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M. C. E.

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CONFLICTS OF INTEREST AND THE PRESIDENT: REVIEWING THE STATE OF LAW IN THE FACE OF A TRUMP PRESIDENCY

*M.C.E.**

“No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other. You cannot serve both God and money.”¹ It is not a novel concept that competing personal interests rob us of our ability to make impartial and objective decisions. For this reason, the need to avoid conflicts of interests comprises a main tenet of our system of due process. Recognition that we, as mere humans, unavoidably root our bias in decision-making is at the core of our process for governing the disqualification of judges and attorneys, and of course in selecting juries.

This avoidance of conflicts supports confidence in the implementation of our substantive rule of law. Our focus on process as a means to secure substantive law and compliant enforcement is what distinguishes Western, and in particular American, rule of law. It is by this process that we create trust in our legal system—we may not all agree with the substantive law or its implementation, but we can at least respect that it was derived from a process with integrity. At its core, minimizing conflicts of interests is a critical mechanism to ensure unbiased decision-making in the legal system in the same way a scientist would use a control mechanism in a lab experiment.

This concept does not stop with the legal system—most government officials are subject to some conflict of interest standard, whether via the Constitution, agency rules and regulation, statute, or contract. Two notable exceptions are the president and vice president. These exceptions are based on the policy rationale that any prohibition against conflicts of interests might impede their ability to carry out their Constitutional duties. However, on November 8, 2016, Donald John Trump was elected to be the 45th President of the United States of America, bringing with him an unprecedented level of potential conflicts of interest.

* Due to fear of retribution against the author’s employer, she is not able to publish this article under her real name.

¹ Luke 16:13; Matthew 6:24.

This is not the first time a business magnate has ascended to an executive office. In 1974, President Gerald Ford nominated Nelson A. Rockefeller for the office of the Vice President. Following Rockefeller's nomination, there was a great deal of concern over "the public-policy implications of a nominee whose vast financial holdings touch many segments of the American economic system."² Rockefeller's business interests and finances were subjected to intense scrutiny, including two sets of Senate hearings in the fall of 1974 and an audit by the Joint Committee on Internal Revenue Taxation of his 1964–1973 federal income tax returns.

Rockefeller had only negligible ownership (a.k.a. less than 0.2%) in Standard Oil Co. of California or any other oil company; his family's holdings in the same company totaled only 2.06%, and this was also their largest holding in any single oil company. Rockefeller testified that his family had "no control of any kind over the management or policies" of Standard Oil of California or any other oil company."³ Moreover, Rockefeller testified that he was having a blind trust prepared in which he was prepared to put all of his personally-held securities should he be requested to do so by Congress—it was ultimately decided this would be useless as Rockefeller would still be aware of his personal and family interests. During the hearings, Senator Robert C. Byrd (D W.Va.) postulated if Rockefeller himself "may be conscious of the power that the two [great political power and extensive economic influence] when combined really add up to. . . . I wonder if you can separate the interest of big business and the national interest when they diverge." Ultimately, the Committee was persuaded by Rockefeller's candor and straightforwardness, determining that his public disclosure of his holdings would "permit a monitoring of those business interests by the public and the news media that would be adequate."⁴

Despite the face-value similarities, a closer look reveals stark differences in both the extent of Mr. Trump's potential conflicts, as well as his handling of any such conflicts. As of September 2016, Mr. Trump's total net worth was estimated to be a whopping \$3.7 billion. He is currently the sole or principal owner of the approximately 500 business entities which compromise the

² Hearings on Nomination of Nelson A. Rockefeller of New York to be Vice President of the United States Before the Senate Comm. On Rules and Administration, 93d Cong., 2d Sess. 39–79 (1974).

³ "Rockefeller Becomes 41st Vice President," CQ ALMANAC 1974, at 917–35 (30th ed. 1975), <https://library.cqpress.com/cqalmanac/document.php?id=cqal74-1223238>.

