

Ethics in the Executive Branch: Enforcing the Emoluments Clause

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INTRODUCTION: GOVERNMENT ETHICS AND THE TRUMP PRESIDENCY

We live in an extraordinary moment for government ethics in the United States. Throughout American history, Presidents have, in general, proactively complied with the evolving ethical standards associated with the office. These include restrictions codified at the nation's founding: the Foreign and Domestic Emoluments Clauses of the Constitution. Today, these standards are regulated by mechanisms that are self-policing—triggered by the voluntary consent of the President himself. But this dependence upon fragile cultural norms have proven a fallibility during the Trump Presidency.

The Trump presidency has applied extraordinary and novel pressure to this ethics apparatus. Under the current pressure, traditional safeguards to manage conflicts of interest by executive branch officials have proven ineffective. A system of ethics that was rooted in fragile norms is in the midst of an existential crisis. The result is litigation that is testing our nation's judiciary, and straining our separation of powers jurisprudence. The situation calls for a reckoning by ethics lawyers and elected officials about the future of ethical oversight in the United States.

The Foreign Emoluments Clause found in Article I generally prohibits any person holding an “office of profit or trust” from accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”¹ The Domestic Emoluments Clause, included in Article II's provision for a presidential salary, prohibits receipt by the President of any “other Emolument from the United States, or any of them” during his term in office.²

These clauses don't completely ban the receipt of emoluments. With the consent of Congress, an officer of the public trust may accept an emolument from a foreign government.³ In this way, the Constitution designates Congress as regulator to mediate the tension between government ethics and foreign relations in a

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1. U.S. CONST. art. I, § 9, cl. 8.
2. U.S. CONST. art. II, § 1, cl. 7.
3. U.S. CONST. art. I, § 9, cl. 8.

diplomatic culture of gift-giving. There is no such exception for emoluments from domestic officials.

In our nation's very early history, Congress fulfilled this role as an ethics watchdog, granting consent for officials' receipt of foreign gifts for diplomatic purposes.⁴ In modern times Presidents have instead proactively sought guidance and opinions from the Department of Justice's Office Legal Counsel (OLC) to determine what benefits qualify as emoluments from both foreign and domestic officials.⁵

Over the past two centuries Congress has layered upon this constitutional foundation for government ethics by legislating "a framework of conflict-of-interest laws and regulations with the aim of transparent government."⁶ In this regulatory climate the modern-day, self-enforcing ethics apparatus blossomed.⁷ Around the world, different norms about what it means to hold an office of the public trust dictates a politics of padding palms and scratching backs.⁸ The Founders crafted the emoluments prohibitions in response to this culture of gift-giving.⁹ Those clauses dictate another vision for public ethics: a prescription for transparent governance. In the dark, government decision-making processes lose legitimacy. Walter Shaub, the former head of the Office of Government Ethics warned that uncertainty about the motivations of our policy makers "undermines the faith in government decision-making and puts a cloud over everything the government does."¹⁰

The Trump presidency indicates a possible shift in those norms and expectations. President Trump rejects the notion that ethics rules could apply to him. "[T]he president can't have a conflict of interest" then-President-Elect Trump

4. *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 53 (D.D.C. 2018) (discussing specific instances of Presidents seeking congressional consent prior to acceptance of foreign presents or emoluments).

5. *Id.* at 53–54 (discussing specific instances of Presidents requesting OLC opinions prior to "accepting potentially covered emoluments."). President Ronald Reagan's White House Counsel requested the opinion of the OLC as to whether his retirement benefits from the State of California violated the "Presidential Emoluments Clause of the Constitution." President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187 (1981), <https://www.justice.gov/file/22681/download> [<https://perma.cc/96V3-QJLW>] (last visited April 1, 2019).

6. Br. of Former National Security Officials as Amici Curiae Supporting Pls., *CREW v. Trump*, No. 17-cv-458, at 17 (2d Cir. 2018) (No. 18-474) [hereinafter Brief of National Security Amici].

7. See, e.g., U.S. Office of Government Ethics, *Agency Profile*, 7 ("[The Office of Government Ethics] is the supervising ethics office for the decentralized ethics program established by the Ethics in Government Act").

8. Transparency International, *Corruption Perceptions Index 2017* (Feb. 21, 2018), https://www.transparency.org/news/feature/corruption_perceptions_index_2017 [<https://perma.cc/GMB3-2NRN>] (last visited April 1, 2019) (ranking countries by perceived levels of public sector corruption according to experts and business people. The United States ranked 16th out of 180, tied with Austria and Belgium).

9. *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 187 (S.D.N.Y. 2017) ("The prohibitions contained in these Clauses arose from the Framers' concern with protecting the new government from corruption and undue influence.").

10. David Smith, *Trump risks US being seen as 'kleptocracy', says ex-ethics chief Walter Shaub*, THE GUARDIAN (Jul. 31, 2017), <https://www.theguardian.com/us-news/2017/jul/31/trump-ethics-chief-walter-shaub-kleptocracy> [<https://perma.cc/4KM3-YAML>] (last visited April 1, 2019).

told reporters, “everything a president does in some ways is like a conflict of interest. . . .”¹¹ President Trump has yet to seek an OLC opinion regarding the status of his profits from foreign and domestic government patrons of his businesses.¹² The assurance he has provided to the public about his business interests consists of a white paper from a private law firm released by his transition team in January of 2017.¹³ While that text does not concede that the Emoluments Clause applies to the President, it outlines steps the President-Elect would take to reduce conflicts of interest.¹⁴ At the time, ethics experts considered the measures insufficient.¹⁵

They’ve proven to be so. The Inspector General (IG) of the General Services Administration (GSA), the government agency that leases the iconic Old Post Office Pavilion to the Trump International Hotel in Washington, D.C., found that the GSA failed to address any potential Emoluments Clause issues with the lease despite their recognition that “the President’s business interest in the OPO lease raised issues under the Constitution’s Emoluments Clauses that might cause a breach. . . .”¹⁶ In conclusion, the IG recommended simply that GSA lawyers conduct a “formal legal review . . . that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity.”¹⁷ In short, the IG gave the GSA an escape hatch to avoid a constitutional violation by reforming the lease term. Such a system of self-policing provides ethics rules malleable as playdough.

11. The Editors, *Donald Trump’s New York Times Interview: Full Transcript*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html> [<https://perma.cc/QAD6-UX3H>] (last visited April 1, 2019) [hereinafter New York Times Editorial Board Interview].

12. In contrast, the President has sought OLC input on multiple controversial moves, including on the constitutionality of his appointment of Matthew G. Whitaker to Acting Attorney General. *See, e.g.*, Sadie Gurman & Byron Tau, *Justice Department Poised to Issue Legal Opinion Supporting Whitaker Appointment*, WALL STREET J. (Nov. 12, 2018) <https://www.wsj.com/articles/democrats-seek-ethics-advice-sought-or-received-by-acting-attorney-general-matthew-whitaker-1542048901> [<https://perma.cc/7UST-NVE2>] (last visited April 1, 2019).

13. MORGAN LEWIS AND BOCKIUS LLP, *Conflicts of Interest and the President* (Jan. 11, 2017), <https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf> [<https://perma.cc/A5QW-JA3W>] (last visited April 1, 2019) [hereinafter Morgan Lewis White Paper].

