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CONGRESSIONAL TESTIMONY

"Landlord and Tenant: The Trump Administration's Oversight of the Trump International Hotel Lease"

Testimony before
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Subcommittee of Economic Development, Public Buildings, and Emergency Management

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Introduction

My name is Hans A. von Spakovsky.[1] I appreciate the invitation to be here today. The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation or any other organization.

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I am a Senior Legal Fellow in the Meese Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the U.S. Federal Election Commission for two years (2006-2007). Before that, I spent four years at the U.S. Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001 and was promoted to be Counsel to the Assistant Attorney General for Civil Rights (2002-2005).[2]

Summary of Testimony

This hearing concerns the lease of the Trump International Hotel ("Trump Hotel") with the General Services Administration ("GSA"). Congress passed the "Old Post Office Building Redevelopment Act of 2008," which directed GSA to redevelop the Old Post Office Building located on Pennsylvania Avenue in Washington, D.C., and originally built between 1892 and 1899. According to a report issued by the IG on January 16, 2019 (the IG Report), GSA solicited bid proposals in 2011. It selected the Trump Old Post Office LLC in 2012 as the developer. GSA entered into a 60-year lease in 2013.[3]

It is important to note at the outset that the lease between the government and Trump Old Post Office LLC became operative more than three years before Donald Trump was elected President of the United States.

The IG comes to a number of erroneous conclusions with regard to the lease of the Old Post Office Building to the Trump Old Post Office LLC (Tenant).[4] The IG claims that GSA failed to consider whether the lease amounts to a violation of the two Emoluments Clauses of the Constitution, and that it failed to consider the emoluments issue when determining whether the leaseholder was in violation of Section 37.19 of the lease.

But as the deputy counsel of GSA, Lennard Loewentritt, properly concluded, the emoluments question was a constitutional issue subject to evaluation by the Department of Justice's Office of Legal Counsel, not GSA.[5] It is the Office of Legal Counsel that determines the position of the executive branch on constitutional issues and agencies like GSA are bound by its legal opinions.[6]

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[3] *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, Office of Inspector General, U.S. GENERAL SERVICES ADMINISTRATION, JE19-002 (Jan. 16, 2019).

[4] *Id.*

[5] *Id.* at 5.

[6] *See* https://www.justice.gov/olc.

The Justice Department has made clear throughout the litigation filed against the president under the Emoluments Clauses that the legal position of the executive branch is that the lease of the Old Post Office Building by the Trump Hotel does not violate the Constitution. That position is controlling and the IG's criticism of GSA is unwarranted.

Furthermore, GSA's position that the Tenant is not in violation of Section 37.19 of the lease is also correct. That provision states that an elected official cannot be "admitted to any share or part" of the lease.[7] But Section 37.19 was not violated when the lease was entered into in 2013, since Donald Trump was not an elected official at that time. Also, the lease was not with him personally but a corporate entity in which he held a majority interest. This provision does not apply to the Tenant under its plain text since it clearly states that it "shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity" if the lease is for "the general benefit of such corporation or other entity."[8]

As the IG herself admits, that is the situation with regard to this Tenant. The Tenant is an entity in which Trump was one of the shareholders and "in which several other business entities also held a small interest each."[9] All of Trump's interests in that entity were transferred to a trust after he was sworn into office; he relinquished his management authority; and his counsel announced that all profits from the hotel from foreign government payments would be donated to the U.S. Treasury.[10] Therefore, GSA was correct when it issued an estoppel certificate on March 23, 2017, stating that the Tenant was in full compliance with the lease.[11]

Even the IG noted that the GSA lease-contracting officer, Kevin Terry, was "walled" off to "avoid any political influence over him and preserve his independence."[12] GSA's general counsel, Jack St. John, notes that after interviewing two dozen employees and reviewing over 10,000 documents, the IG "found not a single instance in which a political appointee or career federal employee at GSA attempted to improperly interfere with or exert pressure on the contracting officer's decision-making process." In fact, the IG "found no undue influence, pressure, or unwarranted involvement of any kind by anyone, including the Executive Office of the President and the Office of Management and Budget."[13] Thus, there is no evidence of any undue influence over GSA's determination that the Tenant was in full compliance with the lease.

