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Grab ‘Em By The Emoluments: The Crumbling Ethical Foundation of Donald Trump’s Presidency

LAWRENCE J. TRAUTMAN[†]

What is most worrisome about Trump is Trump himself. He is a man so unpredictable, so reckless, so petulant, so full of blind self-regard, so untethered to reality that it is impossible to know where his presidency will lead or how much damage he will do to our nation. His obsession with his own fame, wealth and success, his determination to vanquish enemies real and imagined, his craving for adulation—these traits were, of course, at the very heart of his scorched-earth outsider campaign; indeed, some of them helped get him elected. But in a real presidency in which he wields unimaginable power, they are nothing short of disastrous.¹

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[†] BA, The American University; MBA, The George Washington University; J.D., Oklahoma City University School of Law. He is author and teacher of public policy, business law, constitutional law, cyber security, entrepreneurship, ethics and corporate governance scholarship. Most recently, he has taught constitutional law, business law, entrepreneurship and ethics at Western Carolina University. The author wishes to thank: Brian Bix; Noah Bookbinder; Frank O. Bowman; Brandon Brockmyer; Erwin Chemerinsky; Sherman Cohn; Norman L. Eisen; Tom Ginsburg; Sherri Harte, Aziz Huq; Kenneth Moffett; Roger Noll; Richard Painter; Christopher Peterson; Paul Rothstein; Zephyr Teachout; Jay Trautman; and Laurence Tribe. All errors and omissions are my own.

¹ See Editorial, *Our Dishonest President*, L.A. TIMES (Apr. 2, 2017), <http://www.latimes.com/projects/la-ed-our-dishonest-president/>.

I. OVERVIEW

Did the Trump campaign make a deal with Russia to sell out the American people in exchange for the presidency? Were Donald Trump and/or certain members of his campaign's inner circle compromised either by prostitutes, bribes, favorable banks loans, or some combination of the above? Are we in a constitutional crisis, with the particulars yet to unfold? Does anybody really believe that Donald Trump would turn down a loan on highly favorable terms from either a Chinese or Russian state-controlled bank?² Does Donald Trump believe that over 200 years of constitutional law does not apply to him?

This paper explores two important areas of U.S. Constitutional law: the constitutional prohibition against acceptance of emoluments (anything of value); and the constitutional provision for presidential impeachment. In brief, the Framers of the Constitution were very concerned about the threat of any influence from foreign powers corrupting the government of the United States. Accordingly, the Foreign Emoluments Clause was inserted into the U.S. Constitution, providing in Article I, Section 9, Clause 8 that "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 whatsoever, from any King, Prince, or foreign state."³ As to presidential impeachment, the U.S. Constitution provides for presidential Impeachment in Article 2 Section 4 as follows: "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."⁴ It is the sole authority of the U.S. House of Representatives to initiate impeachment proceedings,⁵ with trial conducted by the Senate.⁶ Any such trial in the Senate will be presided over by the Chief Justice of the Supreme Court, and requires the concurrence of two-thirds of the senators present.⁷

On Friday January 20, 2017, Donald J. Trump, age seventy, became the 45th president of the United States by carrying the Electoral College, despite losing the popular ballot by 2,868,519 votes.⁸ The 2016 presidential

² See Donald O. Mayer & Adam J. Sulkowski, *Emoluments and Implications from Conflict of Interest Laws and Private Sector Fiduciary Duty* __ BRIT. J. AM. L. (forthcoming), <https://ssrn.com/abstract=3003141>.

³ U.S. CONST. art. I, § 9, cl. 8.

⁴ U.S. CONST. art. II, § 4.

⁵ U.S. CONST. art. I, § 2.

⁶ U.S. CONST. art. I, § 3.

⁷ *Id.*

⁸ See *Presidential Results: Donald Trump Wins*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/elections/results/president> (306 electoral votes for Donald J. Trump versus 232 electoral college votes for Hillary Clinton; and 7 votes for others).

campaign, like most, was messy. As evidenced by Democratic National Committee (DNC) chairwoman Debbie Wasserman Schultz's abrupt resignation on the eve of the party's convention, the Hillary Clinton campaign was soiled by disclosures of Democratic Party bias against the popular primary campaign of Senator Bernie Sanders.⁹ Numerous scholars have expressed concern about the current risk to our constitutional democracy.¹⁰ Professors Aziz Huq and Tom Ginsburg present "a taxonomy of different threats of democratic backsliding, the mechanisms whereby they unfold, and the comparative risk of each threat in the contemporary moment."¹¹