14. These steps include, the President-Elect’s resignation from all “official” positions within the Trump Organization, a shield reducing the information flow between the Trump Organization and the Presidency, and the appointment of an Ethics Advisor to flag ethics and conflict of interest concerns. As to future deals, “new” domestic deals will be subject to a “rigorous” vetting process, and “new” foreign deals are prohibited. *Id.* at 2–3.

15. Sheelah Kolhatkar, *Walter Shaub’s Brave, Quixotic Ethics Battle with Trump*, THE NEW YORKER (July 7, 2017), <http://www.newyorker.com/news/news-desk/walter-shaubs-brave-quixotic-ethics-battle-with-trump> [<https://perma.cc/CC6L-W47N>] (last visited April 1, 2019) (recommending the President divest from his businesses); *Br. of Former Gov’t Ethics Officers as Amici Curiae Supporting Pls., CREW v. Trump*, No. 17-cv-458 (2d Cir. 2018) (No. 18-474) (opining that the President’s business exposure to foreign and domestic influences violates both statutory and constitutional ethics provisions).

16. Office of Inspector General, U.S. General Services Administration, *Evaluation Of GSA’s Management And Administration Of The Old Post Office Building Lease*, 1 (Jan. 16, 2019).

17. *Id.* at 24.

These clauses received little public attention before the Trump presidency. When asked about emoluments at his Attorney General confirmation hearing before the Senate Judiciary Committee, William Barr, who has already served in the post, told Senators “I can’t even tell you what it says.”¹⁸ At this inflection point in American political culture, the question of who should enforce the Emoluments Clauses is crucial to sustaining a framework of government ethics. The Southern District of New York and the Districts of D.C. and Maryland have each provided an answer.

Three groups of plaintiffs have sought standing to enforce the Emoluments Clauses against the President with mixed results. The various outcomes provide three distinct candidates for the role of intended enforcer of the Emoluments Clauses, fueled by differing views on separation of powers. Their conclusions fundamentally rely on distinct value judgments about the court’s role when enforcing the Constitution. This note will compare the district court’s standing analyses in these cases, each of which demand consideration of its viability for enforcing our Constitution’s ethics rules.

In the first two years of the Trump presidency, while a Republican-controlled Congress refused to take up the issue of emoluments, the following lawsuits were filed. The courts appeared to be the only body able to enforce these rules against the President. Nevertheless, Democrats won the House of Representatives in the 2018 midterms.¹⁹ Immediately, the new majority began to discuss the possibility of investigating reported emoluments violations. This gives force to the Southern District’s holding that emoluments are a political question, and that the political process is capable of regulating their receipt by elected officials. If we conceive of these clauses as ethics rules, this logic misses the point: their enforcement is crucial to the operation of our federal government.

The first emoluments case against President Trump was filed in the Southern District of New York by representatives of the hotel industry who claim to compete with those businesses owned by the President. They argue that his financial interest in hospitality establishments (1) violates the Foreign and Domestic Emoluments Clauses; and (2) that the conduct has created unfair competition in the marketplace in which they all operate. The District Court dismissed the case for lack of Article III standing and suggested that with respect to violations of the Foreign Emoluments Clause the claims were neither ripe nor appropriate for judicial resolution as a matter of separation of powers.²⁰ Plaintiff’s appeal is pending before the Second Circuit.

The second, filed in U.S. District Court for the District of Maryland by the D.C. and Maryland Attorney Generals, asserts their proprietary, quasi-sovereign,

18. Transcript of Senate Judiciary Committee Hearing at 00:54:57 (Jan. 15, 2019).

19. See *infra* note 85.

20. *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 194 (S.D.N.Y. 2017).

and *parens patriae* interests.²¹ As state and local governments, they claim the same economic injuries under the competitor-standing doctrine as plaintiffs in the Southern District of New York.²² Here, however, the court found that the plaintiffs have Article III standing²³ and have stated a claim on the merits.²⁴ The court also dismissed the government's request for interlocutory appeal on these questions, including a request to stay discovery.²⁵

Over two hundred Democratic Members of Congress brought the third lawsuit, claiming that his failure to seek consent for receipt of Foreign Emoluments "effectively nullified" their votes.²⁶ Applying a *Raines* analysis, the District of D.C. granted the lawmakers standing, determining that the courts provided the only available adequate remedy to redress their injuries.²⁷ All three lawsuits seek declaratory and injunctive relief.

In defense the government concedes that there may be no "proper plaintiff" to enforce the Emoluments Clause.²⁸ Their premise requires acceptance of the idea that there is no judicial remedy for the violation of a structural provision of the Constitution. Further, the position requires acceptance that the Executive may not always be bound by the confines of the Constitution—that the rules contained therein may not always be enforceable. In such a universe, the President may not have a conflict of interest simply because he does not believe he can.

Each group of plaintiffs demands its own analysis. The split between the courts, however, cannot be explained away by differences among the plaintiffs alone. They reveal fundamentally different presumptions about the role of the courts in enforcing government ethics. These lawsuits highlight two main areas of disagreement. First is a fundamental question about our government's foundational text: does a constitutional violation always give rise to a legal remedy, or are there some provisions that are simply unenforceable rules? The answers have larger implications for separation of powers jurisprudence.

The second is a question about what "ethical governance" means, whether that definition is a fixed, legal one, or is subject to the political process. In diverging on the issue, three district courts have carved out distinct visions for regulating government ethics. The Southern District of New York's holding conceives ethics a matter of cultural norms. Our nation's evolving expectations for government is reflected in the "statesmen" elected to offices of the public trust. Those politicians then, have discretion to interpret or enforce ethics rules as they see fit.

21. *D.C. v. Trump*, 291 F. Supp. 3d 725, 735–6 (D. Md. 2018).

22. *Id.* at 743–47.

23. *Id.*

24. *D.C. v. Trump*, 315 F. Supp. 3d 875, 907 (D. Md. 2018).

25. *D.C. v. Trump*, 344 F. Supp. 3d 828, 832 (D. Md. 2018).

26. *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 60 (D.D.C. 2018). *Blumenthal v. Trump* deals solely with the Foreign Emoluments Clause.

27. *Id.* at 61–62.

28. *Id.* at 71 (quoting the hearing transcript). See also Oral Argument at 22:43, *CREW v. Trump*, Case No. 17-cv-458 (No. 18-474) (Oct. 30, 2018).

The District of Maryland, alternatively, views the Emoluments Clauses as enshrining in the structure of our government legal standards of transparency and accountability that guarantee a right to ethical governance for all Americans. By private right of action, anyone, including business competitors, can sue to assert that right in a federal court. Finally, the District Court of D.C. determined that a default in the political process has prevented congressional oversight of foreign emoluments. Under this interpretation, whether a foreign emolument is proper is subject to political considerations. The court, however, mandates that the political branches make those considerations on the record.

