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Updated February 7, 2020

The Emoluments Clauses of the U.S. Constitution

Recent litigation involving President Trump has raised a number of legal issues concerning formerly obscure constitutional provisions that prohibit the acceptance or receipt of "emoluments" in certain circumstances. This In Focus provides an overview of these constitutional provisions, highlighting several unsettled legal areas concerning their meaning and scope, and reviewing the status of ongoing litigation against President Trump based on alleged violations of the Emoluments Clauses.

The Constitutional Provisions

The Constitution mentions emoluments in three provisions, each sometimes referred to as the "Emoluments Clause":

- **The Foreign Emoluments Clause** (art. I, § 9, cl. 8): "[N]o Person holding any Office of Profit 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 Domestic Emoluments Clause** (a.k.a. the Presidential Emoluments Clause) (art. II, § 1, cl. 7): "The President shall, at stated Times, receive for his Services, a Compensation which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."
- **The Ineligibility Clause** (art. I, § 6, cl. 2): "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

Purposes of the Emoluments Clauses

Each of the Emoluments Clauses has a distinct, but related, purpose. The purpose of the Foreign Emoluments Clause is to prevent corruption and limit foreign influence on federal officers. The Clause grew out of the Framers' experience with the European custom of gift-giving to foreign diplomats, which the Articles of Confederation prohibited. Following that precedent, the Foreign Emoluments Clause prohibits federal officers from accepting foreign emoluments without congressional consent.

The purpose of the Domestic Emoluments Clause is to preserve the President's independence. Under the Clause, Congress may neither increase nor decrease the President's compensation during his term, preventing the legislature from using its control over the President's salary to exert influence over him. To further preserve presidential independence, the Clause prohibits a sitting President from receiving emoluments from federal or state governments, except for his fixed salary.

The purpose of the Ineligibility Clause is to preserve the separation of powers and prevent executive influence on the legislature (and vice versa). To that end, the Clause prohibits federal officers from simultaneously serving as Members of Congress. Moreover, a Member of Congress may not hold an office if it was established during his tenure or if the emoluments of that office were increased during his tenure.

Officers Subject to the Emoluments Clauses

In terms of the persons to whom they apply, the scope of the Domestic Emoluments Clause and the Ineligibility Clause is clear from the text of the Constitution: The Domestic Emoluments Clause applies to the President, and the Ineligibility Clause applies to Members of Congress.

The scope of the Foreign Emoluments Clause is less clear. By its terms, the Clause applies to any person holding an "Office of Profit or Trust under" the United States. The prevailing view of the Clause is that this language reaches only federal, and not state, officeholders. According to the Department of Justice's Office of Legal Counsel (OLC), which has a developed body of opinions on the Foreign Emoluments Clause, offices "of profit" include those that receive a salary, while offices "of trust" are those that require discretion, experience, and skill.

There is disagreement, however, over whether elected federal officers, such as the President, are subject to the Foreign Emoluments Clause. Some legal scholars have argued that, as a matter of original public meaning, the Foreign Emoluments Clause reaches only appointed officers (and not elected officials). While there is some historical evidence in support of this view, other evidence may point in the opposite direction. Moreover, the OLC has generally presumed that the Foreign Emoluments Clause applies to the President, and a recent district court opinion came to the same conclusion.

The Meaning of the Term "Emolument"

Black's Law Dictionary defines an "emolument" as an "advantage, profit, or gain received as a result of one's employment or one's holding of office." There is significant debate as to precisely what constitutes an emolument within the meaning of the Foreign and Domestic Emoluments Clauses, particularly as to whether it includes private, arm's-length market transactions. The only two courts to decide this issue adopted a broad definition of "Emolument" as reaching any benefit, gain, or advantage, including profits from private market transactions not arising from an office or employ, although one of those decisions was vacated on appeal on other grounds.

Standing to Enforce an Alleged Violation of the Emoluments Clauses

Whether the Emoluments Clauses may be enforced through civil litigation is an open question. The doctrine of standing

presents a significant limitation on the ability of public officials or private parties to seek judicial enforcement of the Emoluments Clauses. Standing is a threshold constitutional and prudential issue that concerns whether the person bringing suit has a legal right to a judicial ruling on the issues he has raised. Standing is grounded in Article III of the U.S. Constitution, which limits the exercise of federal judicial power to "cases" and "controversies."

To establish the standing requirements of Article III, a plaintiff must identify a personal injury (referred to as an "injury-in-fact") that is actual or imminent, concrete, and particularized. The injury must additionally be "fairly traceable" to allegedly unlawful conduct of the defendant and "likely to be redressed by the requested relief."