The IG's conclusion that GSA's "unwillingness to address the constitutional [emoluments] issues affected its analysis of Section 37.19" makes no sense. Since it was and is the Justice Department's position that there has been no violation of the Emoluments Clauses, there was and

[7] IG Report at 3.
[8] IG Report at 3.
[9] IG Report at 8.
[10] IG Report at 8.
[11] IG Report at 10.
[12] IG Report at 4.
[13] *Memorandum from Jack St. John, General Counsel, to Carol F. Ochoa, Inspector General*, GENERAL SERVICES ADMINISTRATION (Jan. 9, 2019); Appendix B, IG Report.

is no reason for GSA to independently consider the emoluments issue. Furthermore, the Tenant has satisfied the plain language of the exception in this provision of the lease.

The Emoluments Clauses

The Foreign Emoluments Clause of the Constitution states that no person "holding any Office of Profit or Trust under [the United States] shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state."[14] As the Heritage Guide to the Constitution explains, the Framers adopted this clause to prevent the corruption of U.S. officeholders, particularly foreign ministers, through the receipt of bribes and improper benefits – presents, gifts, and emoluments – from foreign officials.

As Heritage outlines, this clause was meant as an "antidote" to what the Framers had "observed during the period of the [Articles of] Confederation."[15] Louis XVI had a habit of giving expensive gifts to foreign diplomats, including Americans, who had signed treaties with France. For example, he gave Arthur Lee and Benjamin Franklin portraits of himself set in diamonds. The King of Spain gave John Jay a horse while he was negotiating with Spain.

As the Justice Department pointed out in its "Writ of Mandamus" in the Fourth Circuit, "interpreting the term 'Emolument' to reach essentially anything of value renders entirely superfluous the Foreign Emolument Clause's prohibition on receipt of any 'present'."[16] According to the Justice Department, such a reading of the Emoluments Clause "is belied by Founding-era history and context." In fact:

> [S]everal early Presidents owned plantations and continued to export cash crops overseas while in office, including [George] Washington, who exported flour and cornmeal to 'England, Portugal, and the island of Jamaica,' and Thomas Jefferson, who exported tobacco to Great Britain. Yet there is no evidence that they took steps to ensure that foreign governments were not among their customers.[17]

Such normal, customary business transactions were not considered emoluments because they were not gifts or presents, and they were not compensation tied to the president's services in his official position. In contrast to President Trump, no one has raised any claim that former President Barack Obama violated the emoluments clause for earning over $10 million in foreign book sales during his presidency.[18]

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[14] U.S. Constitution, Art. I, Sec. 9, Cl. 8.
[15] The Heritage Guide to the Constitution; https://www.heritage.org/constitution/#!/articles/1/essays/68/emoluments-clause.
[16] In re Donald J. Trump, No. 18-2486 (4th Cir.), *Petition for a Writ of Mandamus to the United States District Court for the District of Maryland and Motion for Stay of District Court Proceedings Pending Mandamus* (Dec. 17, 2018), p.21-22.
[17] *Id.* at 23 (citations omitted).
[18] John-Michael Seibler, *Democrats' Suit Claims Constitution Means One Thing for Obama, but Another for Trump*, DAILY SIGNAL (June 13, 2017); https://www.dailysignal.com/2017/06/13/democrats-suit-claims-constitution-means-one-thing-for-obama-but-another-for-trump/.

Entering into a lease with the federal government on a property that will generate profits over and above what is paid to the government for the lease is also not a prohibited emolument. This is especially true when the lease was entered into with a private company, whose major shareholder held no public office whatsoever at the time the lease was ratified.

