AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Emoluments

*Walter Dellinger*, **Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities** (1994)[[1]](#footnote-1)

*Two scientists at the federal government’s Goddard Institute for Space Studies proposed taking a leave of absence to teach at the University of Victoria, a public university in Canada. A majority of the 15-member board of governors of the University of Victoria is appointed by the governor of British Columbia, but two of the eight members appointed by the governor must be nominated by the alumni association. The academic senate governs the academic affairs of the university and has little representation from government appointees. The academic senate is responsible for appointing the faculty, though the board of governors must give final approval.*

*The Office of Legal Counsel was asked whether these visiting faculty appointments at the University of Victoria for NASA scientists ran afoul of the emoluments clause of the U.S. Constitution. The emoluments clause bars any person holding an office of profit or trust in the federal government from accepting any “present, Emolument, Office, or Title” from any king or foreign state. The OLC concluded that the clause did not apply to these appointments since the university was acting independently of any foreign state in making its academic appointments.*

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The Emoluments Clause was adopted unanimously at the Constitutional Convention, and was intended to protect foreign ministers and other officers of the United States from undue influence and corruption by foreign governments – a danger of which the Framers were acutely aware. . . . “Consistent with its expansive language and underlying purpose, the provision has been interpreted as being ‘particularly directed against every kind of influence by foreign *governments* upon officers of the United States, based upon our historic policies as a nation.’” . . .

Our Offices has been asked from time to time whether foreign entities that are public institutions but not diplomatic, military, or political arms of their government should be considered to be “foreign State[s]” for purposes of the Emoluments Clause. In particular, we have been asked whether foreign public universities constitute “foreign State[s]” under the Clause. Our prior opinions on this subject have not been a seamless web. . . .

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The language of the Emoluments Clause is both sweeping and unqualified. The Clause in terms prohibits 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. There is no express or implied exception for emoluments received from foreign states when the latter act in some capacity other than the performance of their political, military, or diplomatic functions. The decision whether to permit exceptions that qualify for 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.

Further, it serves the policy behind the Emoluments Clause to construe it to apply to foreign states even when they act through instrumentalities, such as universities, which do not perform political, military, or diplomatic functions. Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty. That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government, even when those benefits took the form of remuneration for academic work or research. . . .

Finally, Congress has exercised its power under the Emoluments Clause to create a limited exception for academic research at foreign public institutions of learning. The Foreign Gifts and Decorations Act provides in part that Federal employees may accept from foreign governmental sources “a gift of more than minimal value when such gift is in the nature of an educational scholarship.” Thus, Congress has recognized that foreign governmental bodies may wish to reward or encourage scholarly or scientific work by employees of our Government, but has carefully delimited the circumstances in which Federal employees may accept such honors or emoluments. . . .

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Having found that foreign public universities may and presumptively do all under the Emoluments Clause, we turn next to the question whether the University of Victoria in particular is an instrumentality of a foreign state (the province of British Columbia), and hence within the Clause. We conclude that it is not, at least with respect to the faculty employment decisionmaking that is in issue here. . . .

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. . . . [T]he University of Victoria is independent of the government of British Columbia with respect to decisions regarding the terms and conditions of faculty employment. Because that showing can be made, we believe the university should not be considered to be a foreign state under the Emoluments Clause when it is acting in that context.

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1. Excerpt taken from Walter Dellinger, “Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities” 18 *Op. O.L.C*. 13 (1994). [↑](#footnote-ref-1)