President Trump and the Foreign Emoluments Clause

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The election of Donald Trump to the American presidency has, among other things, brought newfound attention to one of the sleepier provisions of the U.S. Constitution. The foreign emoluments clause provides that "no 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."

Within 72 hours of his inauguration, a nonprofit government ethics group had filed a constitutional complaint against President Trump in federal court. The group, Citizens for Responsibility and Ethics in Washington (CREW), asserts that the provision bars the President "from accepting anything of value, monetary or nonmonetary, from any foreign government or its agent or instrument without congressional consent." In other words, for businesses owned by Donald Trump to accept payments from foreign governments — say, under a lease held by a state-owned Chinese bank for office space in Trump Tower — violates the Constitution. The President shot back the same day, calling the suit meritless. Does CREW have a case?

CREW can point to both text and context in support of its position. According to the Oxford English Dictionary (and others), "emolument" means both "profit or gain arising from station, office, or employment: reward, remuneration, salary" and, secondarily, "advantage, benefit, comfort." Two former White House ethics lawyers and Harvard Law Professor Larry Tribe, all of whom are involved in CREW's legal effort, have argued in a paper that the term was understood in the founding era "as a catch-all for many species of improper remuneration." What is more, they add, the phrase "of any kind whatsoever" underlines that the framers meant the term to be interpreted expansively. This makes sense, argues Zephyr Teachout, a Fordham Law School professor also working with CREW, because the Constitution's framers were haunted by the problem of corruption and obsessed with preventing it. Read in light of this Anti-Corruption Principle, even ostensibly arms-length transactions with foreign states are impermissible, because it create potential for conflicts of interest when foreign policy choices can mean personal gains or losses.

Still, this is no open-and-shut case. For starters, it is not universally accepted that the foreign emoluments clause applies to the President at all. In particular, Professor Seth Barrett Tillman of Maynooth University has argued, based on intricate textual analysis, that the clause is properly read to cover appointed offices only. And assuming the President is covered, it is not obvious how the clause applies to payments made not to the President himself, but, say, to business entities owed by him indirectly within the labyrinthine Trump Organization. But the main point of contention centers around the scope of the ban. Does the clause really cover anything of value, as CREW insists?

In a recent piece, University of Iowa College of Law Professor Andy Grewal has come down in favor of a narrower, "office-related definition" of emolument, which covers only compensation for services performed personally by the officer, in connection with employment by a foreign government. On this view, it is constitutional, for instance, for foreign diplomats to stay at the Trump International Hotel for prevailing market rates. (To the extent above-market rates are involved, we may edge into the territory of presents, which *are* covered by the foreign emoluments clause, or else bribes, which are explicit grounds for impeachment.) This interpretation not only accords with the principal dictionary definition of "emolument," but it also lines up with legislative and executive branch interpretations of the foreign emoluments clause

dating back decades. What is more, it matches how the Supreme Court has used the term "emolument" in a number of cases, albeit none related specifically to the foreign emoluments clause.

A midcentury case involving Germany illustrates the office-related approach in action. A U.S. officer had served as a judge in Germany, but had been forced out of his position under the Nazi regime on account of race. After the war, the officer received money from the German government under a statutory restitution scheme. More specifically, he took a one-time payment of $4000, to compensate him for lost wages, and a monthly annuity of $263, for the retirement benefits that would have accrued but for his termination. The Office of Legal Counsel (OLC), the Justice Department unit that gives authoritative legal advice to the President and administration, was asked in 1954 whether these payments violated the foreign emoluments clause. OLC's opinion concluded that the annuity did, owing to the tight nexus between retirement benefits and employment: it was "part of the emoluments of office," and could only be kept with congressional consent. The $4000 payment, on the other hand, did not fall within the clause, since it amounted to damages paid for a wrongful act. Clearly, under the broader definition advanced by CREW, both payments would be covered.

OLC's opinion on the matter is not binding on courts, but the office-related interpretation also avoids some rather extreme implications of the CREW approach. As Grewal notes, the "anything of value" reading makes it unconstitutional for an officer to accept a driver's license, or a building permit for renovations to her vacation home, from a foreign government. What is more, in addition to the foreign emoluments clause, the Constitution features a domestic counterpart, targeting specifically the President, and prohibiting him from receiving "any other Emolument from the United States, or any of them," apart from his salary, during his term of office. If "emolument" has the same meaning in both, and if that meaning is the broad one, then it is also unconstitutional, for instance, for President Trump to benefit from the numerous tax breaks that his developments enjoy. And indeed, the CREW complaint notes, almost in passing, that domestic emoluments clause violations are also likely. But by the same token, it was unconstitutional for President Reagan to receive a pension from California for his service as governor. Likewise, Grewal notes, it was even unconstitutional for President Obama to receive the benefit of copyright protection for his books while in office. This may be stronger medicine than the framers had in mind, and stronger medicine than it is reasonable to stomach.

Does CREW have standing?

But the biggest challenge for CREW may be getting past the courthouse door. In the United States, federal courts can only hear cases when the parties have standing. Standing requires, among other things, that the party bringing the suit has suffered some concrete injury, particular to it: a "generalized grievance" that the Constitution has been violated is not enough.

CREW alleges that the President's constitutional violations have hit them squarely in the pocketbook. According to the complaint, those violations "have required CREW to divert and expend its valuable resources specifically to counteract those violations, impairing CREW's ability to accomplish its mission." The complaint details all that CREW is doing to research the issues, investigate the President's business interests, raise public attention, and initiate litigation. It also describes the work on other issues that has gone undone as a consequence.

CREW's standing argument is not without precedent. The complaint cites to *Havens Realty Corp. v. Coleman*, from 1982, in which the Supreme Court held that a housing rights organization had standing to challenge discriminatory rental practices at two Virginia apartment complexes. The Court accepted the group's argument that its efforts to identify and counteract discrimination—including by sending white and black "testers" to apply for leases—consumed significant resources that could otherwise be used to provide services to its clients.

But even if the injuries are comparable, the times are different, and the Supreme Court has grown much stingier with standing in the last 35 years. The *Clapper*

v. Amnesty International USA case, from 2013, is especially uncongenial to CREW. Amnesty alleged that its communications were likely subject to secret, and unconstitutional, surveillance under the auspices of a federal intelligence program. Amnesty took costly and burdensome measures in order to protect its sensitive communications, and claimed standing in part on this basis. The Court rejected the argument, concluding that such "self-inflicted injuries" cannot be laid at the government's doorstep. It is not hard to imagine CREW's suit meeting a similar fate.

CREW's suit may well be the first constitutional claim filed against the new President. CREW is seeking a declaration that the President is violating the foreign emoluments clause and an injunction to stop him. Between the standing issue and uncertainty over the scope of the clause, it may emerge empty-handed. But the week since their filing has made it abundantly clear that this will not be the last constitutional challenge this administration will face.

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