

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era—Separation of Powers/General

David J. Barron, **Applicability of the Emoluments Clause to the President’s Receipt of the Nobel Peace Prize** (2009)¹

In 2009, newly elected President Barack Obama was chosen to receive the Nobel Peace Prize. The Nobel Peace Prize is a legacy of the bequest of the Swedish chemist Alfred Nobel. The recipient of the annual peace prize is selected by a committee chosen by the Norwegian Storting, or Parliament. The prize is accompanied by cash prize paid from an endowment managed by the Nobel Foundation. In 2009, the cash prize was worth just under \$1.5 million. Before accepting the prize, the president asked for a legal opinion determining whether the prize would run afoul of the emoluments clause of the U.S. Constitution, which specifies that “no Person holding any Office 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 Office of Legal Counsel concluded that the emoluments clause did not apply to the Nobel Committee.

...

... [U]ntil 1977, the Committee’s official title was the Nobel Committee of the Norwegian Storting. Nevertheless, it has long been recognized that the “[C]ommittee is formally independent even of the Storting, and since 1901 it has repeatedly emphasized its independence.” In 1936, for instance, the Norwegian Foreign Minister and a former Prime Minister recused themselves from the Committee’s deliberations out of concern that bestowing the award on the German pacifist Carl von Ossietzky would be perceived as an act of Norwegian foreign policy. To make clear the independent nature of the Committee’s decisions, moreover, the Storting in the very next year, 1937, barred government ministers from sitting on the Nobel Committee. . . . [But] two of the current members, who joined the Nobel Committee in 2009, appear to have served on the Storting during much, if not all, of the period during which this year’s Prize recipient was selected. The other three members of the Committee were private individuals.

Apart from the Storting’s role in selecting the members of the Nobel Committee, the Norwegian government has no meaningful role in selecting the Prize recipients or financing the Prize itself. In addition to fully funding the Prize, the Sweden-based private Nobel Foundation, established pursuant to Alfred Nobel’s will, is responsible for the Committee’s viability and the administration of the award. Specifically, your Office has informed us that the Committee’s operations, including the salaries of the various Committee members and of the staff, are funded by the Foundation and not by the Norwegian or Swedish governments. The Committee also deliberates and maintains staff in the Nobel Institute

¹ Excerpt taken from David J. Barron, “Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize,” Office of Legal Counsel (December 7, 2009).

building, which is owned by the private Nobel Foundation rather than by the government of Sweden or Norway. . . .

. . . Adopted unanimously at the Constitutional Convention, the Emoluments Clause was intended to recognize the “necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence,” specifically, undue influence and corruption by foreign governments. . . .

. . .
None of our Office’s precedents concerning the Emoluments Clause specifically considers the status of the Nobel Committee (or the Nobel Foundation), but there is substantial and consistent historical practice of the political branches that is directly relevant. The President would be far from the first government official holding an “Office of Profit or Trust” to receive the Nobel Peace Prize. . . . Throughout this history, we have found no indication that either the Executive or the Legislative Branch thought congressional approval was necessary.

. . .
This longstanding treatment of the Nobel Peace Prize is particularly significant to our analysis because several of the Prizes were awarded when the Nobel Committee—then known as the Nobel Committee of the Norwegian Storting—lacked some of the structural barriers to governmental control that are present today, such as rules generally barring government ministers and legislators from serving on the Committee. If anything, then, these prior cases arguably would cause more reason for concern than would be present today, and yet the historical record reveals no indication that either the Congress or the Executive believed receipt of the Prize implicated the Emoluments Clause at all. The absence of such evidence is particularly noteworthy since the Clause was recognized as a bar to gifts by foreign states without congressional consent throughout this same period of time, such that the Attorney General and this Office advised that various gifts from foreign states could not be accepted, and Congress passed legislation specifically manifesting its consent to some gifts bestowed by foreign states on individuals covered by the Clause. . . .

. . .
The precedents of the Office do establish that the Emoluments Clause reaches not only “foreign State[s]” as such but also their instrumentalities. Quite clearly, the Nobel Committee is not itself a foreign state in any traditional sense. The issue, therefore, is whether the Committee has the kind of ties to a foreign government that would make it, and by extension the Nobel Foundation in financing the Prize, an instrumentality of a foreign state under our precedents. Our past opinions make clear that an entity need not engage specifically in “political, military, or diplomatic functions” to be deemed an instrumentality of a foreign state. Thus, for example, we have determined that entities such as corporations owned or controlled by a foreign government and foreign public universities may fall within the prohibition of the Clause. . . .

To determine whether a particular case involves receipt of a present or emolument from a foreign state, however, our Office has closely examined the particular facts at hand. Specifically, we have sought to determine from those facts whether the entity in question is sufficiently independent of the foreign government to which it is arguably tied—specifically with respect to the conferral of the emolument or present at issue, e.g., hiring an employee or bestowing an award—that its actions cannot be deemed to be those of that foreign state. In short, our opinions reflect a consistent focus on whether an entity’s decision to confer a particular present or emolument is subject to governmental control or influence.

The factors we have considered include whether a government is the substantial source of funding for the entity; whether a government, as opposed to a private intermediary, makes the ultimate decision regarding the gift or emolument; and whether a government has an active role in the management of the entity, such as through having government officials serve on an entity’s board of directors. No one of these factors has proven dispositive in our prior consideration of Emoluments Clause

issues. Rather, we have looked to them in combination to assess the status of the entity for purposes of the Clause, keeping in mind at all times the underlying purpose that the Clause is intended to serve. . . .

Consistent with this analysis, we have concluded in the past that Emoluments Clause concerns are raised where the “ultimate control” over the decision at issue—e.g., an employment decision or a decision to bestow an award—resides with the foreign government. . . .

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