Emoluments

Members of Congress Emoluments Case
Key Excerpts from 2020 Appeals Court Opinion on Lack of Standing

Prepared by Elise Bean
Levin Center at Wayne Law

On August 21, 2019, President Trump, represented by the U.S. Department of Justice ("DOJ"), filed an interlocutory appeal of two D.C. District Court rulings which found that Members of Congress had standing to bring suit to enforce the Constitution's foreign emoluments clause and stated a cause of action. A D.C. Circuit 3-judge panel, with Judges Griffith, Henderson, and Tatel, was assigned to Case No. 19-5237. On Feb. 7, 2020, in a *per curiam* opinion, the panel found that the Members of Congress lacked standing to bring the suit and remanded the matter to the district court with instructions to dismiss the case. *Blumenthal v. Trump*, No. 16-5237, 2020 WL 593891 (D.C. Cir. Feb. 7, 2020). Here are key excerpts from the panel's 12-page opinion, each excerpt of which consists of a direct quotation taken from the text of the opinion, with no changes in punctuation but with footnotes omitted.

Holding
Because we conclude that the Members lack standing, we reverse the district court and remand with instructions to dismiss their complaint.

History of foreign emoluments clause
Troubled that "one of the weak sides of Republics was their being liable to foreign influence & corruption," 1 *The Records of the Federal Convention of 1787* 289 (Max Farrand ed., 1911), the Framers prohibited "Person[s] holding any Office of Profit or Trust under" the United States from accepting from a foreign sovereign "any present, Emolument, Office, or Title, of any kind whatever" without the "Consent of the Congress." Justice Joseph Story described the Clause as "founded in a just jealousy of foreign influence of every sort[.]"

Procedural Posture
The district court bifurcated the issues, addressed standing first and held that the Members "sustained their burden to show that they have standing to bring their claims." *Blumenthal*, 335 F. Supp. 3d at 54. The President then moved to certify the district court's standing order

for interlocutory appeal under 28 U.S.C. § 1292(b) …. While the certification motion was pending, the district court denied the remainder of the President's motion to dismiss, holding that the Members had an implied equitable cause of action for injunctive relief and that they had stated a claim under the Clause. *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 207–09 (D.D.C. 2019). The President again moved for interlocutory appeal, Motion for Certification for Interlocutory Appeal, 382 F. Supp. 3d 77 (D.D.C. 2019) (No. 17-1154), ECF No. 71, and this motion was also denied, 382 F. Supp. 3d at 77.

Having exhausted his options in district court, the President petitioned our court for a writ of mandamus. … We denied the petition without prejudice but remanded the matter "for immediate reconsideration of the motion to certify." *In re Trump*, 781 F. App'x at 2. On reconsideration, the district court certified both dismissal denials for interlocutory appeal and stayed its proceedings. *Blumenthal v. Trump*, No. 17-1154, 2019 WL 3948478, at *3 (D.D.C. Aug. 21, 2019). We then granted the interlocutory appeal.

Standard of review
On appeal of a dismissal denial, we review the district court's legal determinations de novo and assume the truth of the plaintiff's material factual allegations.

Test for standing
To establish Article III standing, a plaintiff must, as an "irreducible constitutional minimum[,] . . . (1) suffer[] an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." ... Put differently, our standing inquiry precedes our merits analysis and "focuses on whether the plaintiff is the proper party to bring [the] suit." *Raines*, 521 U.S. at 818.

***Raines* analysis**
Raines is our starting point when individual members of the Congress seek judicial remedies. … This case is really no different from *Raines*. The Members were not singled out—their alleged injury is shared by the 320 members of the Congress who did not join the lawsuit—and their claim is based entirely on the loss of political power. … We can, therefore, resolve this case by simply applying *Raines*. …

The Supreme Court's recent summary reading of *Raines* that "individual members" of the Congress "lack standing to assert the institutional interests of a legislature" in the same way "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole," *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953–54 (2019), puts paid to any doubt regarding the Members' lack of standing. Here, the (individual) Members concededly seek to do precisely what *Bethune-Hill* forbids. …

After *Raines* and *Bethune-Hill*, only an institution can assert an institutional injury provided the injury is not "wholly abstract and widely dispersed." *Raines*, 521 U.S. at 829.

The district court misread *Raines* in declaring that "*Raines* . . . *teaches* that it is not necessary for an institutional claim to be brought by or on behalf of the institution." *Blumenthal*, 335 F.

Supp. 3d at 58 (emphasis added). Its confusion may be partially due to timing—the district court ruled before *Bethune-Hill*, which was decided the following year.

Especially rigorous inquiry

Our standing inquiry is "especially rigorous" in a case like this, where "reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* at 819–20; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015) ("[S]uit between Congress and the President would raise separation-of-powers concerns absent" in litigation brought by state legislature).

Number of Members of Congress

[O]ur conclusion is straightforward because the Members—29 Senators and 186 Members of the House of Representatives—do not constitute a majority of either body and are, therefore, powerless to approve or deny the President's acceptance of foreign emoluments. ... For standing, the Members' inability to act determinatively is important, *see Raines*, 521 U.S. at 829, and, conversely, the size of their cohort is not—so long as it is too small to act. That is, we assess this complaint—filed by 215 Members—no differently from our assessment of a complaint filed by a single Member.

No case or controversy

The Members can, and likely will, continue to use their weighty voices to make their case to the American people, their colleagues in the Congress and the President himself, all of whom are free to engage that argument as they see fit. But we will not—indeed we *cannot*—participate in this debate. The Constitution permits the Judiciary to speak only in the context of an Article III case or controversy and this lawsuit presents neither.

Reversed, remanded to dismiss, vacated as moot

Because the district court bifurcated the motion to dismiss proceedings, two of its judgments are before us on appeal. With regard to the first, in which the district court held that the Members have standing, *Blumenthal*, 335 F. Supp. 3d 45, we reverse and remand with instructions to dismiss the complaint. The second, in which the district court held that the Members have a cause of action and have stated a claim, Blumenthal, 373 F. Supp. 3d 191, is vacated as moot.