⁴ *Id.*

Trump Organization, spread across at least 20 countries.⁵ Mr. Trump has filed the requisite financial disclosure report, but he has repeatedly refused to produce his tax returns despite repeated requests to do so, claiming he is currently being audited (despite his attorney having confirmed his pre-2009 taxes are no longer being audited).⁶ Similar to Rockefeller, Mr. Trump's placement of his assets into a blind trust would likely be ineffective given his intimate knowledge of his self-titled empire. However, unlike Rockefeller, Mr. Trump has never offered to place his holdings in a blind trust. Rather, he has announced he will be turning over control of his empire to his three children—Ivanka, Donald Jr., and Eric—all three of whom Mr. Trump is simultaneously relying upon to help curate the next government as members of the executive committee of his transition team.

This article will provide a brief sample of Mr. Trump's potential conflicts, both international and domestic; examine the current state of laws that could potentially limit a president's ability to engage in interested transactions; assess the effects of exempting such a powerful member of the government from conflict of interest standards; and discuss what, if any, limitations the office of the president should be subjected to avoid conflicts of interest.

Potential and Current "Conflicts"

Mr. Trump's extensive businesses spark an array of potential conflicts across the globe. However, despite Mr. Trump's frequent discussion of his business empire and unabashed promotion of his own brand during the campaign, there was relatively little pre-election interest in discussing exactly what Mr. Trump intended to do with his Trump empire if elected.⁷ During a Fox business debate, Mr. Trump said if he became president, he "couldn't care

⁵ Morgan, Lewis & Bockius LLP, "Status of U.S. federal income tax returns" (March 7, 2016), https://assets.donaldjtrump.com/Tax_Doc.pdf; <https://www.documentcloud.org/documents/2838696-Trump-2016-Financial-Disclosure.html>.

⁶ *Id.*

⁷ Meg Anderson, *Trump Often Uses The Campaign Spotlight To Promote His Own Brand*, NPR.COM (Oct. 26, 2016), <http://www.npr.org/2016/10/26/499441383/trump-often-uses-the-campaign-spotlight-to-promote-his-own-brand>.

less about [his] company.”⁸ Looking back, the fact that Trump was unaware of the definition of a “blind trust” probably should have been a red flag.⁹

Not surprisingly, since being elected, Mr. Trump has declined to liquidate his assets (which is arguably not even an economic or legally feasible option) and place them in a truly blind trust.¹⁰ Instead, as mentioned above, Mr. Trump has announced he will turn over management of his businesses to his children—Ivanka, Eric and Donald, Jr.¹¹ Mr. Trump previously scheduled a press conference for December 15, 2016 to discuss more in-depth the plan for handling his expansive conflicts of interests, but mere days before it was to take place the conference was postponed until January without further elaboration on Mr. Trump’s exact plans.¹² Regardless of the ultimate details of the arrangement, any benefit from this arrangement in terms of reducing conflicts is undermined by Mr. Trump’s simultaneous decision to also appoint these same three children to his transition team.

One example of Trump’s international conflicts of interest is his investment dealings in the Philippines. In October, Mr. Trump’s partner in a \$150 million development project in the Philippines, Jose E. B. Antonio, was named a special envoy to the United States by President Rodrigo Duterte.¹³ Following the election, Mr. Antonio came to the United States on a “business,” and not “political” trip, and met with Mr. Trump’s children. Relations with the Philippines have recently been tense, and there is a fear that Mr. Trump’s ties to the Philippines, both personal and financial, could compromise America’s efforts to criticize the ongoing intermingling of state power and business entities of the Pilipino political elite.

⁸ Kate Taylor, “Here’s what will happen to Trump’s businesses now that he’s going to be president,” BUSINESS INSIDER (Nov. 9, 2016), <http://www.businessinsider.com/what-will-happen-to-trump-businesses-2016-11>.

⁹ Steven Benen, “Why Trump’s confusion about what a ‘blind trust’ is matters,” MSNBC (Jan. 8, 12:30am), <http://www.msnbc.com/rachel-maddow-show/why-trumps-confusion-about-what-blind-trust-matters>.

¹⁰ Jennifer Wang, *Why Trump Won’t Use A Blind Trust And What His Predecessors Did With Their Assets*, FORBES (Nov. 15, 2016), <http://www.forbes.com/sites/jenniferwang/2016/11/15/why-trump-wont-use-a-blind-trust-and-what-his-predecessors-did-with-their-assets/#5a8bb2267915>.

