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ETHICS AND GOVERNMENT LAWYERING IN CURRENT TIMES

*Richard W. Painter**

The topic I want to talk about with you today is the role of lawyers in addressing conflicts of interest within our government. Conflicts of interest have been at the center of my scholarly work and my teaching since the very beginning when I went into teaching law in 1993.¹ I had worked here in New York City, and I was on the Association of the Bar of the City of New York Ethics Committee² and had looked at many conflict of interest issues. I taught corporate securities law and looked at the serious problems lawyers have to deal with when, for example, a lawyer is a lawyer for the corporation, and they are talking to the chief executive officer and the officers about a problem, but the problem is not getting solved. What do you have to do when it's a conflict of interest between the officers, directors, and shareholders of the same company? Well, we said you have to go up the ladder and actually talk to the directors and explain to them what is going on because, after all, the organization is your employer, not the directors. We had a lot of fighting back and forth regarding this with the New York City Bar Association and then with the American Bar Association. Eventually, Congress adopted the Sarbanes-Oxley Act³ and said that if you are a lawyer for a corporation, and you know of securities fraud, you have an obligation to notify your chief executive officer and chief legal officer. If you cannot get the problem fixed through them, you have an obligation to go to your client's board of directors and tell them about it. That is an example of a

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† This speech was delivered on February 26, 2018, at Hofstra Law School, as a Howard Lichtenstein Annual Lecture. The transcript of Professor Painter's address has been lightly footnoted and styled for publication by the Board of Editors of the *Hofstra Law Review*. A video recording of the speech can be found at https://www.youtube.com/watch?v=K8hHV_BaEu8.

1. Mike Mullen, *Richard Painter: The Ethicist in Chief*, CITY PAGES (Feb. 9, 2018), <http://www.citypages.com/news/richard-painter-the-ethicist-in-chief/473021243>.

2. *Id.*; see also *Faculty Profile of Richard W. Painter*, U. MINN. L. SCH., <https://www.law.umn.edu/profiles/richard-w-painter> (last visited Apr. 22, 2019).

3. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and other titles).

serious conflict of interest problem within the organizational structure of a publicly held company.

That is where I spent most of my time until 2005 when I went into the Bush White House as a chief ethics lawyer.⁴ I very quickly learned about government ethics regulations applicable to all United States government federal employees. Some of them were also lawyers, so I would constantly have to remind them that they had certain obligations under the ethics rules for lawyers in the states where they were licensed. I learned very quickly that government is essentially about conflicts of interest as well. The role of a government lawyer is very much involved with the work of trying to deal with the various conflicts of interest that arise for government officials.

The big picture here is that government officials should be responsible to the public and should not be making decisions based on their own personal, financial interests. Similarly, government officials should not be making decisions based on their own, particular, sectarian connections or religious affiliations. There is a separation there, a conflict of interest which the founders addressed in our Constitution.⁵ Government officials should not be making decisions based on undue influence from political parties, and certainly not political campaign contributors. So we have those conflicts of interest between political operations that elect elected officials and the actual official role. This exists not only among elected officials but also among their appointees and conflicts of interest between political interests' campaign funders and the official role of the government and of government officials. Then, of course, the independence of the judiciary is a major concern—the importance that the judiciary, that branch of government, be independent of political concerns. The role of the lawyer often involves advising government officials on where the appropriate boundaries are and when a boundary is clearly being crossed.

What I am going to do is discuss some of the most important conflict of interest provisions: in the United States Constitution—provisions I would refer to as being in part about conflicts of interest; in the United States Code; in the regulations of the Office of Government Ethics; and in the Hatch Act regulations. I will also discuss the very challenging situations that we have seen in recent years, but particularly in the Trump administration, in addressing these conflicts of interest and what lawyers can do to hopefully keep government officials focused on

4. *Faculty Profile of Richard W. Painter*, *supra* note 2.

5. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion . . .").

their task of serving the public interest rather than allowing these conflicts of interest to unduly influence their official duties.

Let's start with the Constitution, and I see parts of the First Amendment really being about conflicts of interest. Europe, for centuries, has dealt with conflicts of interest from the conflation of religious identity and politics. Ever since the Reformation, the bitter wars between Catholics and the attacks on the Jews, and expulsion of the Jews in Spain, religion and politics were too intertwined. The founders of the United States wanted to have a different vision of the role of government and religion. They wanted a separation. They did not want that conflict over here. People had come here for religious freedom. Now they were only years into the settlement of America and did not always observe religious freedom. The Puritans who had escaped Great Britain for their own religious freedom were not too tolerant—look at the history of the Salem Witch Trials.⁶ But, by the time of the founding of the country, it was recognized that religion should be separated from the role of government in two ways. One, there should be no establishment of a state-owned church. Second, there should be no interference with the free exercise thereof.

