



Commentary: Emoluments Clause vs. the Trump empire

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In a moment of glory for Constitution nerds, "Emoluments Clause" was trending last week on Twitter.

That's the clause in our nation's founding document that bans federal officeholders from accepting favors from foreign governments without the OK of Congress. It has come to the fore in part because the operations of the Trump Organization regularly throw President-elect Trump and his family into business relations with such governments and their representatives.

For example, Trump just threw an event welcoming potential customers to his newly opened Washington hotel, which is expected to do a boom business on inauguration week. Some diplomats told reporters that they were planning to book Trump suites as a gesture of goodwill toward the big man, just as they might do back home.

Even the more Trump-sympathetic voices in the press (yes, there are some) have been warning that the president-elect must act now to head off the looming conflict of interest. The Wall Street Journal says he needs to divest his business empire outright to function impartially as chief executive, while the New York Post warns against just putting the business in a peekaboo trust for his kids:

"After all, if the election had gone the other way, we'd right now be furiously denouncing the idea of letting Chelsea run the Clinton Foundation."

Trump initially responded to critics on Twitter with a note of defiance: "Prior to the election it was well known that I have interests in properties all over the world. Only the crooked media makes this a big deal!"

But this issue is not likely to go away on its own, nor will he find it as easy to stonewall as he did the one-time story of his tax return. New conflicts and potential conflicts arising from foreign patronage of Trump properties are going to come up day after day.

Trump points out that the president is exempt from the conflict-of-interest laws that bind Congress and the judiciary, but that doesn't mean he will escape scrutiny from public opinion or from the body of federal law as a whole, including the Emoluments Clause.

That clause reads in relevant part: "And no Person holding any Office of Profit or Trust under , 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."

A plausible reading of "present" would include transactions in which a foreign state pays an officeholder more than the fair market value of whatever has changed hands. "Emolument" includes payments for labor or services rendered, even if at arm's-length rates with no overpayment.

We can also expect fights about whether the ban includes businesses owned in large part by foreign states, or businesspersons understood to enjoy insider or emissary status from such governments.

The wording of the clause itself points one way to resolution: Congress can give consent, as it did in the early years of the Republic to presents received by Ben Franklin and John Jay. It can decide what it is willing to live with in the way of Trump conflicts, and then enact those into a resolution approving the resulting set of presents and emoluments. If it misjudges public opinion, it will pay a political price at the next election.

If it doesn't act, could someone sue to enforce the Emoluments Clause? Even if a litigant could be found who has standing to sue, it's quite possible that the U.S. Supreme Court could turn the dispute down on the grounds that it's a political question for which the indicated constitutional remedy should be impeachment.

But it can't be good for America to generate a series of possible impeachable offenses from a running stream of controversies about whether arm's-length prices were charged in transactions petty or grand. Impeachment would be overkill for petty infractions, but quite appropriate if Trump ends up engaging in massive corruption.

There is no doubt that doing the right thing poses genuine difficulties for Trump not faced by other recent presidents. If he signals that he understands the nature of the problem, it would not be unreasonable to ask for extra time to solve it.

But if the president-elect really winds up thumbing his nose at any calls for him to rein in potential conflicts, should we really be surprised if by 2019 the Trump Organization has diversified its business lines through merger and acquisition into defense contracting, hospital supplies, and textbook publishing?

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