AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers/Emoluments

*Robert B. Shanks*, **Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act** (1982)[[1]](#footnote-1)

*In 1982, an employee of the Nuclear Regulatory Commission (NRC) sought permission to work for a small American consulting firm while he was leave from his government position. In particular, he would be reviewing the design of a Mexican nuclear power plant, and the consulting firm was working under a contract with the Mexican government’s Federal Electrical Commission. The work was expected to take seven to ten days. He had previously had dealings with the Mexican government about this same power plant through the United States Department of State and the International Atomic Energy Agency, and that earlier experience apparently led to the Mexican government approaching him about doing the private consulting job. The general counsel for the United States Nuclear Regulatory Commission sought an opinion from the Office of Legal Counsel as to whether there were legal complications for the NRC employee taking the job. The emoluments clause of the Constitution indicates that no person holding an office of trust or profit in the federal government shall, without the consent of Congress, accept any present, emolument, office or title from any king or foreign state. The OLC concluded that the consulting contract would fall within that constitutional prohibition.*

. . . .

At the outset we note that your agency has concluded that the proposed activity is permissible under the NRC conflict of interest regulations governing outside employment by NRC employees.

The Foreign Gifts and Decorations Act generally prohibits employees from requesting or otherwise encouraging the tender of a gift or decoration, or from accepting or retaining a gift of more than minimal value. That section defines “gift” as “a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government.” It seems clear that this Act only addresses itself to gratuities, rather than compensa­tion for services actually performed, as would be the case here.

The Emoluments Clause presents more difficult problems. . . .

. . . . The Supreme Court has said that “any appointee exercising significant authority pursuant to the laws of the United States” is an officer under the Appointments Clause and must be appointed in the manner prescribed by that Article. Employees are “lesser functionaries” subordinate to officers. The Emoluments Clause . . . is designed “to exclude corruption and foreign influence.” Even though the Framers may have had the example of high officials such as “foreign Ministers” in mind when discussing the clause, its policy would appear to be just as important as applied to subordinates. The problem of divided loyalties can arise at any level. This may be particularly true in a field where, as here, secrecy is pervasive.

It is presumably for this reason that Congress, in enacting the Foreign Gifts and Decorations Act, assumed without discussion that under the Emoluments Clause its consent was necessary for *any employee* to accept a gift from a foreign government. Although the view of Congress is not, by itself, conclusive, we are persuaded that the interpretation suggestion by the Foreign Gifts and Decorations Act is appropriate here. It is not necessary therefore for us to decide whether the NRC employee in this case must be considered an officer in the Appointments Clause sense.

The next issue presented under the Emoluments Clause is whether the payment in this case is “from any King, Prince, or foreign State.” As noted, Congress has consented only to the receipt of minimal gifts from any foreign state as provided by 5 U.S.C. § 7342. Therefore, any other emolument stands forbidden unless the conclusion can be reached that the payment is not “from” a foreign govern­ment at all. We must thus decide whether payment through the consulting firm, in effect, shields the employee from payment by the Mexican government.

. . . .

In the present case, the retention of the NRC employee by the consulting firm appears to be the principal reason for selection of the consulting firm by the Mexican government. He is the firm’s sole source of expertise and was, at least in part, selected because of prior experience gained while working on the same project in an official capacity. As we understand the situation, it seems clear that the ultimate control, including the selection of personnel, remains with the Mexican government. . . . Under the circumstances presented here . . . we cannot conclude that the interposition of the American corporation relieve the NRC employee of the obligation imposed by the Emoluments Clause.

1. Excerpt taken from Robert B. Shanks, “Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act” 6 *Op. O.L.C*. 156 (1982) [↑](#footnote-ref-1)