

TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT



Report on the Legality of Payments by Foreign Diplomats to the Trump Organization through the Trump International Hotel in Washington, D.C.

The Question

Do payments by foreign diplomats at Trump International Hotel in Washington, D.C. violate the Foreign Emoluments Clause of the federal constitution?

Introduction

Although he is the President of the United States, Donald Trump still owns an international business enterprise: the Trump Organization. The Trump Organization is a group of approximately 500 business entities spanning across the world. Its portfolio includes clothing lines, golf courses, and, most relevant to this report, hotels. President Trump did not divest himself from the business before his inauguration; instead, he retained his financial stake and, according to his lawyers,¹ transferred management responsibilities to his sons Eric and Don Jr and long-standing Trump associate Allen Weisselberg. This was a remarkable step: presidents and presidential candidates going back to the 1970s have placed or promised to place their assets into blind trusts because of ethics concerns.² Trump and his lawyers refused to follow their predecessors because Trump “should not be expected to destroy the company he built.”³

Trump’s predecessors probably had more than ethics in mind when they placed their assets into blind trusts. They likely also feared violating the Foreign Emoluments Clause, which prohibits government officers from accepting foreign emoluments without Congress’s consent.⁴ The Constitution’s Framers included the Foreign Emoluments Clause to prevent corruption and curtail foreign actors’ influence on members of the government. Without a Congressional check, so the logic goes, foreign actors could use emoluments to manipulate government officials and American policy. By placing their business holdings in blind trusts, past presidents have avoided the conflicts-of-interests that the Emoluments Clause intends to limit.

While all of President Trump’s business holdings could attract foreign emoluments, the Trump International Hotel in Washington, D.C. has drawn the most scrutiny. Multiple outlets have reported foreign diplomats paying exorbitant fees to stay at the hotel, and plaintiffs ranging from Congressional Democrats to nearby hotel and restaurant owners have filed lawsuits alleging that the hotel is the site of ongoing Emoluments Clause violations.⁵ Those cases are pending resolution.

Facts

The Trump International Hotel in Washington, D.C. opened on October 26th, 2016. It is located at the Old Post Office building, which sits just a few blocks away from the White House on Pennsylvania Avenue.⁶ After \$200 million in renovations, the hotel now offers 263 rooms and a host of other luxury amenities.⁷

Donald Trump was elected President of the United States on November 8th, 2016. At the time of his election, he was still serving as president of the Trump Organization. In January 2017, he and his tax lawyers held a press conference at which they announced their intention to leave “no doubts in the minds of the American public that [Trump was] completely isolating himself from his business interests.”⁸ They explained that Trump was relinquishing management of the company to his two adult sons, Eric and Don Jr., and a long-time Trump executive Allen Weisselberg, with the promise that Trump would know nothing of any new business deals they may strike thanks to his “sharply limited information rights.”⁹ They also explained that any problematic deals going forward would require written approval from an appointed ethics advisor, and promised to donate any profits from foreign government payments during the Trump presidency to the Treasury Department. Further, their agreement prohibited any new foreign deals but allowed domestic ones that survive “a rigorous vetting process.”

Critically, though, the plan left Trump with his original financial interest in the Trump Organization. Perhaps anticipating criticism of this arrangement, Trump’s counsel emphasized that Trump made these decisions out of good-will and not any sense of ethical or constitutional duty. Payments at his hotels did not constitute emoluments, she argued, because those payments “[would] have absolutely nothing to do with an office holder.” The Framers of the Constitution did not intend for the Clause to reach “routine business transactions like paying for hotel rooms” but instead only gifts that related to a government office. Regarding Trump’s financial interest, Trump and his lawyers claimed that complete divestment would create more conflicts, that the restrictions formed a “suitable alternative,” and that Trump “should not be expected to destroy the company he built.”

Numerous foreign actors have reportedly spent money at the Trump International in Washington. In February 2017, Kuwaiti diplomats hosted their annual National Day celebration at the hotel, accumulating an estimated \$40,000 to \$60,000 tab.¹⁰ Representatives from Saudi Arabia spent approximately \$270,000 at the hotel from October 2016 to March 2017.¹¹ A Georgian diplomat tweeted about his stay at the hotel and complemented its services.¹² Why these officials chose to stay at the hotel is clear: as one diplomat explained to the *Washington Post*, “Why wouldn’t I stay at [Trump’s] hotel blocks from the White House, so I can tell the new president, ‘I love your new hotel!’ Isn’t it rude to come to his city and say, ‘I am staying at your competitor?’”¹³ Those reports have prompted lawsuits by the District of Columbia and Maryland, nearby hotel and restaurant owners, and Congressional Democrats alleging that these payments constitute violations of the Foreign Emoluments Clause.¹⁴ None of these cases have reached the merits.

Legal Discussion

A. What is an emolument?

Black's Law Dictionary defines emolument as "[a]ny advantage, profit, or gain received as a result of one's employment or one's holding of office."¹⁵ Georgetown Law professor John Mikhail studied 40 dictionaries published between 1604 and 1806, and found that 37 of those dictionaries gave similarly broad definitions of the word.¹⁶ Those definitions, he explained, encompassed profits from ordinary market transactions, as used by George Washington and James Madison.¹⁷

B. Intent of the Framers

The Framers of the Constitution included the Foreign Emoluments Clause to prevent foreign actors from corrupting American officials. Although the Articles of Confederation contained a similar clause, the Foreign Emoluments Clause was not added initially at the Constitutional Convention until Charles Pickney requested it. Pickney "urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence."¹⁸ Edmund Randolph Jennings confirmed the Clause's anti-foreign corruption purpose, saying "It was thought proper, to prohibit any one in office from receiving or holding any emoluments from foreign states."¹⁹ When Congress was first called on to approve of the acceptance of foreign emoluments, it confirmed that the Clause served as an institutional check on foreign corruption. As representative Williams Charles Cole Claiburn explained, "[The Clause] is intended to lock up every door to foreign influence, to the influence of the Courts and Monarchies, which could not but prove baneful to every free country."

