

# Does the Emolument Rule Exist for the President?

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**ABSTRACT:** In this article, I argue that with regard to the President, the Emoluments Clause (EC) is not law. I argue for this on the basis of two premises. First, if something is a law, then it has a legal remedy. Second, EC does not have a legal remedy. This premise rests on one or more of the following assumptions: EC does not apply to the President; if EC were to apply to the President, it does not provide a remedy; or, if EC were to apply to the President and have a remedy, it is not law because it is vague. The conclusion that EC does not apply to the President has a practical upshot. As a practical matter, President Trump's worldwide business tentacles and his refusal to put his business assets into a blind trust does not violate EC and, arguably, does not violate federal conflict-of-interest law.

## PART ONE: THESIS

President Donald Trump has business operations in at least twenty countries, with a concentration in the developing world.<sup>1</sup> For example, he has business projects in China, India, and Turkey. This might underestimate the extent of his worldwide entanglements as it leaves out firms that lent or will lend money to his firm. In India, he is partnered with people who have family ties to the leaders of the most powerful political party. The concern is that his dependence on foreign actors will result in his being pressured to act on behalf of his financial interest rather than his country's interest. Specifically, the concern is that various entities will trade favorable terms for special consideration, access, taxpayer money, a foreign policy change, and so on. At the very least, widespread entanglement makes Trump appear to have a conflict of interest. Some commentators have called for Trump to liquidate his assets and put the proceeds in a blind trust.<sup>2</sup> It is commonly thought that Trump can and should be limited in part based on the Emolument Clause.

An emolument is a return from office or employment. It can take the form of a gift or compensation. The Article I Section 9 Emoluments Clauses prohibits the receipt of such things.

No Title of Nobility shall be granted by the United States; and no person holding any Office of Profit or Trust under them, shall, without the Consent of Congress,

accept of any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State.

There is no judicial precedent interpreting it. Nor has the Supreme Court addressed it. Its language suggests that it differs from laws against bribery and conflict of interests. It differs from bribery because, unlike bribery, it does not require a quid pro quo. It also differs because it only concerns gifts from foreign governments rather than from public or private parties.<sup>3</sup> It differs from the conflict of interest clause in that the latter rule, at least the primary clause, explicitly does not apply to the President.<sup>4</sup>

Here is my thesis:

**Thesis: Prohibition.** With regard to the President, the Emoluments Clause (EC) is not law.

## PART TWO: ARGUMENT

Here is the argument for the thesis.

(P1) If something is a law, then it has a legal remedy.

(P2) EC does not have a legal remedy.

(C1) Hence, EC is not law. [(P1), (P2)]

The first premise rests on the following assumption:

**Assumption #1a: No Remedy, No Right.** If something is a law, then it affects a legal right.

**Assumption #1b: No Right, No Law.** If something affects a legal right, then it has a remedy.

Here are the ideas behind these assumptions. First, if something is a law, then it creates a legal right. Law constitutes government-recognized relations between individuals.<sup>5</sup> These relations are exhausted by Hohfeldian relations and involve maintaining, eliminating, or changing a claim (or power). A right is a claim (or power) and, perhaps, other Hohfeldian element.<sup>6</sup> Thus, the notion that a law always affects a legal right rests on the function of law, which is to constitute the government-recognized relations between individuals.

Second, if someone has a legal right, then he has a legal remedy.<sup>7</sup> A remedy is the means by which the government-recognized relations are constituted. That is, government-recognized relations are cashed out in terms of what one person can demand from another party and, at bottom, what one can demand is a remedy when he is treated in certain ways.

The second premise rests on one of the three different assumptions.

**Assumption #2a: Inapplicable.** EC does not apply to the President.

Scott Tillman provides three arguments for this assumption.<sup>8</sup> First, he argues that the Constitution does not use “office” to refer to the president and vice president. Rather, he notes, it refers to commissioned rather than elected officials. He

continues that when a provision applies to apex or elected officials, it explicitly names them. Consider, for example, the Impeachment Clause.