SECTION 1: A COMPARATIVE CASE STUDY

I. SOUTHERN DISTRICT OF NEW YORK: THE EXECUTIVE BRANCH IS SELF-POLICING

The Southern District of New York held that plaintiffs did not allege an adequate injury under competitor-standing doctrine.²⁹ The allegations were found to be excessively speculative on two grounds. First, Judge George Daniels found that plaintiffs failed to trace their claimed lost business to the incentives created by President Trump's financial dealings as opposed to an "independent desire to patronize Defendant's businesses."³⁰ Second, Judge Daniels disclaimed an ability to redress the injury due to additional possible variables which could foster such an independent desire, driving business to President Trump's properties regardless of a court-imposed prohibition on emoluments.³¹

Plaintiffs rely on economic logic. When increased competition is created by unlawful conduct, resultant economic harms are judicially cognizable.³² Plaintiffs assert their harm as follows: the President retains financial interests in upscale hospitality industry actors in New York and Washington, D.C., and uses the powerful platforms that come with the office to promote those businesses.³³ The opportunity presented by those financial interests skews the upscale hospitality market in those cities, advantaging the President's properties and disadvantaging plaintiffs.³⁴ Thus, plaintiffs argue, the President's receipt of emoluments creates unlawful competition.³⁵

29. *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 186–7 (S.D.N.Y. 2017).

30. *Id.* at 186.

31. *Id.*

32. Brief for Appellant at 27–28, *Citizens for Responsibility & Ethics in Washington v. Trump*, Case No. 17-cv-458 (No. 18-474) (Apr. 24, 2018).

33. *Id.* at 34–35.

34. Eric Goode, plaintiff, is a hotel owner. Restaurant Opportunities Center United, Inc., a nonprofit organization, asserts harms to employees of the President's competitors by virtue of the distorted market. *Id.* at 13–14, 16–17.

35. *Id.* at 22.

But according to the court, the incentives to patronize a President's business are so manifold that the claim cannot be redressed because the specific opportunity to enrich the President is too diluted.³⁶ In this complex biosphere of incentives, economic logic fails to assert an injury in fact.³⁷ The court concedes that those incentives may be attributable to President Trump's public profile.³⁸ Nevertheless it found that even if President Trump cut his financial ties to the businesses in question, foreign officials might still choose to patronize those businesses to curry favor with the President by fact of simple brand loyalty. Without a financial benefit conferred, this attempt to influence the President is outside of the reach of the Emoluments Clauses. Even if a business transaction did in fact contribute tangibly to a policy outcome, the court's finding of no traceability suffocates most potential claims due to the difficulty of neutralizing the myriad of potential factors that motivated the transaction.

Judge Daniels employs belt and suspenders to insulate the President from an externally-triggered enforcement of the Emoluments Clauses. The court also characterized the question presented by the Foreign Emoluments Clause as a political one: it is exclusively Congress' job to define an emolument and permit an officer of the public trust to accept it.³⁹ Even if plaintiffs had adequately alleged competitor-standing, the issue is non-justiciable. Consequently, not only is there no private right of action implied for these particular plaintiffs, but also for any other private party.

This conclusion is not specific to the facts of this Presidency. These same intervening causal factors would exist for any dual public official who is also a business owner. By finding that the financial incentives cannot effectively be parsed, the court necessarily accepts that there are violations of the Constitution its authority cannot reach. Some constitutional provisions do not give rise to individual injuries.⁴⁰

This reasoning fits within the minimal precedent for the judiciary entertaining claims pursuant to the Emoluments Clauses. When a woman filed suit claiming President Obama's acceptance of the Nobel Peace Prize was a violation of the Emoluments Clause, she claimed as injury her fear that the award would have a

36. *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017).

37. *Id.* at 184.

38. *Id.* at 186 ("It is only natural that interest in his properties has generally increased since he became President. As such, despite any alleged violation on Defendant's part, the Hospitality Plaintiffs may face a tougher competitive market overall"). See also Brief for Appellee, at 21, *Citizens for Responsibility & Ethics in Washington v. Trump*, Case No. 17-cv-458 (No. 18-474) at 11 (May 29, 2018) ("[t]here is simply no basis to speculate that the independent decisions of government customers are based on the President's financial interest in any competing businesses, rather than their affiliation with the Trump brand and family or ordinary factors (such as location, price, quality, etc.) that are unrelated to the asserted violations of the Emoluments Clauses.").

39. *CREW*, 276 F. Supp. 3d at 193-4.

40. Oral Argument, *supra* note 28, at 23:14; In re U.S. Catholic Conference, 885 F.2d 1020, 1031 (2d Cir. 1989) ("[T]he lack of a plaintiff to litigate an issue may suggest that the matter is more appropriately dealt with by Congress and the political process.").

corrupting influence on the President.⁴¹ In granting the President's motion to dismiss for lack of subject matter jurisdiction, the Central District of California found the allegations too generalized and abstract to support standing.⁴² It does not cite or even address the OLC's opinion one year earlier that the Foreign Emoluments Clause did not apply to the Nobel Committee.⁴³ By rejecting traceability between the Prize and corruption, the court makes a value judgment about the rationality of Plaintiff's alleged fear. *CREW v. Trump* makes a similar move in its extended discussion of the Emoluments Clauses' zone of interest. In distinguishing the Framer's concern with presidential independence from the plaintiff's harm of increased competition, the Southern District of New York (SDNY) made a value judgment about plaintiffs' injuries: competitive injuries are not related to good governance or its absence.⁴⁴

The court excludes competitive injuries from the zone of interest on the grounds that the Emoluments Clause does not contemplate protecting competitors.⁴⁵ It provides two justifications. First, the Emoluments Clauses do not concern themselves with nongovernment actors, who are also subject to the incentives that distort the market.⁴⁶ One can imagine, for example, corporate lobbyists—not contemplated by either clause—are attracted to the President's properties for the same reasons, and make up a larger proportion of the market share than official government business. Second, Congress could consent and bless the market distortion, rendering these plaintiffs unprotected.⁴⁷ The court thus requires the injury fall strictly within the text's purpose of mitigating corruption. If the injury does not result from a corrupting effect, there is no case or controversy.⁴⁸

In deferring to the executive, Judge Daniels declined to apply executive branch precedent in determining the zone of interest of the Emoluments Clauses.⁴⁹ To have standing, a plaintiff must establish that his injury falls within the zone of interests sought to be protected by the constitutional guarantee claimed.⁵⁰ Rather than apply the purposive test applied by OLC—"whether the payments were

41. *Jones v. Obama*, No. CV-10-1075-GAF, 2010 WL 11509096, at *3 (C.D. Cal. July 20, 2010).

42. *Id.*

43. See David Barron, Office of the Legal Counsel, Applicability Of The Emoluments Clause And The Foreign Gifts And Decorations Act To The President's Receipt Of The Nobel Peace Prize, Op. O.L.C. (December 7, 2009), https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace_0.pdf [<https://perma.cc/KR92-4APS>] (last visited April 1, 2019).

44. *CREW*, 276 F. Supp. 3d at 188.

45. *Id.* at 188.

46. *Id.*

47. *Id.*

48. See also Brief for Appellee, *supra* note 37, at 37 ("... the Clauses were intended to prevent corruption and protect independence, and that those goals were simply the means of ensuring the fundamental integrity of the 'exercise of public power' against the citizenry. Yet, they seek to have the Clauses protect against injuries wholly unconnected to such exercises of public power.")

