# ARTICLES

# The Unresolved Threshold Issues in the Emoluments Clauses Litigation: The President Has Three Bodies and There Is No Cause of Action for Ultra Vires Conduct

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ABSTRACT

*Shortly after President Trump's January 2017 inauguration, he was sued for violating the Foreign and Domestic Emoluments Clauses. The plaintiffs alleged that Trump's acceptance of profits from foreign and domestic state governments violated these once-obscure provisions of the Constitution. We filed amicus briefs in these cases, and we made two arguments that had implications for separation of powers jurisprudence.*

*First, the plaintiffs erred by suing President Trump in his "official capacity." Under settled case law, a government officer violates the Constitution in his official capacity if—and only if—a government policy or custom must have played a part in the violation of federal law. Still, the plaintiffs never alleged that President Trump acted pursuant to any government policy or custom. Nor did the plaintiffs allege that Trump acted "under the color of law"—a precondition for pleading an individual-capacity claim. Rather, these cases concerned alleged conduct that President Trump took personally. With respect to the Emoluments Clauses, the President has three bodies or capacities, and, as such, he can be sued in three distinct fashions: [1] an official-capacity claim involves a government policy or custom; [2] an individual-capacity claim involves action taken by a government officer under the color of law; and [3] a personal claim involves private conduct, absent state action.*

*We identified a second jurisdictional problem. The plaintiffs argued that the federal courts had equitable jurisdiction to halt ultra vires action by a government officer. To support this argument, the plaintiffs contended that federal district courts could issue an injunction—an equitable remedy—against the President. This argument conflated equitable jurisdiction and equitable relief. A plaintiff cannot establish equitable jurisdiction merely by seeking equitable relief. Rather, the plaintiffs must invoke a traditional equitable cause of action that was judicially recognized by 1789, or a cause of action that was created by Congress or the courts. The Supreme Court has not recognized a free-floating equitable cause of action to challenge ultra vires conduct by government officers.*

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*Ultimately, the Supreme Court did not settle these issues, or any others presented by the Emoluments Clauses litigation. After President Biden's inauguration, the Supreme Court vacated the lower-court judgments that ran against the President, and ordered the courts of appeals to dismiss the cases as moot.*

*As the Emoluments Clauses litigation fades in the rear-view mirror, this Article offers a retrospective of these two unresolved threshold issues. Our article also provides some guidance on how to litigate future allegations that the President personally violated the Constitution.*

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## INTRODUCTION

The Constitution includes a Foreign Emoluments Clause and a Domestic Emoluments Clause. The former provision states that "no Person holding any Office of Profit or Trust under them [the United States], 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] The latter provision states that the President "shall not receive within that Period [for which he was elected] any other Emolument from the United States, or any of them."[2] For much of American history, the Foreign and Domestic Emoluments Clauses remained obscure. However, shortly after President Trump's January 2017 inauguration, he was sued for violating both provisions in three federal district courts. The plaintiffs alleged that the acceptance of profits from foreign and state governments, and their instrumentalities, by President Trump or by Trump-affiliated commercial entities violated the Emoluments Clauses.

We filed amicus briefs in these three cases, which began in the U.S. District Courts for the Southern District of New York, the District of Maryland, and the District of Columbia.[3] We made two primary arguments: [1] the President was not covered by the Foreign Emoluments Clause[4] and [2] the profits from the business transactions at issue were not "emoluments."[5] These arguments were very much limited to the unique litigation against President Trump. But we made two other arguments that had far greater implications for separation of powers jurisprudence and litigation against government officials, including the President and other elected officials.

First, the plaintiffs erred by suing President Trump in his "official capacity." The term "official capacity" carries a well understood meaning as established by Supreme Court case law. This phrase is not used haphazardly. Under settled case law, a government officer violates the Constitution in his "official capacity" if—and only if—a government "'policy or custom' *must* have played a part in the

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1. U.S. CONST. art. I, § 9, cl. 8.
2. *Id.* art. II, § 1, cl. 7.
3. All of our briefs are available at https://bit.ly/2LUUTiY [https://perma.cc/792L-9MGF].
4. *See* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution*, *Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2021), https://ssrn.com/abstract=3890400 [https://perma.cc/A6NL-5XMV] (discussing taxonomy); John Blackman & Seth B. Tillman, *The Emoluments Clauses Litigation*, *Part 1: The Constitution's Taxonomy of Officers and Offices*, WASH. POST (Sept. 25, 2017), http://bit.ly/2nchNJY [https://perma.cc/6LTV-U62M] (same).
5. Seth Barrett Tillman, *Business Transactions and President Trump's "Emoluments" Problem*, 40 HARV. J.L. & PUB. POL'Y 759 (2017).

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violation of federal law."[6] We made this point in our amicus briefs. Still, the plaintiffs never alleged that President Trump acted pursuant to any government "policy or custom." Rather, they made a conclusory assertion: the President violated the Emoluments Clauses in his official capacity because he is subject to the Emoluments Clauses as President and not as a private citizen.

In response to our brief, U.S. District Court Judge Peter J. Messitte of Maryland urged the plaintiffs to sue President Trump in his "individual capacity." The plaintiffs in the Maryland litigation followed Messitte's guidance. But this amendment to the complaint did not solve the pleading and jurisdictional problems. Like the doctrine of "official capacity," the doctrine of "individual capacity" carries a well-understood meaning as established by federal and state case law. An individual-capacity claim alleges that the purported illegal conduct was taken "under the color of law." But the plaintiffs' complaints in all three Emoluments Clauses cases, made no such allegation. Rather, the cases concerned alleged conduct that President Trump took *personally*—the sort of acts that any private citizen could take. Therefore, an individual-capacity claim also could not lie. With respect to the Emoluments Clauses, the President has three bodies and can be sued in three distinct capacities: [1] an official-capacity claim involves a government policy or custom; [2] an individual-capacity claim involves action taken by a government officer under the "color of law;" and [3] a personal claim involves private conduct, absent state action.

We identified a second jurisdictional problem. In each case, the plaintiffs argued that the federal courts had equitable jurisdiction to halt ultra vires action. To support this argument, the plaintiffs contended that federal district courts could issue an injunction—an equitable remedy—against the President. This argument conflated equitable jurisdiction and equitable relief. A plaintiff cannot establish equitable jurisdiction merely by seeking equitable relief. Rather, a plaintiff must invoke a traditional equitable cause of action that was judicially recognized in 1789. Or the plaintiff must invoke a cause of action created by Congress or the courts. The Supreme Court has not recognized a free-floating equitable cause of action to challenge ultra vires government conduct.

Had the courts reached and accepted either of our arguments, the complaints in all three cases should have been dismissed. However, the Department of Justice (DOJ), which represented President Trump in his official capacity, agreed with the plaintiffs that *only* an official-capacity claim was properly plead. Likewise, President Trump's private counsel, which represented Trump in his individual capacity, agreed with DOJ's position: that plaintiffs' suit could only lie against Trump in his official capacity. Each of the courts to squarely address this issue found that the official-capacity claim was proper.

In contrast to our position on capacity, the Department of Justice, as well as the President's private counsel, both advanced our second position. Both sets of

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6. Hafer v. Melo, 502 U.S. 21, 25 (1991) (emphasis added) (citations omitted).

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attorneys vigorously argued that the plaintiffs failed to assert a valid equitable cause of action. However, several lower federal courts disagreed. Ultimately, those appellate judgments were reversed or vacated.

Despite more than four years of litigation, the Supreme Court did not settle these issues, or any others presented by the Emoluments Clauses litigation. After President Biden's inauguration, the Supreme Court vacated the lower court judgments that ran against President Trump and ordered the appellate courts to dismiss the cases as moot.

This Article will address these two unresolved but foundational threshold issues in the Emoluments Clauses litigation. First, in our view, when the President engages in quintessentially personal conduct, he cannot be sued in either his official or individual capacity. Rather, he commits these acts in his third body: *personally*. Second, plaintiffs cannot invoke a free-floating equitable cause of action to challenge ultra vires conduct by federal officials.

This Article proceeds in three parts. Part I introduces the three primary cases in the Emoluments Clauses litigation. First, *Citizens for Responsibility & Ethics in Washington v. Trump* (*CREW*)[7] was brought by private parties in a New York federal district court. Second, *Blumenthal v. Trump*[8] was brought by members of Congress in a D.C. federal district court. And third, *District of Columbia v. Trump*[9] was filed by the D.C. and Maryland Attorneys General in a Maryland federal district court. In *District of Columbia* and *Blumenthal*, the district courts found that the plaintiffs had standing, that they properly sued the President in his official capacity, and that they invoked a valid cause of action. By contrast, in *CREW*, the district court found the plaintiffs lacked standing. A divided Second Circuit panel found that the *CREW* plaintiffs had standing, and the panel reversed the district court. The Second Circuit denied rehearing en banc over a dissent. In *Blumenthal*, a panel of the D.C. Circuit found that the plaintiffs—members of Congress—lacked standing, and the panel reversed the district court's ruling. Three weeks before the November 2020 presidential election, the Supreme Court denied certiorari in *Blumenthal*. The D.C. Circuit's judgment in favor of the President became a final judgment.

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7. 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Daniels, J.) (initial opinion). For full discussion of this and subsequent opinions, see Part I.A, *infra*. For a complete bibliography of the opinions, pleadings, briefs, and other filings, see Seth Barrett Tillman, *Full Length Opinions in the Emoluments Clauses Cases, and Related Cases*, NEW REFORM CLUB (Mar. 3, 2019, 11:12 AM), https://reformclub.blogspot.com/2019/03/full-length-opinions-in-emoluments.html [https://perma.cc/YDE5-NNHU]; Seth Barrett Tillman, *A Work in Progress: Select Bibliography of Court filings and Other Sources Regarding the Foreign and Domestic Emoluments Clauses Cases*, NEW REFORM CLUB (Feb. 28, 2018, 8:59 AM), https://reformclub.blogspot.com/2018/02/a-work-in-progress-select-bibliography.html [https://perma.cc/728L-9RD7].

8. 373 F. Supp. 3d 191 (D.D.C. 2019) (Sullivan, J.) (initial opinion). For full discussion of this and subsequent opinions, see Part I.B, *infra*.

9. 291 F. Supp. 3d 725 (D. Md. 2018) (Messitte, J.) (initial opinion). For full discussion of this and subsequent opinions, see Part I.C, *infra*.

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The Maryland litigation was far more complicated. The district court urged the plaintiffs to sue the President in his individual capacity. However, the judge then refused to rule on the motion to dismiss filed by Trump's private defense counsel, who represented Trump in regard to the individual-capacity claim. On appeal, the Fourth Circuit, in two separate panel opinions, ruled that the plaintiffs lacked standing to sue Trump in his official- and individual-capacities. However, the en banc Fourth Circuit reversed both panel decisions. Ultimately, after President Biden's inauguration, the Supreme Court vacated the appellate decisions in *District of Columbia* and *CREW*. Furthermore, the Fourth Circuit vacated the district court's rulings against President Trump. After nearly four years of litigation, the plaintiffs did not even obtain a single page of documents in discovery, let alone a final judgment against the President.

Part II turns to the question of capacity. Government officers can commit torts in three distinct capacities: official capacity, individual capacity, and personally. Scholars have recognized that the Thirteenth and Twenty-First Amendments can be violated in these three fashions.[10] We contend the Foreign and Domestic Emoluments Clauses can also be violated in these three fashions. The President, like other government officials, has three bodies. In the Emoluments Clauses litigation, the plaintiffs sued President Trump in his official capacity. However, they complained of quintessentially personal conduct taken by Donald J. Trump and Trump-affiliated private commercial entities. Trump did not act pursuant to any government "policy or custom." And his alleged wrongful conduct was not performed "under the color of law." The plaintiffs, therefore, lacked standing to sue Trump in his official and individual capacities. Trump could only be sued personally, assuming the plaintiffs had a valid cause of action.

Part III explains that the plaintiffs lacked an equitable cause of action. Throughout the course of the Emoluments Clauses litigation, litigants and courts conflated equitable relief with equitable jurisdiction. Merely seeking equitable relief is insufficient to invoke a federal court's equitable jurisdiction. Rather, a plaintiff must *also* assert a cause of action that arises in equity. Equitable causes of action include those traditional causes of action recognized by the English Court of Chancery by 1789. The plaintiffs in the Emoluments Clauses cases did not assert a traditional equitable cause of action. The Supreme Court has not recognized a free-floating equitable cause of action to challenge ultra vires government conduct. For these reasons, the district courts lacked equitable jurisdiction to hear the Emoluments Clauses cases.

Ultimately, these cases should have been dismissed based on either of these threshold issues: the plaintiffs sued the President in the wrong capacity and the plaintiffs lacked an equitable cause of action. However, the courts that addressed these issues failed to follow settled law on both points.

10. *See, e.g.*, Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 220 (1995).

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As the Emoluments Clauses litigation fades in the rear-view mirror, this Article offers a retrospective of these two unresolved threshold issues. We will also provide guidance on how to litigate future allegations that the President personally violated the Constitution.

## I. THE EMOLUMENTS CLAUSES LITIGATION

In 2017, three prominent cases were filed against President Trump based on the Foreign and Domestic Emoluments Clauses. First, *CREW v. Trump* was brought by private parties. Second, *Blumenthal v. Trump* was brought by members of Congress. Third, *District of Columbia v. Trump* was filed by the D.C. and Maryland Attorneys General. All three cases involved claims based on the Foreign Emoluments Clauses. *CREW* and *District of Columbia* also raised claims under the Domestic Emoluments Clause. Initially, all three cases were pleaded only as official-capacity claims. However, at the suggestion of the presiding federal district court judge, the D.C. and Maryland Attorneys General later amended their complaint to include an individual-capacity claim.

Congress has not created a statutory cause of action based on the Emoluments Clauses. Rather, the plaintiffs in these cases invoked the purported equitable jurisdiction of the federal courts to enjoin ultra vires government conduct. Part I will provide a brief overview of the litigation, with a focus on the two questions this Article seeks to address. First, were the plaintiffs' official-capacity claims properly pled? And second, did the plaintiffs have a valid cause of action to challenge ultra vires action? Two federal district court judges answered "yes" to both questions. No federal court of appeals squarely decided either issue. Ultimately, the two appellate decisions that ruled against President Trump were vacated as moot after President Biden's inauguration.

### A. *CREW v. Trump*

In *CREW v. Trump*, the plaintiffs put forward two claims. First, plaintiffs alleged that the acceptance of profits from foreign governments by President Trump or Trump-affiliated commercial entities violated the Foreign Emoluments Clause.[11] Second, the plaintiffs alleged that Trump or Trump-affiliated commercial entities violated the Domestic Emoluments Clause through the receipt of profits from any part of the federal government, any state government, or any local government.[12]

There were four plaintiffs. One was a hotelier who had an ownership interest in New York-area hotels. Another was a nonprofit that owned a restaurant in Manhattan. The Citizens for Responsibility and Ethics in Washington (CREW), the original named plaintiff, later withdrew when the case was on appeal. The

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11. *See* Second Amended Complaint at 59–61, CREW v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Civ. A. No. 1:17-cv-00458-RA), 2017 WL 2734681 (Count I) (Abrams, J.), ECF No. 28, https://perma.cc/UDH9-85K6; *see also CREW*, 276 F. Supp. 3d at 174.

12. *See* Second Amended Complaint, *supra* note 11, at 61–63 (Count II).

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fourth plaintiff, Jill Phaneuf, purportedly booked diplomatic events in D.C.-area hotels. She also withdrew from the case when it was on appeal. The plaintiffs sued the President exclusively in his official capacity. And the Department of Justice represented the President in his official capacity.

In December 2017, the U.S. District Court for the Southern District of New York ruled that the plaintiffs lacked standing.[13] Therefore, the court did not "reach the issue of whether Plaintiffs' allegations state a cause of action under either the Domestic or Foreign Emoluments Clauses."[14] The court did not decide if the plaintiffs' official-capacity claims were properly pled. The court also did not determine if the plaintiffs had a cognizable cause of action.

In September 2019, a divided panel for the Second Circuit Court of Appeals reversed.[15] Senior Circuit Judge Leval wrote the majority opinion, which was joined by Judge Droney. Senior Circuit Judge Walker dissented. The circuit court found that the plaintiffs had standing.[16] Like the district court, the panel majority did not opine on whether the official-capacity claims were proper. Likewise, the majority did not decide whether the plaintiffs had a cognizable cause of action. On March 20, 2020, the Second Circuit amended its opinion,[17] but the panel did not alter its analysis about capacity and cause of action. By that time, Circuit Judge Droney had retired from the court,[18] but "[t]he remaining two members of the panel [were] in agreement regarding this order."[19]

In August 2020, the Second Circuit denied rehearing en banc.[20] Judge Menashi dissented from the denial of rehearing en banc and was joined by Judges Livingston and Sullivan. Judge Walker wrote a statement in opposition to the denial of en banc rehearing. Judge Leval wrote a statement in support of the denial of en banc rehearing.[21] None of the judges addressed whether the district court had equitable jurisdiction. But Judges Menashi and Leval vigorously disagreed with one another about whether the plaintiffs' official-capacity claims were proper.

Judge Menashi observed that, for the plaintiffs, "[i]t was obviously important" to "challeng[e] acts taken in an official capacity" and to seek "relief . . . against

13. CREW v. Trump, 276 F. Supp. 3d 174, 179 (S.D.N.Y. 2017).

14. *Id.* at 180 n.1.

15. CREW v. Trump, 939 F.3d 131, 138 (2d Cir. 2019).

16. *Id.* at 142.

17. *Id.* at 178.

18. *Christopher Fitzgerald Droney*, FED. JUD. CTR., https://www.fjc.gov/history/judges/droney-christopher-fitzgerald [https://perma.cc/H8MF-74PF] (last visited Dec. 23, 2021).

19. CREW v. Trump, 953 F.3d 178, 184 (2d Cir. 2019), as amended (Mar. 20, 2020).

20. CREW v. Trump, 971 F.3d 102 (2d Cir. 2020).

21. In the Second Circuit, senior judges do not vote to rehear cases en banc, but they do issue "statements" in lieu of writing or joining opinions with respect to the denial of en banc review. *See id.* at 122 n.1 (Walker, J.) ("Although, as a senior judge, I have no vote on whether to rehear a case en banc, Fed R. App. P. 35(a), and thus cannot dissent, this court is currently reviewing whether, as a matter of court practice, a senior judge that was on the panel may file a statement on the denial of en banc rehearing. In the meantime, a ruling by the chief judge, with the concurrence of the court's active judges, has permitted such a statement pending the outcome of the review.").

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the President in his official capacity."[22] After all, Menashi observed,"[t]he plaintiffs insist no fewer than three times that they are suing the President only in his official capacity as President of the United States."[23] And the plaintiffs "further allege[]—three more times—that the President has used his official position as President to generate business to his hotel properties and their restaurants from officials of foreign states, the United States, and/or state and local governments."[24] The plaintiffs in *CREW v. Trump*, like the "plaintiffs in the other two lawsuits alleging violations of the Emoluments Clauses against the President," followed this "consistent approach."[25]

However, according to Judge Leval, the plaintiffs did not actually challenge President Trump's official conduct. Leval acknowledged that "the conduct addressed by the complaint is wholly private and not official."[26] For reasons we will discuss in Part II, Leval's concession should have been a sufficient basis to conclude that the official-capacity claim was improperly pled.