Second, Tillman argues that in understanding the Constitution special consideration is due to the precedent set by President Washington and his administration, especially with regard to presidential powers. Washington accepted gifts from the French government without any Congressional consent or even a record of congressmen criticizing his doing so. If the generation that wrote and ratified the Constitution didn't think the Emolument Clause applied to the President, this suggests that it doesn't.

It should be noted that the Department of Justice Office of Legal Counsel asserts that EC applies to the President.<sup>9</sup> It does not argue for this position and its failure to do so is noteworthy.

Third, during the Washington administration, Tillman points out, the Senate ordered Secretary of the Treasury, Alexander Hamilton, to list people who held office under the United States and their salaries. Hamilton's list included appointed, but not elected, officials. Tillman argues that this suggests that "office" in EC does not include elected officials such as the President.

Will Baude adds to Tillman's argument by claiming that it unifies the Constitution's use of office-related phrases and does so in a way that makes sense of text, structure, and history.<sup>10</sup> For example, he notes, under Article II, the President is required to "Commission all Officers of the United States."

Baude points out that there are two other emolument clauses (Article I Section 6 and Article II Section 1) limiting salary increase for members of Congress and the President and both mention these positions by name.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

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

Even if EC were to apply to the President, it does not provide a remedy.

**Assumption #2b: No Remedy.** Even if EC were to apply to the President, it does not provide a criminal or civil remedy.

EC does not result in a criminal remedy because, arguably, the President is not subject to federal criminal law. Even if he were subject to it, EC does not provide a criminal remedy.

It is not clear whether the President is subject to the federal criminal law.<sup>11</sup> The President is the boss of the Justice Department and Attorney General, it is unclear whether they could charge or punish him without his permission. There is a theoretical issue as to whether a person can consent to be punished because punishment intuitively seems to involve an imposition of involuntary harm in

response to an offense or, perhaps, perceived offense.<sup>12</sup> Even if someone can consent to be punished, it is unlikely that a President would actually agree to be receive a serious punishment. Even if he were to agree and was subsequently convicted and sentenced, he could still pardon himself. Even if he consented to be convicted and sentenced and did not pardon himself, it is unclear whether he would be imprisoned given that he is the boss of the federal prison system. The Justice Department asserts that a sitting President cannot be indicted for a crime.<sup>13</sup>

The state is a different sovereign and, on one account, not entirely subordinate to the federal government.<sup>14</sup> Because EC is a federal rule, he cannot be punished under state law for violating it. A state might try to pass a law that piggybacks on EC, but it is unclear whether this law would be preempted by federal law and, even if it weren't, it would not be a criminal punishment for EC. Rather, it would be a criminal punishment for violating state law.

The President is subject to federal civil law.<sup>15</sup> A remedy is a way in which a person is set right.<sup>16</sup> That is, it involves solving, correcting, or improving something. EC does not result in a civil remedy. The President is not subject to EC because (a) no one has standing to sue under it and (b) even if someone had standing, there is no remedy. To have standing, you have to show that you have a concrete and particularized injury.<sup>17</sup> If there is a remedy, the remedy is (a) electoral or (b) impeachment and conviction, but receiving an emolument is neither necessary nor sufficient for them. It is unclear whether receiving an emolument or gift is a high crime or misdemeanor.

In general, impeachment and conviction have been imposed for serious corruption or abuse of power, criminal activity, or violating federal law in such a way as to trespass onto Congressional power.<sup>18</sup> Some infringements of EC likely constitute serious corruption or abuse of power, but others do not. Even if it were serious corruption or abuse of power, violating EC would merely add to the reasons for impeaching and convicting the President, it would not be a sufficient legal reason in the way required by a rule-constituted theory of law. Let us leave aside the issue of whether law is constituted merely by rules.