That is one of the reasons why I first became quite angry at then-candidate Trump. It was when he said that people should be banned from emigrating to our country or subjected to extra government surveillance because of their religion, specifically targeting Muslims. We just do not do that in the United States. The founders did not intend that. Rather, they specifically prohibited the interference with the free exercise of religion. They did not want that conflict of interest over here. We are not going to have the expulsion of the Jews or the expulsion of the Muslims. We are not doing that in the United States of America. That is a conflict of interest that wreaked havoc in Europe, tearing Germany apart with the Thirty-Year War, and we were not going to have it here. My message to President Trump—at the time I criticized him for that—is that we are not doing that; that is not the American tradition. It is right there in the First Amendment.

The First Amendment also, of course, guarantees the freedom of the press, and that is another area where, in many countries, the ruling political party seeks to get control of the press quite quickly. That was going on in Europe at the time of the founding of the United States where the King would always seek to try to control the press and then they would use various statutes and sedition acts to go after the free

6. See *Salem Witch Trials*, HISTORY, <https://www.history.com/topics/colonial-america/salem-witch-trials> (last visited Apr. 22, 2019).

press. The founders of the United States recognized that the press was supposed to be separate from the government, separate from government control. We not only have freedom of speech generally in the First Amendment, but freedom of the press as well.

I have become quite frustrated with the recent attacks on the freedom of the press because things can change very quickly. In Germany in the 1930s when the National Socialist German Worker's Party ("NSDAP"), with Hitler at the top, was talking about the *Lügenpresse*—the lying press.⁷ There was actually a quite robust free press in Germany until 1933. When Hitler took control, apparently only four percent of the newspapers in the country were affiliated with the NSDAP, the Nazi party. Within about six months, it was up to ninety-six percent.⁸ So, if you have a government that wants to get control of the press and people allow that, it can happen very quickly, and we see what the results can be. That was something the founders anticipated as being a problem and did not want over here. I feel very threatened when I hear government officials constantly railing against the press, even though there will always be some anger and criticism from the press. However, that is what being a government official is all about. There are going to be newspapers that like you, and those that do not, T.V. stations that like you, and those that do not. However, the constant rhetoric of targeting the press in this administration, for me, is very disturbing.

There are some concrete actions that I have been quite concerned about. For example, the President targets CNN repeatedly through tweets and verbal rhetoric. Then, CNN's parent company, Time Warner is going to have a merger with AT&T, and the Justice Department determines that it is going to challenge that merger in court. I think what the Justice Department wants is for CNN to be sold.⁹ This is an antitrust

7. See J. Herbert Altschull, *Chronicle of a Democratic Press in Germany Before the Hitler Takeover*, 53 JOURNALISM Q. 229, 229-30 (1975); Rick Noack, *The Ugly History of 'Lügenpresse,' a Nazi Slur Shouted at a Trump Rally*, WASH. POST (Oct. 24, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/10/24/the-ugly-history-of-luegenpresse-a-nazi-slur-shouted-at-a-trump-rally/?utm_term=.d371b9fa7926; Propaganda Timeline 1933-1938, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/propaganda/timeline/1933-1938> (last visited Apr. 22, 2019) ("January 30, 1933. The National Socialist German Workers' Party (*Nationalsozialistische Deutsche Arbeiterpartei*; NSDAP), more commonly known as the Nazi Party, assumes control of the German state when German President Paul von Hindenburg appoints Nazi Party leader (Führer) Adolf Hitler as Chancellor at the head of a coalition government of 'National Renewal.'").

8. See ORON J. HALE, *THE CAPTIVE PRESS IN THE THIRD REICH* 58-61 (1964); DAVID WELCH, *THE THIRD REICH: POLITICS AND PROPAGANDA* 43-48 (2d ed. 2002).

9. The merger was subsequently approved and allowed to continue by a U.S. District Court. *The Latest on the AT&T and Time Warner Merger*, AT&T (June 14, 2018), http://about.att.com/story/court_rules.html (listing press releases such as "AT&T Completes Acquisition of Time Warner Inc." and "AT&T Applauds Court Decision on Time Warner Deal"). The DOJ appealed this decision to the D.C. Court of Appeals, but the appeals court affirmed the

suit. Democratic administrations have been traditionally more likely to aggressively pursue antitrust claims against such companies. Now, Republican administrations occasionally do bring antitrust suits, once in a while, but this one is a stretch. That is what most of my friends who are antitrust lawyers tell me—that even the most liberal democratic administration probably would consider it too aggressive to say that in order to merge with AT&T, someone has to sell CNN.

