The Emoluments Clauses Litigation, Part 8: There is no cause of action for a suit against the President in his individual capacity for purported violations of the Emoluments Clauses

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Throughout the Emoluments Clauses litigation (See Parts 1, 2, 3, 4, and 5), we have argued in amicus briefs filed with federal district courts in New York, the District of Columbia, and Maryland: that the complaints were each filed against the President exclusively in his "official" capacity, but the conduct plaintiffs are complaining about is not "official" conduct. As we noted in Part 6 of this series, the Department of Justice ("DOJ"), which is defending the President, has failed to argue that the Maryland complaint (where the issue was discussed during oral argument) or any of the other two complaints were improperly pleaded. To the contrary, DOJ has maintained that the Maryland case is properly pleaded as an official capacity suit. Part 7 explained why the President's acceptance or receipt of purported profits and purported emoluments are not, as DOJ argued, "executive action."

This eighth installment will address an essential follow-up question. Even if the Plaintiffs (in the Maryland case) amend their complaint to enjoin conduct taken by the President in his individual capacity, they still will have failed to state claim on which relief can be granted. Why? Because there is no express or implied constitutional cause of action under which the Plaintiffs can bring such an individual capacity suit.

As a general matter, federal officers can be sued in their *official* capacity for purported violations of the Constitution. We have already addressed (in parts 6 and 7) why the allegations made against President Trump do not amount to an *official* capacity suit. (Likewise, we set aside for a moment whether a federal court has the power to issue an injunction against the sitting President, in light of *Mississippi v. Johnson*.) On the other hand, in order for such officers to be sued in their *individual* capacity, the Plaintiffs must identify a relevant cause of action. No cause of action exists to allow a suit against the sitting President in his individual capacity for violating the Constitution's Foreign and Domestic Emoluments Clauses. Causes of action come in two types: express and implied.

Express Causes of Action. Unlike the traditional congressionally-enacted action brought under 42 U.S.C. § 1983—which allows suits against *state* officers in their official and individual capacities—Congress has never seen fit to create by statute an express cause of action against *federal* officers, much less a cause of action against federal officers based on the Emoluments Clauses. (That Congress could have enacted such a statute, and have not done so, should provide courts some pause to resolve these matters.)

Implied Causes of Action Based on the Constitution. The Supreme Court has created implied constitutional causes of action under the Fourth, Fifth, and Eighth Amendments pursuant to the doctrine announced in *Bivens v. Six Unknown Named Agents*. 403 U.S. 388 (1971). However, the Supreme Court has not seen fit to imply a constitutional cause of action against federal officers with respect to any other rights-conferring provisions of the Bill of Rights. *See generally* Erwin Chemerinsky, Federal Jurisdiction § 9.2 (7th ed. 2016). Indeed, the Supreme Court's recent plurality decision in *Ziglar v. Abbasi* casts serious doubt on extending this doctrine to any "new *Bivens* context" with respect to the Fourth Amendment. 137 S. Ct. 1843, 1860 (2017).

This rule would apply with even greater force to structural provisions (as opposed to rights-conferring provisions) of the Constitution, such as the Foreign Emoluments Clause and the Domestic Emoluments Clause. These two structural provisions have never been the basis for an implied cause of action. The plaintiffs in the Maryland litigation have cited *Bond v. United States* (2011) for the proposition that claims based on structural provisions of the Constitution are justiciable. Plaintiffs' claim is a stretch. In *Bond*, the defendant raised the Tenth Amendment as a defense against a criminal prosecution. The usual rules of justiciability are very different in the civil and criminal context. In any event, because of the ongoing prosecution, the defendant in *Bond* did not need to rely either on an implied or an express cause of action. *Bond* therefore does not speak, one way or the other, to whether a new and novel judicially-created implied constitutional cause of action should be implied from the Foreign Emoluments Clause or the Domestic Emoluments Clause.