49. *Contra* D.C. v. Trump, 315 F. Supp. 3d 875, 901-02 (D. Md. 2018) (looking to OLC precedent to define emoluments on consideration of the merits).

50. *CREW*, 276 F. Supp. 3d at 187 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 468-69 (1992)).

intended to influence, or had the effect of influencing, the recipient as an officer of the United States”⁵¹— Judge Daniels looks freshly to the text to determine that competitive injuries are categorically excluded from the Founders’ intent.⁵²

Judge Daniels proceeds to say that without congressional action, the claim is not ripe for judicial review. It characterizes the emoluments consideration as “a conflict between two co-equal branches of government that has yet to mature.”⁵³ Despite this ripeness finding, *CREW v. Trump* suggests the court does not reserve the right to review the constitutionality of an act of congressional consent, or alternatively, a denial of consent. Competitor-plaintiffs are outside the zone of interest because their injuries aren’t necessarily unconstitutional—the court envisions a universe in which Congress consents to those alleged injuries. Yet this isn’t simply a deferral to the consent of Congress. To dismiss the claims on a 12(b)(1) motion without reaching the merits of the case, the court defers to the executive branch, the only party with perfect knowledge of the violations.

At the pleadings phase it is unlikely that plaintiffs would have access to information necessary to show a certain payment resulted in a specific instance of corrupt influence. By rejecting the plaintiff’s contention that competitor-standing doctrine accounts for information asymmetries, the court suffocates most claims.⁵⁴ At oral argument, the Second Circuit acknowledged that under this reasoning the court likely keeps many citizens seeking to enforce these clauses of the Constitution out of court except in the most egregious circumstances. The Second Circuit posed a hypothetical of secret payments: even if the public did find out about the payment, what is the likelihood that the plaintiff is able to prove resulting corruption?⁵⁵ To deny competitor-standing for an Emoluments Clause violation, the court asserts that ethics in the executive branch is self-policing.

To adhere to this application of standing doctrine, the court disclaims any responsibility for Emoluments Clause enforcement against office-holders of the public trust. The sole remaining control on the President, absent congressional action, is the political necessity of eliminating any appearance of corruption. Those optics concerns could trigger self-enforcement mechanisms such as requesting the opinion of OLC or pre-emptively divesting business holdings, but only at the President’s discretion. To punt the question without placing any burden on the President to seek approval from Congress, the court deemed the executive branch self-policing when it comes to our Constitution’s ethics code. This approach comports with a century of precedent in which the President seeks OLC opinions or those of the Comptroller General.⁵⁶ Other courts have taken different approaches.

51. Reagan O.L.C. Opinion, *supra* note 5, at 189.

52. *CREW*, 276 F. Supp. 3d at 188.

53. *Id.* at 194.

54. *Id.* at 185.

55. Oral Argument, *supra* note 28, at 22:20.

56. Reagan OLC Opinion, *supra*, note 5.

II. DISTRICT OF MARYLAND: MEMBERS OF THE PUBLIC MAY ENFORCE THE CLAUSE VIA A PRIVATE RIGHT OF ACTION

Another group of plaintiffs was found to have standing to bring a competitive injury claim in the District of Maryland. The plaintiffs are notably different from the plaintiffs in the Southern District of New York: these are not private parties, but rather a sovereign state, Maryland, and a local government, the District of Columbia.⁵⁷ The fact that these plaintiffs are governing entities did not grant them standing; sovereign interests asserted were dismissed on a 12(b)(1) motion.⁵⁸ Instead, the court found that the non-sovereign proprietary interests, comparable to those of plaintiffs in the SDNY, were asserted by way of the competitor-standing doctrine.⁵⁹

Unlike CREW, where the allegations in *CREW* could not overcome the hurdles set by economic logic, the same injuries make it over the finish line in *D.C. v. Trump*. Anecdotes in public reporting provide sufficiently “specific instances of foreign governments foregoing [sic] reservations at other hotels in the arena and moving them to the President’s Hotel.”⁶⁰ For Judge Peter Messitte, nebulous, multifactor nature of decision-making by foreign and domestic officials did not stand as a barrier: “accepting the President’s third-party argument would render impossible any effort to ever engage in Foreign or Domestic Emoluments Clause analysis because action by a foreign or domestic government, i.e., by a third party, is always present by definition.”⁶¹ Finally, Judge Messitte did not require complete redressability. Rather than impose upon the complaint a requirement that the requested remedy make plaintiffs whole, it asked only if the remedy eliminates the unconstitutional incentive “to some extent.”⁶²

Although the plaintiffs in the Maryland and New York cases have substantial differences,⁶³ the conflicting outcomes cannot be explained on this basis alone. The district courts fundamentally differ on micro, emoluments-specific questions as well as macro, separation of powers concerns. Judge Messitte disagrees explicitly with the Southern District of New York’s interpretation of the Emoluments Clauses as per se excluding from its zone of interest all competitors:

57. *D.C. v. Trump*, 291 F. Supp. 3d 725, 733 (D. Md. 2018).

58. *Id.* at 740 (specifically, Maryland asserted that it suffered injury in the forms of: (1) interest in enforcing the terms upon which it entered the union; and (2) loss of tax revenues due to competition from the President’s business holdings).

59. *Id.* at 743-44; Plaintiff’s proprietary interests were additionally found to be asserted via quasi-sovereign interests, on behalf of residents as *parens patriae*. *Id.*

60. *Id.* at 745.

61. *Id.* at 749.

62. *Id.* at 752 (citing *Massachusetts v. EPA*, 549 U.S. 497, 525-26, 525 n. 23 (2007)).

63. Apart from competitive injuries from actual financial interest in Trump Hotel competitors they additionally attained standing to bring claims *parens patriae* on behalf of residents who may also suffer economic harm from market distortion. *Id.* at 747. DC also asserted an “intolerable dilemma” by being forced to choose between granting special concession to Trump Org activities and collecting fully-owned tax revenue. *Id.* at 741.

“the Emoluments Clauses clearly were and are meant to protect *all Americans* [T]here is no reason why Plaintiffs, a subset of Americans who have demonstrated present injury or the immediate likelihood of injury by reason of the President’s purported violations of the Emoluments Clauses, should be prevented from challenging what might be the President’s serious disregard of the Constitution.”⁶⁴

While Judge Daniels views the text’s purpose formally as only encompassing injuries resulting from undue influence, the District of Maryland views the Emoluments Clauses as enforceable by any injured plaintiff, because as a prophylactic guard against corruption, an Emoluments Clause violation threatens any American’s right to a government free from undue influence.⁶⁵

But the disagreement between the courts extends further than the interpretation of this bit of constitutional text. The District of Maryland refuses to accept the premise that no one, “save Congress . . . would ever be able to enforce these constitutional provisions.”⁶⁶ It rejects outright the notion that these constitutional provisions are solely self-enforcing. One reason for this is the court’s conclusion that Congress may never act.⁶⁷ Judge Messitte finds inexplicable that a clause requiring consent of Congress could render Presidential actions immune from judicial review.⁶⁸ Like his colleague in the District Court of D.C., it refuses to interpret congressional silence as consent to an emolument conferral. These decisions declare unconscionable the notion that the Constitution becomes unenforceable if Congress refuses to act. By providing a private right of action in the Emoluments Clauses, the court widens the universe in which it can enforce the Constitution’s ethics code.

