Symposium on Trump and Conflicts of Interest

Introduction

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This symposium consists of four papers on Trump and conflicts of interest. The first, by Michael Davis, looks carefully, conceptually, at the nature of conflicts of interest themselves, and the types of conflicts of interest Trump has, according to Davis. The second paper, by Aaron Quinn, looks at Trump and conflicts of interest from a journalistic perspective and raises the question of how the matter is, and should be covered by the press. The third paper, by Stephen Kershnar, takes a legal perspective in analyzing whether Trump can be found guilty of violating the Emoluments Clause of the United States Constitution. According to the Oxford English Dictionary, an emolument is a "[p]rofit or gain arising from station, office, or employment; dues; reward, remuneration, salary."[1] Article 2, Section 9 of the U.S. Constitution ("The Emoluments Clause") forbids government officials from receiving emoluments. This provision states,

> No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

The fourth paper, by Fritz Allhoff and Jonathan Milgrim, also takes a legal perspective in considering whether the above Clause can apply to the presidency, but comes to a different conclusion than Kershnar regarding the latter. Unlike Kirshnar's, the latter paper also considers whether federal conflict of interest law applies to the presidency.

Relying on his earlier, well known work on conflicts of interest,[2] Davis begins by defining a conflict of interest as "a situation in which some person, whether an individual or corporate body, is in a relationship with another requiring him, her, or it to exercise judgment in the other's behalf when he, she, or it, has an interest tending to interfere with the proper exercise of judgment in that relationship."[3] Applying this definition to Trump, Davis argues that Trump confronts two types of conflicts of interest as President. First, there are potential conflicts of interest linked to his vast real estate holdings, which can interfere with discharging his duties as President, which are "beyond avoidance, escape, disclosure, or management."[4] The second type of conflict of interest, Davis maintains, is even more serious than the first type. This second type of conflict, Davis argues, is indelibly

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linked to Trump as a "brand," which could only be relinquished through the destruction of his "royal" image.[5]

Applying Davis's definition of conflicts of interest, Quinn argues that "traditional journalists and news organizations," such as CNN, The Washington Post, and the New York Times, are doing a reasonable job covering Trump's conflicts of interest despite criticisms that such consolidated, corporate organizations are not capable of being objective.[6] Pointing to several examples of conflicts of interest Trump faces, Quinn argues that, while this coverage does not always yield truth, it does provide "justified belief," which, in an age of "fake news" that inundates online social new feeds, is "more than adequate."

As one example of a conflict of interest Trump confronts, Quinn cites:

> Trump is accused of revealing sensitive national security information to Russian diplomats, relationships that he might have massaged for personal business interests and/or for avoiding political blackmail because of links between the Trump campaign and Russia's alleged hacking of the Democratic Party.[7]

While Quinn suggests that the aforementioned raises the specter of the President possibly having conspired with the Russians in meddling in the last presidential election, there is still no public outcry. In fact, states Quinn, the statistics are showing relatively stable support for Trump among his base and Republicans. Quinn's at least "partial" explanation is: "post-truth politics and journalism."[8]

But are there other possible "partial" explanations that may be at odds with Quinn's assessment of how well the corporate media are covering Trump? Perhaps such bottom-line, driven media are not truly covering the news as well as they ought. When CNN gives equal time to the likes of Jeffrey Lord, an ardent Trump supporter who once compared Donald J. Trump to Martin Luther King,[9] is it also guilty of disseminating "fake news" or less than "justified belief"? Did the corporate media actually help Trump to get elected in the first place? A 2016 study conducted by the Shorenstein Center at Harvard University maintains that Trump got more press coverage than did his Democratic opponent, Hillary Clinton, and that Trump also received less negative coverage.[10] A possible explanation for such extended coverage may have been the corporate media's insatiable desire for profit and the perception, if not the reality, that Trump simply attracted more viewers than did Clinton.[11]

In 1979, in his celebrated analysis of CBS Evening News, NBC Nightly News, Newsweek, and Time, Hebert J. Gans argued that there is no objective news perspectives, only alternative perspectives.[12] According to Gans, news organizations do their job well when they attempt to bring as many alternative perspectives into the news hole as possible. So, is this the news philosophy that still permeates today's mainstream media coverage rather than reverence for epistemic justification, as Quinn claims? And are all news organizations truly equal in their reverence for epistemic justification? For example, is CNN on the same epistemic footing as the Washington Post in its coverage of Trump's alleged conflicts of interest?

