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Emoluments, The (Nearly) Unlitigated Clauses of the Constitution

By Dan Blair*

INTRODUCTION

In the ongoing case of *District of Columbia v. Trump*, the governments of Washington D.C. and Maryland (the Plaintiffs) are suing Donald Trump individually and in his official capacity as President of the United States for violations of the Foreign and Domestic Emoluments Clauses.¹ The basis of this lawsuit is President Trump's continued ownership stake in the Trump Organization.² The Trump International Hotel is located in the Old Post Office Building in Washington D.C. and is particularly of note to this case.³ The Plaintiffs allege that President Trump is in violation of both emoluments clauses because, amongst other things, the Maine delegation and several foreign governments have stayed at the President's Trump International Hotel while visiting Washington D.C. to discuss issues with the President and others in the Executive Branch.⁴ Recently, the court has given a detailed explanation of the definition of emoluments in its ruling to deny the President's motion to dismiss for failure to state a claim.⁵ An emolument, as defined by the court, is any profit, gain or advantage that an official receives in addition to his or her proscribed salary.⁶

BACKGROUND

The Foreign Emoluments Clause and the Domestic Emoluments Clause differ slightly in ways that could become important in the case at hand. The Foreign Emoluments Clause states that "no Person holding any Office of

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¹ *District of Columbia v. Trump*, 2018 WL 3559027, 1 (D. Md. 2018).

² The Trump Organization LLC and The Trump Organization, Inc. make up the Trump organization which President Trump maintains sole or partial ownership in both entities. These entities operate as umbrella corporations which have many other corporations, limited liability companies, limited partnerships, and other organizations affiliated with President Trump under them. *Trump*, 2018 WL 3559027 at *2.

³ *Trump*, 2018 WL 3559027 at 2-3.

⁴ *Id.* at 3.

⁵ The United States District Court for the District of Maryland, Peter J. Messitte presiding.

⁶ *Trump*, 2018 WL 3559027 at 19.

Profit or Trust . . . shall, without the Consent of the Congress, accept of any . . . Emolument . . . of any kind whatever, from any King, Prince, or foreign State.”⁷ The Domestic Emoluments Clause, in regulating the Presidents compensation states that “he [The President] shall not receive . . . any other Emolument from the United States, or any of them.”⁸

There have been three previous cases involving a President and the emoluments clauses. The first came in 1975, when former-President Nixon sued for the right to have recordings, documents, records, etc. from his time in office.⁹ The District Court of D.C. found that, among several other reasons, Nixon was not entitled to the materials because the Domestic Emoluments Clause sought to limit the profit Presidents could get from the office and as such he had no personal right to the materials, which undoubtedly had some value.¹⁰ In a later case brought by President Nixon on the same issue, the same court found that the Domestic Emoluments Clause did not apply after a Court of Appeals decision, based upon historical precedent, held that the papers were already President Nixon’s property.¹¹ President Obama was also sued under the Foreign Emoluments Clause for his acceptance of the Nobel Peace Prize.¹² Though the claim in this case was quickly thrown out for lack of standing,¹³ a Justice Department memo makes it clear that the President was free to accept the award because the Nobel Committee that awards the prize is not made up of a “King, Prince, or foreign State.”¹⁴

⁷ U.S. CONST. art. I, § 9, cl. 8.

⁸ U.S. CONST. art. II, § 1, cl. 6.

⁹ *Nixon v. Sampson*, 389 F.Supp. 107, 117 (D. D.C. 1975).

¹⁰ *Id.* at 137.

¹¹ *Griffin v. U.S.*, 935 F.Supp. 1, 4 (D. D.C. 1995); See also *Nixon v. U.S.*, 978 F.2d 1269, 1275-1276 (C.C. Cir. 1992).

¹² *Jones v. Obama*, 2010 WL 11509096, 3 (C.D. Cal. 2010).

¹³ *Id.*

¹⁴ U.S. DEP’T OF JUSTICE, APPLICABILITY OF THE EMOLUMENTS CLAUSE AND THE FOREIGN GIFTS AND DECORATIONS ACT TO THE PRESIDENT’S RECEIPT OF THE NOBEL PEACE PRIZE, 1

(2009), <https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace.pdf>.

In the few other cases that exist where the emoluments clause is mentioned, it does not address the issue of emoluments specifically or emoluments issues are quickly ruled out as not being pertinent to the case at hand.¹⁵

COURT'S ANALYSIS

The President's argument in this case is that the definition of "emoluments" is "profits arising from an office or employ."¹⁶ The President states that this means that an emolument is only something one can get for an official duty and not for services rendered in an individual capacity or in the private sector.¹⁷ The court points out that having outside groups pay the President for official duties is bribery.¹⁸ The court further addresses the insufficiency of this argument in stating that the founders certainly did not intend to make bribery from a foreign government acceptable with Congressional approval as the Foreign Emoluments Clause would do under the President's interpretation.¹⁹

Ultimately, the court decided to follow the Plaintiffs' definition of emoluments as any profit, gain, or advantage that an official receives in addition to his proscribed salary.²⁰ The court gives extensive reasoning throughout the decision for conclusion.