On a side note, Alexander Hamilton in the *Federalist* No. 65 suggests that a high crime or misdemeanor includes "the misconduct of public men . . . from the abuse or violation of some public trust."<sup>19</sup> It is plausible that a gross violation of EC usually, if not always, meets this condition. In any case, as argued above, even if it were to be a high crime and misdemeanor, this would not be a remedy under EC but under the Impeachment Clause (Article II Section 4). Even if the infringement of EC did have a remedy in civil law, it is unlikely any one has standing to bring suit and thereby get a court-ordered remedy. There is no history of standing on EC and little to suggest that violating EC in and of itself would infringe a private citizen's fundamental right, cause her particularized and concrete injury, or curtail legislative or judicial power.<sup>20</sup> In addition, the Eleventh Amendment would likely protect the President against suit by a private citizen.<sup>21</sup>

If EC were to apply to the President and were to have a remedy, it is an incredibly vague rule.<sup>22</sup> On one interpretation, an emolument for a businessperson can take the form of payment for something beyond its fair market value.<sup>23</sup> There is an issue as to whether a present or emolument is met when a gift or compensation is

given to a President's corporation, foundation, or adult children. Similarly, there is an issue as to whether the condition is met were the gift or compensation given by a private corporation partly owned by a foreign government or given by a private citizen with close ties to a government.<sup>24</sup> The same is true for what counts as fair market value. The problem gets worse if the fair market value is affected by the fact that a business owner is now the president. This is a problem if a vague rule cannot be law.

**Assumption #2c: Void.** EC is not law with regard to the President because it is vague.

Vagueness might prevent something from being law because of the void-for-vagueness rule in the criminal law.<sup>25</sup> It is unclear whether there is a parallel principle in the civil law. If there is not, vagueness could be solved by moral reasoning or by picking the principle that best fits and justifies EC. This would be similar to other moral concepts in the Constitution such as provisions addressing unreasonable search and seizure, just compensation, or cruel and unusual punishment. Perhaps this is right. Still, if one were a legal positivist, then as a technical matter there would be no law even if this would make no practical difference. A legal positivist who asserts that law consists of rules and that rules are picked out by plain meaning would find that there is no law, although the judge deciding a case would create law.<sup>26</sup> A parallel thing would be true of a theorist who asserts that law is the command of a sovereign.<sup>27</sup>

The void-for-vagueness reason is clearly less powerful than the earlier two arguments. It is worth noting that even if one wasn't fully confident with one argument (inapplicability, no remedy, or vagueness), a stronger case can be made that at least one of the three succeed. This is enough to establish the second premise.

The conclusion that EC does not apply to the President has a practical implication. President Trump's far-reaching businesses and his refusal to put them in a blind trust does not violate EC or, arguably, conflict-of-interest laws. Nor would it be bribery if he got a sweetheart deal that is not part of a quid pro quo. Thus, a common criticism of some high profile experts and threats to impeach him for violating the clause are mistaken.

Perhaps this is unsurprising if, as I believe, the powers of Congress are limited to a small set of tasks set out in Article I Section 8 and those of the President are even more limited. The President is limited to signing rules initiated by Congress and then executing such laws. Even the President's foreign policy powers are sharply limited if, as I believe, his ability to start and wage war depends on Congress declaring war and then funding it. Originally, the President's power was further subject to state legislatures because they chose electors who chose the President. The Presidency's initial limited function and dependence on federal and state legislatures makes it less worrisome that he might be bribed, have a conflict of interest, or have the appearance of one of them than is the case under the current imperial Presidency.<sup>28</sup> The imperial Presidency can be seen in the President's greatly expanded powers to regulate the economy, implement laws in a way not authorized by Congress, surveil the American people, make war without Congressional declaration of war or funding, and so on. Another practical

concern, then, is that with the rise of the imperial Presidency, worries about his being conflicted, bribed, or appearing to be one of them become more significant.

To the extent that my conclusion is jarring, it is because the rise of the imperial Presidency and the exponential gain in Congressional power has not been accompanied by EC being revised. The explosion of Congressional power can be seen, for example, in the lack of any real limit accompanying Congress's ability to justify its laws via the Commerce Clause.<sup>29</sup> The imperial Presidency can be seen in the loss of Congressional oversight and control over the President's war-making power. It can also be seen in the growth of the regulatory state, pattern of Presidents implementing outright illegal domestic policies, and the weaponized misuse of various agencies (for example, Internal Revenue Service).