George Washington *directly* transacted business with the federal government, purchasing public land up for public sale in the then Territory of Columbia. As the Justice Departments relates:

> [N]o concern was raised that such transactions conferred a benefit, and thus a prohibited emolument, on Washington. The absence of any such concern is especially telling because one of the three Commissioners [of the district who were appointed by Washington] had, like Washington, attended the Constitutional Convention, and the other two had voted in the state ratification conventions.[19]

Additionally, in the early days of our Republic, the term "emolument" was comprehensively defined as "compensation or pecuniary profit derived from a *discharge of the duties of the office*."[20] Thus, the Justice Department argues persuasively that the Foreign Emoluments Clause "prohibits benefits arising from services the President provides to the foreign state either as President (e.g., making executive decisions favorable to the paying foreign power) or in a capacity akin to an employee of a foreign state (e.g., serving as a consultant to a foreign power)."[21]

This provision was intended to prevent gifts and presents from foreign leaders, as well as payments for services rendered in the president's official capacity. It was not meant to bar a president from having private business interests or owning businesses in which customers and consumers – including foreigners – pay the fair market value of products or services they receive in an open exchange. This would include paying for a hotel room and hotel services in a luxury hotel in Washington, D.C. In fact, at the time of our founding, government officials were not paid very well "and many federal officials were employed with the understanding that they would continue to have income from private pursuits."[22]

But here, Donald Trump, upon becoming President, put his interests in the private company that owns the hotel into a trust, which he has zero ability to control or manage.

The terms of the Domestic Emoluments Clause directly support this interpretation as well. This clause provides that the president shall "receive for his Services, a Compensation...during the Period for which he shall have been elected, and he shall not receive within the Period any other

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[19] CREW v. Trump, Case No. 17-458 (So. D. N.Y.), *Memorandum of Law in Support of Defendant's Motion to Dismiss* (June 9, 2017), p. 38.
[20] Hoyt v. U.S., 51 U.S. 109, 135 (1850) (emphasis added).
[21] CREW v. Trump, Case No. 17-458 (So. D. N.Y.), *Memorandum of Law in Support of Defendant's Motion to Dismiss* (June 9, 2017), p. 29.
[22] CREW v. Trump, Case No. 17-458 (So. D. N.Y.), *Memorandum of Law in Support of Defendant's Motion to Dismiss* (June 9, 2017), p. 36 (citing Leonard D. White, *The Federalists: A Study in Administrative History* (1st ed. 1948), pages 291-92, 296).

Emolument from the United States, or any of them."[23] In other words, he cannot receive any other compensation for his service, tying the term "emolument" directly into the president's service as president. Thus, none of the fifty states may provide him with presents, gifts, or additional compensation for his services as president, just like foreign governments.

The very same reasoning applies to this provision as to the Foreign Emoluments Clause. As the Justice Department points out, "[n]either the text nor the history of the Clauses shows that they were intended to reach benefits arising from a President's private business pursuits having nothing to do with his office or personal service to a foreign power."[24] Similarly, this provision does not "preclude a President from acting on the same terms as any other citizen in transacting business with a federal or state instrumentality, such as entering into a lease or applying for a tax credit."[25]

The arguments advocated by Donald Trump's opponents are far beyond what the Framers ever intended for the Emoluments Clauses. Under the claim that the receipt by a president of *anything* of value outside of his salary as president is a violation of either of the two Emoluments Clauses, Pres. Ronald Reagan's receipt of a pension from the State of California based on his service as governor would have been a violation of the Domestic Emoluments Clause. As the Office of Legal Counsel concluded, however, those benefits were not "emoluments in the constitutional sense" and their receipt by the president did not "violate the spirit of the Constitution" either.[26]

Under this theory, a president could not even hold U.S. Treasury bonds while in office since the interest paid on those bonds could be considered an "emolument" from the U.S. government over and above his salary and compensation. Such a broad interpretation makes no sense and is not in according with the historical understanding of the clause. In truth, the Emoluments Clauses are not the sweeping anti-corruption laws that Trump's opponents would like them to be.

The Inspector General misinterprets and misapplies the past opinions of the Office of Legal Counsel on the Emoluments Clauses on pages 18 and 19 of the IG Report. All of the opinions the IG cites concern federal employees receiving stipends, consulting fees, employment compensation, gifts, awards, and partnerships fees from foreign governments.