The problem is that when you have repeated attacks on the press, you could say that there is no violation of the First Amendment because the President wants to criticize the press for fake news every other day in a tweet. That in itself does not violate the First Amendment; he has a First Amendment right to say that. However, when you have concrete actions that might very well be motivated by antipathy for the press, I become concerned—when you have had tweets threatening the NBC license; when you have had the attacks on Amazon. Why is he upset at Amazon? Well Jeff Bezos, founder of Amazon, also owns the *Washington Post*. I do not think it is Amazon he is worried about—it's the *Washington Post*. Yet he will then go after Bezos by saying we need to change the tax treatment of Amazon,¹⁰ which is actually a legitimate issue. Suppose you have an all-powerful central government in the United States and enormous amounts of power there. The President himself is not only attacking the free press, but suggesting and hinting at ways in which his government might go after the free press. I become concerned, and I wonder about the role Department of Justice lawyers have. I have not seen the communications back and forth about that antitrust suit against Time Warner regarding CNN. If there are political motivations present, communications from the White House—whether it is in an email, or on the phone, or in meetings—is their justice department lawyer in the antitrust division going to speak up and say, “This is wrong. This is use of the antitrust laws to infringe on a freedom of the press.”? Are there other areas in which there will be an attempt to infringe on the freedom of the press? Because essentially, the First Amendment is about that conflict of interest and the need for independence of the press so that the press is not controlled by the government. We are in danger with the amount of rhetoric that we

decision of the district court. Edmund Lee & Cecilia Kang, *Hurdle Falls: Time Warner and AT&T Can Merge*, N.Y. TIMES, Feb. 27, 2019, at B1, <https://www.nytimes.com/2019/02/26/business/media/att-time-warner-appeal.html>.

10. See Jonathan Swan, *Trump Hates Amazon, Not Facebook*, AXIOS (Mar. 28, 2018), https://www.axios.com/trump-regulation-amazon-facebook-646c642c-a2d7-454b-a9a9-cdc6e4eaf2c.html?utm_source=sidebar.

have seen in recent times—hostile rhetoric addressed and targeted at the press.

Of course, the Constitution has other conflict of interest provisions. If you skim through some of the Amendments, talk about an obscure one—financial conflicts of interest. Well, it was obscure until about a year and a half ago. I had never taught it in a Constitutional law course. It was certainly not in my course when I took the course in law school some thirty years ago. The Emoluments Clause¹¹ in the Constitution is some obscure provision. There is really a technical detail within the Emoluments Clause that says a person holding a position of trust with the United States government should not receive a present, title of nobility, or an emolument (meaning any profit or benefit) from a foreign government. Is that merely technical? It is technical how the President of the United States should be someone who was born in the United States and a natural born citizen? Why are those provisions in the Constitution—that the President of the United States must be a natural born citizen and that if you hold any position of trust with the United States government, you cannot receive presents, profits, and benefits from foreign governments?¹²

The founders were petrified of the risk that foreign governments would seek to use their money—their enormous concentration of wealth in the great European powers at the time—to take over our government; to do with their money that which they could not do through force of arms. The British could not win the Revolutionary War when we fought back, with the help of the French. They could not control the colonies from over there with their redcoats. Could they control our government with money? Because there was an enormous concentration of wealth in Great Britain, in the hands of the crown, and in the hands of corporations—that were very much tied to either the crown or members of Parliament—including the notorious East India Company. The enormous power and money, in the East India Company and the British crown—could this be used to bribe American politicians and officeholders?

Of course, you usually cannot prove a bribe. It is so hard to prove a quid pro quo. The founders anticipated this problem and wanted to say:

11. U.S. CONST. art I, § 9, cl. 8 (“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.”).

12. U.S. CONST. art II, § 1, cl. 5 (“No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.”); *see* U.S. CONST. art I, § 9, cl. 8.

“We are going to have a proper elected rule. We are not going to have any person holding a position of trust with the United States government who is accepting profits and benefits from deals with foreign governments. If it is a private company in Britain, that’s okay, but if it is government owned or government controlled, that’s not happening.” Because what is the point of throwing all the tea in the Boston Harbor and having an American Revolution, and then you have a President who is buying and selling tea to King George?

Great Britain was not the only one. France, in the time before the French Revolution, had an enormous concentration of power out there in Versailles, in the hands of the king. The French King—who did not have a Parliament to deal with—spent a lot of his time actually trying to bribe the British Parliament. So, the King of Great Britain had a competitor there in his own Parliament—the French King giving out various presents and benefits to members of Parliament. Edmund Burke, Member of Parliament (“MP”), would get up on the floor of the House of Commons, giving many speeches about how corrupt this was. The founders over here did not want any of it.¹³ There were other great powers at the time with enormous concentrations of wealth, such as Austria-Hungary and Russia. Russia for years, even back then, was seeking to corrupt various Polish and Lithuanian princes to reach into Eastern Europe and use the concentration of power and wealth hands of the Tsars. This is a game the founders did not want over here.