Of course, there are inherent limits to justified belief in news reporting. For example, reporters cannot report whether Trump violated the Emoluments Clause but can only report whether an attorney, or a court, has decided that it has. Citing

a Washington Post article reporting that a watchdog group has filed suit against Trump for violation of the Emoluments clause, Quinn suggests the possibility that Trump may, indeed, have done so. However, Kershnar, in his paper, attempts to show that such a charge would itself not be justified.

In his paper, Kershnar argues that the Emoluments Clause (EC) does not apply to the President; that "EC does not result in a criminal remedy because, arguably, the President is not subject to federal criminal law"; and that, "even if he were subject to it, EC does not provide a criminal remedy."[13]

So, why, according Kershnar, is the President not subject to federal criminal law? Because, he says, "the President is the boss of the Justice Department and Attorney General,"[14] so they would need his permission to punish him; and even if they could do that, he could always pardon himself. As such, with distant echoes of former President Nixon who declared himself to be above the law,[15] Kershnar gives Trump a free pass on the Emoluments clause. As Kershnar realizes, this does not exempt him from prosecution under state law. So, when Trump once declared, "I could stand in the middle of 5th Avenue and shoot somebody and I wouldn't lose voters,"[16] he may have been right (on Quinn's account of the staunchness of Trump supporters), but that would not exempt him from prosecution under New York State criminal law if he actually shot somebody. So, it would still be misleading to say, without qualification, that Trump is "above the law."

Further, there may be just reason to question the weight that Kershnar places on the absence of an explicit legal remedy to the Emoluments Clause, for, if this were a problem with applying this provision to the President, then it would be a problem with applying it to any public official, which would mean that the Founding Fathers placed a provision into the Constitution that had no application whatsoever, which is absurd. Second, while it is true that the U.S. Constitution does not explicitly require a remedy for every harm, the Magna Carta, upon which the Constitution is largely based, does succinctly address the issue. In Chapter 29, it declares, "We will sell to no man, and we will not deny or defer to any man, either justice or right." In 1641, Sir Edward Coke, in his classic work, *Second Part of the Institutes of the Laws of England* interpreted this to mean, in part, that

> [E]very subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporall ,..or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.[17]

Here, the words, "without exception" should be emblazoned in the minds of any lawmaker who claims that the President is above the rights of the people to justice. In fact, recently, Attorneys General for the District of Columbia and the state of Maryland sued President Trump alleging that he has violated the Emoluments Clause by accepting millions in payments and benefits from foreign governments since assuming the office of President. In part, the suit alleges that taxpayer-owned convention centers in DC and nearby Maryland may have been adversely affected by the Trump hotel. If so, there is also a tangible harm and thus a legal necessity for a remedy. Further, as Kershnar admits, the Justice De-

partment Office of Legal Counsel has already maintained that the Emoluments Clause applies to the President.[18]

Civil law may be a different matter, however. In *Nixon v. Fitzgerald*, a case involving a management analyst with the U.S. Air Force who was fired by Nixon for testimony he delivered to a congressional subcommittee regarding cost overruns and technical problems in the production of a certain airplane, the U.S. Supreme court concluded that the "Petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts."[19] The Court then went on to defend its conclusion thus:

> A rule of absolute immunity for the President does not leave the Nation without sufficient protection against his misconduct. There remains the constitutional remedy of impeachment, as well as the deterrent effects of constant scrutiny by the press and vigilant oversight by Congress. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.[20]

Does such "absolute immunity" also mean that the special counsel,[21] now investigating the Trump campaign team for possible collusion with the Russians, and Trump, himself, for possible obstruction of justice, lacks the power to criminally prosecute him? On Kershnar's analysis, this would appear to be the case inasmuch as such crimes would be federal, not state crimes.

In their paper, Allhoff and Milgrim look more broadly at both federal conflict of interest law pertaining to financial conflicts of interest as well as EC. They first point to the Ethics Reform Act of 1989 as revising the definitions of the terms "officer" and "employee" of prior conflict of interest legislation (the Ethics in Government Act of 1962) to explicit exempt presidents, vice-president, members of congress, and federal judges. Second, they explore the normative question of whether federal financial conflict of interest law *should* apply to the presidency, and conclude that there are practical reasons that tip the scale against so applying it.

