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The Yet-to-Be-Applied Emoluments Clause

By
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In order to avoid questions regarding conflicts of interest, presidents have historically separated themselves from their private financial interests before taking office. Because of this some legal questions surrounding presidential conflicts of interest have gone largely unanswered. Recently these questions have leapt to the forefront of public discourse.

One such question deals with a tiny clause of the Constitution, the little-known-until-recently Emoluments Clause. This clause prevents foreign governments from having an undue influence on U.S. government officials. It states that a "person holding any office of profit or trust [of the United States]" cannot accept, without the approval of Congress, presents or emoluments "of any kind whatever, from any king, prince, or foreign state." Basically, federal officials cannot accept anything, including gifts or payments for services (emoluments), from any foreign government without the OK from Congress.

The Supreme Court has never issued a decision on the Emoluments Clause, nor does it seem have any lower courts. This leaves interesting ambiguities in the clause, such as: who qualifies as a "government official" under the clause? What qualifies as a "foreign state"? In the case of a violation, is there a remedy?

Is the president included in the clause?

First, let's look at whether presidents are even included as a "person holding any office." At least one scholar, Seth Barrett Tillman, argues presidents are not.* This argument relies on the fact that the president is not named in the clause. Other similar Constitutional clauses do explicitly refer to the president. Thus, the argument goes, if the framers had intended the president to be included in the Emoluments Clause they would have specifically mentioned the president. For example, Article 2, Section 4, makes bribery, treason, and other high crimes impeachable offenses for the "President, Vice President and all civil Officers of the United States." Supporting this interpretation are the actions of our first president, since George Washington's actions are generally taken as indications of the framers' intent. While president, Washington accepted two gifts from French officials without seeking Congressional approval. And Alexander Hamilton, when asked by the Second Congress to create a list of "any civil office or employment under the United States," did not include the president in his list of officeholders.

However, there are some who disagree with this interpretation. They argue that the president was always intended to be included in the Emoluments clause.* To start with, while George Washington's actions are often used as indications of the framers' intent, this should not be the case here. Washington's actions, the argument goes, should be thought of as an indication of the framers' intent only when there is a clear indication of what his rationale was; in this instance of accepting gifts from French officials there is no such indication. Also, remember that list of Hamilton's? It was a list of "any civil office or employment under the United States." That's not the same language as the Emoluments Clause when it says, "person holding any office of profit or trust." Therefore, the argument goes, Hamilton's list cannot be used to define the meaning of the Emoluments Clause. Also, it has been customary for presidents since Andrew Jackson to seek advice from Congress regarding the clause. If the president isn't covered, why bother seeking the advice? Finally, every modern attorney general has concluded, expressly or implicitly, that presidents are bound by the clause. Most recently President Obama sought advice about his acceptance of the Nobel Peace Prize; the Attorney General advised that, while the president couldn't accept such a prize from a foreign government, the Nobel Foundation was not part of a foreign government.

What is a "foreign state"?

What about the term "foreign state" under the Emoluments Clause? The current President-elect's business holdings include loans and leases from the Bank of China, whose majority stakeholder is the Chinese government. Generally, corporations owned or controlled by foreign governments are viewed as a "foreign state." This potentially means that, under the Emoluments Clause, any business dealings the Bank of China has with

the President-elect's privately-owned international conglomerate could violate the Constitution. And if that is true, what about agents of foreign governments staying at the conglomerate's hotels? As mentioned above, no court has interpreted the Emoluments Clause, so it's unclear whether entities controlled by a foreign government would be defined as a "foreign state" under the Emoluments Clause.

Who can bring a claim?

But let's suppose for a moment that both the president and entities controlled by foreign governments are included in the Emoluments Clause, and there is some potential violation. Who has standing to bring a claim? A competing business *might* have standing if it could prove that it suffered direct harm because a foreign government favored the president's business over its own. But the loss of business could in no way be related to normal business competition. And that would be hard to prove. In any case, the court could just as easily find that the Emoluments Clause doesn't even protect individual competitors, but instead only protects the United States government.