Beyond these constitutional standing requirements, courts have at times recognized a set of prudential principles relevant to the standing inquiry. Because such limits are not constitutionally mandated, Congress may modify them if it does so expressly. In general, prudential principles require that the plaintiff (1) assert her own legal rights and interests (as opposed to those of a third party); (2) complain of injuries that fall within the "zone of interests" covered by the legal provision at issue; and (3) not assert what amounts to a "generalized grievance[]" more appropriately addressed by the representative branches of government.

Different plaintiffs in ongoing Emoluments Clause cases have relied on various theories to support standing, with mixed results. Private parties, including business competitors, have asserted injuries in the form of increased competition and loss of business from the alleged constitutional violations. States have alleged injury to proprietary interests connected to ownership of competing businesses and harm to their "quasi-sovereign" interests in the federal system, among other things. Some Members of Congress have relied on the alleged deprivation of their opportunity to vote on the acceptance of emoluments under the Foreign Emoluments Clause.

Significant Litigation Involving the Emoluments Clauses

Until recently, there had been no substantial litigation concerning the Emoluments Clauses. However, since 2016, a number of private parties, state attorneys general, and Members of Congress have filed lawsuits against President Trump alleging that his retention of certain business and financial interests during his presidency—and his failure to seek congressional approval of interests relating to foreign governments—violate the Foreign and Domestic Emoluments Clauses. Three major federal lawsuits concerning the Emoluments Clauses have been filed.

In *Citizens for Responsibility and Ethics in Washington (CREW) v. Trump*, No. 17-CV-458 (S.D.N.Y.), a nonprofit government ethics watchdog, along with various organizations and individuals associated with the hospitality industries in New York and Washington, DC, alleges violations of the Domestic and Foreign Emoluments Clauses through President Trump's receipt of payments from the federal government and various foreign government officials at different Trump Organization properties. For example, plaintiffs allege that the Trump International Hotel's continuing lease with the General Services Administration violates the Domestic Emoluments Clause, and that payments for services made to the Trump International Hotel by agents of foreign governments violate the Foreign Emoluments Clause. President Trump moved to dismiss the suit, asserting that the plaintiffs lack standing and that the term "emoluments" does not extend to arm's-length commercial transactions. The district court dismissed the case for lack of standing on December 21, 2017. However, on September 13, 2019, the Second Circuit reversed, holding that the hospitality-industry plaintiffs had standing based on a theory of competitive harm resulting from the allegedly unlawful conduct. The President has petitioned for rehearing by the full Second Circuit.

In *District of Columbia v. Trump*, No. 17-1596 (D. Md.), the District of Columbia and the State of Maryland sued President Trump, alleging violations of the Foreign and Domestic Emoluments Clauses similar to those in the *CREW* lawsuit. President Trump moved to dismiss based on standing and a failure to state a claim. On March 28, 2018, the district court ruled that the plaintiffs had standing, limited to alleged injuries in the District of Columbia related to the Trump International Hotel. On July 25, 2018, the court denied President Trump's motion to dismiss, holding that plaintiffs had stated a claim because the President was subject to the Foreign Emoluments Clause and the term "emolument" reached any "profit, gain, or advantage, of more than *de minimis* value, received by [the President], directly or indirectly, from foreign, the federal, or domestic governments." These rulings were appealed to the Fourth Circuit, which issued a panel decision on July 10, 2019, reversing the district court on the standing issue and holding that the plaintiffs lacked standing to pursue their claims. However, on October 15, 2019, the full Fourth Circuit agreed to rehear the case. Oral argument was heard before the full Fourth Circuit on December 12, 2019; the court has yet to issue a decision.

Finally, in *Blumenthal, et al. v. Trump*, No. 17-1154 (D.D.C.), 201 Members of Congress have alleged violations of the Foreign Emoluments Clause through the President's receipt of foreign-government payments at Trump properties, foreign licensing fees, and regulatory benefits, among other things. President Trump moved to dismiss on the grounds that the plaintiffs lack standing and that he has not received any prohibited "emoluments." On September 28, 2018, the district court ruled that the plaintiffs have standing, reasoning that these Members of Congress suffered an injury-in-fact through the deprivation of a voting opportunity under the Foreign Emoluments Clause. On April 30, 2019, the district court held that the plaintiffs had stated a claim against the President. On August 21, 2019, the district court certified an immediate appeal and stayed the case pending appeal. On February 7, 2020, the D.C. Circuit reversed the district court's standing decision, holding that the Members lacked standing to sue because individual Members of Congress may not sue based on alleged institutional injury to the legislature as a whole. The D.C. Circuit therefore vacated the district court's decision on the merits and remanded with instructions to dismiss the complaint.

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