So, this is an obscure provision of the Constitution, perhaps because we do not teach it in law schools, but it is a very important one. It is about conflict of interests and indeed the founders were so worried about foreign governments getting control of the United States—that somehow the British or somebody else might send somebody over here to then become a powerful business person and buy favors and get himself elected President of the United States—so they also put in that provision saying that no person who is not a natural born citizen could be the President of the United States. These provisions are there for a reason, particularly the Emoluments Clause, which is about money and the corrupting power of money. For me, it has been quite troubling that President Trump, who continually berated President Obama over a non-existent Kenyan birth certificate, challenging the constitutional validity of his presidency, now stands in a position of quite clearly being in violation of the Emoluments Clause of the Constitution, receiving profits and benefits from dealings with foreign governments.

13. EDMUND BURKE, SELECTIONS FROM THE SPEECHES AND WRITINGS OF EDMUND BURKE (2002) (ebook), <https://www.gutenberg.org/files/3286/3286-h/3286-h.htm>.

Now the profits and benefits dealing with foreign governments that those of us who are working on this litigation have identified most clearly start with, of course, the dealings with the hotels, starting after the election. Hotel room rates go up at the Trump Hotel.¹⁴ Every diplomat wants to stay there, and the various Middle Eastern countries that want to prove that they are on the good side may, for example, want to hold a shindig in the ballroom and rent that out. We also found that there is a large number of foreign government-owned banks—specifically Chinese government-owned banks—that rent large amounts of space at Trump Tower. Those leases are going to be renegotiated, so there is foreign government money there as well.¹⁵

Now all I know about the real estate business—from my time in New York City when I was practicing real estate law some of the time in addition to securities law at Sullivan & Cromwell—is that there is a lot of debt in a real estate empire. There generally is. I do not blame Donald Trump necessarily for having ninety percent debt on the Taj Mahal casino.¹⁶ A lot of the real estate operators were that way. Many were not quite as leveraged as much as he was, but real estate is about debt. You get as much credit as you can from the banks. The banks take the risk, and then you make money on the upside. If it doesn't work out, well, it doesn't work out. After a number of those business failures in 1990—one, two, three, Taj Mahals, some others—President Trump and the Trump Organization had some difficulties obtaining credit in the United States.¹⁷ I do not know where the money comes from. You would see some of that in the corporate tax returns for these closely held businesses owned by the President, but we do not get to see the tax returns. Trump is the first President since President Nixon not to release his tax returns.¹⁸ But if he has turned to foreign governments for financing,

14. Alexandra Berzon, *Trump Hotel in Washington Saw Strong Profit in First Four Months of 2017*, WALL ST. J. (Aug. 11, 2017, 4:35 PM), <https://www.wsj.com/articles/trump-hotel-in-washington-saw-strong-profit-in-first-four-months-of-2017-1502424589>.

15. See Dan Alexander & Matt Drange, *Open for Business*, FORBES, Feb. 28, 2018, at 88, 88-95; Anna Schecter et al., *Trump's D.C. Hotel, a Clubhouse for his Fans, May Also be a 5-star Conflict of Interest*, NBC NEWS (Aug. 8, 2018, 4:30 AM), <https://www.nbcnews.com/politics/donald-trump/trump-s-d-c-hotel-clubhouse-his-fans-may-also-n898041>.

16. See Russ Buettner & Charles V. Bagli, *How Trump Profited on Failed Casinos*, N.Y. TIMES, June 12, 2016, at A1, <https://www.nytimes.com/2016/06/12/nyregion/donald-trump-atlantic-city.html>.

17. Jason Silverstein, *A Brief History of Donald Trump's Many, Many Business Failures*, N.Y. DAILY NEWS (Feb. 10, 2016), <http://www.nydailynews.com/news/national/history-donald-trump-business-failures-article-1.2526913>.

18. See Jill Disis, *Presidential Tax Returns: It Started with Nixon. Will it End with Trump?*, CNN (Jan. 26, 2017), <https://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html>. Technically, Gerald Ford did not release his tax returns. However, he made large

whomever those foreign governments might be, there is an issue. That is a question of transparency and we do not have that information.

Yet the Constitution makes it clear that nobody holding a position of power in the United States government—not just the President—can accept profits and benefits from dealings with foreign governments. So, this is why I have asked Congress to look into this. Congress does not feel like doing this right now. They have got some other priorities, over at the House Oversight Committee. Congress has not wanted to get into the Emoluments question even though it was important enough to the founders to put it in the Constitution.