III. DISTRICT COURT OF D.C.: THE PRESIDENT MUST PRESENT TO CONGRESS, AND CONGRESS MUST CONSENT

The final suit answers the call for congressional action. Democratic members of Congress assert that the President has violated the Foreign Emoluments Clause by accepting profits earned from foreign states without first seeking the consent of Congress. In *Blumenthal v. Trump*, members of Congress were granted standing to assert their institutional injury resulting from Presidential inaction: a vote effectively nullified by virtue of the President not having sought consent for acceptance of emoluments.⁶⁹

64. *Id.* (emphasis added).

65. *Id.* (“Precedent makes clear that a plaintiff may bring claims to enjoin unconstitutional actions by federal officials and that they may do so to prevent violation of a structural provision of the Constitution.”).

66. *Id.* at 755.

67. *Id.*

68. *Id.* at 757.

69. The injury is both institutional, by damaging all members of Congress equally, and personal to “legislators entitled to cast the vote that was nullified.” *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 65 (D.D.C. 2018).

In *Blumenthal*, the judiciary asserts its role in a subtle yet powerful way, by emphasizing Congress' consent role and placing burdens of reporting on the Executive. Moreover, congressional consent must come in the form of a vote, not by silent acquiescence.⁷⁰ Legislative standing for inter-branch lawsuits asks: (1) is there an adequate legislative remedy; and (2) could another plaintiff bring the case?⁷¹ Without legislative tools at the plaintiff's disposal, the court asserts legislator-plaintiffs must be able to "seek relief in federal court" as a last resort.⁷²

Blumenthal found that the Foreign Emoluments Clause unambiguously "places a burden on the President to convince a majority of Members of Congress to consent" to his receipt of emoluments.⁷³ The court rejects the possibility of self-enforcement outright. Its reasoning is premised on this particular President's apparent ambivalence about the existence of the Emoluments Clause. Even if Congress were to pass such a law, there is no guarantee it would prevent the President from accepting emoluments, especially "given that the Constitution itself has not prevented him from allegedly accepting them."⁷⁴

The clause requires presidential action before receipt of an emolument: it "places the burden on the President to convince a majority of Members of Congress to consent."⁷⁵ Unlike in a self-policing regime, the Judge Emmet Sullivan carves out a concrete role for all three branches. Far from deeming emoluments acceptance a political dispute between the branches, the court views the Emoluments Clauses as constitutional ethics provisions with the force of law. In recognizing nullification of a vote as an injury, the court recognizes a defect in the political process the Constitution designates to regulate government ethics.⁷⁶

The judiciary, on the other hand, has the duty to declare the law by identifying (1) what is an emolument; (2) what does it mean to accept an emolument; and (3) whether the President has violated the Foreign Emoluments Clause.⁷⁷ Rather than classifying this as a political question, the court determined the questions raised by the claim are "concrete legal questions that are within the purview of the federal courts to adjudicate."⁷⁸

Judge Sullivan, like Judge Messitte in Maryland, also rejects the government's assertion that the Foreign Emoluments Clause may be unenforceable against the

70. *Id.* at 53 ("And the President may not accept any emolument until Congress votes to give its consent.").

71. *Id.* at 58 (citing *Raines v. Byrd*, 521 U.S. 811, 826 (1997)). The inquiry for individual or groups of legislators seeking standing differs from that when an official congressional entity (i.e. the House of Representatives) does so. The plaintiffs in *Blumenthal* are an example of the former.

72. *Id.* at 71 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473-74 (1982)). *Blumenthal*, 335 F. Supp. 3d at 71.

73. *Blumenthal*, 335 F. Supp. 3d at 67.

74. *Id.*

75. *Id.*

76. *Id.* (distinguishing the President's proposed legislative remedies from those in *Raines*.).

77. *Id.* at 70. It is also notable that on consideration of a motion to dismiss the court took it upon itself to define an emolument.

78. *Id.* The court leaves open the question of whether injunctive relief sought is constitutional for the merits discussion. *Id.* at 72.

President.⁷⁹ Deeming impeachment an inadequate alternative remedy to defeat legislative standing, the court reasoned that “if these plaintiffs do not have standing to bring their claims to address their alleged injury, it is unlikely that another plaintiff would, rendering the clause unenforceable against the President except via impeachment.”⁸⁰ This is a different vision of separation of powers than the one espoused by Judge Daniels in the Southern District of New York. It also displays a different attitude about the legal force of the Emoluments Clauses: they must be enforceable outside the political process. With these three competing visions for enforcing ethics in the executive branch laid out, we can better examine the reasons for the failure of ethics in the Trump Administration and explore if any of the three options present a viable solution.

SECTION 2: A CRITICAL ANALYSIS—WHO IS THE BEST ENFORCER OF THE EMOLUMENTS CLAUSE?

I. THE SELF-POLICING OPTION

Judge Daniels largely defers to the mode in which the government has enforced the Emoluments Clause for the past two centuries. Political pressure, optics and perception have traditionally driven Presidents to pre-emptively neutralize any real or perceived financial conflicts of interest. It acknowledges the self-enforcing nature of these ethics mechanisms. It does not suggest that the court can compel the President to present payments to Congress or otherwise impose a duty to report on the President. As a result, if neither Congress nor the President begin the conversation, the issue is put to rest. There are strong arguments apart from inertia that recommend the modern precedent of leaving the executive branch to self-police through its existing ethics apparatus.

Deference to the executive branch is not unprecedented in our systems of government and justice. Courts generally defer to the Executive on a range of implicit and explicit grants of power, including military authorities as commander in chief and other important foreign policy roles.⁸¹ There is also vast precedent for Congress to acquiesce by silence to executive action in these areas.⁸² Especially with a Congress controlled by the same party as the Presidency, there is plenty of

79. *Id.* at 67. (quoting *Marbury v. Madison*, 1 Cranch 137, 174 (1803)).

80. *Id.* at 71; The court considers impeachment an “extreme measure” that should not be used to enforce performance of a “perfunctory duty by the President.” *Id.* at 68 (quoting *Nat’l Treasury Emp. Union v. Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974)).

81. *See, e.g.* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015).

82. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (validating an executive action based on an implied congressional acquiescence). Accepting silence as consent, however, poses a challenge the court’s ripeness analysis. If it is determined that Congress has had notice of Presidential acceptance of emoluments and subsequently consented by silence, one may assume the issue has become ripe for judicial review. This is not a serious flaw in the SDNY’s reasoning: to continue to keep emoluments enforcement out of the purview of the courts, the court only has to rely on its political question and standing analysis.

reason to think that congressional silence is indeed consent in this instance. The question becomes, does it make sense to treat government ethics in this same way?

Because the executive branch's foreign affairs powers loom large on this list, it may seem natural to add acceptance of foreign emoluments to it. But there are two important reasons why the Executive should not be deferred to on the issue of foreign emoluments. First, the Foreign Emoluments Clause is designed to ensure the President has the nation's best interests in mind.⁸³ The deference granted to the President in the realm of foreign affairs actually heightens the importance of ethical oversight to weed out undue influences.⁸⁴ Courts often grant the President a wide breadth of deference, deemed to be implied by a litany of powers itemized in Article II. In the foreign sphere, courts have tended to take an expansive approach to construing the powers assigned to the President, partially due to the exigency of having a unitary decisionmaker acting decisively in a complex, fast-moving global dynamic. Without ethical rules governing undue influences on executive officers, the rationales upon which doctrine of deference in the foreign sphere is called into question.

