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Norms, law and the impeachment power



JOHN GREABE

Constitutional Connections

The *Path of the Law*, written in 1897 by then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes Jr., is one of the most important essays in American legal history.

Originally delivered as an address to law students at the dedication of a new building at Boston University Law School, and later published in the *Harvard Law Review*, *The Path of the Law* cautioned students who wished to understand the true nature

of law against confusing it with moral norms.

Moral norms might lead a person to conclude, for example, that one should honor one's agreements. But the law of contracts does not. If it is in a person's economic interest to violate contract A in order to enter into a more lucrative contract B, the law usually poses no barrier.

Keeping law and moral norms conceptually separate can be a tricky business because the law is peppered

with lots of moral jargon, and is frequently misunderstood as a body of principles that mark the line between right and wrong.

To differentiate law from mere norms, Holmes famously argued, one must look at it from the perspective of a "bad man, who cares only for the material consequences which ... knowledge (of the law) enables him to predict."

So understood, law consists of

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There is a different kind of 'law' governing the president's conduct

CONSTITUTION FROM D1

"nothing more pretentious" than "the prophecies of what the courts will do in fact." Law is, in other words, nothing more or less than that which actually will lead to adverse consequences if you violate it.

During his campaign and since assuming office, President Donald J. Trump has on numerous occasions acted in ways that many Americans regard as inconsistent with norms we expect the president to observe.

He has, among other things, suggested that a federal judge of Mexican ancestry was biased against him because of that ancestry, attacked the integrity of judges who ruled against his administration in lawsuits challenging his "travel bans," profited off of the presidency and ap-

pointed inexperienced family members to key government posts.

He also has criticized foreign allies, cozied up to foreign adversaries, leveled baseless accusations against former President Barack Obama, fired an FBI director who was investigating whether persons affiliated with his presidential campaign colluded with Russia to interfere in last year's election, and pardoned a former county sheriff who was prosecuted by his own Justice Department and convicted of showing a criminal contempt for the orders of a federal court.

But do any of these norm-violations raise the possibility of adverse consequences that could transform them into violations of "law" under Holmes's definition?

In considering this ques-

tion, note that the president is both privileged and specially encumbered in comparison to Holmes's hypothetical "bad man." In other words, the "law" applicable to the president differs from the law applicable to ordinary civilians.

Insofar as the adverse consequence essential for a principle to be a law (under Holmes's definition) is an adverse *court* judgment, the president is privileged vis-à-vis civilians.

Most experts believe that, while a president can be criminally prosecuted after leaving office, he cannot be prosecuted while he is president. And while the president may be sued civilly while holding office, the office confers powerful immunities and other constitutional defenses that are unavailable to ordinary civilian defendants.

But insofar as the question

is whether mere norm-violations can ground official adverse consequences, the president is specially encumbered vis-à-vis civilians.

The Constitution gives Congress the power to impeach and remove the president for "Treason, Bribery, or other high Crimes and Misdemeanors." Obviously, conduct constituting a violation of a statute can fall within this constitutional definition.

But experts agree that Congress also may exercise the impeachment-and-removal power for conduct that falls short of being a direct statutory violation – for example, conduct that "merely" violates the president's oath to "faithfully execute the Office of the President of the United States," or to "preserve, protect and defend the Constitution of the United States."

So where do things stand

with President Trump? Has he violated "law" in a manner that warrants the adverse consequence of impeachment and removal from office?

A special counsel is investigating whether members of the Trump campaign colluded with Russians to meddle in the 2016 election, and whether the firing of FBI director James Comey – who was investigating the same question – constitutes an obstruction of justice. And at least one state prosecutor is also said to be investigating persons close to the president for criminal conduct.

If these investigations yield evidence that convinces Congress that the president has committed one or more serious crimes, the president clearly can be impeached and removed from office on that basis.

But even if no direct viola-

tion of a statute is shown, Congress still may impeach the president and remove him from office for repeated, serious disregard of presidential norms.

Thus, there is "law" governing the president's conduct that is different from the law governing the rest of us. In a very real sense, the judgment of Congress regarding the norms of the presidency also can constitute "law" that the president must observe – at least insofar as Congress is prepared to act against a president who violates those norms.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)