If Congress is not going to focus on it, my group, Citizens for Responsibility and Ethics in Washington (“CREW”)¹⁹ has filed suit against the President in his official capacity. That suit was filed in the Southern District of New York.²⁰ The problem is, and you learn this in Civil Procedure, is that you not only need to have a winning case on the merits, you also have to have standing to succeed. Otherwise, the court is not going to hear your case on the merits.²¹ We do not have a system where just anybody can walk into the Federal District Court and say: “Well President Trump is violating the Constitution, and I want to start a new case.” If that were the law, we would have a line a mile long outside of the Federal District courthouse and it would tie up traffic and so forth. So you need to have standing, and we believe we had a good standing argument for CREW. We are an organization that has been focused on conflicts, especially in government for twelve, thirteen years. This is directly central to our core mission, and it is directly affecting the way we carry out our mission at CREW. Judge Daniels of the Southern District of New York disagreed with us and dismissed the suit.²² Now that suit is going to be appealed in the Second Circuit. That is case number one on the Emoluments.²³ But there are two others making similar claims on the merits that have different standing arguments.

quantities of data available regarding his federal taxes. *Id.*

19. Amber Phillips, *Make No Mistake: Richard Painter Is Running for Senate, Thanks to Trump*, WASH. POST (Apr. 30, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/04/30/make-no-mistake-richard-painter-is-running-for-senate-thanks-to-trump/?utm_term=.f68b14ce02d3.

20. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 174 (S.D.N.Y. 2017).

21. *See, e.g., Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 519-21 (2007) (holding that Massachusetts had standing to challenge the Environmental Protection Agency's action).

22. *Id.* at 179, 195.

23. Brief of Plaintiffs-Appellants, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (2017), No. 18-474 (2d Cir. Apr. 24, 2018).

The second is brought by members of Congress because the Emoluments Clause says that you may not accept the profits and benefits, or a present, from foreign governments without the consent of Congress. The founders understood that there might be some situations where a public office holder should be able to receive a present from a foreign government, or maybe a profit or benefit, or an emolument, but they should go to Congress first. For example, Congress has passed the Foreign Gifts Decorations Act,²⁴ which allows someone to receive a gift, that they believe is worth up to \$390 from a foreign government.²⁵

I remember that well because I think the Saudi government or someone affiliated with the Saudi government tried to give one of President Bush's top national security advisors a Rolex watch. Well, that is a violation of the Emoluments Clause of the Constitution unless it is a fake Rolex. It does not pass the smell test either, so the answer was to return the watch. So this is a situation where Congress could give consent to receipt of the present or the profit or benefit from dealing with a foreign government under the Constitution. A number of members of the House and the Senate led by Senator Richard Blumenthal of Connecticut went to court—federal district court in the District of Columbia—and filed suits. We were never consulted; nobody asked us for consent. None of the Republicans were willing to join in on this litigation. A large number of Democrats that filed that case. The case is now pending before the federal court now in the District of Columbia.

Then, there is the third case brought by the Attorney General of the state of Maryland,²⁶ and it turns on the District of Columbia and part of that is about competition with the hotel. That is their ground for standing of local businesses—but the interesting argument that Maryland can make as well is that the Constitution is really a contractual relationship between the states and the federal government. Maryland was one of the first adopters of the Constitution.²⁷ As we learned in the Civil War, once

24. Foreign Gifts and Decorations Act (FGDA), 5 U.S.C. § 7342 (2011) (\$390 effective January 2017).

25. See Memorandum from Troy Cribb, Associate Administrator, Office of Government-wide Policy on Foreign Gifts and Decorations Minimal Value, to Heads of Federal Agencies (Jan. 12, 2017) (describing that the maximum value is \$390 as of January 1, 2017).

26. At the time this speech was delivered, the case against Mr. Trump was still pending in the District Court for the District of Maryland. Complaint, *District of Columbia & Maryland v. Trump*, No. 17-cv-01596-PJM (D. Md. filed June 12, 2017), <https://www.courtlistener.com/docket/6072774/1/the-district-of-columbia-v-trump>; see *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018).

27. Maryland was the seventh state adopting the Federal Constitution. See Bernard C. Steiner, *Maryland's Adoption of the Federal Constitution*, 5 AM. HIST. REV. 207, 207-24 (Dec., 1899), <https://www.jstor.org/stable/pdf/1834608.pdf>.

you are in, you cannot get out. So Maryland is stuck in its contractual relationship with all the other states and this relationship with the three branches of the federal government. If one of those branches is not playing by the rules—for example, the President of the United States is taking profits and benefits and dealings with foreign governments—well shouldn't the state of Maryland have standing to go into federal district court and say, your honor, we want you to look at this?