Moreover, there is a crucial distinction between deferring to Executive decisions based on affirmative authorities granted to the President in Article II, and deferring to interpretations of the restrictions placed upon the President's power in Article II. In Justice Jackson's seminal *Youngstown* concurrence, Jackson contemplates that a court can determine that a pattern of congressional silence is acquiescence to an Executive action.⁸⁵ But in the foreign emoluments context, the President cannot necessarily rely on his independent Article II powers to define an emolument. The text does not specify *who* defines an emolument, and the courts are as good a candidate as any. Even if it didn't defy logic to defer to the President on interpreting the restrictions imposed upon his own power, there is another reason not to grant deference here. The power to restrict presidential conduct by refusing consent is expressly given to Congress in Article I.

While the constitutionality of consent by silence is tenuous, the alternative—to require congressional action, may be unworkable. Judge Sullivan in *Blumenthal* does not address how changing political circumstances may change this analysis. In the days after the elections, Congressman Elijah Cummings appeared on television to say the House Oversight Committee would investigate emoluments

83. Citizens for Responsibility & Ethics in Washington v. Trump, 276 F. Supp. 3d 174, 188 (S.D.N.Y. 2017) (“[T]here can be no doubt that the intended purpose of the Foreign Emoluments Clause was to prevent official corruption and foreign influence, while the Domestic Emoluments Clause was meant to ensure presidential independence.”).

84. Accord Brief of National Security Amici, *supra* note 6, at 16. (“[the Foreign Emoluments Clause] enables, and indeed, requires, that Congress and the American people evaluate whether foreign money would improperly influence national security decision-making”).

85. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

violations.⁸⁶ Have the legislator-plaintiffs in the House of Representatives lost standing after November's midterms, because, holding a majority, they can now bring such items of legislation to the floor? By acknowledging congressional silence as a valid mode of Emoluments Clause enforcement, Judge Daniels appeals to well-grounded judicial wisdom to stay out of disputes deemed political.

In the self-policing regime, the President initiates the review process before an ambiguous benefit is conferred. The framework presents a classic fox-in-the-hen-house scenario that separation of powers fundamentally seeks to avoid. The scheme reinforced in *CREW* gives the President not only the discretion whether to subject himself to the Emoluments Clauses, but to influence what that application might look like. To give congressional silence affirmative significance, we must also be prepared to accept the attitude toward ethical duties that each elected leader brings to the office. This includes those conflicting with existing law and norms. Although the OLC has operated on the assumption Emoluments Clauses apply to the President,⁸⁷ President Trump is unwilling to concede the point.⁸⁸ Indeed, if as the President has exclaimed, he does not believe that conflicts of interest apply to him,⁸⁹ he is unlikely to believe that ethical rules apply to him.

In the modern presidency, the OLC often acts as a neutral arbiter of ethical determinations.⁹⁰ Courts take seriously the reasoning laid out in these opinions: in denying the President's motion to dismiss, Judge Messitte looked to OLC opinions as well as the Constitution's plain text to define an emolument broadly.⁹¹ On consideration of a motion for leave to file interlocutory appeal, it returned to "executive branch precedent" to demonstrate a lack of difference of opinion "among courts" on the issue.⁹² Seeking the opinion of the OLC differs from the DOJ's defense of the President in an Article III court. Where the DOJ defends an administration's policy choices from legal challenges, the OLC produces opinions that are more judicial than adversarial in nature.⁹³

86. Lauren Fox, Jeremy Herb & Manu Raju, *Democrats To Use House Majority to Launch Trump Investigations* (Nov. 7, 2018, 1:33 AM), <https://www.cnn.com/2018/11/07/politics/investigations-house-democrats/index.html> [https://perma.cc/4H5P-E42R] (last visited April 1, 2019). See also Kyle Griffin (@KyleGriffin1), TWITTER (Nov. 11, 2018, 10:40 AM), <https://twitter.com/kylegriffin1/status/1061644850855067648/video/1> [https://perma.cc/KW6Q-ZR2H] (last visited April 1, 2019).

87. See, e.g., Reagan O.L.C. opinion, *supra* note 5, at 187.

88. MLB White Paper, *supra* note 13, at 1.

89. New York Times Editorial Board Interview, *supra* note 11.

90. See, e.g., Reagan O.L.C. opinion, *supra* note 5.

91. D.C. v. Trump, 315 F. Supp. 3d 875, 901 (D. Md. 2018) ("The Court finds executive branch precedent and practice overwhelmingly consistent with Plaintiffs' expansive view of the meaning of the term 'emolument.'").

92. D.C. v. Trump, 344 F. Supp. 3d 828, 836 (D. Md. 2018).

93. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions at 1 (Jul. 16, 2010), <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> [https://perma.cc/GM84-DZAU] (last visited April 1, 2019) ("OLC must provide advice based on its best understanding of what the law requires. . . ."). When President

Nevertheless, there is rarely one vision of “what the law requires.” And when OLC has been perceived as falling short, the DOJ has pointed to politics to excuse them. The Office of Professional Responsibility found the OLC lawyers who authored the “torture memos” guilty of professional misconduct for intentionally providing “incomplete and one-sided advice” in violation of a professional obligation “to provide a thorough, objective, and candid interpretation of the law.”⁹⁴ The DOJ ultimately declined to refer those lawyers to their bar associations for disciplinary measures, rejecting the standard of professional conduct for OLC attorneys applied by the OPR.⁹⁵ Instead, the DOJ explicitly adopted a 2004 OLC “Guiding Principles” memo that the OLC “should not simply mirror those of the federal courts, but should also reflect . . . the views of the President who currently holds office.”⁹⁶

While it is sensible for the OLC to be responsive to the views of the President in some contexts, this a fatal flaw in a self-enforcing ethics apparatus. No portion of the executive branch is completely insulated from the political process.⁹⁷ In deferring to the OLC, the courts defer to the President himself to interpret restrictions on his power. When the President endorses a culture of conformity with ethics norms in his administration, the OLC can be a competent ethics enforcer. This isn’t the case when the President explicitly disclaims any ethical restrictions—unlike his predecessors, he hasn’t asked the OLC for an opinion. The OLC’s objectivity is irrelevant, if the office is never presented the question.

If the norms of good governance codified in the Constitution fall victim to a different model of political leadership, it threatens the legitimacy of our democracy and undercuts Americans’ trust in government. Even if President Trump did seek OLC guidance on the constitutionality of his business dealings, courts should not defer to those opinions or that process to regulate government ethics.

Kennedy’s estate sought approval of naval retirement pay that had accrued while he was President, the OLC punted the question, to preserve an appearance of independence of the ethics operation because the Attorney General was the President’s brother. They were careful to frame its opinion as “an unofficial work-product” furnished as guidance to the General Accounting Office, rather than “an official utterance of the Department.” Reagan OLC Opinion, *supra* note 5, at 189 n. 4.