Furthermore, under *Ziglar*, courts should hesitate before creating a new judicially-created implied constitutional cause of action based on provisions of the Constitution that have never been interpreted by the Supreme Court at all. Finally, although we have questioned whether the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342(a)(1)(E) is premised on the Foreign Emoluments Clause, (Response at 18–19), to the extent that the former statute is authorized by the latter constitutional provision, the case for an implied constitutional cause of action becomes even weaker because Congress's statute occupies the field. That a federal statute occupies the field, counsels against a court crafting a novel judicially-created implied constitutional cause of action.

A federal officer could violate the Foreign Emoluments Clause in either his official or individual capacity—that is, such a constitutional violation may or may not involve government policy. While both types of constitutional violations are unlawful, the manner in which the clause is violated matters for purposes of litigation. Here, for example, a lawsuit to prevent a federal officer from accepting unlawful emoluments in his official capacity would seek declaratory or injunctive relief to halt the government policy that authorizes or orders him to receive the (purported) emoluments. The Supreme Court recently explained that such an official capacity suit would "require action by the sovereign or disturb the sovereign's property.'" *Lewis v. Clarke* (2017) (quoting *Larson v. Domestic and Foreign Commerce Corp.* (1949)). If the suit were successful, the court would enjoin the policy that permits or mandates the receipt or acceptance of the (purported) prohibited emoluments.

In contrast, if a federal officer received or accepted (purported) prohibited emoluments in his individual capacity—that is, not pursuant to any government policy—the prayer for relief would

look very different. In this latter situation, the prayer for relief, if successful, would not "require action by the sovereign," because the sovereign took no action in the first place to enable receipt or acceptance of emoluments.

The federal courts can hear the former type of lawsuit, i.e., an official capacity lawsuit, brought against an officer in his official capacity for constitutional violations, by virtue of the Constitution standing alone, without any federal statute. Individual capacity suits are entirely different. The latter type of suit, i.e., an individual capacity lawsuit, is theoretically possible, so long as a cause of action exists. Unlike an official capacity suit (which can be based on the Constitution standing alone), an individual capacity must be supported either by a federal statute or by a judicially-created implied constitutional cause of action. There is no express cause of action based on any applicable federal statute, and for the reasons discussed above, the weight of Supreme Court precedent would indicate (we think) that such a cause of action should and cannot be implied.

Indeed, we speculate that the reason these three lawsuits have not been argued in the alternative from the day each lawsuit was first filed, is because every step in the analysis above was entirely understood by (at least some of) plaintiffs' attorneys. After all, the principles laid out here are basic: bread-and-butter principles taught in first-year civil procedure and third-year federal courts classes.

Admittedly, many aspects of this case are unsettled and novel. For example, the Supreme Court has never passed on whether the Foreign Emoluments Clause applies to the President, nor has it opined on whether such suits are justiciable. We do not purport to predict how the Court or any federal court will rule on such issues of first impression. However, the distinction between official and individual capacity suits is well-settled. Likewise, the Court's jurisprudence has evinced a strong hesitancy to extend implied causes of action beyond the Fourth, Fifth, and Eighth Amendments. Even if the Maryland Plaintiffs establish standing, and show that the case is justiciable, the absence of an express (that is, a statutory) cause of action or an implied constitutional cause of action, and cases like *Ziglar*, provide the courts with an easy way to dispose of these cases.

There is, in fact, a distinct risk for the Maryland Plaintiffs in pressing the suit against the President in his individual capacity. In *Ziglar*, there was only a four-member majority, due to Justice Scalia's passing. The Emoluments Clauses litigation could provide a five-member majority with an opportunity to slam the door shut, permanently, on implying new judicially-created causes of action (and perhaps terminating the doctrine entirely). This entire doctrine is largely a vestige of the Warren Court that has been fluttering on life support for two decades or so. The Emoluments Clauses cases, ironically enough, could put an end to this doctrine, altogether. We suspect several of the scholars who are closely affiliated with this litigation, as well as their amici, would not want to take this risk—which may explain why an amended complaint still has yet to be filed.