Now if in these cases, any one of the three, the judge does decide that there is standing, that very may well be appealed by the administration. The Justice Department is representing President Trump in this litigation because he is being sued in his official capacity. If a judge decides there is standing, and that standing decision sticks, then the judge would do what I have been urging the Congress to do—look at the facts, open the books, look at the tax returns, look at the data, and find out where the money is, where the money is coming from, and then simply tell the President what he *can* have and what he *cannot* have. Then, if he refuses, you would have a situation where there is a confrontation between the President and the judiciary. We will see when it comes up.

But this brings up another critically important point of the conflict of interest aspects of the Constitution. In the United States, we do seek to have an independent judiciary. Federal judges have life tenure for a reason—to insulate them from the political sphere, from what is going on in the other two branches of government. In order to get nominated for a federal judgeship, of course you play political games with the White House and with the Senate. However, once you are on the courts, there is a critically important independent role for the judge. We give a federal judge lifetime tenure. While it is arguably permissible, I do not think it is particularly appealing to see a Supreme Court Justice go give a speech at the Trump Hotel, as Justice Gorsuch recently did, when he might very well be hearing cases involving the Trump Hotel.²⁸ We can debate about what judges should do and what they should not do with respect to their own independence.

I have wished that the Supreme Court, and Supreme Court Justices, some very liberal and some very conservative, be somewhat more reticent with respect to various actions and statements they have made that appear to compromise their independence. For example, showing up to the Federalist Society all the time or the American Civil Liberties

28. Adam Liptak, *Facing Protests at Speech, Gorsuch Calls for Civility*, N.Y. TIMES, Sept. 29, 2017, at A16, <https://www.nytimes.com/2017/09/28/us/politics/neil-gorsuch-trump-hotel-protests.html>.

Union (“ACLU”) dinner may be seen as compromising their independence. I wonder how much of that should be going on for Supreme Court Justices. Let’s look at the other part of it—the judges should not be subjected to attack from the political branches because of their decisions. Now, this is not new in the United States. I was only five or six years old when the “Impeach Earl Warren” movement was getting going. People wanted to get rid of the Chief Justice of the Supreme Court in the 1960s,²⁹ not because he had done anything that violated judicial ethics rules, but because of his decisions. They are trying to use the impeachment provision³⁰ of the United States Constitution to remove a judge because of the ideological aspects of his decisions. That of course was pushed back.

But I have been quite worried about the recent rhetoric from President Trump about “so-called judges” when a decision comes down against him in the Ninth Circuit on the travel ban case.³¹ That rhetoric—of course he has the First Amendment right to say what he wants about a judge, but this is not something that you expect from the President of the United States. We respect the judiciary and the decisions of the judiciary. Even President Nixon, when he was told by the Supreme Court, “You have to have to hand over the tapes,” he handed over the tapes.³² We respect judicial decisions even when we disagree with them. We can appeal them; we do not attack the judge. Of course, during the campaign, I was most offended when Candidate Trump—now President—said that a judge was biased in the case against him because the judge was of Mexican-American heritage. That combines the attack on the judiciary with ethnic stereotypes. That is exactly the type of rhetoric that, if allowed to get out of hand, can lead to disaster. There were repeated attacks in the late 1920s and early 1930s in Germany on judges of Jewish heritage, saying that they were biased in cases involving Aryan Germans. Under the guise of removing bias, within two to three months of the Nazis taking power in early 1933, the Jewish

29. Michael Anthony Lawrence, *Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 BROOK. L. REV. 673, 718 (2013).

30. U.S. CONST. art. II § 4 (“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.”).

31. Katie Reilly, *Read President Trump’s Response to the Travel Ban Ruling: It ‘Makes Us Look Weak’*, TIME (Mar. 16, 2017), <http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling> (commenting on Trump’s rebuke of the Ninth Circuit after its decision regarding the travel ban, as well as providing a transcript of Trump’s speech); Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 9:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en> (commenting about a “so-called judge” who temporarily blocked the travel ban).

32. *United States v. Nixon*, 418 U.S. 683, 700-02 (1974).

judges were removed. This is one of the first things they did to solidify political control over the judiciary. The next step was “assisting” the judges on how to be affiliated with the Party or at least have a good relationship with the Party.

So the independent judiciary is critically important in the United States, and judges have a role in policing the balance of conflicts of interest in our government and upholding the Constitution. I have been through some Constitutional provisions, but there is more because we have conflicts of interest statutes in the United States. We have a financial conflict of interest statute, an interesting one. In 18 U.S.C. Section 208, it is a crime for any United States government official in the executive branch to participate in a government matter that has a direct or indirect effect on that government official’s financial interest.³³ It is a crime. That statute applies to every single employee in the executive branch, except for two: the President and the Vice President. The Emoluments Clause of the Constitution does; that is about the foreign government money. The conflicts of interest that do not involve foreign government money technically are not a criminal offense for the President and the Vice President. They are for everybody working for them, but not the President and the Vice President. It is true for the members of Congress as well. They are not subject to that statute either.