Nevertheless, Judge Leval drew a wholly different set of conclusions. First, he contended that "what renders that private conduct illegal . . . is the fact that the beneficiary of the emoluments" is covered by the Foreign and Domestic Emoluments Clauses.[27] Second, Judge Leval offered an explanation for why the plaintiffs sued Trump in his official capacity: "[t]he complaint's naming of the President in his 'official capacity' is arguably *necessary* because it is the President's official capacity as an officer of the United States [sic] that renders his private conduct illegal under the theory of the complaint."[28] Third, even if the plaintiffs "nam[ed] the President in his official capacity," it does not necessarily follow "that the suit is directed against official conduct of the President."[29] Indeed, according to Leval, suing the President in his official capacity does not mean that the challenged conduct "*must* be characterized as 'official' business of the Executive Branch."[30] Fourth, Leval wrote that the "President's personal receipt of moneys is private conduct," but that conduct can still be challenged in an official-capacity claim "because his office is what renders that private conduct unlawful."[31]

Judge Menashi seemed perplexed by Judge Leval's rationalization of the panel opinion. Menashi wrote that according to Leval, "when it comes to the Emoluments Clauses, the President is engaging in 'private conduct' while in his

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22. *Id*. at 116 (Menashi, J., dissenting).
23. *Id*. (quotation marks omitted).
24. *Id*. (quotation marks omitted).
25. *Id*.
26. *Id*. at 131 (Leval, J.).
27. *Id*.
28. *Id*. at 132 (emphasis added). Judge Leval used the phrase "officer of the United States." This phrase does not appear in the Foreign Emoluments Clause. That provision refers to an office "under" the United States. U.S. CONST. art. I, § 9, cl. 8.
29. *CREW*, 971 F.3d at 132 (Leval, J.).
30. *Id*. (emphasis added).
31. *Id*.

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'official capacity.'"[32] Menashi continued that the panel "without expressly saying so, authorized an official-capacity suit that seeks remedies against the President personally."[33] Here, the panel approved of an "unprecedented" suit that "has never been seen before: the official-capacity-but-private-conduct suit."[34] In other words, "the President violates the Emoluments Clauses only when acting privately (though, perhaps, somehow still in his official capacity)."[35] These sub silentio holdings, Judge Menashi wrote, are "striking departure[s] from established practice and precedent."[36] The Supreme Court "has explained that 'an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity.'"[37]

Judge Menashi did "not reach any conclusion about whether compliance with the Emoluments Clauses is an official act."[38] His dissent "expressly decline[d] to take a position on this difficult question."[39] Again, for reasons we will discuss in Part II.C, this issue, which is governed by settled Supreme Court case law, is not a "difficult" one. The dissent affirmed that "owning a business is a private function."[40] Still, Menashi stated "ordering [his] affairs to avoid emoluments is a duty that applies to the President only because he is the President," and is subject to the Emoluments Clauses.[41] Citing Tillman and Blackman's amicus brief, Menashi only "assum[ed]" the President was subject to the Foreign Emoluments Clause and indicated that the issue remained undecided.[42]

In the end, Judge Leval offered the plaintiffs an escape hatch. He wrote, "even if the plaintiffs' decision to sue President Trump 'in his official capacity'" was in error, "the plaintiffs should be allowed to amend their complaint to state that President Trump is sued 'in both his official and his personal capacities.'"[43] By this point, the complaint "ha[d] been pending for over 3 years, [but] ha[d] not yet reached its first substantive phase."[44] Moreover, Leval cited no case law indicating that plaintiffs' amending their complaint *after* plaintiffs had filed their notice of appeal and *after* the intermediate court of appeals had issued a ruling would remain timely.

32. *Id.* at 114 (Menashi, J., dissenting).
33. *Id.* at 115.
34. *Id.*
35. *Id.* at 117.
36. *Id.* at 115.
37. *Id.* (quoting Kentucky v. Graham, 473 U.S. 159, 166 (1985)).
38. *Id.* at 114.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 111 n.16 ("arguing [the Foreign Emoluments Clause] does not [apply to the President]" (citing Brief of *Amici Curiae* Scholar Seth Barrett Tillman and the Judicial Education Project in Support of Defendant-Appellee at 16–25, CREW v. Trump, 939 F.3d 131 (2d Cir. 2019) (No. 18-0474-cv), ECF No. 135, https://bit.ly/2X1kFZv)).
43. *Id.* at 133 (Leval, J.).
44. *Id.* at 133 n.9.

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The Department of Justice appealed the Second Circuit's decision to the Supreme Court.[45] The case was distributed for conference on January 8, 2021—twelve days before the inauguration. The case was then relisted for conference on January 22, 2021—two days after the inauguration. On January 25, 2021, the Supreme Court vacated the Second Circuit's judgment and remanded the case "to the United States Court of Appeals for the Second Circuit with instructions to dismiss the case as moot."[46] Finally, on March 2, 2021, the Second Circuit "ORDERED that the case is DISMISSED."[47] The panel decision was vacated by the Second Circuit in conformity with the Supreme Court's order. More than four years after *CREW v. Trump* began, it came to an end.

### *B. Blumenthal v. Trump*

In *Blumenthal v. Trump*, more than two hundred members of Congress, led by Senator Richard Blumenthal of Connecticut and Representative John Conyers, Jr. of Michigan, alleged that President Trump was violating the Foreign Emoluments Clause. Unlike the other two cases, this case did *not* involve claims based on the Domestic Emoluments Clause. The *Blumenthal* plaintiffs sued the President exclusively in his official capacity. The plaintiffs contended that "whether a suit is an official- or personal-capacity suit turns on the nature of the relief sought: a suit seeking injunctive or declaratory relief, rather than monetary damages, is *always* an official-capacity suit."[48] For reasons we will discuss in Part II, this statement is flatly inconsistent with Supreme Court precedent.

The Department of Justice filed a motion to dismiss. The U.S. District Court for the District of Columbia decided the DOJ's motion in two separate rulings: the first ruling addressed standing, and the second ruling addressed several other defenses put forward by the DOJ. In September 2018, the court ruled that the plaintiffs had standing to proceed with their claim.[49] And in April 2019, the court "held that plaintiffs . . . had standing to sue defendant Donald J. Trump in his official capacity as President of the United States."[50] The court also found that the plaintiffs had an "implied cause of action in the Foreign Emoluments Clause."[51] Specifically, the court "exercise[d] its equitable discretion to enjoin allegedly unconstitutional action by the President."[52] The court favorably cited *Free*

45. *Trump v. CREW, No. 18-474*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-330.html [https://perma.cc/L476-D43M].

46. Trump v. CREW, 141 S. Ct. 1262 (2021).

47. CREW v. Trump, No. 18-474 (2d Cir. Mar. 2, 2021), ECF No. 241, https://bit.ly/33mNOk7 [https://perma.cc/6TEQ-SH64].

48. Plaintiffs' Supplemental Memorandum at 33, Blumenthal v. Trump, 373 F. Supp. 3d 191 (2019) (Civ. A. No. 17-1154), ECF No. 50 (emphasis added), https://perma.cc/KMK4-K6ZF.

49. Blumenthal v. Trump, 335 F. Supp. 3d 45, 51 (D.D.C. 2018).

50. Blumenthal v. Trump, 373 F. Supp. 3d 191, 193 (D.D.C. 2019).

51. *Id.* at 209.

52. *Id.* (quoting Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326–27 (2015) ("[W]e have long held that federal courts may in some circumstances grant injunctive relief . . . with respect to violations of federal law by federal officials.")).

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*Enterprise Fund v. Public Co. Accounting Oversight Board*,[53] which stated that "'it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution' unless there is a reason not to do so."[54]

In February 2020, the D.C. Circuit Court of Appeals reversed the district court's decision. The panel held that the plaintiffs—who were members of Congress—lacked standing to sue the President.[55] The per curiam opinion did not discuss whether the official-capacity claim was properly pled. Nor did the panel address whether the plaintiffs asserted a valid cause of action.

In July 2020, the plaintiffs filed a petition for a writ of certiorari. On October 23, 2020—three weeks before the presidential election—the Supreme Court denied the plaintiffs' petition for a writ of certiorari.[56]

### C. *District of Columbia v. Trump*

*CREW* and *Blumenthal* followed fairly predictable procedural paths. By contrast, the third case, *District of Columbia v. Trump*, followed a different and far more complex path. This litigation began in Judge Peter J. Messitte's courtroom in Greenbelt, Maryland. The Attorneys General for the District of Columbia and Maryland sued President Trump for violating the Foreign Emoluments Clause and Domestic Emoluments Clause. Like in *CREW* and *Blumenthal*, the plaintiffs only sued the President in his official capacity. However, at the suggestion of Judge Messitte, the plaintiffs amended their complaint to include an individual-capacity claim. The case then followed two tracks: an official-capacity track and an individual-capacity track. In this part, we will trace the complicated posture of this case along these two tracks from the district court, to a Fourth Circuit panel, to the en banc Fourth Circuit, and finally, to the Supreme Court.

#### 1. The Official-Capacity Claims

In *District of Columbia v. Trump*, the district court found that the official-capacity claim was proper and the plaintiffs had a valid cause of action. On appeal, a panel of the Fourth Circuit found the plaintiffs lacked standing. The panel did not decide if the official-capacity claim was proper or if the plaintiffs had a valid cause of action. The en banc Fourth Circuit reversed the panel decision. Because the appeal to the Fourth Circuit arose on a petition for a writ of mandamus, the en banc court did not fully resolve whether the official-capacity suit was proper. In dissent, Judge Wilkinson wrote that the plaintiffs lacked a cause of action but seemed to assume that the official-capacity claim was proper.

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53. 561 U.S. 477 (2010).
54. *Id.* at 209 (citing *Free Enter. Fund*, 561 U.S. at 491 n.2).
55. Blumenthal v. Trump, 949 F.3d 14, 16 (D.C. Cir. 2020).
56. Blumenthal v. Trump, 141 S. Ct. 553 (2020).

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*a. Litigation in the District of Maryland*

The D.C. and Maryland Attorneys General "originally filed [suit] against the President [only] in his official capacity."[57] Judge Messitte concluded that the official-capacity claim was proper. He wrote that "a suit against a Federal Government official is not necessarily the equivalent of a suit against the United States."[58] Here, Messitte explained, "the challenged actions by the [President] fall well outside his 'official duties.'"[59] Yet, "the 'official capacity' styling of the suit" does not change this characterization of the case.[60] Rather, Messitte "look[ed] beyond the simple denomination of [Trump's] status," and gleaned from "the gist of the Amended Complaint" what conduct the Attorneys General really challenged.[61] According to the plaintiffs, "the President's purported receipt of emoluments . . . has nothing at all to do with his 'official duties.'"[62] To support this position, the court favorably cited the President's own pleadings. "As the President himself concedes" in his motion to dismiss, the "Plaintiffs are challenging the President's acceptance of money taken through private transactions—something that has 'nothing to do with the President's service . . . as President.'"[63] Still, the court was "satisfied that Plaintiffs may properly bring this action against the President in his official capacity."[64]

Judge Messitte also found that the plaintiffs had a valid equitable cause of action. "The Court [saw] no problem in invoking its equitable jurisdiction."[65] Judge Messitte ruled that "a plaintiff may bring claims to enjoin unconstitutional actions by federal officials and that they may do so to prevent violation of a structural provision of the Constitution."[66] The court stated that "equitable relief is [not] limited solely" to cases where a plaintiff is exposed "to a potential enforcement action."[67]

*b. Fourth Circuit Panel Decision*

In December 2018, the Department of Justice sought mandamus from the district court's denial of the government's motion to dismiss. The following month, we filed an amicus brief before the Fourth Circuit Court of Appeals.[68] We argued, as we had before, that the plaintiffs lacked standing to sue the President in his official capacity for quintessentially private conduct.

57. District of Columbia v. Trump, 291 F. Supp. 3d 725, 746 (D. Md. 2018).
58. *Id.*
59. *Id.*
60. *Id.* (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)).
61. *Id.* at 747.
62. *Id.*
63. *Id.* (citing Defendant's Motion to Dismiss at 30, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 21-1).
64. *Id.*
65. *Id.* at 755.
66. *Id.*
67. *Id.*
68. *See* Brief of Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* Supporting Petitioners, *In re* Trump, 958 F.3d 274 (4th Cir. 2020) (No. 18-2486), ECF No. 28-1, https://perma.cc/UA7C-F87Z.

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We also introduced a new argument: the equitable jurisdiction of the federal courts did not provide plaintiffs with a cause of action. In doing so, we relied on *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*—a 1999 decision by Justice Scalia.[69] In *Grupo Mexicano*, the Supreme Court held that "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)."[70] To that point, *none* of the litigants or courts in the Emoluments Clauses litigation had cited *Grupo Mexicano*. But we thought it was an important and relevant precedent. The following month, the Department of Justice invoked *Grupo Mexicano* for the first time.[71] In its reply brief, the government argued that the "federal equity jurisdiction is limited to historical practices of the English Court of Chancery."[72]

In July 2019, the Fourth Circuit panel reversed the district court's ruling.[73] Judge Niemeyer wrote the majority opinion, which was joined by Judges Quattlebaum and Shedd. The appellate court favorably cited the government's arguments based on *Grupo Mexicano*. In "the classic type of case in which plaintiffs sue to enjoin unconstitutional conduct without a statutory cause of action," plaintiffs can rely on a "traditional equitable remedy" that was "traditionally accorded by courts of equity."[74] However, the panel found, the equitable remedy sought by the D.C. and Maryland Attorneys General "falls outside the scope of this traditional type of case."[75] The panel observed that "allowing the suit to proceed would in effect recognize an entirely new class of equitable action."[76]

However, the panel's position was that there was no strict need to decide whether the plaintiffs invoked a cognizable equitable cause of action. Rather, the panel explained, "the threshold matter to be decided [was] whether the District and Maryland have standing under Article III to pursue their claims, a question that goes to [the court's] judicial power." The panel concluded "that the District and Maryland do not have Article III standing to pursue their claims against the President" in his official capacity.[77] Thus, the panel "reverse[d] the district court's orders denying the President's motion to dismiss filed in his official capacity."[78] The panel did not reach the issue of whether the official capacity case was properly pled.

69. *Id.* at 11.

70. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (quoting A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)).

71. Reply Brief for Petitioner at 2, *In re* Trump, 958 F.3d 274 (4th Cir. 2020) (No. 18-02486).

72. *Id.* (citing *Grupo Mexicano de Desarrollo*, 527 U.S. at 318).

73. *In re* Trump, 928 F.3d 360 (4th Cir. 2019).

74. *Id.* at 373 (citing *Grupo Mexicano de Desarrollo*, 527 U.S. at 318–19).

75. *Id.* at 374.

76. *Id.*

77. *Id.* at 379–80.

78. *Id.* at 380.

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### *c. Fourth Circuit En Banc Decision*

In October 2019, the Fourth Circuit granted rehearing en banc.[79] And in May 2020, the en banc court reversed the panel's decision.[80] Judge Motz wrote the majority opinion, which was joined by Chief Judge Gregory and Judges King, Keenan, Wynn, Diaz, Floyd, Thacker, and Harris. In dissent were Judges Wilkinson, Niemeyer, Agee, Richardson, Quattlebaum, and Rushing. The majority opinion did not address whether the official-capacity claim was properly pled. Furthermore, the majority opinion did not settle whether the plaintiffs invoked a valid equitable cause of action. The Court recognized that the government's argument based on *Grupo Mexicano* was "plausible," but "the [scope of the] cited cases are not obviously limited in the way [suggested by the government]."[81] In other words, in the context of an "appeal" seeking mandamus, the precedents did not indisputably support the President's case.

Judge Wilkinson wrote the principal dissent. He found that the plaintiffs did not have standing to sue the President in his official capacity. Albeit, the dissenters seemed to assume that the official-capacity claim was properly pled.[82] However, Judge Wilkinson forcefully rejected the plaintiffs' argument that that the Emoluments Clauses provides "a ready-made equitable cause of action directly against the President in his official capacity."[83] He wrote, "[t]he majority is using a wholly novel and nakedly political cause of action to pave the path for a litigative assault upon this and future Presidents and for an ascendant judicial supervisory role over Presidential action."[84] Citing *Grupo Mexicano*, Judge Wilkinson concluded that "the allegations set forth in their complaint do not bring this action within the carefully circumscribed equity jurisdiction of the federal courts."[85] He added, "[i]ndeed, history, tradition, and precedent all underscore they lie outside it."[86] These "suits in equity comprise only those 'cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.'"[87] The plaintiffs failed to invoke the court's "equitable jurisdiction because they have not alleged 'a wrong which directly results in the violation of a *legal right*.'"[88] Specifically, "plaintiffs do not assert that President Trump's actions have infringed any traditional legal right."[89] Therefore, "the strict bounds of our

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79. *In re* Trump, 780 F. App'x 36, 37 (4th Cir. 2019).
80. *In re* Trump, 958 F.3d 274, 279 (4th Cir. 2020).
81. *Id.* at 286.
82. *Id.* at 301 (Wilkinson, J., dissenting) (explaining "how [the President] decides to allocate his energies and attentions in an *official capacity* is itself owed constitutional protection" (emphasis added)).
83. *Id.* at 305.
84. *Id.* at 291.
85. *Id.* at 293.
86. *Id.*
87. *Id.* (citing 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 33 (Boston, Hilliard, Gray & Company 1836), bit.ly/3qtE7wY).
88. *Id.* (quoting Ala. Power Co. v. Ickes, 302 U.S. 464, 479 (1938)) (emphasis added).
89. *Id.* at 294.

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equity jurisdiction under Article III render the federal courts powerless to unilaterally create and protect such a right."[90] The majority opinion did not address Judge Wilkinson's arguments concerning equitable jurisdiction.

### 2. The Individual-Capacity Claims

Initially in *District of Columbia v. Trump*—as in the other two Emoluments Clauses cases—the plaintiffs only sued the President in his official capacity. On October 6, 2017, we filed an amicus brief in support of the President. Most of our brief argued that the President was not subject to the Foreign Emoluments Clauses and the challenged commercial transactions were not "emoluments."[91] But on the final page of the brief, we included a short footnote:

> Plaintiffs' Complaint is brought against the President in his "official capacity." Compl. p. 4, ECF No. 1. Given that the case could not continue against the President's successor, this suit cannot be an "official capacity" suit. *See* Lewis v. Clarke, 137 S. Ct. 1285, 1292 (2017). *See* Seth Barrett Tillman, *The Emoluments Clauses Lawsuits's Weak Link: The Official Capacity Issue*, Yale J. of Reg. Notice & Comment Blog (Aug. 15, 2017), perma.cc/759Y-CC2R.[92]

We included similar footnotes in our briefs in *CREW* and *Blumenthal*.[93] This footnote would alter the course of *District of Columbia v. Trump*.

During oral argument, Judge Messitte referred to our amicus brief and repeatedly suggested that the plaintiffs amend their complaint to sue the President in his individual capacity. The plaintiffs followed Judge Messitte's suggestion and promptly amended their complaint to sue the President in his individual capacity.

As a result of the new Messitte-inspired claim, President Trump retained private counsel to oppose the newly-introduced individual-capacity claim. His attorneys promptly filed a motion to dismiss. Furthermore, Trump's counsel sought an expedited briefing schedule for that motion and also sought leave to participate in the oral argument which had already been scheduled for the official-capacity claim.

Judge Messitte permitted the expedited briefing schedule but refused to allow the individual-capacity counsel to be heard at that oral argument. Indeed, Judge Messitte never ruled on the individual-capacity defendant's motion to dismiss,

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90. *Id.* at 296.