The text of the Clause confirms the Framers' purpose to bar a wide range of potential foreign corruption, including monetary and non-monetary transactions. The Clause mentions both "presents" and "Emoluments," which combine to apply to anything of value. Additionally, the Clause prohibits the receipt of "any present [or] Emoluments . . . of any kind whatever," which emphasizes the extent of conduct the Clause means to prevent.

C. Trump's Culpability

The broad sweep of the Foreign Emoluments Clause covers the payments at the Trump International in Washington. As the prior subsections demonstrate, both the Clause's text and the intent of the Framers indicate that the Clause means to apply to even "routine business transactions," because such transactions could still influence an office holder. Trump still owns the Trump International; that means he profits when the hotel profits. Payments at the hotel are therefore only a few steps away from being payments to Trump himself. Even if Trump gives away the profits that the Trump Organization receives from foreign actors,²⁰ the payments still likely create a positive impression on the President, that foreign governments are trying to support his businesses.

Trump's lawyer alluded to the Black's Law definition during their press conference when she mentioned that payments from foreign actors could not be emoluments if they have nothing to do with an office holder. That appears to be true; the definition covers benefits flowing "as a result of one's . . . holding office." If the pending emoluments cases against Trump ever reach the merits, the plaintiffs will have to demonstrate that the foreign payments were connected to

Trump's role as president. If other diplomats have the same motivations as the one quoted by the Washington Post, however, that connection will not be difficult to establish.

Conclusion

The payments at Washington's Trump International Hotel likely constitute emoluments and require Congressional approval. Plaintiffs' success in their suits against Trump will depend on whether they can prove that those payments relate to his role as President of the United States.

¹ Karen Yourish & Larry Buchanan, *It 'Falls Short in Every Respect': Ethics Experts Pan Trump's Conflicts Plan*, N.Y. Times (Jan. 12, 2017), <https://www.nytimes.com/interactive/2017/01/12/us/politics/ethics-experts-trumps-conflicts-of-interest.html>.

² Matt O'Brien, Donald Trump won't do what Ronald Reagan, George H.W. Bush, Bill Clinton and George W. Bush Did Wash. Post (Nov 15, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/15/ronald-reagan-did-it-george-h-w-bush-did-it-bill-clinton-did-it-george-w-bush-did-it-donald-trump-wont-do-it/>.

³ Yourish & Buchanan, *supra* note 1.

⁴ U.S. Const. Art. I, § 9, cl. 8 (“No Title or Nobility shall be granted by the United States: And no Person holding any Office or Profit or Trust under them, shall, without the Consent of Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”)

⁵ *See D.C. v. Trump*, No. 17-1596 (D. Md.); *CREW v. Trump*, No-17-CV-458 (S.D.N.Y.); *Blumenthal et al. v. Trump*, No. 17-1154 (D.D.C.).

⁶ Jennifer Wang, *Trump's D.C. Hotel Officially Opens, But Trouble Has Dogged The Iconic Property Since The Start*, Forbes (Oct. 26, 2016), <https://www.forbes.com/sites/jenniferwang/2016/10/26/trumps-d-c-hotel-officially-opens-but-trouble-has-dogged-the-iconic-property-since-the-start/#3b4e33c864f6>

⁷ *Id.*

⁸ Karen Yourish & Larry Buchanan, *It 'Falls Short in Every Respect': Ethics Experts Pan Trump's Conflicts Plan*, N.Y. Times (Jan. 12, 2017), <https://www.nytimes.com/interactive/2017/01/12/us/politics/ethics-experts-trumps-conflicts-of-interest.html>.

⁹ *Id.*

¹⁰ Jackie Northam, Kuwait Celebration at Trump Hotel Raises Conflict Of Interest Questions, NPR (Feb., 25, 2017), <https://www.npr.org/sections/parallels/2017/02/25/517039323/kuwait-celebration-at-trump-hotel-raises-conflict-of-interest-questions>.

¹¹ Alex Altman, Donald Trump's Suite of Power, Time, (June 8, 2017), <https://time.com/donald-trumps-suite-of-power/>.

¹² Kaha Imnadze (@kahanimnadze), Twitter (Apr. 6, 2017, 8:49 AM), <http://bit.ly/2oiF8Fd>.

¹³ Julie Bykowicz, *Trump Hotel May be Political Capital of the Nation's Capital*, Associated Press (Mar. 5, 2017), <http://apne.ws/2n2RxfS>.

¹⁴ See *D.C. v. Trump*, No. 17-1596 (D. Md.); *CREW v. Trump*, No-17-CV-458 (S.D.N.Y.); *Blumenthal et al. v. Trump*, No. 17-1154 (D.D.C.).

¹⁵ Emolument, Black's Law Dictionary (10th ed. 2014).

¹⁶ Peter Overby, Professor: 37 Historic Dictionaries Disagree With Trump's Definition of 'Emolument,' NPR (Sept. 5, 2017), <https://www.npr.org/2017/09/05/548002254/professor-37-historic-dictionaries-disagree-with-trumps-definition-of-emolument>

¹⁷ *Id.*

¹⁸ 2 Farrand, *The Records of the Federal Convention of 1787*, at 389.

¹⁹ 3 Farrand, *The Records of the Federal Convention of 1787*, at 327.

²⁰ Which he doesn't appear to be. See Ari Melber, et al., *Trump Failing to Track Foreign Cash at His Hotels*, NBC News (May 24, 2017), <http://nbcnews.to/2qWzv3x>.