None of these opinions apply to the lease agreement for the Trump Hotel.[27]

When state government officials choose to stay in the Trump Hotel and pay the fair market value of their hotel room and room services, that is not a gift, a present, or an emolument tied to the president's official duties. They are engaging in a normal, standard business transaction, no different from staying in any other hotel in the nation's capital. Neither of the Emoluments Clauses

[23] U.S. Constitution, Art. II, Sec. 1, Cl. 7.
[24] CREW v. Trump, Case No. 17-458 (So. D. N.Y.), *Memorandum of Law in Support of Defendant's Motion to Dismiss* (June 9, 2017), p. 26.
[25] *Id.* at 29.
[26] *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 192 (1981).
[27] In his Jan. 9, 2019, response to the IG Report, GSA's general counsel, Jack St. John, points out "despite its lengthy historical analysis of the Emoluments Clauses," the IG Report "does not find that any constitutional violation occurred."

was intended to prohibit a company or a business in which a president has an ownership or financial interest from doing business with any foreign, federal or state government.

As of the date of this hearing, there have been no federal court of appeals decisions on the substantive interpretation of the Foreign and Domestic Emoluments Clauses and their applicability to the Trump Hotel and the lease that is the subject of the IG Report.

A three-judge panel of the Fourth Circuit Court of Appeals has thrown out claims made by the State of Maryland and the District of Columbia, concluding that neither the state nor the federal district has Article III standing to even assert a claim against the president.[28] The court said that their interest in enforcing the emoluments clauses, based on a theory that the Trump Hotel supposedly keeps customers from choosing their own hotels and facilities, "is so attenuated and abstract that their prosecution of this case readily provokes the question of whether this action against the President is an appropriate use of the courts."[29]

On the other hand, a divided panel of the Second Circuit recently reinstated a similar claim that had been dismissed by a federal district court for lack of standing.[30] In his dissent, Judge John M. Walker explained that "nothing in the plain text of either Emoluments Clause addresses competition in the marketplace or the conduct of business competitors generally."[31] The plain text "concerns only the receipt of 'emoluments' from foreign governments or their officials by those 'holding any Office of Profit or Trust' on behalf of the United States and the Domestic Emoluments Clause only prohibits the President from receiving 'emoluments' beyond the salary of the office from 'the United States, or any of them.'" According to Walker, "the text and historical meaning plainly do not evidence concern for protecting fair competition in the marketplace."[32]

Conclusion

The concerns that have been raised by the Inspector General of GSA have no basis in fact or law. There was no violation of the Emoluments Clauses of the Constitution when the Trump organization was selected to be the developer of the Trump Hotel in 2012 and entered into a lease in 2013. Further, there was no violation after the president was elected based on the specious claim that any state, federal, or foreign government official staying at the hotel and paying for the standard services provided by the hotel is paying an "emolument" to the president. The president is not providing any services to such officials in his official capacity as president.

Given that the Justice Department has maintained since the beginning of the administration that the lease is not a violation of the Emoluments Clauses, there was no reason for GSA to

[28] In re Donald J. Trump, 928 F.3d 360 (4th Cir. 2019). In addition to the claim involving hotel services provided to guests by the Trump Hotel, the court also dismissed claims contending that granting a $32 million historic-preservation tax credit for the hotel and government officials using the facilities of the Mar-a-Largo Club would violate the emoluments clauses.
[29] 928 F.3d at 379.
[30] CREW v. Trump, ___ F.3d ___, 2019 WL 4383205 (2nd Cir. 2019),
[31] 2019 WL 43832205 at *19.
[32] Id.

consider that issue when evaluating the lease, contrary to the criticisms of the IG. The IG's disapproval of GSA is unjustified and the IG is incorrect when she claims that "the uncertainty over the lease remains unresolved." The Justice Department has the last word on constitutional issues, not GSA and not the IG.

GSA was also correct in its assessment that there was no violation of Section 37.19 of the lease. Under the plain terms of that provision, the Tenant – Trump Old Post Office LLC – was not an "elected official" of the government and Donald Trump was not president when the lease was entered into. By its own terms, the lease also does not apply to the president who was merely a shareholder in the Tenant, especially given the fact that the president transferred his shareholder interest to a trust after his inauguration.