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.”

**Purpose 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.

**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
that are 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 (1) a plaintiff assert her own legal rights and
interests (as opposed to those of a third party); (2) the
plaintiff’s complaint fall within the “zone of interests”
covered by the legal provision at issue; and (3) the plaintiff
may not assert what amounts to a “generalized grievance[]”
that is 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 and government ethics watchdog groups, have
asserted injuries in the form of increased competition in
their industries and diversion of resources to combat 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 related 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 food
services or 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. The plaintiffs’ appeal on the standing
issues is currently pending before the 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 injuries in the District of Columbia, based on
alleged injuries 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
decision on July 10, 2019, reversing the district court on the
standing issue. The Fourth Circuit panel concluded that the
plaintiffs lacked standing to pursue their claims and
remanded the case with instructions to dismiss. However,
the plaintiffs may still petition for rehearing by the full
Fourth Circuit or seek review from the Supreme Court.

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, adopting a broad
definition of the term “Emolument” as reaching any gain,
profit, or advantage. After the district court denied the
President’s request for an immediate appeal, the President
petitioned the D.C. Circuit, requesting that it stay the
district court’s proceedings and review its rulings. On July
19, 2019, the D.C. Circuit denied the petition but suggested
that the district court had abused its discretion by not
permitting an immediate appeal. On August 21, 2019, the
district court certified an immediate appeal and stayed the
case pending appeal to the D.C. Circuit.

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