¹¹ Danielle Wiener-Bronner, *Trump to turn over business empire to his children*, CNN MONEY (Nov. 11, 2016), <http://money.cnn.com/2016/11/11/news/trump-transfers-business/>.

¹² Jennifer Wang, *Trump Postpones Press Conference Meant To Address Conflict Of Interest Issues*, FORBES (Dec. 12, 2016), <http://www.forbes.com/sites/jenniferwang/2016/12/12/trump-postpones-press-conference-meant-to-address-conflict-of-interest-issues/#29a24ef06147>.

¹³ Richard C. Paddock, *et al.*, *Potential Conflicts Around the Globe for Trump, the Businessman President* (Nov. 26, 2016), http://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html?mwrsm=Email&_r=0.

Another example is Mr. Trump's use of a direct appeal to a foreign politician to support personally beneficial regulatory change. Several days after the election, Nigel Farage of the U.K. Independence Party (UKIP) met with Mr. Trump in New York. During their conversation, Trump allegedly encouraged Farage to campaign against wind farms.¹⁴ Mr. Trump has previously campaigned himself against wind farms as he believes they will tarnish the view from his two Scottish golf courses.

As to Mr. Trump's children, in October, Donald Jr. met with diplomats, businessmen and politicians—including pro-Russian figures—in Paris to discuss formulating a plan to work with Russia to end the war in Syria.¹⁵ Donald Jr. was also seen hunting in Turkey shortly after his father's call with President Erdogan.

Mere days after the election, all three children attended a meeting between Mr. Trump and several Indian real-estate executives who are in the process of erecting a Trump-brand apartment complex in Mumbai. Mr. Trump decried accusations that the meeting undermined his recent assurances that he would be stepping away from control of Trump Organization, characterizing the meeting as merely an informal congratulations. However, according to one of the executive-attendees, during the meeting Donald Jr. expressed interest in expanding the pace of Trump Organization's India business.¹⁶

Several days later, Ivanka, who is allegedly closing a business deal with a Japanese clothing company whose largest stakeholder is the Japanese government, sat in on a meeting between President-elect Trump and Japan's Prime Minister, Shinzo Abe.¹⁷

There are also numerous potential domestic conflicts. Mr. Trump's election raises multiple issues with the Old Post Office Pavilion deal alone. The 60-year

¹⁴ Danny Hakim and Eric Lipton, *With a Meeting, Trump Renewed a British Wind Farm Fight*, N.Y. TIMES (Nov. 21, 2016), <http://www.nytimes.com/2016/11/21/business/with-a-meeting-trump-renewed-a-british-wind-farm-fight.html>.

¹⁵ Jay Solomon, *Donald Trump Jr. Held Talks on Syria With Russia Supporters*, WALL STREET JOURNAL (Nov. 23, 2016), <http://www.wsj.com/articles/donald-trump-jr-held-talks-on-syria-with-russia-supporters-1479920753>.

¹⁶ Kailash Babar, *Donald Trump Meets Indian Partners, Hails PM Modi's Work*, THE ECONOMIC TIMES (Nov. 17, 2016), http://economictimes.indiatimes.com/news/politics-and-nation/donald-trump-meets-indian-partners-hails-pm-modis-work/articleshow/55465060.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

¹⁷ Felkis Garcia, *Ivanka Trump was closing business deal in Japan when pictured with Donald Trump and Shinzo Abe*, THE INDEPENDENT (Dec. 6, 2016), <http://www.independent.co.uk/news/people/ivanka-trump-japan-business-deal-donald-trump-shinzo-abe-prime-minister-a7457161.html>.

long lease is between the General Services Administration (the “GSA”), whose administration will be appointed by Mr. Trump, and Trump Old Post Office LLC, which is a part of Trump Organization and thus will be run by Mr. Trump’s children.¹⁸ As such, Mr. Trump’s children will be conducting necessary lease re-negotiations with a GSA employee who reports to their father’s appointee—just imagine negotiating the sale of a car to the children of your boss’s boss. Moreover, the lease contains a provision stating “no . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.”¹⁹ Mr. Trump currently has a 76.725% personal ownership interest in the lease.²⁰