91. Brief of Scholar Seth Barrett Tillman and Judicial Education Project as *Amici Curiae* in Support of the Defendant, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 27, https://perma.cc/HK64-R7AU.

92. *Id.* at 31 n.119.

93. Brief for Scholar Seth Barrett Tillman and Judicial Education Project as *Amici Curiae* in Support of the Defendant at 30 n.122, CREW v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Civ. A. No. 8:17-CV-01596-PJM), 2017 WL 269250, ECF No. 27, https://perma.cc/UUW2-5SYQ; Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* in Support of the Defendant at 22 n.89, Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (Civ. A. No. 1:17-cv-01154-EGS), ECF No. 16-1, https://perma.cc/WB6T-VXT4.

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even as he resolved motions concerning the official-capacity defendant. Furthermore, Messitte allowed discovery to go forward after he denied the DOJ's motion to dismiss the official-capacity claim. That discovery affected the interests of the individual-capacity defendant. At that point, the individual-capacity defendant appealed Messitte's refusal to decide *his* motion to dismiss. A Fourth Circuit panel found that it had appellate jurisdiction, and the panel remanded with instructions to dismiss the individual-capacity claim. However, the Fourth Circuit granted en banc review, and the en banc court reversed the panel's decision. The court held that the panel lacked jurisdiction to hear the interlocutory appeal from the President in his individual capacity.

In this part, we will trace the individual-capacity claims from the District Court to the Fourth Circuit panel to the en banc court.

*a. District of Maryland*

On January 25, 2018, Judge Messitte of the U.S. District Court for the District of Maryland held oral arguments.[94] At the outset of the proceedings, Judge Messitte referenced our amicus brief, which contended that the official-capacity suit was not proper:

> First, this is a suit against the President in his official capacity and yet, I understand the plaintiffs are also arguing that what he's done here is really as an individual. He's benefiting individually. There's at least one amicus brief I read that seem[s] to suggest that if he's sued in his official capacity, that changes the ballgame. Address that issue, if you will, somewhere along the way since if I'm correct in understanding plaintiff's [sic] position, it's because he's *personally profiting*, not because he is the President of the United States.[95]

However, Judge Messitte did not fault the plaintiffs for failing to plead their own case properly. Rather, he urged the plaintiffs to correct this error by amending their complaint to add a new claim against the President in his individual capacity.

Loren L. AliKhan, the D.C. Solicitor General, explained that the plaintiffs sued the President "in his official capacity because it is through this official capacity that he is both bound by the clauses and through which he is using his office to—."[96] Judge Messitte interrupted AliKhan. He said, "But you notice that the defense is transforming a suit against the President in his official capacity to a suit against the United States. That's where I'm stuck."[97] AliKhan replied, "we brought this suit against the President in his official capacity because we do

94. Transcript of Motion Proceedings Before the Honorable Peter J. Messitte United States District Judge, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 92 (emphasis added), https://perma.cc/CM3W-Z8SP.

95. *Id.* at 5:05–14 (emphasis added).

96. *Id.* at 44:17–20.

97. *Id.* at 44:21–24.

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believe it's his status as president that both makes these clauses applicable and that befalls the harms to the states that comes from his acceptance of emoluments."[98] Judge Messitte asked: "What would be the impropriety of bringing a suit against him individually and in his official capacity?" Messitte added, "[y]ou see suits like that all the time."[99] AliKhan could take a hint. She replied, "If this Court thought that this suit was more proper against the President in his individual capacity, we would absolutely seek to amend and could do so easily."[100] She added, if that "is a problem, it's one that can be cured."[101] Still AliKhan reiterated that she thought an official-capacity claim was proper, but said "of course, we could certainly amend."[102] Once again, Judge Messitte interrupted her: "Not sure what the harm is by doing that, but all right."[103]

Later in the hearing, AliKhan said, "if this Court feels that we also need to bring a case against [the President] in his individual capacity, we certainly will do so and are prepared to do so."[104] AliKhan reiterated that "I think that this case can move forward in just an official capacity, but if this Court would like us to amend."[105] The Court interrupted her:

> I'm not going to direct that you to do anything. I'm only pointing out to you that if for some reason down the road this case is determined to be one that ought to have been an individual capacity as opposed to official and/or the two, that's a problem you're going to face. And I can't really anticipate where a higher court would come out on this. That's your call, not mine really.[106]

As a practical matter, the Court's suggestion became the plaintiffs' legal strategy. AliKhan replied, "Certainly, and we will think about it."[107] That answer still was not good enough for Judge Messitte:

> You decide. I'm not making a decision one way or another, because you still seem to be arguing that, but this is not an official duty that he performed. This is something he's done in his private capacity. Now, how you get there in terms of the way in which you cast your suit, that's up to you.[108]

During the hearing, Brett Shumate argued on behalf of the Department of Justice. He observed that the plaintiffs did not contend that "the President is

98. *Id.* at 45:22–46:01.
99. *Id.* at 46:02–05.
100. *Id.* at 46:06–08.
101. *Id.* at 46:09.
102. *Id.* at 46:15.
103. *Id.* at 46:16–17.
104. *Id.* at 175:16–18.
105. *Id.* at 184:15–17.
106. *Id.* at 184:18–24.
107. *Id.* at 184:25.
108. *Id.* at 185:03–08.

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taking action in his personal capacity."[109] Judge Messitte interrupted Shumate. Messitte asked, "[y]ou don't" read their argument that way?[110] Judge Messitte, continued, "maybe I'm misreading something."[111] Shumate replied, "They're the ones that brought the Complaint in the official capacity."[112] Messitte expressed his frustration with how the plaintiffs pleaded their case. "Well, it puzzled me too, but I wonder if it isn't curable."[113] Shumate said if there is a "defect in the Complaint"—that is, the plaintiffs sued the defendant in the wrong capacity—"the Court should dismiss the Complaint and tell them to start over."[114] Judge Messitte rejected that proffer: "Well, I can grant them leave to amend."[115] He added that amendeded complaints "happen all the time."[116]

In prison litigation, it is perhaps common for federal district court judges during oral argument to advise impoverished and otherwise friendless litigants without representation to amend their civil rights pleadings.[117] With that help, substantial justice can be reached in spite of technical errors in pleadings. For example: a pro se prisoner incorrectly sues a warden for damages in his official capacity. In such a case, a district court judge might advise the plaintiff to sue the warden in his individual capacity. But the D.C. and Maryland Attorneys General were not pro se litigants. Shumate observed that all three lawsuits against the President were "brought against the President in his official capacity."[118] And the plaintiffs were represented "by very sophisticated counsel."[119] Their choice to sue the President only in his official capacity was deliberate.

Lest there be any doubt, Judge Messitte explained why he counseled the plaintiffs to amend their complaint: to ensure plaintiffs did not waive any issues for appeal.

> [R]ight now a lot of what they're saying sounds like it's the President acting in his individual capacity. Look, when you look down the road on a case like this, if it stays in court, it would be, I think, sort of a technical glitch if for some reason an appellate court or even the Supreme Court said, "oh, too bad you sued in his official capacity. You should have had individual capacity." Well, that possible glitch is covered if they amend, so it's really not impermissible. We do it all the time on motions to dismiss. You say, it's impermissible. I don't really buy that, unless I've operated wrong for the last 32 years.[120]

109. *Id.* at 97:12–13.
110. *Id.* at 97:15.
111. *Id.* at 97:15–16.
112. *Id.* at 97:17–18.
113. *Id.* at 97:19–20.
114. *Id.* at 97:21–23.
115. *Id.* at 97:24.
116. *Id.* at 98:04.
117. *See, e.g.*, Flynn v. Dep't of Corr., 739 F. App'x 132, 136 (3d Cir. 2018) (per curiam) ("The District Court thus erred when it (1) failed to offer Flynn an opportunity to amend and (2) did not say why.").
118. Transcript of Motion Proceedings, *supra* note 94, at 98:08–12.
119. *Id.* at 98:11–12.
120. *Id.* at 170:18–171:05.

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Judge Messitte wanted to ensure his decision was not reversed on appeal.

Towards the end of the argument, Steven Sullivan, the Maryland Solicitor General, said that the plaintiffs were "prepared to make that amendment as quickly as possible if the Court will grant leave and if the Court think[s] that's the best scenario to address that."[121]

When Judge Messitte made this suggestion, the only attorneys present before the court were plaintiffs' attorneys and Department of Justice attorneys for the official-capacity defendant. Judge Messitte urged the plaintiffs to sue Trump in his individual capacity. At that time, Trump did not have private counsel representing him in the proceedings. Judge Messitte did not merely recommend that the plaintiffs include an additional claim or theory of liability against a defendant who had already been sued and was represented in the proceedings before him. Rather, he recommended that the plaintiffs sue a new party who, at that time, had no representation in this case. Indeed, the interests of the Department of Justice did not align with the interests of Donald J. Trump personally.[122]

After the hearing, the D.C. and Maryland Attorneys General spoke to the press outside the courthouse. (Blackman, who attended the hearing, recorded their remarks.) Karl Racine, the D.C. Attorney General, indicated that the plaintiffs would consider amending their complaint in response to the court's comments and questions:

> The court indicated, as you know from being in the hearing that it asks the question because down the road it may be that if the injunction only applies to the president in his official capacity and not the president in his personal capacity, a later court might find the injunction to not be as expansive and legally correct as it otherwise might be. That's why we've agreed to take a hard look at whether we should file an amendment to include the president in his personal capacity.[123]

In effect, Judge Messitte became co-counsel, if not chief appellate strategist, for D.C. and Maryland.

Three weeks later, the plaintiffs sought leave to amend their complaint to include a claim against the President in his individual capacity.[124] They did so

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121. *Id.* at 167:24–168:02.

122. *See generally* Kathleen Clark, *The Lawyers Who Mistook a President for Their Client*, 52 IND. L. REV. 271 (2019).

123. Josh Blackman, *D.C. Attorney General Remarks after Emoluments Clauses Hearing*, YOUTUBE (January 25, 2018), https://youtu.be/8YySc7zATgU [https://perma.cc/N9DY-XS6J].

124. *See also* Motion for Leave to File an Amended Complaint and Apply the Pending Motion to Dismiss [Doc. 21] to the Amended Complaint at 2, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 90, https://perma.cc/M7RJ-GPD5; *cf.* Brief of Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* in Support of Neither Party with Respect to Motion to Dismiss on Behalf of Defendant in His Individual Capacity at 1, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), 2018 WL 2159867, ECF No. 114, https://perma.cc/QKP9-48VS.

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because that is what they were told to do.[125] The court promptly granted the motion to amend the complaint.[126]

The President in his individual capacity was a stranger to the lawsuit as it was originally brought. As a result of Judge Messitte's intervention, Trump—in his individual capacity—became a defendant. Moreover, because of Judge Messitte's strategic advice, Trump was required to retain private counsel.[127] His private counsel, who had sixty days to respond, sought leave to brief the outstanding motion to dismiss in an expedited fashion in order to participate in the already-scheduled oral argument.[128] The next day, Judge Messitte accepted the contracted briefing schedule, but he refused to let Trump's private counsel participate in the scheduled argument.[129] In their brief, the President's private counsel maintained that only an official-capacity claim would be proper, but an individual-capacity claim was not proper.[130]

In two opinions that addressed DOJ's motion to dismiss, the district court allowed the official-capacity claims to go forward. But neither opinion resolved the individual-capacity defendant's motion to dismiss. First, in March 2018, the court stated it would "deal with the viability of the individual capacity claims in a subsequent Opinion and Order."[131] Judge Messitte wrote, "[i]t remains to be seen whether the President should be in this case in his individual capacity in addition to or in lieu of his official capacity." Second, in July 2018, Judge Messitte, once again, stated that "[t]he Court will address the individual capacity claims and the arguments to dismiss them in a separate Opinion."[132] That "separate Opinion," adjudicating the individual-capacity defendant's arguments, would never come.

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125. Memorandum of Law in Support of Plaintiffs' Motion for Leave to File an Amended Complaint and to Apply the Pending Motion to Dismiss [Doc. 21] to the Amended Complaint at 2, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 90, https://perma.cc/9QMP-5X84 ("First, this motion is brought in good faith. Indeed, it was prompted by the Court's questioning at oral argument.").

126. *See* Memorandum Order Granting Motion to Amend Complaint, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 94, https://perma.cc/98UK-W44X.

127. CREW v. Trump, 971 F.3d 102, 133 n.9 (2d Cir. 2020) (Leval, J., filing a Statement in Support of the Denial of En Banc Rehearing) ("In a similar case before the District of Maryland, after the court granted the plaintiffs leave to amend their complaint to add the President 'in his individual capacity,' the President promptly retained counsel for that purpose." (citing Notice of Appearance, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596), ECF No. 109)).

128. *See* Partial Consent Motion to Participate in Oral Argument, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 110, https://perma.cc/R5M2-4X8Y.

129. *See* Memorandum Order Granting in Part and Denying in Part Motion for Leave to Appear at Oral Argument (Partially Consented), 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 111, https://perma.cc/G6WD-8M3F.

130. Reply in Support of Motion to Dismiss on Behalf of Defendant in His Official Capacity at 10, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 118, https://perma.cc/WKK6-ZVCZ ("Claims under the Emoluments Clauses must be brought against the President in his official capacity.").

131. District of Columbia v. Trump, 291 F. Supp. 3d 725, 733 n.4 (D. Md. 2018).

132. District of Columbia v. Trump, 315 F. Supp. 3d 875, 877 n.2 (D. Md. 2018).

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Indeed, Judge Messitte *never* resolved the individual-capacity defendant's motion to dismiss, which raised a potentially dispositive immunity defense.[133] The motion sat on Judge Messitte's docket for nearly three years: it was filed on May 1, 2018, fully briefed on May 25, 2018, and finally dismissed as moot when Judge Messitte dismissed the case on May 11, 2021.[134]

Judge Messitte treated DOJ's motion to dismiss in a very different fashion from how he treated the motion to dismiss filed by President Trump's personal counsel. Judge Messitte *promptly* ruled on all the motions proffered by the official-capacity defendant. But over the course of nearly three years, Judge Messitte never addressed the President's counsel's motion. Moreover, Judge Messitte's six-month Civil Justice Reform Act motion list was nearly spotless.[135] Messitte regularly resolved motions to dismiss in a timely manner, but he did not address the motion filed by the President's counsel.

Judge Messitte was responsible for adding the individual-capacity claim against the individual-capacity defendant. He was also responsible for trying to dismiss that claim at the eleventh hour. After Trump's private counsel filed a notice of appeal,[136] Judge Messitte *sua sponte* ordered both parties to address whether the Court can "dismiss without prejudice the claims against President Trump in his individual capacity, and if so, whether it should do so."[137] It was not hard for plaintiffs to read between the lines. Two days after the court issued its *sua sponte* order, the plaintiffs again did precisely what they were told. Rather than responding to the individual-capacity defendant's motion for a stay, plaintiffs moved to "voluntarily dismiss without prejudice the above-captioned action

133. Motion to Dismiss on Behalf of Defendant in His Official Capacity at 2, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-1596-PJM), ECF No. 112, https://perma.cc/PFH6-CZTJ (arguing that "[a]bsolute immunity bars individual-capacity lawsuits against the President for actions taken upon assumption of office").

134. *See* Final Order of Judgment, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 199, https://perma.cc/VEN6-GE3G.

135. In March 2018, Judge Messitte had one motion pending more than six months. ADMIN. OFF. OF THE U.S. CT., CIVIL JUSTICE REFORM ACT OF 1990 REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS ON MARCH 31, 2018 (2018), https://perma.cc/4RRN-M66W. In September 2018, Judge Messitte had one motion pending after six months. ADMIN. OFF. OF THE U.S. CT., CIVIL JUSTICE REFORM ACT OF 1990 REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS ON SEPTEMBER 30, 2018 (2018), https://perma.cc/K4NV-RMKD. In March 2019, Judge Messitte had three motions pending after six months. ADMIN. OFF. OF THE U.S. CT., CJRA TABLE 8—REPORT OF MOTIONS PENDING OVER SIX MONTHS FOR PERIOD ENDING MARCH 31, 2019 (2019), https://perma.cc/LV2Y-72FQ. In September 2019, Judge Messitte had zero motions pending after six months. ADMIN. OFF. OF THE U.S. CT., CJRA TABLE 8—REPORT OF MOTIONS PERIOD ENDING SEPTEMBER 30, 2019 (2019), https://perma.cc/AYH2-UJGX.

136. *See* Defendant's Notice of Appeal, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 147, https://perma.cc/WNR7-YJ5F (subsequently appearing on appeals court docket No. 18-2488).

137. Memorandum Order at 1, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 150, https://perma.cc/4JJF-V5YR.

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against Donald J. Trump in his individual capacity to allow the claims against President Trump in his official capacity to move forward expeditiously."[138]

*b. Fourth Circuit Panel Decision*

On appeal, the same three-judge panel that heard the official-capacity case also heard the individual-capacity case. Once again, Judge Niemeyer wrote the majority opinion, which was also joined by Judges Quattlebaum and Shedd. The panel found that "the District and Maryland do not have standing under Article III to pursue the claims against the President in his individual capacity."[139] Therefore, the panel "remand[ed] with instructions to dismiss the complaint with prejudice."[140] The panel did not opine on whether an individual-capacity claim was otherwise properly pled. This decision would not stand for long.

*c. Fourth Circuit En Banc Decision*

The Fourth Circuit also granted en banc review of the individual-capacity claim. This appeal had a separate civil action number. The Fourth Circuit treated this appeal as a separate case from the appeal addressing the official-capacity claim against the official-capacity defendant. Once again, Judge Motz wrote the majority opinion. The en banc court found that the court lacked jurisdiction to hear the interlocutory appeal from the President in his individual capacity.[141] Judge Messitte had never formally ruled on the pending motion to dismiss the individual-capacity claim. In such circumstances, the trial court did not issue a final order on the individual-capacity claim. Therefore, the majority reasoned, Trump's appeal was not properly before the Fourth Circuit.

Judge Niemeyer wrote the principal dissent. He contended that the court of appeals did have appellate jurisdiction. Niemeyer also observed that the district court "repeatedly deferred ruling on the President's individual capacity claim of absolute immunity, instead ordering full discovery to proceed against the President in his official capacity."[142]

Judge Richardson wrote a solo dissent.[143] He stated that the President could only violate the Emoluments Clauses in his official capacity. The President can be sued "in his individual capacity only . . . for his purely private conduct."[144] Richardson wrote, "[t]he duty sued on must match the Presidential personality sued." However, compliance with the Emoluments Clauses was part of the President's "official Presidential duties."[145] He added, this "legal duty [is]

138. Notice of Voluntary Dismissal of Donald J. Trump, in His Individual Capacity, Pursuant to Fed. R. Civ. P. 41(a)(1)(a)(i) at 1, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 154, https://perma.cc/Q5GK-4ANU.

139. District of Columbia v. Trump, 930 F.3d 209, 211 (4th Cir. 2019).

140. *Id.*

141. District of Columbia v. Trump, 959 F.3d 126, 129 (4th Cir. 2020).

142. *In re Trump*, 958 F.3d 274, 313 (4th Cir. 2020) (Niemeyer, J., dissenting).

143. *District of Columbia*, 959 F.3d at 142 (Richardson, J., dissenting).

144. *Id.*

145. *Id.* at 144.