94. *Id.* at 251–52. Adding “[i]n order to effect its mission of providing authoritative legal advice to the Executive Branch, the OLC must remain independent . . . the [Department of Justice] . . . must encourage and support the OLC in its independence, even when OLC advice prevents its clients, including the White House, from taking the actions it desired.” *Id.* at 260.

95. David Margolis, *Memorandum for the Attorney General from the Deputy Attorney General*, 11–17 (Jan 5, 2010).

96. *Id.* at 15. In support of the OPR’s more rigorous standard for OLC attorneys see generally Nancy V. Baker, *Who Was John Yoo’s Client? The Torture Memos and Professional Misconduct*, PRESIDENTIAL STUDIES QUARTERLY, Vol. 40, No. 4, 750 (December 2010).

97. See also Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1327–28 (2000) (“[T]he American people influence the fundamental constitutional and legal norms that govern in the executive branch through their choice of President. In this manner, the democratic process informs Constitutional interpretation.”).

II. PRIVATE RIGHT OF ACTION

When the political process fails to enforce the Constitution, we often look to the courts to step in to defend the text. Judge Messitte in Maryland recognized a constitutional right that Judge Daniels in the New York denies is implicit in the Emoluments Clauses: that they are meant to protect all Americans from government corruption.⁹⁸ By acknowledging that every American has a right to a President who conforms to the Constitution's ethics provisions, regardless of the specific nature of injury alleged, Judge Messitte asserts the court's role as an enforcer of government ethics.

Judge Daniels holds competitor's claims to be nonjusticiable in part because "there is no remedy th[e] Court can fashion" to remedy competitive harms.⁹⁹ But again, this conclusion only follows if we determine the fear of government corruption from official business to be irrational, like the fear of the woman in *Jones*.¹⁰⁰ As the alternative analyses in Maryland and D.C. show the court does not suffer a remedial problem. The court can (1) prohibit receipt of any domestic emolument and (2) prohibit receipt of any foreign emolument in the absence of congressional acquiescence to it, while still insulating such consent from judicial review.

By implying a private right of action in the Emoluments Clauses, the court not only positions itself to grant judicial redress for a constitutional violation, but also potentially ignites a stagnant Congress with respect to foreign emoluments. If the court found a violation of the Foreign Emoluments Clause, Congress could step in and pass legislation to approve a completed conferral. Congress could even pass a statute that narrowly defines an emolument. In asserting the judiciary as an ethics watchdog, this framework also retains Congress' oversight role.

That dynamic changes if the origin of the benefit is foreign or domestic. As to foreign emoluments, regardless of how the court defines an emolument, Congress can consent. The court's retains a powerful role in forcing the President to engage with a co-equal branch. The court's role is far more robust in regards to domestic emoluments. If Congress voted on the definition of an emolument for the purposes of regulating the President's salary, the courts may be in the position to determine whether the statute contradicted the Constitution, authoritatively defining the meaning of the term.

The judiciary as ethics watchdog may be an inefficient assignation of an enforcement role. The court rigorously applies standing principles in suits against the President to weed out spurious complaints. Giving courts the responsibility of Emoluments Clause enforcement could result in a drain on both judicial and executive-branch resources. For every valid emoluments suit, there could be

98. *D.C. v. Trump*, 344 F. Supp. 3d 828, 839 (D. Md. 2018).

99. *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017).

100. *Jones v. Obama*, No. CV-10-1075-GAF, 2010 WL 11509096, at *3 (C.D. Cal. July 20, 2010).

dozens of frivolous filings. Moreover, differing interpretation of the clauses, such as the contradicting application of the zone of interests test in Maryland and in Southern District of New York, could result in forum shopping.

As the government argued in their motion for leave to file an interlocutory appeal, the civil discovery made available to plaintiffs can be “burdensome and distracting” to the President.¹⁰¹ However, the District Court of Maryland notes that the discovery would be sought from third parties, such as the Trump International Hotel, as opposed to the White House or another executive agency that might suffer exceptional hardship from certain discovery requests.¹⁰² Moreover, the prospect of discovery can act as a powerful incentive for the President to initiate existing ethics mechanisms within the executive branch, restoring balance among the branches.

Still, without a duty to report, a private right of action may be an ineffective tool to enforce government ethics. There is no guarantee the public will know about violations of the Emoluments Clauses, especially to the extent necessary to file a lawsuit. The only party with perfect knowledge of potential emoluments conferral is the President.¹⁰³ Without any records disclosure, it could be said litigation is a weak deterrent. Then again, these competitor-plaintiffs built an initial complaint solely on public news reporting. As long as such a complaint can survive a motion to dismiss, as it has in the District of Maryland, the court’s order of discovery effectively acts as a mandatory reporting requirement. In this way, a private right of action restores the balance when the President declines to seek consent from Congress for receipts of emoluments.

III. BURDEN ON PRESIDENT TO SEEK CONSENT FROM CONGRESS

The vision articulated by Judge Sullivan in D.C. comports with how the Emoluments Clause was enforced in our nation’s early history: the official presented the specific emolument to Congress who could consent and impose conditions on the acceptance.¹⁰⁴ It is well within the court’s relative institutional competence to enforce a political process and uphold a separation of powers within our government. Placing a burden of reporting on the President seems like

101. *Id.* at 842–43 (D. Md. 2018) (denying motion to stay all discovery pending appeal in the interest of judicial economy and hardship to the moving party).

102. On December 3rd, prosecutors announced they would “serve subpoenas to third-party organizations and federal agencies.” Jessica Taylor, *Subpoenas Coming Soon In Trump Emoluments Lawsuit*, NAT’L PUBLIC RADIO (Dec. 3, 2018), <https://www.npr.org/2018/12/03/673056131/subpoenas-coming-soon-in-trump-emoluments-lawsuit> [<https://perma.cc/5AXN-PYXU>] (April 1, 2019). *See also D.C. v. Trump*, 344 F. Supp. 3d at 843 (noting that “the Court is always available to limit given discovery to minimize an unusual impact”).

103. The managers of a President’s business operations may also have perfect knowledge of any emoluments. However, whether a benefit conferred to the President without his knowledge qualifies as an emolument is a legal question outside the scope of this paper.

104. *See, e.g., ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* 126 (2014); *Blumenthal v. Trump*, 355 F. Supp. 3d 45, 53 (D.D.C. 2018).

an efficient way to structure the interaction between the political branches, because of the natural information asymmetries with an emoluments violation claim.¹⁰⁵

Although the President carries the initial burden, *Blumenthal* contemplates a powerful congressional role. While the opinion puts an affirmative duty on the President, it also makes a strong statement about Congress' responsibility as an ethics enforcer. The court dismisses an uninformed vote as insufficient to satisfy the clause's demands.¹⁰⁶ Congress is also well-equipped for this regulatory task. The House Committee on Oversight and Government Reform and Senate Committee on Homeland Security and Government Affairs would be obvious choices to perform this kind of oversight. In this scheme, Congress would be as politically accountable as the President for any perceived corruption. The goal then of the Foreign Emoluments clause is not to prohibit any benefits from foreign state sources, but to guarantee transparency and accountability.