Here is a summary of the above argument:

|             |  |  |
|-------------|--|--|
| <b>(P1)</b> | If something is a law, then it has a legal remedy. | <b>Assumption #1a: Law to Legal Right.</b> If something is a law, then it creates a legal right.<br><b>Assumption #1b: Legal Right to Legal Remedy.</b> If someone has a legal right, then he has a legal remedy.  |
| <b>(P2)</b> | EC does not have a legal remedy.                   | <b>Assumption #2a: Inapplicable.</b> EC does not apply to the President.<br><b>Assumption #2b: Applicable but No Remedy.</b> If EC were to apply to the President, it would be have a criminal or civil remedy, but it does not.<br><b>Assumption #2c: Void.</b> With regard to the President, EC is void for vagueness. |
| <b>(C1)</b> | Hence, EC is not law.                              | (P1), (P2)   |

### PART THREE: OBJECTIONS

One objector might argue that premise (P1) is false. Specifically, he might argue that not every law creates a legal right or not every legal right is or entails a remedy. The notion that not every law creates a legal right might rest on the notion that a law can affect another law without directly affecting someone's legal right. Consider, for example, second-order rules concerning rule change, execution, or adjudication. Because of this, there can be a law that does not create a legal right. In addition, the objector might argue, a legal right can exist without a remedy. The right might be merely symbolic. An example might be a legal day of recognition. Consider, for example, Congressional recognition of those celebrating golden anniversaries.<sup>30</sup>

This objection fails to identify the central function of law. Law constitutes government-recognized relations between individuals or, perhaps, attempts to do so. This is what allows law to achieve whatever purpose one has for it. Consider, for example, the following purposes: promoting peace, protecting natural

rights, and justly distributing goods. Hohfeldian relations exhaust government-recognized relations. Even if this view of law's central function is not correct, a law that does not affect someone's right (or related Hohfeldian relations), even indirectly, is for all practical purposes not a law, regardless of whether it is a law in some technical sense. This is because such a law would make no difference to people's lives.

A second objector might reject premise (P2). He might argue that EC has a remedy. For example, it might be grounds for a court, police, or military to block receipt of a gift or to repossess it. The problem with this objection is that the emolument or gift could be blocked only with Presidential approval. It is thus not be a remedy in the sense of something made right without the President agreeing to it. Under the Constitution, a court would not have a legal justification for blocking receipt. In addition, even if the court ordered a gift or payment be blocked or confiscated, this would be done only if the President executed the order. It would thus be under his discretion.

A third objector might also target premise (P2). He might claim that a remedy is present, namely impeachment and conviction. The principle that best fits and justifies EC is the following: violation merits impeachment and conviction. This, then, is the remedy for a right-holder. It fits and justifies the clause because it explains why it is in the Constitution and what good thing it accomplishes. In addition, it justifies the clause because there is good reason in terms of justice and utility to have EC backed by a remedy.

The problem with this objection is that infringing EC is neither necessary nor sufficient for impeachment and conviction. This can be seen if we consider the language, structure, or intention behind the "High crimes and Misdemeanors" term in the Impeachment Clause. It is thus not a remedy in the relevant sense. The same is true as a practical matter. Congress will likely not remove a popular President for accepting some small gift or payment given its relatively recent refusal to remove a President for perjury and obstruction of justice. The same is true were the objector to claim that the remedy is for voters to vote against a President that violates the clause in the next election.

A fourth objection to my argument is that my concentration on EC and quick dismissal of criminal law applying to presidents makes it sound like the President could shoot people on Fifth Avenue and then just pardon himself. The objector notes that this is absurd. He continues by arguing that law has a spirit as well as a letter and my argument ignores the spirit of EC.<sup>31</sup>

With regard to the Emoluments Clause, if my argument succeeds, then there is no law with regard to the President. If there is no law, then it has no spirit. The objector would reply, though, that the spirit of the EC suggests that it should be interpreted to have a remedy, even if only impeachment and conviction. This situation is made worse, if, as I suggest above, the President is immune from federal prosecution while in office.