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imposed on the President, *because* he is President, for so long as he is President, and that he must execute as President."[146] He reasoned, "[t]he President may not be sued in his individual capacity for violating his official duties."[147] Here, "the Plaintiffs sued the President in his individual capacity for an official duty."[148] And "[t]he President is not subject to personal suit for his official duties."[149]

### 3. On Appeal to, and on Remand from, the Supreme Court

On September 9, 2020—four months after the en banc Fourth Circuit decision—the Department of Justice filed a timely petition for a writ of certiorari with the Supreme Court.[150] (Due to the COVID-19 pandemic, the Supreme Court gave parties up to 150 days to file a petition for a writ of certiorari.[151]) The President's private counsel did not appeal the Fourth Circuit's en banc decision.

The respondents, the D.C. and Maryland Attorneys General, requested an extension of their deadline from October 14, 2020 to November 28, 2020. With this plan, the respondents could file their response *after* the presidential election.[152] The Court granted that extension.[153] On November 18, 2020, the respondents requested another extension from November 30, 2020 to December 30, 2020.[154] The Court granted an extension to December 14, 2020. The Attorneys General filed their response that day.[155] The plaintiffs argued that "the outcome of the recent presidential election eliminates any need for this Court's intervention."[156] After President Biden's inauguration, "the prospective injunctive relief sought by the District of Columbia and the State of Maryland will become unnecessary, and the case will become moot."[157]

On December 23, 2020, the Acting Solicitor General filed his reply brief. He largely agreed the case would become moot after the change in administration. DOJ's brief stated, "if Congress accepts the votes of the Electoral College, the

146. *Id*. (emphasis added).
147. *Id*. at 142.
148. *Id*. (emphasis omitted).
149. *Id*.
150. Petition for Writ of Certiorari, Trump v. District of Columbia, 141 S. Ct. 1262 (2021) (No. 20-331), https://perma.cc/EY4E-ZJHS.
151. Miscellaneous Order, 589 U.S. (Mar. 19, 2020), https://perma.cc/R5WK-LWNV.
152. Extension Request at 1, Trump v. CREW, 141 S. Ct. 1262 (No. 20-331), https://perma.cc/WU8A-63RZ.
153. *Trump v. District of Columbia, No. 18-2486*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-331.html [https://perma.cc/C4TD-8LER].
154. Request for an Extension of Time to File a Response to a Petition for a Writ of Certiorari, *CREW*, 141 S. Ct. 1262 (No. 20-331), https://perma.cc/Z2GG-6VWU.
155. Brief in Opposition, *CREW*, 141 S. Ct. 1262 (No. 20-331), https://perma.cc/JW2F-6ZWF.
156. *Id*. at 2.
157. *Id*.

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Court should hold the petition until it becomes moot after the inauguration, and then grant certiorari and vacate under *United States v. Munsingwear, Inc*."[158]

On January 25, 2021—five days after the inauguration—the Supreme Court vacated the judgment of the Fourth Circuit, and remanded the case "with instructions to dismiss the case as moot."[159] And on March 9, 2021, the Fourth Circuit "dismiss[ed] this appeal as moot."[160] The panel also vacated the trial court decisions below: "*District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018); 315 F. Supp. 3d 875 (D. Md. 2018); and 344 F. Supp. 3d 828 (D. Md. 2018)."[161] And the court of appeals "remand[ed] with instructions to dismiss the case."[162]

On May 11, 2021, Judge Messitte dismissed the entire case as moot.[163] After nearly four years of litigation, the case came to a close. The plaintiffs, across all three cases, did not even obtain a single document from discovery, let alone a final judgment against the President.

## II. THE PLAINTIFFS SUED PRESIDENT TRUMP IN HIS OFFICIAL CAPACITY, BUT THEY COMPLAINED OF QUINTESSENTIALLY PERSONAL CONDUCT TAKEN BY DONALD J. TRUMP AND BY TRUMP-AFFILIATED PRIVATE COMMERCIAL ENTITIES

In the Emoluments Clauses litigation, the plaintiffs lacked standing because they sued the wrong defendant. They complained of quintessentially personal conduct taken by Donald J. Trump and by Trump-affiliated private commercial entities. But they sued the official-capacity defendant. And, in one case, the plaintiffs also sued the President in his individual capacity. However, neither defendant caused the alleged injuries.

Government officers can commit torts in three distinct fashions. And lawsuits filed in each fashion must be pled differently in order to identify who is, in fact, being sued. First, a government officer violates the Constitution in his *official capacity* if—and only if—a government "'policy or custom' *must* have played a part in the violation of federal law." Second, a government officer violates the Constitution in his *individual capacity* if the officer was acting under the *color of law*, but was not acting pursuant to a government policy or custom. But there is a third, less common way in which a government officer can be sued: he can be sued *personally* for a claim that involves private conduct but which does not involve state action. The Thirteenth Amendment and the Twenty-First Amendments can be violated in these three fashions. The Foreign and Domestic Emoluments Clauses can also be violated in these three fashions.

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158. Reply Brief for the Petitioner, *District of Columbia*, 141 S. Ct. 1262 (No. 20-331), https://perma.cc/L579-7PXW.

159. *District of Columbia*, 141 S. Ct. at 1262.

160. District of Columbia v. Trump, 838 F. App'x 789, 790 (4th Cir. 2021).

161. *Id.*

162. *Id.*

163. Final Order of Judgment, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2021) (Civ. A. No. 8:17-CV-01596-PJM), ECF No. 199, https://perma.cc/VEN6-GE3G.

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The plaintiffs did not simply have a binary choice: official-capacity and/or individual capacity. The president has three bodies, and he can violate the Domestic Emoluments Clause in each of the three fashions. (In our view, the President is not subject to the Foreign Emoluments Clause, but the capacity analysis would be the same for both clauses.) Not everything the President does during his tenure is, *ipso facto*, an "official act." In any event, the capacity analysis does not turn on whether an act is official. More importantly, not every wrong by the President or by other government officials involves a government "policy or custom." And not every wrong by the President or by other government officials involves conduct under the "color of law."

Failing to sue the President in the correct capacity should have precluded plaintiffs' case from going forward. Specifically, the plaintiffs lacked standing to sue President Trump in his official and individual capacities; he could only be sued personally. And because Trump did not *cause* those injuries in his official- or individual- capacities, the plaintiffs' alleged injuries could not be redressed. The complaints should have been dismissed because the plaintiffs sued the wrong defendant. If the plaintiffs sued the wrong defendant, any judicial order granted by the court could only run against that defendant. And because the court could only grant relief against that wrong defendant, the court could not redress harm caused by the correct defendant, who actually caused the harm. Critically, if a court cannot redress a plaintiffs' alleged harm, then the plaintiffs lack standing.

### *A. Government Officers Can Commit Torts in Three Distinct Fashions: Official Capacity, Individual Capacity, and Personally*

Generally, government officers can violate the Constitution in two capacities: their official capacity and their individual capacity. First, a government officer violates the Constitution in his *official capacity* if—and only if—a government "'policy or custom' *must* have played a part in the violation of federal law."[164] In an official-capacity case, the plaintiff may sue a government entity, or a named individual, or both. In those cases where the plaintiff sues an individual defendant, the named defendant is merely a nominal defendant. The suit, in fact, lies against the government entity that adopted the policy or custom. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."[165] Second, a government officer violates the Constitution in his *individual capacity* if the officer was acting under the *color of law*, but was not acting pursuant to a government policy or custom.[166] In a typical individual-capacity case, the named defendant is not a nominal defendant. The suit actually lies against that individual defendant. These two types of lawsuits do have something in common—in both cases, the defendant is affiliated with the government.

164. Hafer v. Melo, 502 U.S. 21, 25 (1991) (emphasis added) (citations omitted).
165. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).
166. *Id.*; *see also* 42 U.S.C. § 1983 (1996).

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In *Lewis v. Clarke*,[167] the Supreme Court explained this "distinction between individual- and official-capacity suits."[168] With "an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself."[169] For that reason, "when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation."[170] With an official-capacity claim, "[t]he real party in interest is the government entity, not the named official."[171] But with an individual-capacity claim, the real party in interest is the named official. And the suit continues against that individual even if he leaves government service.

Generally, an official-capacity suit seeks injunctive relief to prospectively halt the unlawful government policy or custom. And generally, an individual-capacity suit seeks retrospective monetary damages against the government officer who acted unlawfully without regard to any government policy or custom. But the distinction between an official-capacity suit and an individual-capacity suit does not turn on the remedy sought. For example, the plaintiffs in *Blumenthal v. Trump* stated, "[q]uite simply, whether a suit is an official- or personal-capacity suit turns on the nature of the relief sought: a suit seeking injunctive or declaratory relief, rather than monetary damages, is *always* an official-capacity suit."[172] Under settled legal doctrine, the *Blumenthal* plaintiffs were incorrect.

Damages are generally unavailable in official-capacity suits due to sovereign immunity. But where there is a waiver of sovereign immunity, damages could be had in an official-capacity case. Moreover, retrospective monetary damages are likely unavailable where the entirety of a plaintiff's injury is premised on threatened future harm. By contrast, in individual-capacity suits injunctive relief is uncommon, but it is arguably permissible where damages would not fully redress the plaintiff's injury. Several courts of appeals have upheld injunctive relief in certain types of individual-capacity *Bivens* suits.[173] Indeed, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, Justice Harlan observed

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167. 137 S. Ct. 1285 (2017).

168. *Id.* at 1291.

169. *Id.*

170. *Id.*

171. *Id.*

172. Plaintiffs' Supplemental Memorandum at 33, Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (Civ. A. No. 1:17-cv-01154-EGS), ECF No. 50 (emphasis added), https://perma.cc/J7C8-7NH2.

173. *See, e.g.*, Bunn v. Conley, 309 F.3d 1002, 1009 (7th Cir. 2002) ("A *Bivens* claim can be brought as an allegation that a constitutional injury arose out of the actions of federal agents—regardless of the nature of the relief sought."); Foreman v. Unnamed Officers of the Fed. Bureau of Prisons, Civ. A. No. DKC 09-2038, 2010 WL 4781333, at *2–3 (D. Md. Nov. 17, 2010) (Chasanow, J.) (observing that the Fourth Circuit "squarely held that a court may order declaratory and injunctive relief in a '*Bivens* type' action" (quoting Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987))). *But cf.* Solida v. McKelvey, 820 F.3d 1090, 1093–94 (9th Cir. 2016) ("holding that relief under Bivens does not encompass injunctive and declaratory relief where, as here, the equitable relief sought requires official government action"); Higazy v. Templeton, 505 F.3d 161, 169 (2d Cir. 2007) ("The only remedy available in a Bivens action is an award for monetary damages from defendants in their individual capacities.").

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that "[i]t will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court."[174]

But those rare cases exist. For example, a court could enjoin a rogue officer who threatens to repeatedly violate the law in the future, and to do so under the color of law, without regard to any official custom or policy. Damages might not prevent the officer, in his individual capacity, from engaging in threatened future violations of civil rights and the Constitution. Likewise, damages are less likely to have a meaningful deterrent effect when the state indemnifies all wrongdoing by the officer. In light of that indemnification, the officeholder may *continue* violating federal law even after a court enters a final judgment concluding he was at fault and is subject to monetary damages. To use another example based on the Foreign Emoluments Clause, a court could enjoin an officer subject to the clause from accepting foreign gifts, even though agency policy prohibits accepting such gifts.

Consider two hypotheticals that further illustrate this distinction between an official-capacity claim and an individual-capacity claim. First, a prison adopts an official policy that requires prison guards to open and read all mail between prisoners and their attorneys. A prison guard follows that policy and reads a prisoner's privileged correspondences. Such a policy would be unconstitutional.[175] And the prisoner could sue the prison guard and warden for violating his civil rights pursuant to an official, albeit unconstitutional, government policy. In this hypothetical official-capacity suit, the prison guard and warden are nominal defendants. The suit would continue even if the prison guard and warden were no longer employed by the prison. The court would simply substitute their successors' names onto the caption—so long as the prison continues to follow that illegal custom or policy. In an official-capacity case, the actual and only defendant is the government entity responsible for enforcing the illegal or unconstitutional policy. Here, the government entity is the prison, and any judicial remedy would run against the prison. For example, an injunction would preclude the prison from prospectively enforcing its unconstitutional policy.

In the second hypothetical, a prison guard wrongfully unseals and reads a prisoner's privileged mail. He does so while working in the prison mailroom, where he has lawful access to unopened correspondences. The guard's decision to open and read the prisoner's mail is his own initiative—he is not following any government policy or custom. Indeed, the prison policy expressly prohibits guards from reading privileged mail. Here, the prison guard went rogue. In this hypothetical suit, the prisoner could not sue the prison or the guard in his official capacity. On these facts, there is no "policy or custom" that played a part, much less a policy or custom that "must" have played a part, in the violation of federal law.[176] To the

174. 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

175. *See* Procunier v. Martinez, 416 U.S. 396 (1974); Hayes v. Idaho Corr. Ctr., 849 F.3d 1204 (9th Cir. 2017).

176. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991).

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contrary, the guard intentionally violated the prison's policy barring the reading of privileged correspondences.

In these circumstances, an official-capacity claim could not succeed. But the prisoner could still sue the defendant in his individual capacity. Why? Because the guard acted under the *color of law*. The guard violated the prisoner's civil rights while he was wearing a prison guard uniform and while he was on duty as a prison employee. Moreover, his government employment provided him with lawful access to the prison mail room. Finally, the guard had apparent authority to intercept the mail. Here, any judicial remedy would run against the prison guard, and not against the prison. A court could award retrospective monetary damages against the prison guard, but not against the prison. The individual-capacity suit could proceed against the guard even if he resigned from prison service. This suit would be a stereotypical individual-capacity claim.

In this hypothetical, a government policy or custom did not play any actual part in the violation of federal law. Therefore, it would be impossible for a court to prospectively enjoin enforcement of any government custom or policy. Generally, there would be no need to grant injunctive relief against the individual defendant guard. In the absence of a government policy or custom playing a part in the legal violation, there is no reason to believe the defendant guard will again engage in wrongdoing. But scenarios do exist where injunctive relief could be proper. For example, the prison guard ignores the monetary award perhaps because all damages awards are indemnified by the state. Then the guard *continues* and openly threatens to *continue* to open plaintiff's mail. And he does so even after a court enters a final judgment concluding that the guard was at fault and was subject to monetary damages. In such circumstances, injunctive relief may be the only remedy that fully redresses the plaintiff's ongoing injuries.

These two hypotheticals illustrate the two capacities in which government officers are generally sued. But there is a third, less common fashion in which a government officer can be sued: he can be sued *personally*. We use the phrase *personal* claim as distinct from an *individual-capacity* claim, which (unfortunately) courts sometimes refer to as a *personal-capacity* claim. For example, in *Kentucky v. Graham*, a government officer was sued "in both his 'individual' and 'official' capacities."[177] Yet, throughout the opinion, the Court used the phrase "individual" and "personal" interchangeably.[178] Indeed, the Court stated, "[p]ersonal-capacity actions are sometimes referred to as individual-capacity actions."[179] We distinguish between individual-capacity claims and personal claims.

177. Kentucky v. Graham, 473 U.S. 159, 169 (1985).

178. *See id.* at 161 ("The question presented is whether 42 U.S.C. § 1988 allows attorney's fees to be recovered from a governmental entity when a plaintiff sues governmental employees only in their *personal* capacities and prevails." (emphasis added)).

179. *Id.* at 165 n.10.

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Consider a third hypothetical to illustrate this distinction. A prison guard breaks into the law offices of the prisoner's attorney while the guard was off-duty and out of uniform. At the prisoner's attorney's office, the guard opens and reads the prisoner's privileged correspondences. Here, the prisoner was injured in the same way as the prisoners were in the two prior hypotheticals. Such conduct is tortious and likely criminal. But this conduct would not support a cognizable federal civil rights claim. The wrong was not performed pursuant to a government *policy or custom*. Therefore, the prisoner could not sue the guard in his official capacity. Likewise, the guard did not act under the *color of law*. He was off-duty and out of uniform. In committing the wrongful conduct, the defendant guard did not make use of any apparent government authority. Therefore, the prisoner could not sue the defendant guard in his individual capacity.

In this third hypothetical, the guard's conduct was no different from the actions of a private tortfeasor, who lacked any connection to the government. A personal claim is simply a tort claim under state or municipal law. A personal claim could also arise based on federal territorial law, but this third category does not include a Section 1983 civil rights lawsuit. The defendant guard is a government officer or employee. But no state action is at issue. Given these facts, the prisoner could not bring a Section 1983 civil rights lawsuit. Of course, the prisoner could sue the guard *personally* for the guard's private tortious conduct. But such a lawsuit would only be viable if state or federal law created a cause of action. In the absence of an express or implied cause of action, the prisoner would be out of luck. Not every wrong can be remedied by a Section 1983 civil rights action.[180]

### *B. Four Provisions of the Constitution Can Be Violated in Three Fashions*

Generally, the Constitution limits state action. However, the Constitution does impose some restrictions on private actors. The Thirteenth Amendment, which prohibits slavery, is the most-well known regulation of private conduct. The Twenty-First Amendment is a lesser-known restriction. It empowers states to prohibit the transportation or possession of alcohol. Thus, private actors who violate those state liquor laws also violate the Twenty-First Amendment.

There are two far lesser-known restrictions on private conduct. Unlike the Thirteenth and Twenty-First Amendments, both of these other restrictions appear in the Constitution of 1788. First, the Foreign Emoluments Clause governs the personal conduct of a wide range of federal office holders. Second, the Domestic Emoluments Clause regulates the personal conduct of one person: the President of the United States. The Emoluments Clauses can be violated in three separate fashions: (1) official capacity; (2) individual capacity; and (3) personally.

180. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) ("If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.").

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### 1. The Thirteenth Amendment Can Be Violated in Three Fashions

The Thirteenth Amendment declares that "slavery" shall not "exist within the United States."[181] Unlike the Fourteenth Amendment, the Thirteenth Amendment's blanket prohibition on slavery does not impose an express state-action requirement.[182] It follows that the Thirteenth Amendment can be violated in three different fashions.

First, if a government officer enslaves a person pursuant to a government custom or policy, then he violates the Thirteenth Amendment in his *official* capacity.[183] This conclusion is true even though the offending government policy or custom is unconstitutional. Legal challenges to such violations must be filed against the government entity responsible for the illegal custom or policy or against a government official in his official capacity.

Second, a government officer could also enslave a person without regard to any government policy or custom, but, nevertheless, while still acting under the color of law. For example, the officer enslaves a person while wearing his government uniform or while he was on duty. Or he does so while using government property which he is authorized to make use of as part of his regular job-related responsibilities. In these scenarios, the officer violated the Thirteenth Amendment in his *individual* capacity. The sovereign played no role in this rogue violation of the Thirteenth Amendment.

There is also a third fashion in which the Thirteenth Amendment can be violated by a government officer; i.e., he acted *personally*. For example, if a government officer enslaves a person in the government officer's privately-owned home, while using his own resources, or while out of uniform on his own time, such conduct gives rise to a personal claim against the government officer. Here, the officer personally committed a constitutional tort: he violated the Thirteenth Amendment, which applies to government and private conduct. The officer was not acting for the sovereign to carry out a government policy or custom, hence he did not act in his official capacity. And the officer did not act under the color of law. Thus, an individual-capacity action could not lie. In this third scenario, a lawsuit against the officer in his official or individual capacity would not be properly pled. Rather, the officer could only be sued personally for what is in effect a private constitutional tort—assuming there is standing and a valid cause of

181. U.S. CONST. amend. XIII, § 1.

182. *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("And such legislation may be primary and direct in its character; for the [thirteenth] amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.").

183. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991) ("Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, 'the entity's "policy or custom" *must have played a part* in the violation of federal law.'" (citations omitted) (emphasis added)).

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action.[184] Here, relief could only run against the wrongdoer and not against the government itself. The Twenty-First Amendment operates in a similar manner.

2. The Twenty-First Amendment Can Be Violated in Three Fashions

The Twenty-First Amendment can also be violated by private conduct. This provision is perhaps best known for repealing the Eighteenth Amendment, which imposed prohibition. But the Twenty-First Amendment also gave the States an express power to regulate the transportation and importation of liquor. Specifically, it provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof, is hereby prohibited*."[185] In other words, violating a state's prohibition laws in fact violates the Constitution. This analysis applies to the population generally, and equally to government officers in their official and individual capacities. It follows that the Twenty-First Amendment can be violated in three fashions.

Imagine that the Maryland legislature invokes its powers under the Twenty-First Amendment, and it passes a statute to prohibit the importation of intoxicating liquors. In response, three Virginia mayors transport alcohol into Maryland in three different, but equally unlawful ways.

First, the Mayor of Charlottesville distills alcohol in City Hall pursuant to a city policy. He then ships that liquor from Virginia to Maryland pursuant to the same city policy. In this scenario, the Charlottesville mayor has violated the Twenty-First Amendment in his official capacity.

Second, the Mayor of Richmond distills alcohol in the mayor's City Hall bathroom. That bathroom is provided for that public official's exclusive use. He then transports that liquor into Maryland using his government vehicle, as well as other government vehicles over which he has authority. Furthermore, he relies on this authority to order municipal police to clear road traffic to facilitate the transportation of the liquor. In this scenario, the mayor did not purport to create any municipal custom or policy. Nor did he purport to act in conformity with any municipal custom or policy. The mayor went rogue. In fact, in this hypothetical, municipal law expressly prohibits using government property and personnel personnel with intent to transport alcohol out of state. Here, the Richmond mayor has violated the Twenty-First Amendment in his individual capacity. He acted

184. *See supra* Part II. Where suing a government officer *personally*, the elements or standards applicable to such a cause of action would be the same ones which would apply to any private individual sued for the same wrong or offense. In such circumstances, a government officer might, under certain conditions, also be impeachable for such conduct, where such conduct violates established positive law. *See* Josh Blackman & Seth Barrett Tillman, *Defining a Theory of "Public" and "Private" Offenses for Impeachment*, REASON: VOLOKH CONSPIRACY (Feb. 3, 2021, 6:00 PM), https://reason.com/volokh/2021/02/03/defining-a-theory-of-public-and-private-offenses-for-impeachment/ [https://perma.cc/L3NY-XNXA]; *see also* Josh Blackman & Seth Barrett Tillman, *Defining a Theory of "Bribery" for Impeachment*, LAWFARE (Dec. 6, 2019, 12:43 PM), https://www.lawfareblog.com/defining-theory-bribery-impeachment [https://perma.cc/F6A2-ANV2].

185. U.S. CONST. amend. XXI, § 2 (emphasis added).

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under the color of state law, but not pursuant to any government policy or custom.

Third, the Mayor of Arlington brews beer in his bathtub in his privately owned home. He then transports the beer into Maryland in his private vehicle. This mayor's actions also run afoul of the Twenty-First Amendment, but there is no state action. The mayor is not acting pursuant to a municipal policy or custom. He does not use government property. Nor is the mayor acting under the color of law. He relied entirely on his own property and made alcohol off the clock. Here, the Arlington mayor has personally violated the Twenty-First Amendment. The Arlington mayor could not be sued in his official or individual capacity. He could only be sued—if at all—personally. Again, in such a lawsuit, the plaintiffs would need to have standing and a cause of action.

Nothing about the capacity question hinges on whether Marylanders, or anyone else, purchase the mayoral moonshine to generate goodwill with the Virginia politicians. Even if a Baltimore bar unlawfully purchased the Arlington Mayor's home-brewed booze to curry favor with him or with the Virginia state government, or even both, any civil claim challenging that transaction would remain a personal action. The buyers' motivation or intent—even an intent to bribe the Virginia municipal official—cannot turn a personal action against a government officer into an official-capacity or an individual-capacity claim. The only type of civil claim that could lie against the Arlington mayor would be a personal tort claim.

#### 3. The Foreign and Domestic Emoluments Clauses Can Also Be Violated in Three Fashions

Professor Tribe identified "only" two ways in which private conduct can run afoul of the Constitution: the Thirteenth and Eighteenth Amendments.[186] In our view, the Foreign Emoluments Clause and the Domestic Emoluments Clause are two other such constitutional provisions that can regulate both government and private conduct.

The Foreign Emoluments Clause provides that "no Person holding any Office of Profit or Trust under them [i.e., the United States], 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."[187] The constitutional tort is the wrongful "accept[ance]" of a proscribed "present, Emolument, Office, or Title" by a person holding an "office . . . under [the United States]."[188] This provision can be violated in three separate fashions: (1) official capacity; (2) individual capacity; and (3) personally. Indeed, the plaintiffs in *Blumenthal v. Trump*

186. *See* Tribe, *supra* note 10, at 220.

187. U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

188. Our position is that the President is not subject to the Foreign Emoluments Clause. *See* Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* Supporting Petitioner, *In re* Trump (District of Columbia v. Donald J. Trump), No. 20-331 (U.S. filed Oct. 14, 2020), https://perma.cc/HGU3-FLQ6.

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observed that the Foreign Emoluments Clause is "*unusual* in regulating the *private* conduct of federal officials."[189] (Nevertheless, those same plaintiffs sued President Trump exclusively in his *official* capacity.[190])

Similarly, the Domestic Emoluments Clause regulates both government and private conduct. It provides that "[t]he President . . . shall not *receive* within that Period any other Emolument from the United States, or any of them."[191] Here, the constitutional tort is the wrongful "recei[pt]" by the President of a proscribed "Emolument" from the federal government or from a state. To draw an analogy from criminal law, the *actus reus* of this wrong is the President's receipt of the prohibited emolument. The Domestic Emoluments Clause also can be violated in three separate fashions: (1) official capacity; (2) individual capacity; and (3) personally.

The two Emoluments Clauses are similar to the Thirteenth and Twenty-First Amendments: all four provisions regulate both government and private conduct. However, the Emoluments Clauses differ from the Thirteenth and Twenty-First Amendments in one important respect. The Thirteenth and Twenty-First Amendments apply to all Americans—government officials and private citizens alike. By contrast, the Emoluments Clauses are only triggered by people holding specific positions in the federal government. But, once triggered, all four provisions operate in the same three fashions. The provisions control *official-capacity* conduct, *individual-capacity* conduct, and *personal* conduct. And, depending on the facts of a given case, these torts could be challenged through official-capacity claims, individual-capacity claims, and personal claims.

To illustrate the distinction between these three types of claims, consider three hypotheticals based on the Foreign Emoluments Clause. In this analysis, we assume that such claims are otherwise justiciable, and that plaintiffs have a valid cause of action.

First, the State Department established a policy that *requires* ambassadors to accept and keep all foreign state gifts *without* seeking congressional consent. This policy would be patently unconstitutional, because the Foreign Emoluments Clause expressly requires ambassadors to seek such consent. An ambassador who follows the policy, and accepts a foreign state gift, would violate the Foreign Emoluments Clause in his official capacity. A plaintiff with standing and a cause of action could sue the ambassador in his *official* capacity. In that suit, the ambassador would be a nominal defendant. The State Department would be the real party-in-interest, because it is the government entity that had adopted the unconstitutional policy. Any judicial remedy would enjoin the State Department from prospectively enforcing its unconstitutional government policy.

189. Plaintiffs' Supplemental Memorandum at 36 n.14, Blumenthal v. Trump, 382 F. Supp. 3d 77 (D.D.C. 2019) (Civ. A. No. 1:17-cv-01154-EGS), 2018 WL 2042238, ECF No. 50 (emphasis added), https://perma.cc/4FKN-R7CK.

190. *See infra* Part II.D.

191. U.S. CONST. art. II, § 1, cl. 7 (emphasis added).

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In the second hypothetical, the State Department has not adopted any policy or custom that requires ambassadors to accept foreign state gifts. Indeed, the State Department has a policy that expressly prohibits ambassadors from accepting foreign state gifts. However, an ambassador disregards that policy: he decides to accept a foreign state's gift. While on duty, the ambassador writes to a foreign government on government stationery using official diplomatic channels. The ambassador is authorized to use these diplomatic channels as part of his regular job-related responsibilities. The ambassador states that he will accept and keep a particular, expensive diplomatic state gift. In accepting the gift, the ambassador directs the foreign state to place the gift on the mantle of his diplomatic residence, which is owned by the federal government. Subsequently, the ambassador sends the gift to his private home in the United States.

Here, the ambassador did not violate the Foreign Emoluments Clause pursuant to any government policy or custom. But the ambassador committed the constitutional tort under the color of law: he "accept[ed]" the prohibited foreign gift through the use of his apparent authority, and he used government diplomatic channels to do so. Moreover, the ambassador was authorized to use these diplomatic channels as part of his regular job-related responsibilities. As a result, the ambassador would have violated the Foreign Emoluments Clause in his individual capacity. A plaintiff with standing and a cause of action could sue the ambassador in his *individual* capacity. The offending ambassador would be the actual defendant, rather than the State Department. The State Department had not adopted any policy or custom that led to this constitutional violation. Any judicial remedy would run against the ambassador alone, even if he left federal service.

There is a third fashion in which the ambassador could violate the Foreign Emoluments Clause. Let's assume that the King of Blackacre is a good friend of an American citizen. Later, that American is appointed as the ambassador to Blackacre. The King then gives that ambassador an expensive state gift, in light of the goodwill the two men had shared prior to the ambassador's appointment. The ambassador personally accepts and keeps that gift, without making use of any apparent authority or government diplomatic channels.

Here, the ambassador did not accept the gift pursuant to a State Department policy or custom. Thus, an official-capacity case is not possible. Moreover, the ambassador did not accept the gift under the color of law. Therefore, an individual-capacity case is not possible. At most, a plaintiff with standing and a cause of action could bring a suit *personally* against the ambassador for violating the Foreign Emoluments Clause.

### *C. The President Has Three Bodies*

In the Emoluments Clauses litigation, the plaintiffs, defendants, and several judges all used the same reasoning to conclude that the official-capacity claims were properly pled. For example, Loren AliKhan, the D.C. Solicitor General, explained that the plaintiffs sued the President "in his official capacity because it

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is through this official capacity that he is . . . bound by the clauses . . . ."[192] Likewise, Circuit Judge Richardson rejected the individual-capacity claim. He explained that only an official-capacity claim could be properly pled, since the "legal duty" from the Emoluments Clauses is "imposed on the President, *because* he is President, for so long as he is President, and that he must execute as President."[193] We think this capacity analysis advanced by Judge Richardson, AliKhan, and others was incorrect.

In short, the parties contended that the Constitution imposes certain duties on the President, and therefore the violation of those duties *must* be an official-capacity claim. We disagree with this reasoning. No other area of civil rights litigation follows this framework. Would this reasoning work in the context of any other constitutional provision? Could prisoners or individual defendants make the following argument: the Fourth Amendment imposes certain duties on a prison guard and, therefore, the violation of those duties *must* always give rise to official-capacity claims? Of course not. The mere fact that a provision of the Constitution imposes a duty on an officeholder does not make all actions that violate this duty, per se, subject to an official-capacity claim.

The plaintiffs' argument also conflicts with the Supreme Court's decision in *Hafer v. Melo*. *Hafer* established that the relevant test is not whether the Constitution imposes some duty on the officeholder. Rather, the Supreme Court has stated that a government officer violates the Constitution in his *official* capacity if—and only if—a government "'policy or custom' . . . *must* have played a part in the violation of federal law."[194] Throughout nearly four years of litigation, none of the litigants or courts grappled with *Hafer*, even though we cited it in several amicus briefs.

The Department of Justice's position is problematic on another level. DOJ contended that the Domestic Emoluments Clause does "not apply to the President as a private individual."[195] If DOJ's analysis were correct, then the President could escape the limitations of the Domestic Emoluments Clause by quietly accepting prohibited emoluments on his own, without relying on apparent authority or government channels. The fact that the Domestic Emoluments Clause in particular applies exclusively to the President does not make all of his purported wrongs subject to official-capacity claims. Rather, the capacity analysis turns on the legal standard established in *Hafer*. So long as *Hafer* remains good law, we must conclude that DOJ's analysis is not correct. Or, more precisely, DOJ's analysis is incomplete. The government seems to have assumed that plaintiffs have a binary choice: official-capacity suit and/or individual-capacity suit. However, the choice is not so limited.

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192. Transcript of Motion Proceedings, *supra* note 94, at 44:17–20.

193. District of Columbia v. Trump, 959 F.3d 126, 144 (4th Cir. 2020) (Richardson, J., dissenting).

194. Hafer v. Melo, 502 U.S. 21, 25 (1991) (emphasis added) (citations omitted).

195. [President of the United States'] Statement of Interest at 1, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. Mar. 28, 2018) (Civ. A. No. 8:17-cv-01596-PJM) (statement filed Mar. 26, 2018), ECF No. 100, https://perma.cc/F6SE-D854.

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The President does not have only two bodies.[196] He has three bodies. The President can act in his official capacity, in his individual capacity, and personally. The President may "occup[y] a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties."[197] But the Chief Executive's duties "are not entirely 'unremitting.'"[198] Not everything the President does during his tenure is, *ipso facto*, an "official act[]."[199] Without question, "'the President is the only person who alone composes a branch of government,' and therefore '[t]he interest of the man' is often 'connected with the constitutional rights of the place.'"[200] And the "line" between the President's "personal and official affairs" is "not always clear."[201] But that line exists. He still has "'personal' affairs."[202]

The President can violate the Domestic Emoluments Clause in three fashions. First, conduct that conforms to an illegal or unconstitutional custom or policy would give rise to an official-capacity claim. Second, conduct under the color of law would give rise to an individual-capacity claim. Third, entirely private conduct that does not involve any state action would give rise to a personal tort. The Domestic Emoluments Clause applies to the President at *all* times during his tenure and in *all* three capacities. (In our view, the President is not covered by the Foreign Emoluments Clause.[203]) Nevertheless, the fashion in which he receives the purportedly proscribed emoluments dictates the nature of a plaintiff's suit: official capacity, individual capacity, or a suit personally against the defendant-President. Official capacity and individual-capacity claims are not the only options.

Moreover, the capacity in which the defendant is sued also affects service of process. If the plaintiffs allege that the President violated the Domestic Emoluments Clause in his official capacity, he must receive service of process in that capacity. In that suit, the President would be represented by the Department of Justice. But if the President allegedly violated the Domestic Emoluments Clause in his individual capacity, he must receive service of process in that capacity. Here, the President would be represented by private counsel. Finally, if

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196. *Cf.* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

197. Clinton v. Jones, 520 U.S. 681, 697 (1997).

198. *Id.* at 699 (quoting United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.)).

199. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982). *Nixon v. Fitzgerald*'s identification of the "'outer perimeter' of [the President's] official responsibility," *id.* at 756, concerns the availability of the defense of absolute immunity; it is not determinative of the line between an official-capacity claim, an individual-capacity claim, and a personal claim.

200. CREW v. Trump, 971 F.3d 102, 111 (2d Cir. 2020) (Menashi, J., dissenting from the denial of rehearing en banc) (quoting Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020) (quoting THE FEDERALIST NO. 51 (James Madison))).

201. *Mazars USA*, 140 S. Ct. at 2034.

202. *CREW*, 971 F.3d at 114 (Menashi, J., dissenting from the denial of rehearing en banc) (quoting *Mazars USA*, 140 S. Ct. at 2034).

203. *See supra* note 4.

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the President allegedly violated the Domestic Emoluments Clause personally, he must receive service of process in that capacity. Once again, he must retain private counsel. Consider another scenario in which the plaintiffs serve the President in his official capacity, but the allegations only concern private conduct. In this scenario the President—that is, the private citizen who happens to be President—did not receive proper service of process. Where the incorrect party is served, counsel for the "wrong" defendant would appear. As a result, the intended defendant would lack notice, an opportunity to be heard, and the attorney of his choice.[204]

Furthermore, the capacity issue is closely linked to Article III jurisdiction. To establish standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[205]

Plaintiffs who sue the defendant in the wrong capacity lack standing. For example, if a defendant is sued only in his official capacity, but he committed the tort in his individual capacity, then the injury could not be traced to any official-capacity defendant conduct. Moreover, in this example, the injury could not be redressed by an injunction awarding prospective relief against the official-capacity defendant. Though the official-capacity defendant and the individual-capacity defendant are nominally the same flesh-and-blood person, they are juridically distinct for purposes of Article III. Conversely, if a defendant is sued only in his individual capacity, but he committed the tort in his official capacity, the injury could not be traced to any individual-capacity conduct, and the injury could not be redressed by awarding retrospective damages against the individual-capacity defendant. Damages do not obviate the *continuing* harm or threatened *future* harm of an illegal government policy or custom—only an injunction can obviate that harm. Again, the official-capacity defendant is distinct from the individual-capacity defendant for purposes of Article III. In this regard, "standing and [capacity] are joined at the hip."[206]

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204. *See* Kentucky v. Graham, 473 U.S. 159, 167–68 (1985) ("A victory in a [individual]-capacity action is a victory against the individual defendant, rather than against the [government] entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a [individual]-capacity lawsuit and has no opportunity to present a defense. That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone from a nonparty.").

205. TransUnion, LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (quoting Lujan v. Defs. of Wildlife 504 U.S. 555, 560–61 (1992)).

206. *See* Collins v. Yellen, 141 S. Ct. 1761, 1796 n.24 (2021) (Gorsuch, J., concurring) (quoting Collins v. Mnuchin, 938 F.3d 553, 609 (5th Cir. 2019) (Oldham, J., concurring in part and dissenting in part)).

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For all these reasons, plaintiffs' failure to sue the President in the correct capacity should have precluded their cases from going forward.

### *D. In the Emoluments Clauses Litigation, the Plaintiffs Lacked Standing to Sue President Trump in His Official and Individual Capacities; He Could Only Be Sued Personally*

In the Emoluments Clauses litigation, the plaintiffs sued the President in his official capacity for committing specific constitutional torts. The *actus reus* of the Emoluments Clauses is accepting or receiving proscribed emoluments by a covered person. These actions were only alleged to occur through distributions to Trump or Trump-affiliated private commercial entities. Plaintiffs did not allege that Trump engaged in government-related conduct, followed a government policy or custom, or acted under the color of law. Instead, plaintiffs merely alleged that Trump held a government position: the presidency.

Even if we assume that there was an "injury in fact," the second and third elements of Article III standing were not satisfied. The plaintiffs could not show that there was a "causal connection between the injury and the conduct complained of" by the *official-capacity* defendant they sued.[207] Nor could the plaintiffs show that there was a "causal connection between the injury and the conduct complained of" by the *individual-capacity* defendant they sued.[208] Rather, those injuries could only be caused by Donald J. Trump, personally. Because Trump did not *cause* those injuries in his official or individual capacities, the plaintiffs' alleged injuries could not be redressed by orders running against the official-capacity or individual-capacity defendant. Those injuries could only be traced to personal conduct. And those injuries could only be redressed—if at all—by enjoining that personal conduct. But that remedy would be unavailable in an official- or individual-capacity case.