One of the difficulties is that every time there is a suggestion that the President and the Vice President should be subject to the same criminal conflict of interest provision that applies to everyone who works in the executive branch, defenders of the President and the Vice President say “Well, it should apply to members of Congress too then, shouldn’t it?” That makes the bill dead on arrival because Congress does not want it to apply to them.

Now, this takes us back to the founding, and the struggle that the founders of our country had with financial conflicts of interest of members of the House and the Senate, and the President and the Vice President. Here, the founders turned a blind eye to their own financial conflicts of interest. They were very cognizant of the conflicts of interest that could come from foreign government profits and benefits, hence the Emoluments Clause, but when it came to their own domestic financial conflicts of interest, they certainly did not address the problem in the Constitution. Indeed, they exacerbated the problem.

Here is the most poignant example: President Trump, when he took office, was criticized by a number of people including myself for holding onto the Trump Organization and his real estate holdings. He

33. 18 U.S.C. § 208 (2012).

said something like, “Well, gee, there is this exemption for the President and the Vice President. I didn’t know about it, but it’s a nice thing.”³⁴ So I heard a little bit of that from Trump, as President-Elect, and then I testified at the House Oversight Committee and one other committee.³⁵ At one of them, the Chairman of the committee said to me, “Well how is what President Trump is doing any different than Washington and Jefferson owning their plantations? And are you saying, Mr. Painter, that Washington and Jefferson were unethical?” And the answer I gave, a good four to five minutes in on this one, and I said something like:

Well, I think they were great presidents. I’m not one of these people who wants to eradicate all the wonderful things that Presidents Washington and Jefferson did for our country. When it comes to those plantations, there were some unethical things going on there—in particular, slave labor. That was a serious financial conflict of interest for our first president, our third president, several other presidents, members of the Senate, members of the House. Washington, Jefferson, and many others had vast plantations. They were very wealthy men, using large numbers of workers who were enslaved, and were they going to deal with the slavery question at the founding of our country in the Constitution or in any other way? No. They did not. So, was that unethical? Yes. Was that a financial conflict of interest? Absolutely. Financial conflicts of interest have consequences. The most tragic decision made at the founding of our country was with respect to slavery, the inability to deal with that question until the Civil War, the legacy we have had after the Civil War and continuing racism, and it is affecting our country to this day. Those issues stem from the financial conflicts of interest of our first and third president and many powerful members of the House and Senate. Conflicts of interest have consequences. So, we can say technically, yes, the members of the House and the Senate, and the President and the Vice President, they are exempt under the statute, so it’s okay. Financial conflicts of interest are okay. Yet we know full well that financial conflicts of interest for powerful people in our government—personal financial conflicts—can have tragic consequences for our country.

34. In an interview with the New York Times, then president-elect Trump stated that “The law’s totally on my side, the president can’t have a conflict of interest.” Interview by the New York Times with Donald Trump, President-Elect, United States (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html>.

35. *Legislative Proposals for Fostering Transparency Before the Committee on Oversight and Government Reform United States House of Representatives Hearing*, 115th Cong. 34-41 (2017) (statement of Richard W. Painter, S. Walter Richey Professor of Corporate Law, University of Minnesota Law School), <https://oversight.house.gov/wp-content/uploads/2017/03/Painter-UMN-Statement-Legislative-Proposals-for-Transparency-3-23.pdf>.

That is basically what actually happened there, so I let the chairman of the committee know I was really sick and tired of hearing about the Washington and Jefferson example.

Another hypothetical example, that fortunately did not happen, has to do with President Trump's vast holdings all over the world and his investments in various countries around the world that are having some difficulties with respect to the democratic experiment. In the 1920s and 1930s, quite a few very prominent business people in the United States decided that they could make very good investments in Germany as it recovered from World War I. They had a number of clients in Germany, and American banks had good relations with companies over there. There was a lot of sunk money in Germany. Then the question is, what do we do about that in 1933 when you have a country which was a republican form of government very quickly turn into a dictatorship? You had a lot of American business people thinking about how do I get my money out? Well, maybe I do not want my money out. Maybe if I put more in—and actually the National Socialist government was growing the economy for a while—we can make money off this. Why is it that relevant? What is going on over there?