The problem with this reply is that removal from office is not the legal remedy for violating the EC. The Impeachment Clause does not mention EC. Nor does it intuitively seem that accepting an emolument or gift necessarily constitutes a high crime or misdemeanor. This is particularly true given that the emolument

or gift might be small or that while big, the President is doing an excellent job when the country really needs him. It is also worth noting that there is no other federal criminal provision piggybacks on EC and thereby allows a prosecutor to indirectly enforce it. Accepting an emolument or gift might be a high crime or misdemeanor when it constitutes corruption or abuse of power, but that is not the only way to commit such wrongs.

The spirit of the law is what the authors or ratifiers intended or the good thing that the law might bring about. However, there are a series of devastating objections against looking at original intention other than as a way to fix the concept that a term expresses. First, intention is a feature of a single mind and a collection of people do not have one. Second, if a collection's intention is the shared goal or goals, then there is an issue as to why their intention should matter, rather than the result of their public act, which is the textual language. Third, there is the issue of whether the second-order intention tracks the first-order intention. If the founders (second-order) intention was that their (first-order) intention be ignored, then it is unclear why the first-order intention should be followed.<sup>32</sup> Fourth, depending on the author or ratifier, the first-order intention might focus on a concrete problem (for example, King George giving a certain type of nobility title to a tax collector), a definition (consider the definition of "office"), or a general problem (concern for conflicts of interest). It is unclear what level of intention should govern and what would justify this level rather than another. This is particularly true if there is no majority intention or if the intention-preference pattern would be intransitive were there head-to-head comparisons.<sup>33</sup> Fifth, it is unclear whether with regard to the Constitution, the intentions that should matter were those of the drafters, delegates, or state legislators who voted on the Constitution.<sup>34</sup>

The argument against looking at the good thing a rule might bring about is that law is constituted by a rule. If the rule is so indeterminate so that the decision-maker (judge or police officer) must decide what the rule says by looking at its intended goal, then she is acting more as a legislator and less as someone who interprets or enforces the law.

Even if the President cannot be convicted while in office, this does not put him above the law. He would still be subject to state criminal law and he can't pardon himself from it. Also, were he removed from office, he would be subject to the federal criminal law. The same is true when his term ended. If he pardoned himself (think of President Clinton's pardoning his relatives and campaign donors), this would let him off the hook for federal offenses, but only at the expense of making a strong case for his being removed from office. The possibility of a President pardoning himself is a threat, but that is the price to be paid when the Impeachment Clause does not rule it out and the rule has not been revised despite awareness that this could be done. The consensus is that a President may pardon himself.<sup>35</sup>

A follow-up to the fourth objection is that upshot of my theory depends on the conditions of impeachment. Here is the Impeachment Clause:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High crimes and Misdemeanors.<sup>36</sup>

The objector might continue: What if the investigation into Russian collusion with Trump and his cronies is corroborated? Is this sufficient for treason? The objector continues that since I raise impeachment in my article, it behooves me to discuss this possible conflict of interest, one connected with possible treason.<sup>37</sup>

Whether this case is treason depends on whether it meets the Constitutional conditions for treason. They are as follows:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.<sup>38</sup>

The issue would be whether the purported deal with Russia involves giving aid and comfort to the enemy and whether there is two witnesses' testimony. This would depend on the facts.

In general, the interpretation of what is an impeachable offense depends on how "High crimes and Misdemeanors" is understood. This might depend on such things as are relevant to statutory interpretation. Among the factors that might be relevant are the history of the rule, what the word or words meant at the time, what the authors or ratifiers intended, the way the phrase relates to other parts of the statute and to language in other statutes, the principles that best fit and justify the rule, and, perhaps, justice- or utility-based considerations. Filling out and prioritizing these considerations would take us too far afield, but in the context of impeachment, the general concern is for criminality, corruption, and abuse of power.