#### 1. President Trump, in His Official Capacity, Did Not Cause, and Therefore Cannot Redress, Plaintiffs' Alleged Injuries

In August 2017, Tillman was the first scholar who wrote in the academic literature that the official-capacity claims against President Trump were not properly pled.[209] Tillman and Blackman raised this argument before the district courts

207. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

208. *Id.*

209. Seth Barrett Tillman, *The Emoluments Clauses Lawsuits's Weak Link: The Official Capacity Issue*, YALE J. ON REGUL. NOTICE & COMMENT (Aug. 15, 2017), https://www.yalejreg.com/nc/the-emoluments-clauses-lawsuitss-weak-link-the-official-capacity-issue-by-seth-barrett-tillman/ [http://perma.cc/759Y-CC2R] ("None of these cases involve government or public policy; rather, they all involve Trump's private commercial ventures and investments."); *cf.* CREW v. Trump, 971 F.3d 102, 117 n.31 (2d Cir. 2020) (Menashi, J., dissenting from the denial of rehearing en banc) ("The statement [by Judge Leval], issued more than three years after the operative complaint was filed, is the first time that anyone in this case has suggested that the President should have been sued in his private capacity.").

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in *CREW v. Trump*,[210] *Blumenthal v. Trump*,[211] and *District of Columbia v. Trump*.[212] Our position was straightforward. The "plaintiffs have never suggested that any act of" President Trump in his *official* capacity "has caused, will cause, or could possibly cause any injury to them."[213] The plaintiffs could not show that a government "'policy or custom' *must* have played a part in the violation of federal law."[214] An official-capacity claim, therefore, was not properly pled.

In *CREW v. Trump*, twenty-one law professors filed an amicus brief in support of the plaintiffs.[215] They contended that "a judicial remedy that redresses [p]laintiffs' injuries would not require the President to take any action—or decline to take any action—in his official capacity."[216] With respect to the Domestic Emoluments Clause, they wrote, "however the case is captioned," the President would only need to "cease accepting emoluments from government clients," which "are not official acts."[217] The law professors were entirely correct. President Trump took no action in his official capacity. There was no government policy or custom that *must* have played a part in Trump's alleged violation of the Emoluments Clauses. The courts could not enjoin President Trump, in his official capacity, for conduct that was not taken pursuant to a government custom or policy.

However, the law professors apparently did not recognize that their argument undermined the propriety of the official-capacity complaint.[218] If "there is no

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210. *See* Brief for Scholar Seth Barrett Tillman as *Amicus Curiae* in Support of Defendant at 30 n.122, CREW v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (Civ A. No. 1:17-cv-00458-GBD), ECF No. 37-1, https://perma.cc/RPC4-37MW.

211. Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* in Support of the Defendant at 22 n.89, Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (Civ. A. No. 17-civ-1154-EGS), ECF No. 16-1, https://perma.cc/KST2-5Y5M.

212. Motion and Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as *Amici Curiae* in Support of the Defendant at 31 n.119, District of Columbia v. Trump, 344 F. Supp. 3d 828 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596-PJM), 2017 WL 4685826, ECF No. 27-1, https://perma.cc/HK64-R7AU.

213. *See* Okpalobi v. Foster, 244 F.3d 405, 426 (5th Cir. 2001) (en banc).

214. Hafer v. Melo, 502 U.S. 21, 25 (1991) (emphasis added) (citations omitted).

215. The twenty-one law professors were Bruce Ackerman (Yale), Matthew D. Adler (Duke), Samuel Bagenstos (Michigan), Cary Coglianese (Penn), Zachary D. Clopton (Cornell), Seth Davis (U.C. Irvine), Michael C. Dorf (Cornell), Daniel Farber (Berkeley), Martha A. Field (Harvard), Daniel Hemel (Chicago), Pamela S. Karlan (Stanford), Leah Litman (U.C. Irvine), Jenny S. Martinez (Stanford), Jonathan S. Masur (Chicago), Jon D. Michaels (UCLA), Richard Primus (Michigan), Eli Savit (Michigan), Peter M. Shane (Ohio State), Scott J. Shapiro (Yale), David C. Vladeck (Georgetown), and Brian Wolfman (Georgetown). *See* Brief of Scholars of Administrative Law, Constitutional Law, and Federal Jurisdiction as *Amici Curiae* in Support of the Plaintiffs at App. A, CREW v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-GBD), ECF No. 64-1, https://perma.cc/NA9A-HJRB.

216. *Id.* at 13–14.

217. *Id.* at 14.

218. In a brief filed before the Second Circuit, a mostly overlapping cohort of the same law professors made *no mention whatsoever* of the capacity issue. The professors did not explain why they concluded that an official-capacity claim was proper. *See* Brief for *Amici Curiae* Scholars of Administrative Law, Constitutional Law and Federal Jurisdiction in Support of Appellants and Urging Reversal at Add., CREW v. Trump, 939 F.3d 131 (2d Cir. 2019) (No. 18-0474-cv), ECF No. 40, https://perma.cc/Y4HE-ZJPM.

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action [by a government defendant]—actual or threatened—whatsoever," a court cannot redress the plaintiffs' alleged injuries with a remedy against the government.[219] Therefore, the plaintiffs lacked standing. Any court-ordered relief running against the official-capacity Defendant—that is, the government of the United States—would have been unable to control, amend, or modify Donald J. Trump's personal conduct, or the conduct of Trump's commercial entities. Indeed, these commercial entities were *never* even served, let alone named as parties, at any stage in any of the three cases. And those purely private activities formed the gravamen of the plaintiffs' allegations. Specifically, the private commercial trust that controlled Donald J. Trump's assets—and which accepted and received the purported emoluments—was created without any involvement by the sovereign.[220] Therefore, no action by the sovereign could modify that private trust or its private conduct in response to any court order running against the official-capacity defendant.

The Department of Justice, which represented the President in his official capacity, disagreed. Responding to our amicus brief, DOJ argued that an injunction against the President "would indeed 'require action by the sovereign,' assuming that separation-of-powers principles would not otherwise bar that relief."[221] What action could be taken by the United States as sovereign? DOJ posited that "[t]he President, as the holder of the Office of the President, would need to ensure compliance with the Emoluments Clauses, and his conduct as such would need to conform to any appropriate injunctive relief."[222] This explanation avoids the critical question. Not everything done by a federal official constitutes "action by the sovereign." Some of the President's actions constitute "action by the sovereign" and some of the President's actions do not. Nor did DOJ grapple with the fact that an official-capacity suit is only properly pled if it alleges that the named defendant-government official acted illegally pursuant to a government custom or policy. Here, the plaintiffs made no such allegation satisfying the *Hafer v. Melo* standard.

Finally, the plaintiffs did not file suit against any other entity in the federal government, including the General Services Administration, which manages the lease to the Trump International Hotel.[223] As a result, the district court lacked jurisdiction to issue a judgment against those agencies.

The official-capacity suit could not provide a basis for standing.

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219. California v. Texas, 141 S. Ct. 2104, 2115 (2021).

220. Sheri Dillon et al., Morgan Lewis LLP White Paper, Conflicts of Interest and the President 2–3 (Jan. 11, 2017), https://perma.cc/B8BU-X4U3 (describing creation and organization of President-Elect Trump's trust).

221. Statement of Interest, *supra* note 195, at 6–7 (quoting Lewis v. Clarke, 137 S. Ct. 1285, 1291 (2017)).

222. *Id.* at 7.

223. Ground Lease by and between the United States of America and Trump Old Post Office LLC (Aug. 5, 2013), https://perma.cc/C7U9-LQME.

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### 2. President Trump, in His Individual Capacity, Did Not Cause, and Therefore Cannot Redress, Plaintiffs' Alleged Injuries

In *District of Columbia v. Trump*, the United States argued that the plaintiffs could not state an "individual-capacity claim because the Emoluments Clauses do not even apply to the President in his individual capacity."[224] For the reasons discussed in Part II.C, we think this statement is mistaken as a matter of settled doctrine. The President can violate the Domestic Emoluments Clause in his individual capacity. For example, the President could violate the Domestic Emoluments Clause in his individual capacity by receiving prohibited emoluments while relying on his apparent authority. Or the President could violate the Domestic Emoluments Clause in his individual capacity by receiving prohibited emoluments while using government channels that he uses as part of his regular official responsibilities. (Again, in our view, the President is not subject to the Foreign Emoluments Clause, but the capacity analysis would be the same for both clauses.) These constitutional torts would be committed under the color of law but without regard to any government custom or policy.

In the Emoluments Clauses litigation, the plaintiffs put forward no allegations that could establish that the President accepted or received proscribed emoluments under the color of law. Indeed, the D.C. and Maryland Attorneys General amended their complaint to add an individual-capacity claim. They failed, however, to include any new factual allegations, much less factual allegations that could establish that the individual-capacity defendant violated the Emoluments Clauses.[225] Other than revising the caption and adding a few references to individual capacity, the amended complaint was virtually indistinguishable from the original complaint.

The plaintiffs did not show that President Trump, in his individual capacity, caused the alleged injuries. Therefore, an injunction against President Trump, in his individual capacity, could not redress the alleged injuries.

### 3. The Plaintiffs' Alleged Injuries Could Only Be Traced to Trump's Personal Conduct

In the Emoluments Clauses litigation, the plaintiffs challenged President Trump's quintessentially private conduct, as well as actions taken by Trump-affiliated private commercial entities. The mere fact that Trump indirectly accepted purported emoluments during his term in office does not make those acts, *ipso facto*, government conduct. Additionally, these actions were not government conduct taken pursuant to a government policy or custom, or conduct taken under the color of law. The only actions that could cause plaintiffs' purported injuries were taken by Trump *personally* or by Trump-affiliated private commercial entities. These entities were never named as defendants.

224. Statement of Interest, *supra* note 195, at 1.

225. *See* Motion for Leave to File an Amended Complaint, *supra* note 124, at 90–93.

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President Trump was not similarly situated to the hypothetical ambassador discussed in Part II.B.3, who accepted a foreign gift pursuant to an official State Department policy. Nor was President Trump similarly situated to the hypothetical ambassador who accepted foreign gifts under the color of law. If the plaintiffs' factual allegations were true, President Trump, arguably, would have been similarly situated to the ambassador who *personally* accepted foreign state gifts.

The plaintiffs could not show that their injuries could be "redressed by a favorable decision" running against the defendants they chose to sue.[226] Indeed, based on the facts alleged, it would be *impossible* for plaintiffs' purported injuries to be "redressed by a favorable decision." Why? The courts lacked the power to issue a judgment against the defendant personally.[227] Plaintiffs did not sue Donald J. Trump, the private individual. Our position is that suing Trump in his individual capacity is distinct from suing Trump personally. Moreover, the plaintiffs did not actually sue any of the Trump-affiliated private commercial entities. Therefore, any possible remedy could not run against those entities. The Tenth Circuit explained that a plaintiff lacks standing where the district court cannot "order [the defendant] to do anything in her official capacity to redress [the plaintiff's] alleged injuries."[228] By a similar chain of reasoning, a plaintiff lacks standing where the district court cannot order the defendant to do anything in her individual capacity to redress the plaintiff's alleged injuries. Here, all the alleged wrongful conduct was performed by private parties, who were not sued. As no orders can run against these non-parties, the court cannot award the plaintiffs any relief. In such circumstances, the plaintiffs lack standing.

There is another important consequence that arises when a plaintiff incorrectly pleads his case. For example, if a plaintiff sues a defendant in his "individual capacity," the plaintiff puts the defendant on notice about the nature of the claim. In an individual-capacity claim, the plaintiff brings a civil rights claim against defendant's illegal government conduct under the color of law. In this example, it would be improper for the plaintiff to recharacterize his claim as a personal tort against a private party midway through the litigation. In light of this reversal, the defendant lacked fair notice of the nature of plaintiff's allegations. This bait-and-switch would deny the defendant a full and fair opportunity to put forward a defense.

A lawsuit against the President in his official capacity is a suit against the United States as sovereign. The Emoluments Clauses cases were pleaded as official-capacity claims. As a result, the courts would only have jurisdiction to issue a judgment against the government, the sovereign, its policies, and its property. But unless Trump was sued personally, the courts would not have jurisdiction to issue a judgment against Trump's private property.

226. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (citations omitted).

227. *See also* Kentucky v. Graham, 473 U.S. 159, 167 (1985) (explaining that "a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity.").

228. Bishop v. Smith, 760 F.3d 1070, 1089 (10th Cir. 2014) (quoting Cressman v. Thompson, 719 F.3d 1139, 1147 (10th Cir. 2013)).

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Any relief that might actually redress the plaintiffs' claims would have to run against Trump personally and his property. But the courts were powerless to order any such redress of plaintiffs' grievances. The courts could not extract a remedy running against Trump personally because he was a stranger to the litigation and to the plaintiffs' official-capacity claims. Indeed, in two of the three cases, the plaintiffs brought only official-capacity claims, and plaintiffs sued only the government. In these circumstances, issuing a judgment against Donald J. Trump personally would violate his due process rights.

This conclusion should not change even if the third-party payments to Trump-affiliated private commercial entities had been motivated by the clout of the President's position. Consider an example based on the Domestic Emoluments Clause. The plaintiffs alleged that state governments made payments to Trump-related entities in order to enjoy future benefits from the President. However, the capacity analysis with respect to the Domestic Emoluments Clause does not hinge on the state government's motivations. The fact that the President would not have received the purported emoluments but for his being President does not turn either a personal or an individual-capacity constitutional violation into an official-capacity claim. The reason is simple. Official-capacity claims are tied to the office-holder's conduct: the defendant's *accepting* or *receiving* proscribed emoluments *must* be driven by a government policy or custom. The capacity analysis does not turn on whether the payment of the emoluments was based on a third-party's expectation of future benefits. The issue here is not bribery, but capacity.

In theory at least, the plaintiffs' alleged injuries could have been redressed had they personally sued the President. For example, the court could have ordered Donald J. Trump to divest or disgorge certain assets in the form of a constructive trust.[229] Only Donald J. Trump, personally, could be ordered to divest or disgorge his personal assets. Any court-ordered injunctive relief would fall within the President's *personal* responsibility. No check would, or could, be issued by the Treasury Department because the purported funds are not, and never have been, in the Treasury's accounts. But none of the plaintiffs sought this remedy against the correct defendant. Indeed, the plaintiffs never explained what remedy they actually sought.[230]

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229. *See* Kimberly Breedon & A. Christopher Bryant, *Considering a Constructive Trust as a Remedy for President Trump's Alleged Violations of the Foreign Emoluments Clause*, 9 CONLAWNOW 111, 114 (2018), https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1060&context=conlawnow [https://perma.cc/2LJ2-Z8B6].

230. *In re* Trump, 958 F.3d 274, 292 (4th Cir. 2020) (Wilkinson, J., dissenting) ("Not only is no right conferred upon these plaintiffs in the Bill of Rights or elsewhere; the nature of any remedy is nowhere set forth. Not knowing what an emolument even is, we can hardly fashion a remedy to what by pure guesswork we are supposed to enjoin. If it is the Trump Hotel that gives offense, are we to order its closure for the duration of the President's term? Or are we to command divestiture of any presidential interest, beneficial or otherwise, notwithstanding the fact that divestment is traditionally disfavored in equity? Are we to place this single asset in some sort of not-so-blind trust? Are we to enjoin foreign dignitaries from patronizing the Hotel? Are we to bring in some third party to manage the Hotel's ongoing operations? I have not the slightest idea. Nor am I comforted in the slightest by the majority's

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## III. THE PLAINTIFFS LACKED AN EQUITABLE CAUSE OF ACTION AND THEREFORE THE DISTRICT COURTS LACKED EQUITABLE JURISDICTION TO HEAR THESE CASES

Article III of the Constitution gave the federal courts jurisdiction over both law and equity. In equity, there is a distinction between equitable relief and equitable jurisdiction. Litigants often conflate these concepts. Moreover, litigants likewise conflate causes of action grounded in law with equitable causes of action. In the Emoluments Clauses litigation, the plaintiffs did not assert a traditional equitable cause of action that established federal court jurisdiction. The Supreme Court has not recognized a free-floating equitable cause of action to challenge ultra vires government conduct. Cases like *Ex Parte Young*, *Free Enterprise Fund*, and *Youngstown Sheet & Tube Co. v. Sawyer* did not provide the plaintiffs with a cause of action. Absent a viable equitable cause of action, the federal district courts lacked equitable jurisdiction to hear the three Emoluments Clauses cases. For that reason, all of the plaintiffs' claims should have been dismissed for lack of subject matter jurisdiction.

### *A. Litigants Often Conflate Law with Equity, and Conflate Equitable Relief with Equitable Jurisdiction*

All too often, litigants conflate law and equity. But they are different concepts. Indeed, the Constitution expressly identifies this distinction: Article III provides that "[t]he judicial Power shall extend to all Cases, in *Law and Equity*."[231] In *Federalist No. 80*, Alexander Hamilton offered separate discussions of law and equity.[232]

Moreover, litigants routinely conflate "equitable relief" with the "equity jurisdiction of the federal courts."[233] These concepts are also distinct. A plaintiff can seek equitable relief—such as a declaration or an injunction—with a complaint that invokes general federal question jurisdiction.[234] And a plaintiff can seek those types of equitable relief even if the cause of action arises in law.

A party can also seek equitable relief with a complaint that invokes federal equity jurisdiction. But seeking equitable relief is not sufficient to invoke a federal court's equitable jurisdiction. Rather, a plaintiff must *also* assert a cause of action that arises in equity. A plaintiff cannot unlock the door to a federal court just by seeking equitable relief or simply by using the phrase "equitable jurisdiction" in his complaint. Equity is not a jurisdictional talisman such that merely by using

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assertion that this all lies somewhere down some road."); *id.* at 307 (Niemeyer, J., dissenting) ("Further, *even if* we could develop a coherent sense of rights and remedies under the Emoluments Clauses, problems still abound. For example, with respect to the Foreign Emoluments Clause, it is quite hard to conceive of a potential judgment that would not at least partially infringe on the President's foreign affairs responsibilities.").

231. U.S. CONST. art. III (emphasis added).

232. THE FEDERALIST NO. 80 (Alexander Hamilton) ("It has also been asked, what need of the word 'equity'[?]").

233. *See In re* Trump, 958 F.3d 274, 293 (4th Cir. 2020) (Wilkinson, J., dissenting).

234. *See* 28 U.S.C. § 1331 (2018).

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the phrase "equitable jurisdiction" in one's complaint, the courthouse door is magically unlocked.

A complaint that merely states in a conclusory fashion that the court has "equitable jurisdiction" or that the plaintiff is seeking "equitable relief" does not comply with Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Instead, "[t]he equity jurisdiction of the federal courts is strictly limited to the 'authority to administer in *equity suits* the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery'" in 1789.[235] And the plaintiff always bears the burden to establish the federal court's equitable jurisdiction. Thus, the scope of the federal court's equity jurisdiction is defined and limited.

### *B. Litigants Often Conflate Causes of Action Grounded in Law with Equitable Causes of Action*

Litigants often make a mistake in cases that seek an equitable remedy: they conflate a cause of action grounded in law with an equitable cause of action. These two concepts are distinct. Congress can create causes of action that arise in law by enacting statutes. Perhaps the most famous statutory cause of action that arises in law is 42 U.S.C. § 1983. Moreover, in cases like *Bivens v. Six Unknown Named Agents*, the Supreme Court has recognized that certain causes of action can be implied from the federal Constitution.[236] When a cause of action arises in law, a plaintiff needs to plead more than a valid cause of action in order to survive a motion to dismiss. The plaintiff must also assert a valid basis for federal jurisdiction. Usually, where a plaintiff invokes a cause of action that arises in law—whether created by Congress or implied by the Constitution—federal subject matter jurisdiction arises under 28 U.S.C. § 1331.

