

Substantial Disruption



Donald J. Trump, Defendant

By Mike Tully

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, 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.

- Constitution of the United States, Article 1, Section 9, Clause 8

Since he was sworn in, Donald Trump has violated the Constitution's [Foreign Emoluments Clause](#), based on a plain reading of its text. That seems clear, but what is less clear is what the consequences will be for the Trump Presidency or, more critically, the future of the American Republic.

The Foreign Emoluments Clause is one of the more arcane provisions of the Constitution, with no meaningful court decisions and few legal opinions addressing it. But Donald Trump, with his various domestic and international business interests and many potential conflicts, is bringing the ancient word “emoluments” into common parlance. Citizens for Responsibility and Ethics in Washington (CREW) has [sued him in federal court](#) in New York for violating the Clause.

While other matters, such as firing the FBI Director, dominate the headlines, the CREW lawsuit quietly abides, the pleadings not yet joined, and no motions or discovery requests filed. However, the lawsuit may tread uncharted Constitutional territory that can shape the Presidency for decades. Whether we regard the President as a public servant or monarch may be determined by its outcome.

A lawsuit requires a “justiciable controversy” -- a party must convince a court that actions of another are damaging its interests. CREW argues that Trump's Emolument Clause violation damages it by requiring it to devote resources to the lawsuit against Trump that would otherwise go to other lawsuits, educational activities and research, all functions historically conducted by CREW. There are two problems: (1) the lawsuit against Trump is the kind of activity CREW routinely engages in, so that claim would apply to any defendant; (2) CREW could forego suing Trump and preserve its assets. CREW's damages claim smacks of *chutzpah*.

Perhaps that's why CREW submitted a First Amended Complaint (FAC), adding plaintiffs who can show cognizable damages: an organization of restaurant workers, owners and diners competing with Trump-owned properties, and a Washington booking agent whose business may suffer for the same reason. Foreign governments have already removed events to Trump properties, such as his new hotel in Washington, and foreign emissaries have admitted they will patronize Trump properties to make a good impression on him. CREW is asking the Court to enjoin Trump from engaging in unfair competition made possible by his Emoluments Clause violation – which means he would have to divest any interest in the competing properties.

(CREW also argues that Trump is violating the [Domestic Emoluments Clause](#), but their primary focus is on the Foreign Emoluments Clause.)

Trump's lawyers will try to dismiss the case on motion, likely arguing the Clause does not apply to the President, and the Plaintiffs have not articulated a basis for recovery. They are likely to lose both motions (although CREW's damages claim is marginal), but their efforts will slow down the process. There will be a protracted fight over Trump's financial records and deposition. Those matters alone, if appealed on an interlocutory basis, could drag the case out for a year or more.

At some point the case must be resolved, through a dismissal (voluntary or otherwise), stipulation, or judgment. Trump may elect to simply pay off the Plaintiffs to resolve the lawsuit. While CREW would likely resist – they want a legal ruling – the other Plaintiffs may be inclined to take the money and run. Trump may get the case dismissed or prevail at trial, although trials resolve factual disputes and CREW seeks legal decisions, which are made in hearings and appeals. Finally, Trump might lose at trial.

At some point the Supreme Court may determine the application of the Emoluments Clauses to the President – something the Court has never done. It's unlikely the Court would adopt CREW's expansive reading of the Clause: that any payment, however routine, from a foreign government or official is a violation. Trump's lawyers may argue that the Emolument Clauses don't apply to the Presidency at all, allowing a President to engage in any manner of foreign or domestic financial entanglements with immunity. That would make the President a monarch.

The Court may be guided by the only Justice who [wrote an opinion](#) on an Emoluments Clause, Samuel Alito, when he was a Deputy Assistant Attorney General, permitting a NASA scientist to accept remuneration from an Australian university for reviewing a thesis. Alito wrote: "(I)n light of the Framers' concerns expressed in the Emoluments Clause, we do not believe that it presents the opportunity for 'corruption and foreign influence' that concerned the Framers and that we must presume exists whenever a gift or emolument comes directly from a foreign government or one of its instrumentalities." If the Court adopted this reasoning, the CREW Plaintiffs might have to show evidence Trump was guilty of "corruption or undue influence" – a heavy lift, but consider:

Chinese law prohibits trademarks that are the same or similar to names of national leaders, such as Trump, and consistently rejected Trump's trademark application until Trump, as President, declared support for the "One China" policy. China then granted the application (FAC, ¶ 113). Trump exempted countries in which he enjoys financial relationships from his Executive Order banning visitors from predominantly Muslim nations (FAC, ¶ 107). There are [concerns](#) involving the United Arab Emirates, Indonesia, Turkey, the Philippines, Azerbaijan and elsewhere.

This evidence might not help the CREW Plaintiffs, but would be relevant to a Congressional impeachment inquiry. Speaker Ryan, this case belongs in your court.