The text of the clauses themselves support the broader definition of emolument, particularly the use of the phrases "of any kind whatever" in the Foreign Emoluments Clause and "any other" in the Domestic Emoluments Clause.²¹ The court's argument is that the phrases would be

¹⁵ See *U.S. ex rel. New v. Rumsfeld*, 350 F.Supp.2d 80, 87 (D. D.C. 2004) (Foreign Emoluments Clause issue about whether wearing a United Nations pin on military uniforms constituted accepting a gift from a foreign government was denied); *Buckley v. Valeo*, 424 U.S. 1, 124 (1976); *DeSilva v. DiLeonardi*, 181 F.3d 865, 866 (7th Cir. 1999); *Richardson v. McCarthy*, 2016 WL 9088757, *4 (D. M.D. Ga. 2016); *Wolfe v. Diguglielmo*, 2008 WL 544645, *3 (D. E.D. Pa. 2008).

¹⁶ *Trump*, 2018 WL 3559027 at *4.

¹⁷ *Id.*

¹⁸ *Id.* at *11.

¹⁹ *Id.*

²⁰ *Id.* at *2.

²¹ *Trump*, 2018 WL 3559027 at *10.

unnecessary in the President's interpretation, and no word can be interpreted to be unnecessary if avoidable.²²

Furthermore, the original public meaning of the word emolument at the time of the writing of the Constitution supports the Plaintiffs' definition.²³ Every English-language dictionary at the time of writing included the definition put forth by the Plaintiffs, while the definition put forth by the President is only in 8% of English-language dictionaries.²⁴ Further evidence supporting the Plaintiffs' definition comes from debates at the Constitutional Convention and in the Federalist Papers, in which Madison specifically wrote the term "emoluments of office" when referring to gains as related to the office.²⁵ "Of office" would be redundant if that is what the word already meant.²⁶

Additionally, the court states that the constitutional purpose of the two emoluments clauses supports the Plaintiffs' definition of emoluments.²⁷ The Foreign Emoluments Clause was adopted with the concern that officials would be open to influence from foreign governments.²⁸ The Founders thought it best to make a "prophylactic" rule to make sure there was not even a small chance of such influence over government officials.²⁹ The Domestic Emoluments Clause was added for the similar purpose of making sure that states are not engaged in competing for the good favor of the President by "appealing to his avarice."³⁰ The President combated this interpretation by arguing that the resulting broad definition of emoluments could result in a situation where an officials global stock holdings could lead to emoluments clause violations if some of the profits could be traced to foreign governments.³¹ This concern, however, would likely not have a large effect on those in office and does not outweigh the broader constitutional concerns addressed by the definition put forth by the

²² *Id.*

²³ *Id.* at *12.

²⁴ *Id.*

²⁵ *Id.* at *15.

²⁶ *Trump*, 2018 WL 3559027 at *15.

²⁷ *Id.* at *16.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (citing The Federalist No. 73 (Alexander Hamilton)).

³¹ *Trump*, 2018 WL 3559027 at 17.

Plaintiffs.³² Here the President raises a “horrible result” scenario, where government officials cannot make money from global stock holdings, that is, at least to a certain degree, in line with what the Founders intended. The Constitution puts more value in having officials who are clear of any direct or indirect undue influence on the decisions they make than those same individuals enriching themselves while in office.

Perhaps the most convincing argument the court makes is that Executive Branch precedent and practice is “overwhelmingly consistent” with the definition of emoluments advanced by the court.³³ Though President Trump brings up that President Reagan was able to receive his retirement benefits from California, the court quickly notes that President Reagan had fully earned these benefits from his time as Governor and, as such, already had the right to them.³⁴ Thus these were not emoluments that Reagan got from California while he was President but part of his proscribed, deferred compensation that he earned as Governor.³⁵ This idea of precedent and practice is further evidenced by the shocking dearth of emoluments cases that have reached the courts: only three examples of cases involving a President had occurred in 228 years between the Constitution’s ratification and Donald Trump being elected to the Presidency.³⁶

CONCLUSION

In the courts detailed and thorough analysis, it has presented a logical definition of emoluments. The support for the analysis follows historical, textual, and constitutional arguments that are unlikely to be refuted by higher courts. In the more direct issue of the present case, this definition is likely fatal to the President’s defense. Because this motion to dismiss was denied and there really are not any major factual disputes, it seems likely that the Plaintiffs will be able to establish that President Trump is in violation of both emoluments clauses simply by The Trump International Hotel having taken money from foreign countries and the State of Maine on behalf of President Trump. The President’s donations of any profit the

³² *Id.* at 19.

³³ *Id.* at 21.

³⁴ *Id.* at 21-22.

³⁵ *Id.*

³⁶ See *Supra* text accompanying notes 10-14.

hotel claimed to make³⁷ seems irrelevant under the definition advanced by the court because the clauses use the words “accepting” and “receiving.”³⁸ What he does with the profits after receiving or accepting them likely does not absolve him of this violation. How the President will respond if this case is lost and all appeals are exhausted is not clear, but it could potentially result in a constitutional crisis in which the President is defying an order from the courts if he refuses to divest himself of ownership in the Trump Organization. However, what is clear for now is that an emolument as it relates to the Constitution is officially defined as any profit, gain or advantage that an official receives in addition to his or her proscribed salary.³⁹

Edited by Carter Gage

³⁷ David A. Fahrenthold and Jonathan O’Connell, *Trump Organization says it has donated foreign profits to U.S. Treasury, but declines to share details*, *The Washington Post* (Feb. 26, 2018), https://www.washingtonpost.com/politics/trump-organization-says-it-has-donated-foreign-profits-to-us-treasury-but-declines-to-share-details/2018/02/26/747522e0-1b22-11e8-ae5a-16e60e4605f3_story.html?utm_term=.5376f6bad278

³⁸ U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. II, § 1, cl. 6.

³⁹ *Trump*, 2018 WL 3559027 at 19.