heritage Guide”].
- 17 5 *Annals of Cong.* 1583 (1798) (Bayard).
- 18 *Id.* at 1585 (Otis).
- 19 Letter from James Madison to David Humphreys (Jan. 5, 1803), in 4 Moore, *A Digest of International Law*, *supra*, at 579.
- 20 3 *Convention Records*, at 327 (Randolph).
- 21 5 *Annals of Cong.* 1583 (1798) (Bayard).
- 22 *Id.* at 1585 (Otis).
- 23 U.S. Const. art. I, § 9, cl. 8
- 24 *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 *Op. O.L.C.* 13, 17 (1994).
- 25 *Id.* (quoting U.S. Const., art. I, § 9, cl. 8 (emphasis added by OLC))

- 26 *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 98 (1986) (quoting 24 Op. Att’y Gen. 116, 117 (1902))
- 27 *Oxford English Dictionary* (2d. ed. 1989) (citing eighteenth-century texts for definition of “emolument” meaning “Advantage, benefit, comfort”); Samuel Johnson, *A Dictionary of the English Language* 690 (1755) (defining “emolument” as “Profit; advantage.”); see, e.g., Jonathan Swift, *The Tale of a Tub* 91 (Henry Morley ed., 1889) (1704) (“And so I proceed with great content of mind upon reflecting how much emolument this whole globe of earth is like to reap by my labours.”).
- 28 See, e.g., Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress* 9 (1775) (“A merchant’s desire is not of glory, but of gain; not of publick wealth, but of private emolument; he is, therefore, rarely to be consulted about war and peace, or any designs of wide extent and distant consequence.”).
- 29 John Mikhail, *A Note on the Original Meaning of “Emolument,”* Balkinization (Jan. 18, 2017) (citing examples), <https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html>.
- 30 Randolph observed in his comments that “[a]ll men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community.” 3 *Convention Records*, at 327.
- 31 Former envoy Thomas Pickney was offered “the customary presents” by the kings of England and Spain, but “declined receiving them, saying, that he would lay the matter before Congress.” 5 *Annals of Cong.* 1590 (1798) (Rutledge). The Senate authorized acceptance of the presents, but the House withheld its consent, see *id.* at 1570-93, subsequently passing a resolution to clarify that the Congressmen “were induced to such refusal solely by motives of general policy, and not by any view personal to the said Thomas Pickney,” *id.* at 1775.
- 32 5 *Annals of Cong.* 1584 (1798) (W.C. Claiborne); see *id.* at 1587.
- 33 *Id.* at 1583 (Bayard).
- 34 *Id.* at 1589 (Lyon).
- 35 *Emoluments Clause*, Heritage Guide, *supra* (“the clause was directed not merely at American diplomats serving abroad, but more generally at officials throughout the federal government”).
- 36 David Robertson, *Debates and other Proceedings of the Convention of Virginia* 345 (2d ed. 1805) (1788).