Apart from this potential breach, Mr. Trump has conceded the perceived increase in value of supporting his business, and the potential that people may perceive this as expressing support for him personally: “I mean it could be that occupancy at that [Old Post office] hotel will be because, psychologically, occupancy at that hotel will be probably a more valuable asset now than it was before, O.K.? . . .”²¹ Despite this, the Trump Organization has urged diplomats to consider patronizing this hotel when in town to meet with Mr. Trump or his team.²²

Additionally, Mr. Trump’s supervisory role over agencies handling conflicts involving his companies could impair the agencies’ abilities to make fair determinations. For instance, Mr. Trump will oversee the National Labor Relations Board while it decides any union disputes involving his hotels. As an example, a mere week before the election, the board ruled against Trump International Hotel in Las Vegas.²³ How many people would be willing to get

¹⁸ Steven L. Schooner and David I. Gordon, *Trump leases his D.C. from a government agency he’ll soon be in charge of*, THE WASHINGTON POST (Nov. 15, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/15/trump-needs-to-give-up-his-trump-hotel-lease-right-now/?utm_term=.0ac6d6bba24a.

¹⁹ Ground Lease between The United States of America and Trump Old Post Office LLC (the “Ground Lease”), at § 37.19, available at <https://www.gsa.gov/portal/content/305477>.

²⁰ Ground Lease, Exhibit G (Ownership Affidavit/Organization Chart), available at <https://www.documentcloud.org/documents/3000979-Exhibit-G-After-FOIA-APPEAL.html>. Donald Trump owns 76.725% of the Trump Old Post Office LLC through a company called DJT Holdings, LLC, which is 100% owned by Trump’s revocable trust. Executive Branch Personnel Financial Disclosure Report (May 16, 2016), at p. 62, available at <https://www.documentcloud.org/documents/2838686-5-18-16-Report.html#document/p62/a311861>. The remaining 22.275% ownership interest is shared equally among Ivanka OPO LLC, Don OPO LLC, and Eric OPO LLC. *Id.*

²¹ Paddock, *supra* note 13.

²² *Id.*

²³ Cogan Schneier, *Labor Board: Trump hotel violated labor law*, POLITICO.COM (Nov. 3, 2016), <http://www.politico.com/story/2016/11/labor-board-trump-hotel-230720>.

their boss's kid in trouble—especially when their boss would have to partly foot the bill for any penalty?

Another example is that Mr. Trump's transition team, including his three eldest children, will be selecting an attorney general. This same attorney general will head the Justice Department, which recently made a \$14 billion opening bid in its settlement negotiations with Deutsche Bank concerning claims related to the bank's handling of the mortgage-backed securities leading to the 2008 financial crisis.²⁴ Deutsche Bank is one of Trump Organization's biggest lenders, and now Mr. Trump and his children might potentially hand-select the person who sits across the table from Deutsche Bank in settlement discussions.

These conflicts create a complicated network of choices where Mr. Trump must choose between his personal financial interests and his duty to the presidency.

Conflict of Interest Laws

Legally speaking, the president is not subject to any conflict of interest law simply by virtue of his or her office. Title 18 Section 208 of the United States Code is the relevant provision concerning conflicts of interest of officers and employees of the executive branch. This provision generally prohibits an officer or employee of the executive branch from personally and substantially participating in matters in which the officer or employee personally, or through his or her family, "general partner," or affiliated organization, has a financial interest. To comply with this provision, the officer or employee must recuse himself or herself from participating in the relevant matter.