Here is a summary of the objections and responses:

|   | Objection  | Response   |
|---|--|--|
| 1 | <b>A law can exist without a remedy.</b> This is because not every law creates a legal right or not every legal right comes with a remedy.                   | Law constitutes the government-recognized relations between individuals. This is done via remedies.  |
| 2 | <b>Remedy exists.</b> The remedy is present in that a government agency might block receipt of a gift or emolument or confiscate after it has been received. | This is not a legal remedy because it would require the President's permission, except when done by the court. The court lacks a legal justification for doing so and would require the President's permission to execute its order. |
| 3 | <b>Impeachment.</b> The principle that best fits and justifies the clause is that this violation merits impeachment and conviction. This is a remedy.        | Violating EC is neither necessary nor sufficient for impeachment and conviction. It is not even closely tied to it. Hence, it is not a remedy.   |
| 4 | <b>Spirit of the Law.</b> The above interpretation of EC fails to capture the spirit of the law. The spirit of it includes a remedy.                         | It is not clear that law has a spirit (intention or goal). Even if it does, it still does not pick out a remedy.   |

## PART FOUR: CONCLUSION

Here I argued that with regard to the President, EC is not law. I argued for this on the basis of two premises. First, if something is a law, then it has a legal remedy. This premise rests on the assumptions that if something is a law, then it affects a legal right and if something affects a legal right, then it has a remedy. Second, EC does not have a legal remedy. This premise rests on one or more of the following assumptions: EC does not apply to the President, if EC were to apply to the President, it does not provide a remedy, or if EC were to apply to the President and have a remedy, it is not law because it is vague. The conclusion that EC does not apply to the President has a practical upshot. As a practical matter, President Trump's worldwide business tentacles and his refusal to put his business assets into a blind trust does not violate EC and, arguably, does not violate federal conflict-of-interest law. The conclusion might be unfortunate, but this is because the rise of the imperial Presidency and the incredible gain in Congressional power has not been resulted in EC being revised.

The notion that Trump's worldwide business and refusal to put his business assets into a blind trust does not violate EC and, arguably, does not violate federal conflict-of-interest law is unfortunate if the law could be better. This might be the case if it were better that the President should avoid receiving gifts and emoluments without Congressional approval and set out a bright-line rule on Presidential conflict of interest. While gifts or emoluments are largely avoidable, the same is not true for some conflicts of interest. They are sometimes better handled by an official escaping, disclosing, or managing such conflicts.<sup>39</sup> This is especially true when an official such as Trump has assets that are illiquid, rest in part on the value of his name, or ones to which the official has an emotional attachment because he spent a lifetime developing them. Too stringent conflict-of-interest rules might discourage successful businesspeople from becoming President and, instead, favor lifelong politicians or government workers (consider, for example, military leaders). It is unclear whether this is good for the country.

One solution is to have an outright ban on Congressionally unapproved gifts and clear-cut cases of emoluments from foreign governments. This would be done by making EC apply to the President and backing it with automatic removal from office. This in turn would have to be done by changing the Constitution. This rule might be accompanied by one that allows Presidents to have conflicts of interest, other than gifts and emoluments, so long as they disclose them. This might be the best solution, although this is far from obvious, but it requires EC to apply to the President. This approach would thereby separate out two types of conflicts of interests. Unapproved emoluments and gifts from foreign governments that would be handled via removal and other conflicts handled via disclosure.

This change to the Constitution would have its own problems. Consider, for example, the conceptual problem of the President being tasked with policing himself, the need for a sanction to back the disclosure requirement, and the potential political abuse of Congress having a low bar for removing someone from the Presidency. It would have the advantages of a bright-line rule, a clear standard

for impeachment and conviction, and clearer choice for voters. The Constitution and likely statutory law do not currently allow for this and if the current law prevents a better set of rules from being in place, then it is unfortunate. I am not sure, though, whether the law fails in this way.<sup>40</sup>

## ENDNOTES

1. For an account of Trump's far flung business dealings, see Richard C. Paddock, Eric Lipton, Ellen Barry, Rod Nordland, Danny Hakim, and Simon Romero, "Potential Conflicts Around the Globe for Trump, the Businessman President," *The New York Times*, November 26, 2017, [https://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html?\\_r=0](https://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html?_r=0).

2. See Zephyr Teachout, "Trump's Foreign Business Ties May Violate the Constitution," *The New York Times*, November 17, 2016, <https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/trumps-foreign-business-ties-may-violate-the-constitution>.