What follows is a discussion about the U.S. Constitution, President Donald Trump, and certain demonstrable conflicts between the behavior of President Trump and constitutional rule of law. An inquiry into President Trump's ethical compass, as demonstrated during his seventy years of life, is important to any comprehensive coverage of this topic. Disturbing facts have emerged during recent months: Trump's transition team's reported proposals to establish a private back-channel to the Kremlin purposefully outside of the ability for U.S. intelligence agencies to monitor;¹² the firing of FBI director James Comey who was investigating Russian meddling in the 2016 U.S. election;¹³ Trump's disclosure of sensitive intelligence to the Russian ambassador and Russian foreign minister;¹⁴ and Trump's pressure on Attorney General Sessions to resign.¹⁵ This article will have been

⁹ See Anne Gearan et al., *DNC Chairwoman Will Resign in Aftermath of Committee Email Controversy*, WASH. POST (Jul. 24, 2016), https://www.washingtonpost.com/politics/hacked-emails-cast-doubt-on-hopes-for-party-unity-at-democratic-convention/2016/07/24/a446c260-51a9-11e6-b7dedf509430c39_story.html?utm_term=.9b99dbe7c634.

¹⁰ See Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018), <https://ssrn.com/abstract=2901776>; Eric A. Posner, *Can It Happen Here?: Donald Trump and the Paradox of Populist Government* (U of Chi., Public L. Working Paper No. 605, 2017), <https://ssrn.com/abstract=2893251>.

¹¹ See Huq & Ginsburg, *supra* note 10 (observing Retrogression is a more subtle, incremental erosion that happens simultaneously to three institutional predicates of democracy: competitive elections; rights of political speech and association; and the administrative and adjudicative rule of law. Over the past quarter century, the authors show that the risk of reversion has declined, while the risk of retrogression has spiked.).

¹² See Ellen Nakashima et al., *Russian Ambassador Told Moscow that Kushner Wanted Secret Communications Channel with Kremlin*, WASH. POST (May 26, 2017), https://www.washingtonpost.com/world/national-security/russian-ambassador-told-moscow-that-kushner-wanted-secret-communications-channel-with-kremlin/2017/05/26/520a14b4-422d-11e7-9869-bac8b446820a_story.html.

¹³ See Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>.

¹⁴ See Carol E. Lee & Shane Harris, *Trump Shared Intelligence Secrets with Russians in Oval Office Meeting*, WALL ST. J. (May 16, 2017), <https://www.wsj.com/articles/white-house-denies-trump-gave-classified-information-to-russian-officials-1494890345>.

¹⁵ See Jonathan Lemire & Sadie Gurman, *Trump Cranks up Heat on Sessions, Says "Time Will Tell" Fate*, STAR TRIBUNE (July 25, 2017), <http://www.startribune.com/ap-sources-trump-speaks-to-advisers-about-firing-sessions/436455643/>; Del Quentin Wilber et al., *Republicans, Former DOJ*

published before conclusive findings are expected from any special investigations or final results from the many Congressional inquiries about matters surrounding the Russian tampering with the American 2016 presidential election. As a result, only a summary overview of Russian-connected matters relevant to any involvement by Trump or his 2016 campaign operatives is presented. An expanded ethical analysis about Donald Trump and any concerns about his historical entanglements with the Russian government (if any) await the results from investigations into these matters.

Instead, this is an inquiry into other serious matters that raise many important questions about Donald Trump's ethical fitness to be President and his major conflicts of interest, many arising from numerous violations of the Foreign Emoluments Clause to the U.S. Constitution. In calmer times, the thought of a U.S. president unconstitutionally lining his pockets with foreign largess while in office would likely be met with considerable outrage. However, the daily barrage of lies and shouts of "fake news" at reports critical of President Trump have caused emoluments concerns to go largely unnoticed. While concerns about emoluments clause violations continue to be drowned out by investigations into the possible unlawful involvement with Russia, the emoluments story here remains an important one for constitutional scholars.

