More Emolument Trouble For President Trump?

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Emoluments is the word of the hour again in the United States. The past week saw the filing of two new lawsuits alleging that President Trump has violated one or more of the Constitution's emoluments clauses by accepting payments and other benefits from foreign and domestic governments. The legal arguments in these complaints are similar to those made in the suit filed in January by Citizens for Responsibility and Ethics in Washington (CREW), a D.C.-based nonprofit outfit dedicated to promoting government ethics. What's significant about the new suits is who the plaintiffs are. *District of Columbia v. Trump*, filed Monday in the federal trial court in Maryland, is brought by the state of Maryland and Washington, D.C. *Blumenthal v. Trump*, filed Wednesday in the federal trial court in Washington, D.C., is brought by 196 members of Congress, all Democrats. Are these the plaintiffs who can get a court to rule, for the first time ever, on what "emolument" means as used in the Constitution?

As detailed in a previous post, President Trump's business dealings potentially implicate two emoluments clauses in the U.S. Constitution. The foreign emoluments clause bars any "person holding an office of profit or trust" under the United States from accepting any "present, emolument, office, or title, of any kind whatsoever" from foreign states without Congress's consent. The domestic emoluments clause is addressed specifically to the President and forbids him from accepting "any other emolument," apart from his salary, from the national governments or the states, whether Congress consents or not. (A *third* constitutional emoluments clause, concerning members of Congress, is blessedly untouched by the current litigation.)

The merits of these claims hinge on the meaning of the word "emolument." The trouble is, "emolument" has two related but distinct meanings. It may refer broadly to benefits of any kind. It may also refer more narrowly to benefits one receives for performing the duties associated with an office. Both usages were current when the Constitution was drafted. Which is the better understanding of "emolument" as it appears in the Constitution? If it's the broader one, then it violates the Constitution for foreign governments to pay the tab for stays at Trump-owned properties, or, for that matter, for state-owned broadcasters to pay royalties to the Trump Organization for the right to air *The Apprentice*. If, on the other hand, the Constitution prohibits office-associated emoluments only, arms-length business transactions between the President's companies and foreign governments are not unconstitutional, even if they are a bad idea. The Supreme Court has never weighed in on the issue, but early presidential practice, plus legislative and executive branch rulings, have favored the narrower view.

The first question in all of these suits, though, is whether the plaintiffs have standing to bring the claims in the first place. To have standing in U.S. federal courts, a plaintiff must suffer an injury that is traceable to the conduct he complains of and redressable by a favorable ruling. Not just any injury will do. According to the Supreme Court, plaintiffs must suffer an "injury in fact" that is actual or imminent, rather than conjectural or hypothetical, and concrete and particularized, as opposed to a generalized grievance. This is the irony of standing doctrine: harms can be so widely shared as to become unremediable in the courts. If the President is violating the emoluments clauses, which aim to prevent corruption, the harm is to American democracy, and thus to all Americans. Therefore, none of us can sue to stop it.

In a bid to get around this problem, CREW amended its complaint in May, joining to the suit new plaintiffs who face particular harms from the President's business dealings with governments. The new

plaintiffs include a hotel owner and restauranteur, a restaurant organization, and an event booker, all with operations in New York and/or Washington. All claim that their businesses will suffer as governments, hoping to curry favor with the President, patronize Trump establishments instead of their own. The President moved for dismissal earlier this month, arguing, among other things, that the plaintiffs hadn't shown the kinds of injuries necessary to establish standing. The filing argued that the plaintiffs served different market segments than the President's businesses, and therefore weren't truly competitors. What is more, it continued, the hotel and restaurant markets in New York and Washington are large, diffuse, and competitive, so that any claim that Trump properties are taking away business from the plaintiffs is speculative.

For their part, Maryland and Washington allege a multitude of injuries in their complaint. Some of these are similar to the harms pleaded by the commercial plaintiffs in CREW's suit. As proprietors of event facilities, both claim their business will flow to Trump-owned competitors as governments angle to please the President. But Maryland and Washington can also claim harms to their "sovereign and quasi-sovereign interests." Emoluments clause violations deny Maryland the benefit of the bargain it made when it joined the union: the state ceded some of its sovereignty on the premise that the anti-corruption protections written into the Constitution would be maintained. What's more, the complaint continues, Maryland and Washington will face pressure to patronize Trump businesses themselves, or else risk disfavor from the administration. The violations will also cause economic harm to residents in both places, and harms to citizens counts as injuries to their governments. The resulting loss of tax revenue in Maryland's case only compounds the injury.

In the *Blumenthal* litigation, standing considerations likely led the plaintiffs to focus exclusively on the foreign emoluments clause, since it contemplates a specific role for Congress. The clause grants Congress a prerogative to consent to emoluments from foreign states. When the President accepts foreign emoluments without seeking congressional approval, the claim goes, he robs Congress of its constitutionally ordained role in the matter. Legislators have a right that their votes be given effect, and in depriving them of the chance to vote on whether specific emoluments should be allowed, the President has injured them in particular.

Will any of these standing arguments work? Maryland and Washington can find some support in the Supreme Court's 2007 *Massachusetts v. EPA* decision, in which the Court showed a "special solicitude" for states in its standing analysis. In allowing Massachusetts to challenge the Environmental Protection Agency's decision not to regulate greenhouse gas emissions, the Court emphasized that the state had ceded the powers necessary to maintain a climate policy of its own when it joined the union. Judicial redress was, in effect, the state's only recourse to protect itself. But Maryland's sovereign standing argument seems to be a bit broader, and perhaps to imply that states have standing to sue any time some part of the constitutional bargain is not kept. Courts may be reluctant to endorse such a broad view of state standing.

The Senators and Representatives suing must contend with a different line of standing doctrine. In *Raines v. Byrd*, a 1997 challenge brought by members of Congress to a statute enhancing the President's veto power, the Supreme Court came close to shutting the door on legislative standing altogether. But in order to avoid overruling an aged precedent, the Court left open a crack, conceding that legislators would have standing to challenge a statute when they could claim their votes were "completely nullified." Hence the emphasis, in the Blumenthal complaint, on how the President's refusal to seek congressional consent for his acceptance of foreign emoluments strips members of the right to vote.

Raines v. Byrd is the Supreme Court's last word to date on congressional standing, and it's not obvious that its strict "nullification" standard applies also to legislator challenges to executive actions. The trial court where Blumenthal will be litigated has some other precedents that the plaintiffs might find useful. Notably, in *U.S. House of Representatives v. Burwell*, the

court ruled that Congress's lower chamber has standing to challenge President Obama's implementation of the Affordable Care Act. That case is distinct from this one, however, in that it was brought by the House as an institution, not by individual members.

Standing jurisprudence is notoriously unpredictable, and while each lawsuit faces obstacles, it would be a mistake to count any of them out. Together, President Trump's challengers now have three bites at the apple, in three different federal courts. And significantly, the plaintiffs benefit from an asymmetry in the availability of appellate review. Any ruling that plaintiffs lack standing can be immediately appealed to a higher court because it's a final order: it terminates the suit. A ruling that a plaintiff does have standing, however, is ordinarily not appealable, because it is not a final order. (The court in *Burwell*, for instance, declined to let the Obama administration appeal its standing ruling.) If the court finds anyone has standing and litigation proceeds to the merits, the plaintiffs will predictably seek discovery on President Trump's business interests, including, perhaps, his long-awaited tax returns. Expect to see vigorous defenses from the President to all three suits.

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