3. See Randall Eliason, "The Emoluments Clause, Bribery, and President Trump," *Sidebars*, November 29, 2016, <https://sidebarsblog.com/2016/11/29/the-emoluments-clause-bribery-and-president-trump/>.

4. See 18 U.S.C. 202(c). See, also, Rachel Stockman, "Trump is Right, Conflict-of-Interest Rules Don't Apply to Him," *Law Newz*, November 23, 2016, <http://lawnewz.com/high-profile/trump-is-right-conflict-of-interest-rules-dont-apply-to-him/>.

5. First-order rules determine what individuals may do. Second-order rules determine whether and how the first-order rules may be changed. A third-order rule governs second-order ones and so on. The higher order rules are part of a system because of the way in which they allow us to change, enforce, or adjudicate first-order rules.

6. Wesley Hohfeld argued that a right is a claim. See Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1946). A brief aside on Hohfeldian relations might be helpful here. A Hohfeldian relation is a legal or moral relation between one person and another. The different types of Hohfeldian relations are thought to exhaust the types of relations one person can have with regard to another. One person has a claim against a second just in case the second owes the first a duty. One person has a power against a second just in case the first may maintain, eliminate, or change another Hohfeldian element. The two other Hohfeldian elements (liberty and immunity) are just the absence of a claim or power in one person relative to another.

7. A different but related idea is that all legal rights are positive. See Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton and Company, 1999).

8. See Seth Tillman, "Constitutional Restrictions on Foreign Gifts Don't Apply to Presidents," *The New York Times*, November 18, 2016, <https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/constitutional-restrictions-on-foreign-gifts-dont-apply-to-presidents>.

9. See David Barron, "Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize," Office of Legal Counsel, Department of Justice, December 7, 2009, pp. 1–13, <https://www.justice.gov/sites/default/files/olc/opinions/2009/12/31/emoluments-nobel-peace.pdf>.

10. See, also, Will Baude, "Some misgivings about the Foreign Emoluments Clause arguments," *The Washington Post*, January 9, 2017, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/09/some-misgivings-about-the-foreign-emoluments-clause-arguments/?utm\\_term=.8df132dc4867](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/09/some-misgivings-about-the-foreign-emoluments-clause-arguments/?utm_term=.8df132dc4867).

11. The idea for this point comes from Eliason, "The Emoluments Clause, Bribery, and President Trump."

12. The idea for this comes from the classic analysis of punishment. See A. Flew, "The Justification of Punishment," *Philosophy* 29 (1954): 291–307; S. I. Benn, "An Approach to the Justification of Punishment," *Philosophy* 33 (1958): 325–41; H. L. A. Hart, "Prolegomenon to the Principles of Punishment," *Proceedings of the Aristotelian Society* 60 (1959–1960): 1–26.

13. See Randolph Moss, "A Sitting President's Amenability to Indictment and Criminal Prosecution," U.S. Department of Justice, October 16, 2000, <https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222.pdf>.

14. There is an issue as to whether dual sovereignty was eliminated during Franklin Roosevelt's administration. See, for example, Norman Williams, "The Commerce Clause and the Myth of Dual Federalism," *UCLA Law Review* 54 (2007): 1847 and Emily Zackin, "What's Happened to American Federalism?" *Polity* 43.3 (2011): 388–403.

15. See *Clinton v. Jones*, 520 U.S. 681 (1997).

16. See "remedy," *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/remedy>. Accessed May 7, 2017.

17. See *Spokeo, Inc. v. Robins*, 578 U.S. \_\_\_\_ (2016) and Laura Jarrett, "Who Can Sue Trump Over Emoluments?" CNN, January 24, 2017, <http://www.cnn.com/2017/01/24/politics/norman-eisen-suing-donald-trump-emoluments/>.

