

After Defeat in New York, State AGs Are Next to Test Emoluments Challenge

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Litigants claiming that President Donald Trump’s business empire violates the Constitution suffered a major loss in federal court in New York last year, but on Thursday, they’ll get another chance.

Lawyers for the **attorneys general** of Maryland and the District of Columbia, Brian Frosh and Karl Racine, respectively, will argue before a federal judge in Greenbelt, Maryland, that Trump is violating two clauses in the Constitution designed to prevent corruption: the Foreign and Domestic Emoluments clauses. The clauses bar those in office from accepting presents, or “emoluments,” from foreign and state governments.

The case, for which U.S. District Judge Peter Messitte of the District of Maryland set aside five-and-half-hours for oral arguments Thursday, could present a chance for such a lawsuit to make it past the initial legal hurdle of the government’s motion to dismiss.

The clauses have rarely, if ever, been subject to litigation prior to the Trump administration.

The case in New York was the first emolument suit filed against Trump. The plaintiffs included the nonprofit Citizens for Responsibility and Ethics in Washington, a group of restaurant workers, business owners and an event booker. But U.S. District Judge George Daniels of the Southern District of New York **tossed** the case in December, **writing** that the plaintiffs had no standing because they could not show a direct injury from the alleged violations.

In June, days after the AGs sued, Democrats in Congress filed an emoluments challenge in the District of Columbia. That case is still pending, but some legal experts believe the state AGs’ suit may be best situated to weather the standing obstacles that felled the CREW lawsuit.

“I think the AGs are the only plaintiffs who have a shot at standing,” said James Tierney, a former Democratic attorney general from Maine, and a lecturer at Harvard Law School.

That's because, he explained, states have unique standing to challenge the federal government. Tierney said there is no wording in the emoluments clauses about how they should be enforced, and the state would be a "natural enforcer" of the clauses because of its interest in preserving its constitutional rights.

Indeed, the state AGs argued in their complaint, the emoluments clauses were "material" in persuading Maryland to enter the Union, and the state has an interest in enforcing "the terms" upon which it agreed to do so.

The AGs also **argue** the residents of Maryland and D.C. are injured by the "perceived and/or actual pressure" to grant special treatment to Trump's businesses because he is the president, as they must choose between giving in or losing out. There is also the argument that they suffer decreased business when foreign governments patronize Trump businesses in exchange for the favors or goodwill from him.

"By accepting money or favors from states, the federal government, and foreign governments, President Trump is 'discriminatorily den[ying]' the District and Maryland their 'rightful status within the federal system,'" the plaintiffs wrote in court filings.

In their motion to dismiss, lawyers for the U.S. Department of Justice wrote that the AGs cannot point to specific losses in business or revenue, and that their claims of losing out to other states that grant "special treatment" to Trump businesses are speculative. The harms the AGs claim, DOJ lawyers wrote, are not traceable to the alleged violations, because the injuries depend on "third parties' independent choices."

Trevor Burrus, a research fellow at the libertarian-leaning Cato Institute, disagreed with the notion that the state AGs may have more luck than other litigants. He said Maryland's claim that it would not have joined the Union without the emoluments clauses' protections was "bizarre and laughable."

"The court has never given standing to states that claim speculative and abstract injuries to their sovereignty," Burrus wrote in an email. "To do so—to allow any state to sue on the assertion that 'this isn't what we thought the Constitution meant'—would eviscerate current standing doctrine. Finally, this argument oddly seems like one that would come from a right-wing, 'states rights' group, not liberals suing President Trump."

He said otherwise, the state AGs claims are similar to those in the CREW case. He also disagreed with the notion that payments to Trump businesses are emoluments. That's because an emolument is a gift or money exchanged "for a benefit rendered in an official capacity." He noted that President George Washington's Mount Vernon was a working plantation during his presidency.

"No one thought that it would be an 'emolument' if, say, a French ambassador bought some of Washington's famous whiskey at the regular price," Burrus said.

Thursday's arguments will take place in five stages, with specific hours set aside for arguments over injury, proprietary interests, traceability and redressability. Brett Shumate, a top lawyer at

the DOJ's Civil Division, will argue on behalf of the government. For the plaintiffs, Steven Sullivan of the Maryland AG's Office and Loren AliKhan of the D.C. AG's Office will split arguments.