That was the attitude for a lot of well-to-do business people that had money invested in Germany. The situation got worse and worse, of course. My grandfather owned a small bond shop; it was just two of them, buying and selling bonds in New York. They never made much money doing it, but he was having fun with it. He was on the other side; he thought we ought to go after Hitler, and when the war broke out in 1939, go in on the side of Great Britain. So he was constantly trying to raise fifty bucks here or there to run an ad in the *New York Times*. The so-called "America First"³⁶ movement, it was called, was adamantly against that. The young people that started America First were young, idealistic pacifists in places like Yale and so forth. A large amount of the money that ended up financing the attacks on those who wanted to be more interventionist—my grandfather—came from the big financial interests, including the Hearst Press. This was a big debate throughout 1939 after the war broke out in September of 1939. The President, Roosevelt, had to make some decisions, and I think he did a lot of what he could to try and help Great Britain fight against the Germans, debating whether he did enough, but he was always getting push back from Congress.

36. See generally Andrew J. Bacevich, *Saving "America First" What Responsible Nationalism Looks Like*, 96 FOREIGN AFF. 57, 57-67 (2017) (discussing the renaissance of the phrase "American First" in the Trump era, but offering a nuanced understanding of what such a phrase should signify in American political discourse).

Why is this relevant? Franklin D. Roosevelt was a very well-to-do man from a prominent New York family. Where would we have been if President Roosevelt had had a Roosevelt Tower in Berlin, another one in Frankfurt, a three-hundred-million-dollar revolving line of credit with Deutsche Bank? That would not have been a good situation if he or people high up in his administration had money sunk in over there as we were struggling to figure out what to do throughout that period before December of 1941. We do not want to have our president or high-ranking officials in our government with the national conflicts of interest.

Now with respect to the President and the Vice President, we have a criminal statute which would apply to these conflicts of interest, but the President and the Vice President could have serious consequences if they have financial holdings in democratic countries that appear to be, at least temporarily, sliding in the wrong direction. I understood that President Trump has a lot of investments, but not in these types of countries. Trump is not investing heavily in Western Europe, Japan, Australia—the established democratic regimes that are not gravitating towards dictatorships. He does not have a lot of money there. He has a lot of his money in other places—which is good for many Americans, to be invested all over the world. We should not just be investing in democracies. However, if you are a government official (such as the President of the United States) and a crisis comes up, I am very worried about that.

So the financial conflicts of interest are serious. There is only so much a lawyer can do if the president says, “Well the statute does not apply to me.” Yet one of the things government lawyers should be doing is explaining to the president the risks of certain other criminal statutes coming into play, that do apply to him and apply to everybody working for him; for example, the bribery and gratuity statute.³⁷ When the president’s sons go touring the world selling condominiums, or whatever types of deals they want to do, and then talk about United States Government business at the same time, whether it is in India, the Philippines, China, or anywhere else, somebody somewhere may get the wrong idea. Somebody somewhere may get the false impression that if you give some financial benefit to the Trump family, you could receive some policy benefit from the United States. At least, I know that is false.

But that will not prevent someone from having that impression and making such an offer. It is certainly exacerbated when the president’s

37. 18 U.S.C. § 201 (2012).

sons are talking about government policy on these tours. They used to bring the Secret Service on tour and talk with them to make sure that everyone understood that they were in a “semi-official” role. It does not help when the Kushner family, when they are going to China, to try to attract investments under our EB-5 program for the visa. You get it, you invest \$500,000 in the United States. They put a big picture of Jared up there, working for President Trump. Now I know that is not Jared Kushner; that is a system. Although they took it down and apologized, they did it again. This is a serious concern, with respect to the mingling of financial interests and government power.

But I will say that this has been the norm throughout much of human history. You look at the old British Empire, that is the way it was. Money had an enormous influence on Parliament and the interrelationship with big companies, like the East India Company—and before that the South Sea Company—and members of Parliament. That is what mercantilism was about, that there was a close relationship between the people who ran the big companies, the government, and their families. This is similar to China today. *The New York Times*, a couple of years ago, did a detailed study of the very successful businesses in China and the links with members of the Communist party and their families—the family connection.³⁸ *The New York Times* website was down in China for about two weeks after that.³⁹

So this combination of government and business, this conflation of government interests and private interests is a serious risk, at least to the way we envision the government of the United States being separate apart from business interests. Are we going to gravitate toward the type of system they have in China and in Russia, or in the old British Empire? Or are we going to be able to—to the extent we can—keep government interests, the financial interests of government officials, and their own family businesses separate? This is the challenge that remains ahead for us. These are all conflicts of interest that government lawyers struggle with.

38. David Barboza, *Billions Amassed in the Shadows by the Family of China's Premier*, N.Y. TIMES, Oct. 26, 2012, at A1, <https://www.nytimes.com/2012/10/26/business/global/family-of-wen-jiabao-holds-a-hidden-fortune-in-china.html>. This article would go on to win a Pulitzer Prize.

39. See Craig S. Smith, *The New York Times vs. the 'Great Firewall' of China*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/insider/the-new-york-times-vs-the-great-firewall-of-china.html>.