However, in 1974 following President Gerald Ford's nomination of Nelson A. Rockefeller to the office of Vice President of the United States, the U.S. Department of Justice ("DOJ") advised the Senate that this provision does not apply to the president (or vice president). The DOJ found that "[t]he effect of applying section 208 to the President is certainly either to disable him from performing some of the functions prescribed by the constitution or to establish a qualification for his serving as President (to wit, elimination of financial

²⁴ Larry Buchanan and Karen Yourish, *The Array of Conflicts of Interest Facing the Trump Presidency*, N.Y. TIMES (Dec. 1, 2016), <http://www.nytimes.com/interactive/2016/12/01/us/politics/trump-conflict-of-interests.html>.

conflicts) beyond those contained in the Constitution.”²⁵ Congress expressly codified the exemptions in 1989. As further explained by a report issued by the Congressional Research Service in October 2016, if subject to Section 208, the president could potentially be conflicted out of any given executive action, ultimately interfering with his or her exercise of constitutional duties.²⁶

In addition to Section 208 is the until-recently lesser-known “Emoluments Clause.” This provision of the Constitution states that “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 whatever, from any king, prince or foreign state.”²⁷ In other words, the president cannot receive gifts from foreign governments without the consent of Congress. This is not just an anti-bribery clause—the Emoluments Clause is broader than any bribery statute in that it does not require the president actually take any reciprocating action to trigger the clause. The Emoluments Clause seems to aim at eliminating even the air of potential influence.

The Emoluments Clause remains somewhat enigmatic given that it has lived in near obscurity, leading to disagreement as to whether the clause would even apply to the president. However, in its December 7, 2009 opinion as to whether it would apply to President Obama’s receipt of the Nobel Peace Prize, the DOJ determined that the president “surely” fell within the definitional scope of the clause.²⁸ The DOJ further stated in a footnote that “[c]orporations owned or controlled by a foreign government are presumptively foreign states under the Emoluments Clause,” and thus a gift from such a corporation could trigger the clause.²⁹

While under the law a corporation is a distinct “person,” that argument is harder to make for a privately held entity such as the Trump Organization conglomerate or any number of Trump’s other privately held entities. Arguably, any business transaction between Mr. Trump personally (or an entity privately held by Mr. Trump) and a foreign government (or a foreign-

²⁵ Letter from Laurence H. Silberman, Acting Attorney General, to the Honorable Howard W. Cannon, Chairman, Committee on Rules and Administration (Sep. 20, 1974), *available at* <https://fas.org/irp/agency/doj/olc/092074.pdf>, at p. 4.

²⁶ “Conflicts of Interest and the Presidency,” CRS LEGAL SIDEBAR (Oct. 14, 2016), *available at* <https://fas.org/sgp/crs/misc/conflicts.pdf>.

²⁷ U.S. Const. art. I, § 9, cl. 8.

²⁸ David J. Barron, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 4 (2009), https://www.justice.gov/sites/default/files/olc/opinions/2010/10/31/goteborg_award_0.pdf.

²⁹ *Id.*

government controlled company) that is anything less than a fair-value, arms-length transaction would trigger the clause. A more expansive view of the Emoluments Clause is that *any* transaction between Trump or a privately-held Trump entity and a foreign government or foreign-government controlled company, regardless of the terms, would violate the clause. Even under the more narrow reading, it seems nearly impossible to keep track of any potentially violative transaction, leaving Mr. Trump to self-police any such actions. The fact that Mr. Trump intends to turn control of his empire over to his children does not remove him from potential violation under the clause. The Emoluments Clause is concerned with *ownership*, not management. Somewhat unclear is whether a gift to Trump's children could potentially trigger the clause given their dual roles as the representatives of his companies and close advisors.

Currently, there is some uncertainty as to whether anyone would actually have legal standing to bring a claim under the Emoluments Clause.³⁰ A recent white paper issued by the Brookings Institute stated that the clause could be enforced through Congressional impeachment, based upon the president's knowing and intentional violation of the Constitution.³¹ Private parties might have standing based upon prior Supreme Court decisions supporting that a party has standing to challenge an unlawful benefit received by a competitor because the judgment would end injury in the form of being placed in a comparative disadvantage, even if the challenging party cannot show that they would have otherwise definitely received the benefit.³²

In the alternative, Congress could potentially create a private right of action allowing competitors of Trump-entities to file suit against Mr. Trump under the Emoluments Clause for declaratory and injunctive relief.³³

In sum, while at least currently the president is not subject to conflict of interest standards under Section 208, it is almost certain that Mr. Trump's business dealings would result in a violation of the Emoluments Clause.