The "Political Question Doctrine"

Even if an Emoluments Clause case made its way to the Supreme Court, the Court might decline to review it on the grounds that it's a political question solely within the purview of the legislative branch. Under the principle of separation of powers written into the Constitution, rights and responsibilities go exclusively to one of the three branches of government, so as to avoid conflicts between the branches. For example, the power to charge a president of unlawful duty while in office (also known as impeachment) is a power designated to the House of Representatives. Because the Constitution grants sole authority of impeachment to the legislative branch (the House charges and the Senate tries the case), the judicial branch does not have the authority to review the case. Thus impeachment of a democratically elected official is properly decided through the democratically elected legislative branch of government, not the unelected Supreme Court justices. In other words, it is a question settled "by the people," not the courts.

This idea that the Supreme Court might refuse to hear a case because it's not the appropriate forum even has its own doctrine, called the "Political Question Doctrine." It wouldn't be crazy to apply it here: after all, Congress is named as the approval-granting body under the clause (presents and emoluments are not allowed "without the approval of Congress"). If the Supreme Court found that the Constitution commits questions regarding the Emoluments Clause to the legislative branch, then Congress, not the courts, would be the proper venue to decide questions regarding the Emoluments Clause.

Congress could potentially impeach a president for violating the Emoluments Clause, but that's more unlikely than a Supreme Court decision on the clause. Congress has only ever impeached two presidents, Andrew Johnson and Bill Clinton, both of whom were acquitted by the Senate. It therefore seems unlikely that we'll receive much more clarity on the Emoluments Clause in the near future.

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* For more information on this debate, see: Seth Barrett Tillman, "Constitutional Restrictions on Foreign Gifts Don't Apply to Presidents." New York Times, November 18, 2016; Zephyr Teachout, "Trump's Foreign Business Ties May Violate the Constitution." New York Times, November 17, 2016; Richard Tofel, "Emoluments Clause: Could Overturning 185 Years of Precedent Let Trump Off the Hook?" ProPublica, December 13, 2016.

Recent Enforcement Cases

► A now-former Housing Preservation and Development ("HPD") Housing Inspector paid a $6,000 fine for representing clients of his private architecture practice 47 times before the New York City Department of Buildings ("DOB") (these violations were committed despite the Housing Inspector having received written guidance from the Board warning him that such appearances before DOB were prohibited); representing a client of his private architecture practice before his own agency; and asking an HPD colleague to remove HPD violations and a vacate order from his private client's property. By making this request to a co-worker on behalf of a private client, the Housing Inspector misused his City position for private financial gain.

► A Department of Environmental Protection ("DEP") Engineering Technician agreed to resign his DEP employment and accepted DEP's prior imposition of a 39-day unpaid suspension (valued at $9,220) for stealing DEP computers that had a total purchase price of over $3,000. The DEP Engineering Technician had previously paid restitution of $600 to resolve related criminal charges.

► The Supervisor of Plumbers at Kings County Hospital Center, a Health + Hospitals ("H+H") facility, paid a $3,000 fine for conducting his private plumbing business on City time; conducting his private plumbing business with City resources by misusing his H+H

computer to access, modify, maintain, save, and/or store five files related to the private plumbing business, as well as misusing his H+H email account to send and receive approximately 48 emails for the private business; and entering into a prohibited financial relationship with a subordinate by purchasing a motor vehicle from an H+H Plumber whom he supervised. The H+H Plumber paid a $450 fine for selling the vehicle to his superior.

► A Department of Transportation ("DOT") Administrative Manager agreed to serve a ten-day suspension, valued at approximately $2,000, for violating the conflicts of interest law by serving as co-chair of Community Board No. 5's ("CB5") Municipal Services Committee, during which time the committee considered matters brought before it by DOT. The Board had previously provided legal advice to the Administrative Manager regarding the impermissibility of chairing a committee that regularly considers matters concerning DOT. And the Administrative Manager also misused City time and email to work on CB5 matters during her regular DOT workday.

Congratulations! to the winner of the Conflict of Interest Board's December Public Service Puzzler contest:

Aitan E. Magence, a Forensic Biology Intern with the Department of Forensic Biology, Office of Chief Medical Examiner.

You can read Ms. Magence's bio in the January issue of the Public Service Puzzler.

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Interested in more information? Get in touch with COIB's Training & Education Unit to arrange a class in Chapter 68 for you and your staff. Contact Gavin Kendall, at kendall@coib.nyc.gov

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