

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 10: The Reagan Era—Separation of Powers/General

*Samuel Alito, Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales (1986)*¹

In 1986, a National Aeronautics and Space Administration (NASA) scientist was asked to serve on the oral defense committee for a Ph.D. student at the University of New South Wales in Australia. The public university offered a \$150 honorarium in compensation for the scientist's services. The legal counsel for NASA asked the Office of Legal Counsel for an opinion on whether accepting such a stipend would be consistent with the U.S. Constitution's emoluments clause, which prohibits any person holding "an office of profit or trust" in the federal government from accepting, with the consent of Congress, "any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state." Samuel Alito provided an opinion concluding that the university stipend for services did not fall within the constitutional prohibition.

...

... This clause was adopted unanimously at the Constitutional Convention as a means of preserving the independence of foreign ministers and other officers of the United States from external influences. Its purpose, as explained by Governor Randolph during the ratification debate in the Virginia Convention, is "to exclude corruption from receiving or holding any emoluments from foreign states." Thus the Emoluments Clause is "directed against every kind of influence by foreign governments upon officers of the United States," unless the payment has been expressly consented to by Congress.

The individual who has been offered the consultancy is a full-time government employee of NASA and thus occupies an "Office of Profit or Trust under [the United States]" as that phrase is used in the Emoluments Clause. Moreover, a stipend or consulting fee from a foreign government would ordinarily be considered an "emolument" within the meaning of the constitutional prohibition. The question in this case, however, is whether the consulting fee from the University of New South Wales can be said to be from a "foreign state."

We have found no judicial opinions construing the Emoluments Clause in which the identity of the source of an emolument was at issue; nor have we found any discussion of this issue in any relevant commentary. In the absence of any authoritative guidance, but with the underlying purpose of the constitutional prohibition in mind, we have relied for our analysis on the factual circumstances of the proposed consultancy.

...

The University of New South Wales was established pursuant to a 1949 Act of the legislature of the state of New South Wales, Australia. It is governed by a Council, which consists of 44 elected and

¹ Excerpt taken from Samuel Alito, "Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales," Office of Legal Counsel (May 23, 1986).

appointed members. Two members are so-called “parliamentary members,” or members of the state government of New South Wales; 21 members are elected from within the University community to represent the administration, faculty, and student body; and 21 members are appointed by the Minister of Education of New South Wales, who is an elected member of the state legislature, to represent various interest groups, including business, the professions, and trade unions.

Under the University’s organic act, the Council has complete power over the University’s academic program, the appointment and termination of faculty and other employees, and the management of the affairs, property and funds of the University. . . . It would appear . . . that although a bare majority of members of the Council consists of state officials or their appointees, the Council itself acts entirely independently of the state government in making decisions affecting the management and academic governance of the University.

While the University’s governing body reflects state and local interests, its finances are derived from and controlled entirely by the federal government. . . . All of the University’s funding comes directly from the Australian federal government. . . .

Given its source of financial support and governing structure, the University of New South Wales is clearly a public institution. However, it is not so clear that it should necessarily be regarded as a “foreign state” for Emoluments Clause purposes, given its functional and operational separation and independence from the government of Australia and state political instrumentalities. The answer to the Emoluments Clause question in this particular situation must depend, we believe, upon a further inquiry into the circumstances of the proposed consultancy, to determine whether the consultancy would raise the kind of concern (*viz.*, the potential for “corruption and foreign influence”) that motivated the Framers in enacting the constitutional prohibition.

. . . The invitation was extended to him on University letterhead by the chairman of the academic department in which the Ph.D. candidate is enrolled. The \$150 consulting fee is apparently to be paid from funds made available to departments of the University for this purpose and is in an amount ordinarily paid by departments to outside experts for services of this kind. The thesis to be reviewed will be sent directly to the NASA scientist in this country, and he will review it here on his own time and submit a written report to the University. There does not appear to be any reason for him to have any direct contact with officials of the University during the course of the consultancy. . . .

Considering the factual setting described above in light of the Framers’ concerns expressed in the Emoluments Clause, we do not believe that it presents the opportunity for “corruption and foreign influence” that concerned the Framers and that we must presume exists whenever a gift or emolument comes directly from a foreign government or one of its instrumentalities. We therefore conclude that the NASA employee’s acceptance of the consultant’s stipend from the University in this case would not be prohibited by the Emoluments Clause.