18. Consider, for example, the impeachment of President Andrew Johnson for violating the Tenure in Office Act and Bill Clinton for perjury and obstruction of justice. Neither was convicted. There have been impeachments and convictions for gifts and bribery. In 1912 a judge (Robert Archbald) was impeached and convicted for improper acceptance of gifts from litigants and attorneys and in 1988 a judge (Alcee Hastings) was impeached and convicted for bribery and perjury. Conflict of interest and bribery, arguably, are a greater problem and less political problem with a judge than the President. See "Impeachment in the United States," *Wikipedia*, [https://en.wikipedia.org/wiki/Impeachment\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Impeachment_in_the_United_States). Accessed May 7, 2017.

19. See Alexander Hamilton, James Madison, and John Jay, *Federalist Papers* (New York: Signet, 2003).

20. See Jarrett, "Who can sue Trump over emoluments?"

21. The Eleventh Amendment says, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

22. Some of these difficulties come from Jonathan Adler, "The Emoluments Clause—is Donald Trump Violating its Letter or Spirit?" *The Washington Post*, November 21, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/21/the-emoluments-clause-is-donald-trump-violating-its-letter-or-spirit/>.

23. See Walter Olson, "Emoluments Clause vs. the Trump Empires," *The Philadelphia Inquirer*, November 29, 2016, [http://www.philly.com/philly/opinion/20161130\\_Commentary\\_Emoluments\\_Clause\\_vs\\_the\\_Trump\\_empire.html](http://www.philly.com/philly/opinion/20161130_Commentary_Emoluments_Clause_vs_the_Trump_empire.html).

24. For an example of a private group that has close ties to the government, consider the Nobel Peace Prize. It has been given to Presidents Theodore Roosevelt, Woodrow Wilson,

and Barack Obama. In 2009, it included members who had recently been connected to the Norwegian government. See Barron, "Applicability of the Emoluments Clause," 2–3.

25. For a classic statement of this principle, see *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

26. See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961).

27. See John Austin, *The Province of Jurisprudence Determined*, ed. Wilfred Rumble (Cambridge: Cambridge University Press, 1995).

28. For the notion of the imperial Presidency, see Conor Friedersdorf, "End the Imperial Presidency Before It's Too Late," *The Atlantic*, May 23, 2016, <https://www.theatlantic.com/politics/archive/2016/05/donald-trump-is-coming/483578/>. See also Arthur Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

29. For an argument that the Commerce Clause has been incorrectly and greatly weakened, see Richard Epstein, *How the Progressives Rewrote the Constitution* (Washington, DC: Cato, 2007).

30. See Zach Bergson, "Congress Recognizes Wide-ranging Issues in 'Day of,' 'Week of,' 'Month of' Resolutions," *The Hill*, June 20, 2012, <http://thehill.com/capital-living/cover-stories/233687-congress-recognizes-wide-ranging-issues-in-day-of-week-of-month-of-resolutions>.

31. I owe this objection to Elliot Cohen.

32. The idea for this point comes from Irving Kaufman, "What Did the Founding Fathers Intend?" *The New York Times*, February 23, 1986, <http://www.nytimes.com/1986/02/23/magazine/what-did-the-founding-fathers-intend.html?pagewanted=all>. See also Michael Moore, "A Natural Law Theory of Interpretation," *University of Southern California Law Review* 58 (1985): 277.

33. With regard to EC, Alexander Hamilton said, "One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption." *Federalist* No. 22. It is unclear if he had in mind instances of corruption, definition of "corruption," or a general moral problem to be solved.

34. See Kaufman, "What Did the Founding Fathers Intend?"

35. See Jonathan Vankin, "Could President Trump Pardon Himself for Crimes," *Heavy*, November 11, 2016, <http://heavy.com/news/2016/11/president-donald-trump-pardon-himself-university-fraud-rape-criminal-lawsuits/>. For the claim that the Supreme Court would likely allow the President to pardon himself, see Richard Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (Cambridge, MA: Harvard University Press, 1999).

36. See Article II Section 4.

37. The idea for this objection comes from Elliot Cohen.

38. See Article III Section 3.

39. This and the next point come from Michael Davis, "Trumping Conflict of Interest," *International Journal of Applied Philosophy* 31.1 (2017): 9–20.

40. I am grateful to Elliot Cohen and Michael Davis for their extremely helpful comments and criticisms and interesting work on this topic.