When a lawsuit arises in equity, the same general principles apply, but in a different fashion. The plaintiff must establish that the federal court has *equitable jurisdiction* to hear the case.[237] To do so, the plaintiff must invoke an *equitable cause of action*. Equitable causes of actions include those traditional causes of action that the English High Court of Chancery recognized by 1789.[238] This baseline remains subject to modification by Congress and the courts.[239]

In *Federalist No. 80*, Alexander Hamilton recognized this overlap between an equitable cause of action and equitable jurisdiction. Hamilton listed four common "equitable causes" of action that existed in the late eighteenth century: "FRAUD,

235. *In re* Trump, 958 F.3d at 293 (Wilkinson, J., dissenting) (quoting Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999)) (emphasis added).

236. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

237. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 472 n.316 (2017).

238. *Grupo Mexicano de Desarrollo*, 527 U.S. at 318.

239. *See Jurisdiction Equity*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-equity [https://perma.cc/7MRJ-LCPS] (last visited Dec. 23, 2021).

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ACCIDENT, TRUST, or HARDSHIP."[240] Under modern doctrine, a defendant could raise such objections as defenses in a court of law. But in Hamilton's time, a party would assert "fraud, accident . . . and hardship" as equitable causes of action in the separate court of chancery.

Hamilton described a hypothetical case involving a contract that was not obtained through "direct fraud or deceit."[241] However, in that case, the plaintiff may have taken "undue and unconscionable advantage . . . of the necessities or misfortunes" of the defendant.[242] This contract could not be "invalidate[d] . . . in a court of law."[243] In the event of a breach, the plaintiff could sue the defendant for damages on his contract claim in a court of law. The law court would only have jurisdiction over common law contract claims and defenses grounded in *law*. But "a court of equity would not tolerate" such a "hard bargain[]."[244] In this hypothetical, after the plaintiff received an award of damages in the common law court of law, the defendant (in the common law court proceedings) would initiate an action before the state's chancery court. The former defendant (in the common law court proceedings) would become the applicant (or plaintiff) before the chancery court. Before the chancery court, the applicant would raise an equitable cause of action to enjoin the common law court's damages award. However, it was not enough to simply allege improper conduct in contracting. The applicant, in chancery court proceedings, had to assert a cause of action that was recognized by a court of chancery, such as hardship.

Hamilton then posed the threshold question: "What *equitable causes* can grow out of the Constitution and laws of the United States?"[245] Here, Hamilton was referring to the sort of equitable causes of action that were known in the late eighteenth century. State chancery courts had equitable jurisdiction. And that equitable jurisdiction extended to equitable causes of action, including "fraud, accident, [breach of] trust, and hardship."[246] Hamilton was not referring to *equitable remedies*, such as an injunction. He was referring to *equitable causes of action*. Hamilton then returned to his hypothetical case: with such a "hard bargain[] . . . it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction."[247] Hamilton expressly equated the existence of equitable causes of action with the equitable jurisdiction in the federal courts.

To this day, the Supreme Court follows Hamilton's understanding of equitable jurisdiction. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund* held that the e*quitable jurisdiction* of the federal courts is coextensive with all of the traditional *equitable causes of action* that were recognized by the "'High Court of

240. THE FEDERALIST NO. 80 (Alexander Hamilton).
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* (emphasis added).
246. *Id.*
247. *Id.*

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Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act [of] 1789 . . . .'"[248] In equity, *jurisdiction* and *causes of action* are overlapping concepts.[249] Thus, if a party lacks an equitable cause of action, the party cannot invoke the federal court's equitable jurisdiction.

More importantly, equitable *jurisdiction* is not properly invoked merely by requesting equitable *relief*. Instead, the process works the other way around. First, the plaintiff must assert a traditional *equitable cause of action* that was known to the English Court of Chancery in 1789.[250] At that point, the *equitable jurisdiction* of the federal court is properly invoked. Second, once the federal district court's equitable jurisdiction is properly invoked, then the court can offer *equitable relief*, such as an injunction or declaration. Simply put, *equitable jurisdiction* is a body of causes of action. In order to open the federal courthouse door, a plaintiff must assert a traditional equitable cause of action.

In two recent articles, scholars have suggested that equity functions absent "causes of action." First, Professors Samuel L. Bray and Paul B. Miller wrote that the "'cause of action' is not an organizing principle for equity."[251] Second, Professors Aditya Bamzai and Bray wrote that "equity does not have causes of action."[252] Bray made this point more directly in a blog post. He wrote that equity "didn't, and doesn't, have causes of action in the sense that law did."[253]

We do not think the position put forward by Bray, Miller, and Bamzai restates where the law of equity was circa 1788, when the Constitution, including Article III, was drafted, debated, and ratified. First, we turn to Hamilton. In *Federalist No. 80*, which we discussed earlier in this section, Hamilton expressly referred to "fraud," "accident," "trust," and "hardship" not merely as "causes" but as "equitable causes." Granted, Hamilton did not write "equitable causes *of action*," but we think his phrasing provides our position with some support. We have every good reason to believe that Hamilton's usage would have been comprehensible to his ratification-era audience. Our view is that equity had causes of actions, and so it was understood in 1788. Moreover, this usage continued to the modern era.[254] That is our first claim.

248. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (citation omitted).

249. *See* Bray, *supra* note 237, at 472 n.316.

250. *Grupo Mexicano de Desarrollo*, 527 U.S. at 318. Equitable jurisdiction remains subject to modification by the courts and by Congress. *See* FED. JUD. CTR., *supra* note 239.

251. Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. (forthcoming 2022) (manuscript at 1), https://ssrn.com/abstract=3952682.

252. Aditya Bamzai & Samuel L. Bray, Debs *and the Federal Equity Power* (Oct. 30, 2021) (manuscript at 34), https://ssrn.com/abstract=3953534.

253. Samuel L. Bray, *Equity in* United States v. Texas (pt. 1), REASON: VOLOKH CONSPIRACY (Oct. 19, 2021, 10:13 PM), https://reason.com/volokh/2021/10/19/equity-in-united-states-v-texas-part-1/ [https://perma.cc/4SB6-WXT3].

254. *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional*, 95 NW. U. L. REV. 1207, 1209 (2001) ("[E]quity courts' subject matter jurisdiction depended primarily on the substantive right a case involved, on the merits; equity jurisdiction followed from the cause of action pursued and the remedy sought.").

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We make a second claim: that the scope of the subject matter jurisdiction of state chancery courts, i.e., courts with equitable jurisdiction, circa 1788, was defined by the equitable causes of action that had been recognized up to that time. We acknowledge that on this point our disagreement with Bray, Miller, and Bamzai may be one of nomenclature that arises in connection with using different labels to describe similar concepts. But of this point, we are less than sure—it may be that further discussion will show that our debate is not over terminology, but over substance.

In our view, in 1788, the year the U.S. Constitution was ratified, the existence of an equitable cause of action was a necessary element towards establishing state chancery court or equitable jurisdiction. Contemporaneous and roughly contemporaneous sources discussed equitable jurisdiction; some discussed equity as a "system." For example, Justice Story wrote "in the Courts of the United States, Equity Jurisprudence embraces the same matters of jurisdiction and modes of remedy, as exist in England."[255] Jurisdiction is one thing; the remedy is another—but these two elements collectively made up the body of equity jurisprudence. Story discusses the heads of equitable jurisdiction. Among others, Story lists causes of action arising in equity's exclusive jurisdiction, including, e.g., trusts and implied trusts.[256] In this way, Story's list resembles Hamilton's listing of "trust" as an "equitable cause."

Bray and Miller come close to acknowledging that "trust" is a true equitable cause of action, and this cause is otherwise indistinguishable from those causes of action arising in law. They write, "[i]t is true that equity would, in the areas in its exclusive jurisdiction, delineate the requirements for a suit with more specificity." [257] As an example, they offer that "a breach of trust claim . . . ha[s] long had definite requirements, and these might look very much like elements."[258] In other words, these claims resemble traditional causes of action, defined by their elements, as opposed to an elementless lengthy narrative seeking to affect the conscience of the court. And, Bray and Miller explain, "[t]here might be relatively little judicial discretion once the claim" with these elements "was made out."[259] We read Bray and Miller to suggest that the existence of discretion in chancery jurisdiction undermines the view that these courts heard genuine causes of action. We think this position is undertheorized. We do not understand why discretion to deny a claim where the elements of a claim or cause of action are otherwise established undermines the position that equitable courts adjudicated genuine causes of action.

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255. *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 57, at 64–65 (Boston, Hilliard, Gray & Company 1836), bit.ly/3qtE7wY.

256. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 961, at 228 (Boston, Charles C. Little and James Brown 2d ed. 1839), https://bit.ly/3c8Y6IZ; *id.* at § 980; *id.* at § 1195.

257. Bray & Miller, *supra* note 251, at 12–13.

258. *Id.*

259. *Id.*

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Story discusses other heads of equitable jurisdiction. These heads focus on the remedy, including interpleader, specific performance, injunctions, and others.[260] One might think then, that in such circumstances, the scope of equitable jurisdiction was defined entirely by the remedy sought. This view is not correct.

These equitable remedies did not exist in air. In 1788, one could not come into a court having equitable jurisdiction and ask for specific performance—even if one could plead a long, developed narrative. More was needed. Accessing the remedy of specific performance required establishing a contract valid in law. Indeed, all these equitable remedies required as a precondition an established legal right. That legal right could be premised on the common law, a statute, or some other positive law. And the court could issue an equitable remedy to vindicate that right, in situations where the remedy at law was deemed inadequate. Still, the recognition that the remedy at law was inadequate is premised on a basic principle: the party seeking relief already had a recognized cause of action, theory of liability, or right at law. In other words, with the exception of causes of action in equity's exclusive jurisdiction, a court of equity could *only* entertain jurisdiction where the party seeking relief already had a right established at law, in circumstances where the remedy at law was deemed inadequate. This understanding of how equity functions supports our position: every head of equitable jurisdiction is founded on an extant cause of action. That cause of action can arise in equity. Or that cause of action could arise in law, such as contract or tort, wherein equity supplies an equitable remedy because the remedy at law was deemed inadequate.

The situation is confusing, in part, because some of the causes of action in "equity" amounted to defenses to adverse judgments in "law." Law supplied the cause of action as a precondition for certain equitable defenses. In *Federalist No. 80*, Hamilton lists such defenses: equitable fraud and hardship. And these defenses were available as relief against strict enforcement of a contract that was otherwise valid at law. This relationship between law and equity reflects equity's adjectival nature: *equity* fits into or overcomes *law*. In this situation the party seeking an equitable remedy in a court with chancery or equitable jurisdiction is seeking to enjoin relief awarded at law. Here too, the sought-after equitable remedy—i.e., an injunction against an award at law or an injunction precluding other parties from seeking relief in law courts—does not exist in air. Rather, this remedy is premised on the existence of an otherwise valid cause of action in law—albeit the valid cause of action is asserted by the *other* party.

At bottom, our usage of the phrase "equitable cause of action" is consistent with Hamilton and Story. For these reasons, we think it proper to continue to argue, contra Bray, Miller, and Bamzai, that circa 1788, a cause of action was an organizing principle within the system of equitable jurisprudence, and, furthermore, that in order to establish equitable jurisdiction, a plaintiff's lawsuit required

260. *See* 2 STORY, *supra* note 256, at §§ 110–28 (interpleader), §§ 21–103 (specific performance), §§ 154–227 (injunctions).

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the support of a valid cause of action—either arising in equity's exclusive jurisdiction or otherwise was established as valid at law.

### *C. The Plaintiffs Did Not Assert a Traditional Equitable Cause of Action that Established Federal Court Jurisdiction*

In the Emoluments Clauses litigation, the plaintiffs contended that the federal courts had equitable jurisdiction to enjoin ultra vires government conduct. For example, the D.C. and Maryland Attorneys General argued that "'[t]he ability to sue to enjoin unconstitutional actions by state and federal officers'" is "'the creation of courts of equity,'" and reflects "'a long history of judicial review of illegal executive action, tracing back to England.'"[261] The plaintiffs invoked the term "equity," as if seeking an equitable remedy establishes the equitable jurisdiction of the District Courts. Two district courts accepted this argument.[262] The D.C. Circuit, however, cast doubt on this position. It found that "[t]he question of whether the Foreign Emoluments Clause or other authority gives rise to a cause of action against the President is unsettled."[263]

For at least five reasons, the plaintiffs erred. First, the plaintiffs failed to identify any "analogous" cause of action that may have been obtained at equity.[264] Nor did they demonstrate that the High Court of Chancery in England could have exercised jurisdiction over an analogous case in 1789. The plaintiffs' purported equitable cause of action would have been unknown to William Blackstone, Chancellor Kent, or Justice Story—and they "do not even argue this point" otherwise.[265]

Second, the plaintiffs' rule lacked any limiting principle. It would open the courthouse door to *every* assertion of illegal conduct against *every* federal officer at the request of *every* litigant. It is not enough to merely assert a violation of the Constitution by some government officer to open the federal courthouse door. For example, in *Armstrong v. Exceptional Child Center*, the Supreme Court rejected the proposition that "the Supremacy Clause creates a cause of action for its violation" in the federal court's equitable jurisdiction.[266] The plaintiffs cited

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261. Memorandum of Law in Support of Plaintiffs' Opposition to Motion to Dismiss of Defendant in His Individual Capacity at 29, District of Columbia v. Trump, 344 F. Supp. 828 (D. Md. 2018) (Civ. A. No. 8:817-cv-01596-PJM), ECF No. 117 (quoting Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326–27 (2015)), https://perma.cc/E89V-GP9Y.

262. District of Columbia v. Trump, 291 F. Supp. 3d 725, 755 (D. Md. 2018) ("The Court sees no problem in invoking its equitable jurisdiction here. Precedent makes clear that a plaintiff may bring claims to enjoin unconstitutional actions by federal officials and that they may do so to prevent violation of a structural provision of the Constitution."); Blumenthal v. Trump, 373 F. Supp. 3d 191, 210 (D.D.C. 2019) ("Rather, the fact that plaintiffs can only obtain relief from the President is precisely the reason the Court should exercise its equitable discretion here."); *cf.* CREW v. Trump, 276 F. Supp. 3d 174, 179 n.1 (S.D.N.Y. 2017) ("Because Plaintiffs' claims are dismissed under Rule 12(b)(1), this Court does not reach the issue of whether Plaintiffs' allegations state a cause of action under either the Domestic or Foreign Emoluments Clauses, pursuant to Rule 12(b)(6).").

263. *In re* Trump, 781 Fed. App'x 1, 2 (D.C. Cir. 2019).

264. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999).

265. *Id.*

266. 575 U.S. 320, 326 (2015).

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*Armstrong*,[267] but they failed to note that in this case the Supreme Court held that there was no equitable cause of action. *Armstrong* cuts against plaintiffs' free-floating claim to an equitable *ultra vires* cause of action.

Third, the plaintiffs' approach would allow the courts, rather than Congress, to deviate from traditional understandings of equitable jurisdiction. *Grupo Mexicano* recognized that under the Court's "traditionally cautious approach to equitable powers," Congress is responsible for "any substantial expansion of past practice."[268] If the plaintiffs were correct, then any party who invoked "equity" in a complaint, without more, could easily evade the Administrative Procedure Act's (APA) restrictions on seeking a federal judicial remedy. Such a "wrenching departure from past practice" must be carefully scrutinized.[269] Judge Wilkinson accurately described this dynamic: cases in which "'a plaintiff has a legally cognizable interest in challenging unlawful conduct'" are "largely outgrowths of the administrative state."[270] The APA, Judge Wilkinson observed, allows "would-be plaintiffs [to] benefit from . . . 'generous' statutory judicial review provisions."[271]

Equity, however, is not a substitute for complying with the APA. Yet, the plaintiffs in the Emoluments Clauses litigation put forward this argument. And the Ninth Circuit Court of Appeals accepted the same argument in *Sierra Club v. Trump*.[272] The plaintiffs in *Sierra Club*, as well as the Ninth Circuit, were wrong.[273] The Supreme Court stayed the Ninth Circuit's ruling. The per curiam order stated that the federal government had "made a sufficient showing at this stage that the plaintiffs have no cause of action."[274] This order suggests that the analysis of the plaintiffs in the Emoluments Clauses cases was also in error. Equity jurisdiction is not a tabula rasa or constitutional free-for-all in which litigants may prosecute claims that would otherwise fail under the APA and in law.

The plaintiffs' unbounded theory of equitable jurisdiction creates a fourth problem: it deprives the defendant of his right to a jury trial. Article III federal

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267. Memorandum of Law, *supra* note 261, at 29 (quoting *Armstrong*, 575 U.S. at 326).

268. *Grupo Mexicano de Desarrollo*, 527 U.S. at 329.

269. *Id.* at 322.

270. *In re* Trump, 958 F.3d 274, 295 (4th Cir. 2020) (Wilkinson, J., dissenting) (quoting Response Brief at 46, *In re* Trump, 958 F.3d 274 (4th Cir. 2020) (No. 18-2486), ECF No. 35) (citations omitted).

271. *Id.* (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987)) (citations omitted).

272. Sierra Club v. Trump, 929 F.3d 670, 694 (9th Cir. 2019).

273. *See* Josh Blackman & Seth Barrett Tillman, *What is the Plaintiffs' Cause of Action in the Wall Litigation?*, REASON: VOLOKH CONSPIRACY (July 31, 2019, 10:46 AM), https://reason.com/volokh/2019/07/31/what-is-the-plaintiffs-cause-of-action-in-the-wall-litigation/ [https://perma.cc/F5Z2-VEDB].

274. Trump v. Sierra Club, 140 S. Ct. 1 (2019). *See Biden v. Sierra Club, No. 20-138*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-138.html [https://perma.cc/H75G-A37Q]. On July 2, 2021, after the Biden Administration reversed the Trump-era policy, the Supreme Court issued an order which stated: "The motion to vacate the judgment is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court to vacate its judgments. The District Court should consider what further proceedings are necessary and appropriate in light of the changed circumstances in this case." Biden v. Sierra Club, 142 S. Ct. 46 (2021).

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court jurisdiction extends to cases arising "in Law and Equity."[275] But the jury right in civil trials is not coextensive with all cases arising in law and equity. The Seventh Amendment provides, "[i]n suits at *common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[276] This Amendment expressly refers to the "law" prong of Article III. But where an action arises under the "equity" prong of Article III, there is no Seventh Amendment jury right in civil actions. This dichotomy is consistent with historical practice.[277]

In short, adopting the plaintiffs' expansive theory of equity would restrict the right to a civil jury. This concern is not novel. Historically, "[t]he right to trial by jury often depend[ed] on whether the case would have been . . . an equity case or not."[278] Courts should avoid any reading of Article III and standing jurisprudence that would effectively curtail the civil jury trial right—what Hamilton described as the "palladium of free government."[279]

Fifth, and finally, the plaintiffs' theory of equitable jurisdiction usurps Congress' role in creating new and novel causes of actions. The elected branches—and not the judiciary—should be responsible for expanding federal court jurisdiction and creating new causes of action.