³⁰ Jonathan Adler, *The Emoluments Clause—is Donald Trump violating its letter or spirit?*, THE VOLOKH CONSPIRACY (Nov. 21, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/21/the-emoluments-clause-is-donald-trump-violating-its-letter-or-spirit/?utm_term=.317d7998537a#comments.

³¹ Norman L. Eisen, et al., *The Emoluments Clause: Its Text, Meaning and Application to Donald J. Trump*, THE BROOKINGS INSTITUTE (Dec. 16, 2016), at pp. 21-22, available at https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf.

³² *Id.*

³³ *Id.*

What's the Big Deal?

Mr. Trump's potential conflicts extend much farther than a simple concern that he might stand to financially benefit from some executive decisions. In addition to the obvious concern that Mr. Trump may be subconsciously, if not consciously, motivated to make decisions based upon the effect they would have on his personal finances, equally, if not more concerning are the overall perception of the American citizenry in the transparency of their government and confidence in the rule of law, as well as the maintenance of America's foreign policy and diplomatic relations with foreign governments.

The foundation of a strong government requires trust, and trust requires transparency. The federal government's level of transparency has become an increasingly important issue for Americans. However, knowing that he stands to profit from his political decisions creates an inherent tension between the President and the citizenry. While Trump has dismissed any concerns that his decision-making abilities will be impaired by these business interests, studies have concluded that even when humans are aware of potential outside influences and actively attempt to avoid such influences when making decisions, it is nearly impossible to escape the effects of unconscious bias.³⁴ Even if Trump is able to completely separate his constitutional duties from his personal business interests, his recent actions in meeting with business associates after publicly vowing to cede control over his companies and appointing his children to actively participate in the selection of the leaders who will regulate the Trump empire undermine the appearance of a clear separation between these interests.

Moreover, as discussed above, the avoidance of conflicts of interest is fundamental to our system of due process. Necessary to the assurance of our liberties is a transparent and effective legal system. It is a basic right of any defendant to have a judge who is free from conflict of interest, and the right of any party to a litigation to be represented by an attorney who is free from conflicting interests. Yet now, we have a president who, along with the future managers of his global empire, are hand-selecting the people who will adjudicate legal proceedings in which the president has enormous personal

³⁴ See e.g., Don A. Moore, *et al.*, *Conflict of interest and intrusion of bias*, *Judgment and Decision Making*, Vol. 5, No. 1, February 2010, pg. 38, available at <http://journal.sjdm.org/10/91104/jdm91104.pdf>; Smith, Richard, *Conflicts of interest: how money clouds objectivity*, *J R Soc Med.* 2006 Jun; 99(6): 292-97, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1472724/>; Brekke N. Wilson TD, *Mental contamination and mental correction: unwanted influences on judgments and evaluations*, *PSYCHOL BULL.* 1994 Jul; 116(1):117-42. (p. 117), available at <http://www.people.virginia.edu/~tdw/wilson&brekke.1994.pdf>.

financial conflicts of interest. It would be beyond naive to believe that these decisions could be made impartially. Even if they were, it is similarly difficult to believe that an appointee or subordinate of the president would be uninhibited in knowingly making a decision that would have significant, adverse financial effects on the president. This situation cripples due process, and eviscerates trust in the rule of law.

Mr. Trump's business holdings also undermine America's use of the Foreign Corrupt Practices Act to stop contractors from paying bribes to secure government work abroad. Mr. Trump has deals in many countries where kickbacks and under-the-table payments are considered a normal part of local business. How can the administration denounce this sort of behavior when the president's own companies are arguably engaging in it? This is especially true for projects where Mr. Trump has merely leased the use of his name, and thus is profiting from the deal but is unable to confirm the legality of underlying transaction.

Mr. Trump's international holdings also add an additional level of complexity to already complicated international relationships. Foreign leaders will undoubtedly try and ingratiate themselves with Trump by either supporting Trump businesses, as discussed above with foreign patronage of the Old Post Office hotel, or by providing Trump businesses favorable financing terms or regulatory environments. After all, how could someone sit across the negotiating table from one of Trump's children and not think they are effectively dealing with the President himself? If your biggest client asks you to give her kid a job, are you really going to tell her no?