More importantly, requiring an informed vote on the record also allows for judicial review. While the Foreign Emoluments Clause gives a political body the ability to approve conferral of emoluments, by rejecting acquiescence by silence, the court provides a record to future litigants. The opinion suggests that a legislative blank check on emoluments receipts, without adequate interaction between the political branches, could be struck down as unconstitutional.¹⁰⁷

Within this framework, a President may very well seek consent, and Congress never act. We have seen many modern instances of a Congress denying a President a requested vote.¹⁰⁸ There is sturdier ground, however, to interpret congressional silence after disclosure by the White House of emoluments as consent, than an exercise of legislative discretion not to raise the issue of emoluments at all. Alternatively, a court can require consent be explicit, and interpret congressional silence as a denial of permission to receive emoluments. Such a rule would not pose an outsized national security risk: if consent is denied, no further limit is

105. *Blumenthal v. Trump*, 355 F. Supp. 3d at 68 ("Legislating after Congress happens to learn about his acceptance of a prohibited foreign emolument through news reports is clearly an inadequate remedy.").

106. *Id.* at 67–68 ("Third, the President does not explain how the proposed legislation would be adequate in view of the allegation that the President has not provided any information to Congress about the prohibited foreign emoluments he has received, and that he does not intend to change this practice.").

107. *Id.* at 70 ("... [I]t is the role of the Judiciary to 'say what the law is' regarding the meaning of the Foreign Emoluments Clause and the President's compliance with it.").

108. Prominent recent examples include the Senate's denial of a vote on Chief Judge Merrick Garland's nomination to the Supreme Court as well as on an Authorization of Military Force in Syria. Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, WALL STREET J. (Jan. 3, 2017), <https://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952> [https://perma.cc/P82Y-GVNZ] (last visited April 1, 2019); Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES (Aug. 31, 2013), <https://www.nytimes.com/2013/09/01/world/middleeast/syria.html> [https://perma.cc/7RMC-XVLU] (last visited April 1, 2019).

imposed upon the President's diplomacy powers except those intended by the Constitution.¹⁰⁹

Whenever the same political party controls both Congress and the presidency, as was the case when the alleged injuries in all three of these lawsuits occurred, there is the possibility that these provisions are not earnestly or uniformly enforced. Even granting room for judicial review, the best the court can do when evaluating whether a President has violated the Foreign Emoluments Clause is to examine the reporting and approval process. Reliance on political accountability is costly, leaving government ethics vulnerable to shifting norms and attitudes that do not reflect those of the Founders.

CONCLUSION: WHO IS THE BEST ENFORCER OF THE EMOLUMENTS CLAUSE?

The federal district courts presented with Emoluments Clause questions talk past each other because they reason from different first principles. Our nation's first businessman-president requires us to ask difficult questions about "ethical governance" in the United States. Fundamentally, we must determine whether government ethics are a fixed, legal question, or an adaptable, political one. Are the Emoluments Clauses rules that the President or Congress can choose to ignore because of changing attitudes about ethical norms, or are they laws that crystallized a specific attitude about the way our democracy should function? If we believe the Emoluments Clauses are part of the structural framework of our government as mapped by the Founders, their interpretation fits safely within the judiciary's purview.

As the nation learns about President Trump's business dealings as a presidential candidate and as the President, we have continued to see a disparity in attitudes about what is expected from a modern statesperson. In reaction to revelations that a close aide to then-candidate Trump lied to Congress about a Trump organization real estate transaction in Moscow,¹¹⁰ Senator John Barrasso told reporters, "The president is an international businessman; I'm not surprised he was doing international business."¹¹¹ If Judge Daniels is correct, and emoluments are a political question, enforcement may come down to the American voter. If she does not value transparency or an honest government at the ballot

109. Brief of National Security Amici, *supra* note 6, at 16–17.

110. The project was abandoned in the summer of 2016 by the time President Trump had secured the Republican party nomination. Mike McIntire, Megan Twohey & Mark Mazzetti, *How a Lawyer, a Felon and a Russian General Chased a Moscow Trump Tower Deal*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/us/politics/trump-russia-felix-sater-michael-cohen.html> [<https://perma.cc/M59F-YJEV>] (last visited April 1, 2019).

111. Felicia Sonmez & Paige Winfield Cunningham, *Cohen's guilty plea suggests Russia has 'leverage' over Trump, top Democrat says*, WASH. POST (Dec. 2, 2018), https://www.washingtonpost.com/politics/cohens-guilty-plea-suggests-russia-has-leverage-over-trump-top-democrat-says/2018/12/02/ac2f5e92-f65c-11e8-8d64-4e79db33382f_story.html [<https://perma.cc/T76Y-DEM5>] (last visited April 1, 2019).

box, or simply finds other issues more deserving of her vote, we may end up with a government ethics apparatus that directly contradicts what the Founders intended.

It might also be true that the issue of whether “emoluments” is a political or legal question creates a false dichotomy. The Emoluments Clauses are indisputably law. Nevertheless, at a time when our nation’s courts are enduring their own crisis of confidence, they are hindered as ethics regulators by their own institutional constraints. Like any constitutional provision, their interpretation and enforcement are inescapably political, and the courts must choose wisely when and how to act.

In a less extraordinary political moment, there would be no reason to question our self-policing framework. Just as the Watergate scandal led to the passage of the Ethics in Government Act,¹¹² the Trump presidency presents an opportune moment to think seriously about whether we are comfortable with the fox watching the hen house when it comes to ethics enforcement. To avoid a separation of powers problem, Congress should pass emoluments legislation, defining a system of reporting and oversight such as that contemplated in *Blumenthal*.

The question of whether the Emoluments Clauses are rule or law must turn on how we view ethics within separation of powers. The Founders’ attitude toward ethical constraints is structural to our democratic republic because it defines which influences are excessive. If these ethics rules are thwarted, much of our separation of powers doctrine may be undermined. Without congressional oversight, it feels irresponsible for courts to continue to defer to a self-policing system that has not been activated.

Yet if we are to believe Maryland’s Judge Messitte that emoluments enforcement is a matter of right for all Americans, the courts shouldn’t allow an undivided government to violate it. It should step in to enforce these measures and provide for transparent and accountable representation. Thus, a more useful and judicially manageable way to frame the question may be: do the Emoluments Clauses imply a right of Americans to a transparent government, or a right to vote for expectations of transparency?

Ethics is rooted in culture, and culture is often set at the top of any organization. A President with a dismissive attitude toward ethical controls could pervade the entire executive branch by creating a dangerous feedback loop. Without some sort of external enforcement mechanism, values of good governance will always be vulnerable to changing attitudes. For originalists, that should present some serious concerns about the Constitution’s elasticity.

Given that the current President seems unconcerned and thus unconstrained by traditional norms, many in the ethics community are rightly activated and

112. O.G.E. *Agency Profile*, *supra* note 7, at 5.

alarmed by his ambivalent demeanor demeanor. The ethics community can lead first by pushing for investigations of Emoluments Clause violations by the Trump administration, and then by lobbying Congress for statutory enactment of an emoluments reporting framework. As these three lawsuits move along their respective life cycles, the ethics community will be watching, forging a new vision for an ethics enforcement scheme of the future.