Third Allhoff and Milgrim turn to the question of whether the Emoluments Clause applies to the President and use a literal interpretation of the Constitution to argue for a qualified affirmation. According to these authors, if the term "office" as used in EC did not apply to the President, then its use elsewhere in the Constitution would lead to absurdity. For example, Eisen, Painter, and Tribe (cited by Allhoff and Migrim) point out that

> Article I, Section 7 provides that any official who has been impeached and removed from office is disqualified from holding any "Office of honor, Trust or Profit under the United States." If the President did not hold an office "under the United States," a disgraced former official would be forbidden from every federal office in the land, but could be President.[22]

Further, according to Allhoff and Milgrim, the term "office" is used abundantly elsewhere in the Constitution to explicitly refer to the President, so excluding the President from being an office holder would render the Constitution incoherent. They further argue that any other interpretation would be inconsistent with the Framers' intentions, and, contrary to Kirshnar's denial that divining legislative intent is feasible, they attempt to drive their point home by citing a direct quote

from Edmund Randolph, the first United States Attorney General, contextually affirming that EC applies to the President.[23]

However, Allhoff and Milgrim argue that the use of the term "emoluments" elsewhere in the Constitution is limited to direct compensation for government services; so interpreting the term as applying to any form of financial gain would be inconsistent. Thus, "fair market transactions are allowed under the Emoluments Clause," however, "overpayments comprise violations." For example, "[c]harging a foreign emissary $100,000 for a round of golf or $5,000 for a hotel room—or even accepting those levels of payment—could be inapposite when the sticker price for those are $1,000 and $500, respectively."

It is not clear why Allhoff and Milgrim think that fair market transactions are allowable under EC while overpayments are not. In a footnote,[24] they state,

> Gross overpayment for a service in order to ensure some outcome or to establish a favorable relationship with the President would violate the Emoluments Clause. This type of transaction would violate both the spirit and the language of the clause. It would be a form of payment, not for the services rendered, but as a way of unjustly enriching the President.

If what is inapposite is use of the office of President to exact further personal gains, then the same might be said about getting a fair market price from a foreign ambassador who stays at a Trump International Hotel in Washington, D.C. rather than at a less expensive Marriott property for fear of falling into disfavor with the President. Either way, by not exempting himself from profiting from such business transactions, the President intentionally permits the office of the presidency to operate as a way of drumming up business.

While Allhoff and Milgrim argue that EC applies to the presidency insofar as it proscribes *direct payment from foreign governments or their representatives*, they do not explicitly apply this provision to Trump in determining whether he, in particular, is in violation. So what would he need to be guilt of in order to violate EC on Allhoff's and Milgrim's narrow interpretation? They provide these examples: consultancies, honoraria, retirement accounts, and bribes.[25] I suspect that much may depend on what these terms signify. For example, is giving top secret information to the Russians serving as a "consultant"; or is agreeing to lighten Russian sanctions in exchange for help in securing the presidency accepting bribes? Of course, such claims are presently unproven. But even if they were established, it is questionable what significance EC would have for purposes of providing a legal remedy for such untoward actions, so Kershnar may have the stronger argument here.

On the other hand, there is Article 2 Section 4 of the Constitution, which states,

> 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.

And, pursuant to 18 U.S. Code §2381, whoever gives "aid or comfort" to the enemies of the United States is guilty of treason for which explicit remedies are provided, including death. This does, indeed, corroborate Allhoff's and Milgrim's point that the Framers of the Constitution were very concerned about corrup-

tion. But, contrary to Allhoff and Milgrim, perhaps the Emoluments Clause was intended to have broader applications not covered elsewhere in the Constitution such as by Article 2, Section 4. In restricting it to what appears to be addressed by the latter, Allhoff's and Milgrim's narrow interpretation may make the Clause redundant and unnecessary.

So, as the Court found in *Nixon v. Fitzgerald*, there is still always the possibility of impeachment as a constitutional remedy to presidential malfeasance. Kershnar agrees. But impeachment is possible *only if* Congress finds the President guilty of an impeachable offence.

The latter "only if" is crucial. As Hume astutely perceived, no matter how many facts are heaped upon each other, no "ought" can be derived without a prior value commitment.[26] Unwavering support for Trump among the Republican-led Congress may then be the deciding factor. Perhaps Socrates said it best when he appeared before the Athenian court.[27] While his charges were contrived, that may not have mattered; for Socrates said that his grievance was not with the laws, but rather with the people who were applying them. In this regard, Kershnar raises the question as to whether the present laws need changing, and concludes that he is not sure. As in the case of Athens (and we know what happened to Athenian democracy[28]), the problem, once again, may not be with the laws, but instead with those applying them.

As all four symposium contributors would seem to agree, the nature, extent, and seriousness of the conflicts of interest confronting the current President are *sui generis*; the ordinary means of dealing with conflicts of interest are confined by the enormity and unusual features of Trump's conflicts; and they raise serious questions about the ethical as well as legal limits of presidential power, and the ability of the press (especially a bottom-line-driven one) to meet its constitutional charge in an age of "fake news." In the least, this symposium aims to provide conceptual clarity about some key elements of these monumental challenges to the prosperity, if not survival, of our democracy.

ENDNOTES

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