Even an absence of favoritism could lead to issues. For example, a foreign leader may, based upon his or her particular culture or customs, have certain expectations that he or she will receive a benefit in exchange for providing some direct or indirect benefit to a Trump business. If that leader does not believe he or she received a "quo" for their "quid," there could be political retaliation.

What Can Be Done?

While the concept of allowing the president unfettered ability to carry out his or her constitutional duties sounds ideal, this vision seems no longer possible in a world where the president-elect is willing to make a personal appeal to a foreign leader to carry out privately motivated political action, as has been suggested is the case with the recent conversation between Trump

and Mr. Farage. To borrow of Erik Jensen in his op-ed about the Clinton Foundation's receipt of gifts from foreign governments while Hillary Clinton served as secretary of state, "[w]hether or not the practice could have survived review by lawyers in green eyeshades, I'm not sure. But the practice smelled. . . ."³⁵ The thought of any high ranking government official exploiting their office for personal financial gain, either directly or indirectly, "violate[s] the spirit, if not the language" of the law.

The president must be able to carry out his constitutional duties, but does this require a complete exemption from conflict of interest laws? The argument that any conflict of interest regulations would potentially impede upon the president's ability to carry out his office rests on the assumption that the president-elect would decline to divest himself or herself of the interests creating the conflict—*e.g.* placing the interests in a blind trust. Had the drafters of the Constitution anticipated that someday one person could amass such wealth and global influence, and show such disregard for separation of personal and official interests, they undoubtedly would have included some mechanism for limiting such conflicts. The essence of such an ideology is clearly appreciated in the Emoluments Clause.

The likely effect of subjecting the presidency to some form of conflict of interest law that requires such an action would be a self-selection of candidates. For example, given the expanse of Trump's business holdings, it is possible that a conflict of interest would be simply unavoidable short of requiring him to divest ownership of his empire. It is entirely conceivable that Trump would not have run would he have been required to sell off all interests in Trump businesses. The logical argument against such a move would be that we should not institute regulations that dissuade successful and motivated individuals from running for presidency. However, the concept of conflict of interests does not exist in a vacuum. As discussed above, in the case of President-elect Trump, the numerous potential conflicts of interest pose a very real threat to both American confidence in the federal government and foreign government relations. While the very idea of a law that established qualifications exceeding those contained in the Constitution was dismissed by the DOJ in its 1974 letter concerning Vice President Rockefeller, the dichotomy between both the possibility for global influence and the personal reactions to potential conflicts of Vice President Rockefeller and Mr. Trump

³⁵ Erik M. Jensen, Opinion, CLEVELAND.COM (Sept. 23, 2016), http://www.cleveland.com/opinion/index.ssf/2016/09/pay_to_play_and_presents_from.html.

render these two circumstances factually distinguishable. In fact, the Brookings Institute recently suggested that Congress could potentially, under the Necessary and Proper Clause and the Emolument Clause's recognition of the "Consent of Congress," pass legislation imposing restrictions on the president's ability to own business or assets that may receive foreign gifts or emoluments.

Balancing the desire to have the most capable candidates against the desire to prevent conflicts of interest simply might require foregoing the miniscule percentage of the population that either is unable to or unwilling to eliminate significant conflicts of interest prior to assuming office. Given that this is only the second time in over 200 years that this situation has arisen, and the first time ever for the president, there is little evidence to suggest we would be losing a substantial number of candidates.

Conclusion

Mr. Trumps' potential conflicts of interest upon assuming the presidency in January 2017 are numerous and real. The conflicts pose a direct threat to the administration of the rule of law, confidence in due process and transparency in government, and pose difficult challenges to foreign policies and relations. While the Emoluments Clause has emerged for the first time in American history as a potentially necessary weapon, the DOJ and Congress should consider—given the novelty of the global community and the current actions of our President-elect—in revising their prior stance on the feasibility of subjecting the president to some form of conflict-of-interest standards, even if this results in a limiting qualification for those who can assume the office without divesting personal assets.