Throughout nearly four years of litigation, the plaintiffs failed to address these serious concerns with their theory of equitable jurisdiction.

### *D. The Supreme Court Has Not Recognized a Free-Floating Equitable Cause of Action to Challenge Ultra Vires Government Conduct*

The plaintiffs invoked the equitable jurisdiction of the federal courts to challenge allegedly *ultra vires* government conduct. But the Supreme Court has never recognized such an equitable cause of action that applies in *all cases*. Rather, the Court explained, "in *a proper case*, relief may be given in a court of equity . . . to prevent an injurious act by a public officer."[280]

Moreover, the plaintiffs cited precedents in which the federal courts issued an equitable *remedy*, and treated those cases as if equity provided the *cause of action* and *equitable jurisdiction*.[281] This approach placed the remedial cart before the jurisdictional horse. In each of these cases, the cause of action arose in *law* and

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275. U.S. CONST. art. III, § 2.

276. U.S. CONST. amend. VII (emphasis added).

277. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 210 n.* (2005) ("Juries traditionally sat in common-law suits but not in equity . . . .").

278. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW xxvii (4th ed. 2019).

279. THE FEDERALIST NO. 83 (Alexander Hamilton); *see also* FEDERAL FARMER NO. 4.

280. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) (quoting Carroll v. Safford, 44 U.S. (3 How.) 441, 463 (1845)) (emphasis added).

281. *See In re* Trump, 958 F.3d 274, 295–96 (4th Cir. 2020) (Wilkinson, J., dissenting) (noting that the decisions Plaintiffs cite that "challeng[ed] unlawful conduct" "were premised on *written* law creating and protecting such interests—not on traditional equitable rights" (citations omitted)); *see also* California v. Trump, 963 F.3d 926, 965–67 (9th Cir. 2020) (Collins, J., dissenting).

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not in *equity*. That analysis is not changed even when the court ultimately granted *equitable relief*, as well as *legal* relief, like monetary damages.

The plaintiffs argued that five leading Supreme Court cases involved an equitable cause of action to challenge ultra vires conduct: *Ex Parte Young*, *Larson v. Domestic & Foreign Commerce Corp.*, *Free Enterprise Fund*, *Youngstown*, and *Dames & Moore v. Regan*. None of these cases supported plaintiffs' novel cause of action. Therefore, plaintiffs lacked a traditional equitable cause of action, and it follows that plaintiffs' assertion of equitable jurisdiction also failed.

#### 1. *Ex Parte Young* Did Not Involve an Equitable Cause of Action to Challenge Ultra Vires Government Conduct

First, the plaintiffs cited *Ex Parte Young*.[282] In this old chestnut, the Supreme Court held that the federal courts could issue injunctive relief to prevent state officers from prospectively violating the Due Process Clause of the Fourteenth Amendment.[283] The plaintiffs drew an inference from *Young*'s well-known holding: the district court had equitable jurisdiction to prevent the President from prospectively violating the Emoluments Clauses.

The plaintiffs, however, focused only on the remedial aspect of *Young*: injunctive relief. The plaintiffs did not address the facts of *Young*, which involved a run-of-the-mill dispute: a government regulation of private property—a railroad company's property.[284] The posture of *Young* was, admittedly, complex. The case began when shareholders of the railroad company sued the company and its directors.[285] The shareholders wanted the directors to challenge the constitutionality of the state regulations as violations of the Due Process Clause of the Fourteenth Amendment.[286] At the time, Minnesota Attorney General Edward Young enforced the railroad regulations.[287] The shareholders could invoke the equitable jurisdiction of the federal court because they relied on traditional equitable principles and former Equity Rule 94.[288] This provision was the precursor to the modern-day Fed. R. Civ. P. 23.1, which governs derivative actions.[289]

In *Young*, the shareholders sought to enforce their fiduciary relationship with the directors. This "trust"-like relationship lies at the core of historical equitable

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282. *See* Memorandum of Law, *supra* note 261, at 29.

283. *Ex parte* Young, 209 U.S. 123, 159–60 (1908).

284. *Id.* at 144 (explaining that "the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take *property* without due process of law" (emphasis added)). *See also* Missouri v. Holland, 252 U.S. 416, 431 (1920).

285. *Young*, 209 U.S. at 143 ("[T]he complainants in the suit commenced in the Circuit Court were stockholders in the Northern Pacific Railway Company, and the reason for commencing it and making the railroad company one of the parties defendant is sufficiently set forth in the bill." (citing former Equity Rule 94)).

286. *Id.* at 149–50.

287. *Id.* at 170.

288. *Id.* at 143. *See* Equity Rule 94, 104 U.S. ix–x (1882), https://perma.cc/TC7V-XCTJ.

289. *See* Archie E. Williams, Jr., *Derivative Suits: Director Demand Under Rule 23.1 and Section 36 (b) of the Investment Company Act*, 4 FORDHAM URBAN L.J. 565, 565 n.4 (1976).

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jurisdiction. Indeed, in *Federalist No. 80*, Hamilton listed "trust" as a traditional cause of action, along with "fraud," "accident," and "hardship."[290] Therefore, the shareholders could also rely on a traditional equitable cause of action to challenge the regulations. In the English High Court of Chancery, and in early American courts, causes of action existed that would allow private citizens to challenge government regulations of *their* own property—even where, as here, title was held beneficially. In *Young*, the government was regulating the railroad company. Such disputes about contested rights and duties involving property (e.g., interpleader) also lie at the core of historical equitable jurisdiction. Specifically, the *Young* plaintiffs sought to prevent *future* state action regulating *their* own property. To accomplish this goal, they invoked the court's equitable jurisdiction to sue their company, its directors, and state officers before those state officers could regulate the plaintiffs' own property through an imminent coercive lawsuit.[291] Professors Bamzai and Bray observe that in *Young*, "equity [was] invoked to protect a proprietary interest." They write that this "equity-property connection helps focus the dispute and prevents equity from pushing aside other areas of law that have their own separate logic, limits, and principles."[292]

In the Emoluments Clauses litigation, the plaintiffs presented an entirely different claim. Their suits did not concern the government's effort to regulate plaintiffs' own property. Rather, the plaintiffs sought to use the legal system to regulate Donald J. Trump's property. (To be precise, the plaintiffs sought to regulate LLCs and corporations in which Donald Trump holds equity.) Donald J. Trump's purported constitutional tort—that is, his *accepting or receiving purported emoluments* through private commercial transactions—did not regulate or seize the plaintiffs' property. Nor did these cases involve a *threatened coercive suit* brought by the government to take or regulate plaintiffs' property. The plaintiffs did not allege that the defendant, or the federal government, were taking or regulating their own property. Thus, *Young* provided no support for establishing an equitable cause of action in the Emoluments Clauses litigation.

The plaintiffs alleged that Trump's properties competed with the plaintiffs' businesses. These allegations may have affected the Article III standing inquiry in a case that relied on a cause of action grounded in the positive law of antitrust or competition law. But modern competitor standing doctrine does not inform whether the plaintiffs can invoke the traditional *equitable jurisdiction* of the federal courts.[293]

The plaintiffs in the Emoluments Clauses litigation, like the *Young* plaintiffs, asked for *equitable relief*. But what the plaintiffs in the Emoluments Clauses

290. THE FEDERALIST NO. 80 (Alexander Hamilton).

291. *Young*, 209 U.S. at 193.

292. Bamzai & Bray, *supra* note 252, at 34.

293. *See In re* Trump, 958 F.3d 274, 295 (4th Cir. 2020) (Wilkinson, J., dissenting) ("Faithful to the bounds of the judicial power, federal courts have consistently refused to grant equitable relief to plaintiffs complaining only of competitive harm.").

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cases needed to show, but did not, was that they could assert a traditional *equitable cause of action* which would establish the existence of *equitable jurisdiction*.

### 2. *Larson* Did Not Involve an Equitable Cause of Action to Challenge Ultra Vires Government Conduct

Second, the Plaintiffs cited *Larson v. Domestic & Foreign Commerce Corp*.[294] That case involved a simple contract claim.[295] Causes of action for specific performance based on a breach of contract have longstanding roots in the law of equity.[296] In *Larson*, the cause of action arose under the common law of contract. The case did not involve a claim arising in connection with an equitable cause of action.

In the Emoluments Clauses cases, the plaintiffs could not point to any common law or contract-based cause of action. *Larson* does not stand for the proposition that plaintiffs have a free-floating equitable cause of action to challenge purportedly ultra vires government conduct.

### 3. *Free Enterprise Fund* Did Not Involve an Equitable Cause of Action to Challenge Ultra Vires Government Conduct

Third, the plaintiffs cited *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.[297] This citation is perplexing because that case did not discuss the federal court's equitable jurisdiction. Rather, a footnote in that decision cited *Correctional Services Corp. v. Malesko* for the proposition that "equitable *relief* 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'"[298] Here, the Court was not discussing federal equitable jurisdiction. Rather, the Court discussed equitable relief flowing from causes of action created in the Code of Federal Regulations. Such equitable relief is proper in that regulatory scheme. Once again, the plaintiffs conflated the request for equitable *remedies* with the invocation of equitable *causes of action* and equitable *jurisdiction*. Seeking equitable relief does not establish equitable jurisdiction.

Moreover, *Malesko* involved an *unsuccessful* cause of action under *Bivens* for damages.[299] The *Malesko* plaintiffs did not invoke equitable jurisdiction to obtain

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294. *See* Memorandum of Law, *supra* note 261, at 31 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)).

295. *Larson*, 337 U.S. at 686.

296. *See, e.g.*, 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 712–93 (Jairus W. Perry ed., Boston, Little, Brown & Co. 12th ed. 1877) (providing a chapter on specific performance); 2 STORY, *supra* note 256, at §§ 21–103 (specific performance).

297. *See* Memorandum of Law, *supra* note 261, at 28–31 (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010)); *see also* Brief of *Amici Curiae* Administrative Law, Constitutional Law, and Federal Courts Scholars in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss at 3, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018) (Civ. A. No. 8:17-cv-01596), ECF No. 56-1 (citing *Free Enter. Fund*, 561 U.S. 477).

298. *Free Enter. Fund*, 561 U.S. at 491 n.2 (quoting Corr. Services Corp. v. Malesko, 534 U.S. 61, 74 (2001)) (emphasis added).

299. *Malesko*, 534 U.S. at 63.

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equitable relief—the word "equity" appears nowhere in the opinion. Indeed, throughout the course of the Emoluments Clauses litigation, the plaintiffs eschewed any claim of a *Bivens*-like implied cause of action arising directly from the Constitution.[300]

The plaintiffs misread *Free Enterprise Fund*. That case did not allow a plaintiff with an Article III injury to obtain prospective injunctive relief if he simply alleged that government officers acted illegally. Critically, *Free Enterprise Fund* involved a *statute-based* cause of action: the threat of a future coercive action by the Securities Exchange Commission against the plaintiffs under the Sarbanes-Oxley Act.[301]

The Supreme Court has never recognized an amorphous, open-ended equitable jurisdiction permitting plaintiffs to challenge alleged violations of the Constitution. Merely asserting that a case arises in "equity" did not authorize the D.C. and Maryland Attorneys General to force federal officials to conform to plaintiffs' understanding of federal law. Such a result stands federalism and federal supremacy on its head.

At bottom, the federal court's "flexible" equitable jurisdiction is "confined within the broad boundaries of traditional equitable relief."[302] Only "'in *a proper case* [may] relief . . . be given in a court of equity . . . to prevent an injurious act by a public officer.'"[303] The Emoluments Clauses cases were not proper: unlike the *Free Enterprise Fund* plaintiffs, the entities that sued President Trump were not threatened by the government with a future coercive lawsuit, much less a threatened future coercive lawsuit that would take or regulate plaintiffs' property.

#### 4. *Youngstown* and *Dames & Moore* Did Not Involve Any Equitable Causes of Action to Challenge Ultra Vires Government Conduct

The plaintiffs also cited two seminal cases to support an equitable cause of action to challenge ultra vires conduct: *Youngstown Sheet & Tube Company v. Sawyer* and *Dames & Moore v. Regan*.[304] Neither of these precedents is availing.

First, in *Youngstown*, the federal government seized control of private steel mills.[305] The mill owners sued Secretary of Commerce Charles Sawyer to challenge his actions. In *Sierra Club v. Trump*, the Ninth Circuit stated that *Youngstown* "illustrate[s]" why there is a "cause of action to enjoin the unconstitutional actions."[306] The Ninth Circuit erred.

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300. *See* Memorandum of Law, *supra* note 261, at 27.

301. *Free Enter. Fund*, 561 U.S. at 489–92.

302. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 322 (1999) (citation omitted).

303. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) (citation omitted) (emphasis added).

304. Brief for Appellees at 44, Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020) (No. 19-5237), https://perma.cc/LET9-BN9W.

305. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–84 (1952).

306. Sierra Club v. Trump, 963 F.3d 874, 891 (9th Cir. 2020).

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In *Youngstown*, the mill owners did not assert a free-floating equitable cause of action to challenge Secretary Sawyer's illegal seizure. Rather, the mill owners' brief explained that their cause of action was based on resolving "a simple cloud on title" of the mills.[307] The cause of action to resolve a cloud on title, the mill owners argued, "has always moved equity to grant relief because no other remedy is complete or adequate."[308] The mill owners contended that "[t]he seizure of the properties and business of the plaintiffs, with its host of uncertainties and legal and practical problems arising from the ambiguous position in which the owners are left, should appeal to equity at least as strongly as a cloud on title."[309]

*Youngstown* was decided half a century before *Grupo Mexicano*. Still, the mill owners used a *Grupo Mexicano*-like framework to establish equitable jurisdiction. They demonstrated that their cause of action was "analogous" to an equitable cause of action that would have been recognized by the High Court of Chancery in 1789.[310] The government seized the mill owners' property. That seizure, much like a taking or temporary taking, nullified their property rights. The plaintiffs did not rely on a generalized allegation of ultra vires conduct by the Secretary of Commerce; instead, they relied on a cause of action to quiet title—*their* title to *their* property. Here too, *Youngstown* was in the heartland of historical equity jurisdiction involving disputed property rights.

Second, *Dames & Moore v. Regan* did not establish a free-floating equitable cause of action to challenge allegedly ultra vires government conduct.[311] In this case, Dames & Moore asserted that the federal government violated federal law and the Constitution.[312] But the plaintiff pleaded an important additional fact: that the government's actions "were unconstitutional to the extent they adversely affect[ed] petitioner's final judgment against the Government of Iran and the Atomic Energy Organization."[313]

Dames & Moore did not use the courts to block purported ultra vires conduct by government officers. Rather, equitable jurisdiction was premised on the company's having vested property rights established by a prior final judgment. Specifically, the company invoked the court's equitable jurisdiction to remedy the government's concomitant effort to *extinguish* those rights. The executive order that nullified Dames & Moore's final judgment operated in a fashion similar to the executive order that gave rise to *Youngstown*. In both cases, plaintiffs were seeking to protect their *own* concrete property rights. The vindication of such recognized property rights lies at the core of historical equity jurisdiction.

307. Brief for Plaintiff Companies at 78, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), 1952 WL 82173, https://perma.cc/4R6Z-VJKD.
308. *Id.*
309. *Id.*
310. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999).
311. 453 U.S. 654 (1981).
312. *Id.* at 664.
313. *Id.* at 667.

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The federal courts had equitable jurisdiction to resolve both *Youngstown* and *Dames & Moore*. These cases, however, did not support the plaintiffs' position.

Throughout nearly four years of litigation, the plaintiffs repeatedly cited *Young, Larson*, *Free Enterprise Fund*, *Youngstown*, and *Dames & Moore*. But the plaintiffs failed to illustrate how these cases were meaningfully analogous to the facts giving rise to the Emoluments Clauses cases. For these reasons, and many others, the plaintiffs lacked an equitable cause of action. And in the absence of an equitable cause of action, the courts lacked equitable jurisdiction. All of these complaints should have been dismissed to due to a lack of subject matter jurisdiction.

## CONCLUSION

The Emoluments Clauses litigation began shortly after President Trump was inaugurated and concluded shortly after he left office. During this four-year span, plaintiffs asserted many novel legal theories about obscure provisions of the Constitution. Several courts reached sweeping rulings on questions of first impression. Yet, all of these cases suffered from the same two threshold defects. Moreover, settled law could establish these two defects: first, the official-capacity claims were not proper; and second, the plaintiffs lacked an equitable cause of action. The district courts could have dismissed all of the official-capacity claims on either of these two grounds without wading into difficult and novel legal questions. Yet, none of the district courts chose these simple paths.

With respect to the cause of action question, the Emoluments Clauses cases were not unique. During the Trump presidency, other courts also concluded that federal courts had equitable jurisdiction to enjoin ultra vires government conduct.[314] These holdings were flatly inconsistent with *Grupo Mexicano*.[315] And DOJ vigorously advanced this straightforward argument—based on *Grupo Mexicano*—that federal courts lack equitable jurisdiction to enjoin purported ultra vires government conduct.

Additionally, there was no adversity between the parties with respect to the capacity question. All of the parties agreed that the President could only violate the Emoluments Clauses in his official capacity. We suspect the plaintiffs avoided an individual-capacity claim for a strategic reason. With an individual-capacity claim, the court would have to imply a new cause of action. The plaintiffs may have worried that the courts would not imply a newly-minted, judge-made cause of action. Such a ruling could have yielded a broad precedent that would make it more difficult to bring an implied cause of action in civil rights litigation. If we are correct that the plaintiffs in fact had this concern, we think such concerns

314. *See supra* Part III.C (discussing *Sierra Club*).
315. *Id.* (discussing *Grupo Mexicano de Desarrollo*).

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would have been reasonable in light of recent Supreme Court decisions that have cast doubt on implied causes of action.[316]

The Department of Justice represented the President in his official capacity. DOJ also may have had strategic reasons for insisting that the plaintiffs properly pleaded their lawsuit against the President in his official capacity. Likewise, DOJ may have had strategic reasons for arguing that an individual-capacity claim was not viable. DOJ argued that, under *Mississippi v. Johnson*, a federal court could not issue an injunction against the President in his official capacity.[317] If that reading of *Mississippi v. Johnson* was correct, then the official-capacity claims should have been dismissed. And if DOJ was also correct that an individual-capacity claim against the President was not properly pled, then in light of that view and *Mississippi v Johnson*, all the lawsuits and all the claims should have been dismissed. However, several courts rejected DOJ's reading of this Reconstruction-era case. DOJ put all of its litigation-related eggs in the *Mississippi v. Johnson*-basket. The DOJ's strategy did not work.

In the end, none of these cases led to a final judgment against the President. However, the lessons learned from these cases will endure beyond the Trump presidency. Future suits against future presidents should be brought in the correct capacity. But absent a common law or statutory cause of action, these suits should have no place in any federal court.

316. *See* Hernandez v. Mesa, 140 S. Ct. 735 (2020); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

317. Petition for Writ of Mandamus to the United States District Court for the District of Maryland and Motion for Stay of District Court Proceedings Pending Mandamus at 18, Trump v. District of Columbia, 928 F. 3d 360 (4th Cir. 2019) (App. No. 18-2486) (Civ. A. No. 8:17-cv-01596-PJM), ECF No. 2-1, https://perma.cc/82E6-FDXZ ("As to the defendant, equitable relief against the President in his official capacity is contrary to the fundamental principle, rooted in the separation of powers, that federal courts have 'no jurisdiction of a bill to enjoin the President in the performance of his official duties.' *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866).").

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