

Certiorari granted by Supreme Court, January 25, 2021
Remanded and vacated by Supreme Court, January 25, 2021

ON REHEARING EN BANC

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2486

In re: DONALD J. TRUMP, President of the United States of America, in his
official capacity and in his individual capacity,

Petitioner.

PROFESSOR CLARK D. CUNNINGHAM; PROFESSOR JESSE EGBERT,

Amici Curiae,

SCHOLAR SETH BARRETT TILLMAN; JUDICIAL EDUCATION PROJECT,

Amici Supporting Petitioner,

FORMER NATIONAL SECURITY OFFICIALS; COMMONWEALTH OF
VIRGINIA; THE NISKANEN CENTER; REPUBLICAN WOMEN FOR
PROGRESS; CHERI JACOBUS; TOM COLEMAN; EMIL H. FRANKEL; JOEL
SEARBY; ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, AND
FEDERAL COURTS SCHOLARS; CERTAIN LEGAL HISTORIANS,

Amici Supporting Respondents.

Appeal from the United States District Court for the District of Maryland, at Greenbelt.
Peter J. Messitte, Senior District Judge. (8:17-cv-01596-PJM)

Argued: December 12, 2019

Decided: May 14, 2020

Before GREGORY, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, KING, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

Petition for writ of mandamus denied by published opinion. Judge Motz wrote the majority opinion, in which Chief Judge Gregory and Judges King, Keenan, Wynn, Diaz, Floyd, Thacker, and Harris joined. Judge Wynn wrote a concurring opinion, in which Judges Keenan, Floyd, and Thacker joined. Judge Wilkinson wrote a dissenting opinion, in which Judges Niemeyer, Agee, Richardson, Quattlebaum, and Rushing joined. Judge Niemeyer wrote a dissenting opinion, in which Judges Wilkinson, Agee, Quattlebaum, and Rushing joined.

ARGUED: Hashim M. Mooppan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioner. Loren Linn AliKhan, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA, Washington, D.C., for Respondents. **ON BRIEF:** Joseph H. Hunt, Assistant Attorney General, Mark R. Freeman, Michael S. Raab, Martin Totaro, Joshua Revesz, Megan Barbero, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioner. Brian E. Frosh, Attorney General, Steven M. Sullivan, Solicitor General, Leah J. Tulin, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland; Karl A. Racine, Attorney General, Stephanie E. Litos, Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA, Washington, D.C.; Norman Eisen, Noah Bookbinder, Laura C. Beckerman, Stuart C. McPhail, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Washington, D.C.; Deepak Gupta, Joshua Matz, Daniel Townsend, GUPTA WESSLER PLLC, Washington, D.C.; Joseph M. Sellers, Christine E. Webber, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, D.C., for Respondents. Craig Thomas Merritt, CHRISTIAN & BARTON, L.L.P., Richmond, Virginia, for Amici Professor Clark D. Cunningham and Professor Jesse Egbert. Carrie Severino, JUDICIAL EDUCATION PROJECT, Washington, D.C., for Amicus Judicial Education Project. Robert W. Ray, THOMPSON & KNIGHT LLP, New York, New York; Josh Blackman, Houston, Texas, for Amicus Seth Barrett Tillman. Jan I. Berlage, GOHN HANKEY & BERLAGE LLP, Baltimore, Maryland, for Amici Judicial Education Project and Seth Barrett Tillman. Harold Hongju Koh, Rule of Law School, YALE LAW SCHOOL, New Haven, Connecticut; Phillip Spector, MESSING & SPECTOR LLP, Baltimore, Maryland, for Amici Former National Security Officials. Mark R. Herring, Attorney General, Toby J. Heytens, Solicitor General, Matthew R. McGuire, Principal Deputy Solicitor General, Michelle S. Kallen, Deputy Solicitor General, Brittany M. Jones, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Amicus Commonwealth of Virginia. Colin E. Wrabley, Devin M. Misour, Brian T. Phelps, Pittsburgh, Pennsylvania, M. Patrick Yingling, REED SMITH LLP, Chicago, Illinois, for

Amici The Niskanen Center, Republican Women for Progress, Cheri Jacobus, Tom Coleman, Emil H. Frankel, and Joel Searby. Regina Kline, Jean M. Zachariasiewicz, Anthony J. May, BROWN, GOLDSTEIN & LEVY, LLP, Baltimore, Maryland, for Amici Administrative Law, Constitutional Law, and Federal Courts Scholars. H. Laddie Montague, Jr., Eric J. Cramer, Candace J. Enders, BERGER & MONTAGUE, P.C., Philadelphia, Pennsylvania; Erica C. Lai, Melissa H. Maxman, COHEN & GRESSER LLP, Washington, D.C., for Amici Certain Legal Historians.

DIANA GRIBBON MOTZ, Circuit Judge:

President Donald J. Trump, in his official capacity, petitions this court for a writ of mandamus directing the district court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) or, in the alternative, ordering the district court to dismiss the complaint against him. The President maintains that the district court committed multiple errors that we should correct; however, this case is not on appeal. We recognize that the President is no ordinary petitioner, and we accord him great deference as the head of the Executive branch. But Congress and the Supreme Court have severely limited our ability to grant the extraordinary relief the President seeks. Because the President has not established a right to a writ of mandamus, we deny his petition.

I.

The District of Columbia and the State of Maryland (“Respondents”) filed this action in the District of Maryland against the President in his official capacity.¹ They allege that the President is violating the Foreign and Domestic Emoluments Clauses of the U.S. Constitution by accepting prohibited “emoluments” from foreign and domestic governments. The Foreign Emoluments Clause provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, 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.

¹ Respondents later amended their complaint to add the President in his individual capacity. The President noted an interlocutory appeal in that case, No. 18-2488, which we address in a companion opinion, also issued today. References to the President in this opinion refer to the President in his official capacity.

U.S. Const. art. I, § 9, cl. 8. The Domestic Emoluments Clause provides:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Id. art. II, § 1, cl. 7.

The President moved to dismiss the complaint. After considering the parties' extensive oral arguments and lengthy briefs, the district court issued two thorough opinions. *See District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018); *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018). The court granted the President's motion to dismiss with respect to the operations of the Trump Organization outside the District of Columbia, concluding that Respondents lacked standing to pursue those claims. *Trump*, 291 F. Supp. 3d at 732. This narrowed the case to the President's alleged violations relating to the Trump International Hotel in Washington, D.C. The district court denied the motion with respect to that hotel.

The President moved for certification to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), seeking appellate review of four questions: (1) the correct interpretation of the term "emolument"; (2) whether Respondents had an equitable cause of action to bring the suit; (3) whether Respondents had Article III standing; and (4) whether any court has the ability to issue equitable relief against the President in these circumstances. The district court declined to certify an interlocutory appeal, explaining its decision in another written opinion. There, the court recognized the proper standard for certification under § 1292(b) and elaborated why, in its opinion, resolution of the questions

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