At this time, it seems unlikely that President Trump will face impeachment. Given that both the U.S. House of Representatives and Senate are in control of the Republican Party, it seems likely that President Trump will be protected against impeachment proceedings unless the Republican Party leadership determines that it is in their best interest to allow for impeachment and removal. Alternatively, if the Democrats take control of one or both chambers of Congress after the 2018 midterm elections, Trump may face a more serious effort to have him removed from office, but ultimately, it will require a bipartisan and constitutionally-mandated supermajority in the U.S. Senate before Trump could be removed from office.¹⁶

By mid-2017, about 150 days into the Trump presidency, the ethical issues already surfaced have become unsettlingly numerous. With new material developments arising on an almost daily basis, the challenge becomes knowing how to best sort through and condense the President's numerous contradictory statements. This article focuses on a few important issues suitable in length to a single law review article. Therefore, I will not

Officials Come to Sessions' Defense, WALL ST. J. (July 26, 2017), <https://www.wsj.com/articles/republicans-former-doj-officials-come-to-sessions-defense-1501022673>; Opinion, *Trump's Sessions Abuse*, WALL ST. J. (July 26, 2017), <https://www.wsj.com/articles/trumps-sessions-abuse-1501026895>; Jeffrey Toobin, *This Time, It's Personal*, NEW YORKER, Aug. 7 & 14, 2017 at 19.

¹⁶ U.S. CONST. art. I, §8, para 6.

spend time or devote considerable language (except in a most cursory manner) to discussing President Trump's controversial personality traits or ethical ambiguities and violations, as demonstrated in instances of exploitation of undocumented immigrants,¹⁷ Fair Housing Act violations,¹⁸ fraudulent charity activity allegations,¹⁹ potential illegal Cuban Casino development activities,²⁰ marital infidelity,²¹ misogyny,²² use of Muslim slurs,²³ and other various forms of racism.²⁴ As a result, I have decided as a threshold matter to group developments into two basic time periods: pre-election and post-inaugural.

The pages to follow are not intended as a recital of the various reasons that might make it hard to like or admire the individual who is Donald J. Trump. Rather, my attempt here is to put aside the thousands of pages that have been printed in that vein, and present a cogent argument of a few more compelling logical arguments about the unconstitutional ethical conduct of the new president that thoughtful citizens should find disturbing, and to do so sufficiently so that impeachment and removal may be in order. As my research unfolded over several months, and as more data points demonstrating President Trump's lack of ethical compass were revealed, it became increasingly apparent that, like several presidents before him, Mr. Trump's continued propensity for lying, fraud, and false statements, demonstrated throughout his early career and life, may ultimately prove to be the dysfunctional personality trait that leads to his eventual demise.

This article proceeds in nine parts. First, a look at Donald Trump's childhood, formative years, and business career is presented. Second, a brief

¹⁷ ALLAN J. LICHTMAN, *THE CASE FOR IMPEACHMENT* 57 (2017).

¹⁸ *Id.* at 46.

¹⁹ *Id.* at 52. See also David A. Fahrenthold, *Trump Boasts About His Philanthropy. But His Giving Falls Short of His Words*, WASH. POST (Oct. 29, 2016), https://www.washingtonpost.com/politics/trump-boasts-of-his-philanthropy-but-his-giving-falls-short-of-his-words/2016/10/29/b3c03106-9ac7-11e6-a0ed-ab0774c1eaa5_story.html?utm_term=.b2504ec3d5dc; Paul Farhi, *Washington Post's David Fahrenthold Wins Pulitzer Prize for Dogged Reporting of Trump's Philanthropy*, WASH. POST (April 10, 2017), <http://www.standard.net/national/2017/04/10/Washington-Post-s-David-Fahrenthold-wins-Pulitzer-Prize-for-dogged-reporting-of-Trump-s-philanthropy>; DAVID CAY JOHNSTON, *THE MAKING OF DONALD TRUMP* 129 (2016).

²⁰ LICHTMAN, *supra* note 17, at 52.

²¹ See JOHNSTON, *supra* note 19, at 142 (relationship with Marla Maples). I remain grateful to Professor Sherman Cohn who "question[s] the use of "marital infidelity" in this context. I know of nothing that lists marital infidelity as a ground of impeachment. If it did, Jack Kennedy, Warren Harding, Bill Clinton, and probably others would have serious problems. Moral straightness has never been a criterion for the presidency . . . there is no allegation that Trump engagement in marital infidelity AFTER becoming President."

²² *Id.* at 24 (describing Rosie O'Donnell as "a pig," "a degenerate," "a slob," and "disgusting inside and out" on television).

²³ *Id.* at 119 (Trump insisting with no proof that he had watched thousands of Muslims cheering in New Jersey as the Twin Towers burned on 9/11).

²⁴ *Id.* at 127 (discussing judge presiding over the Trump University trial as unqualified to hear Trump's case because of the judge's Mexican heritage).

discussion of the 2016 presidential election campaign, including important facts known to date about the Russian meddling. Third is coverage about the Trump Administration's first seven months with a particular reference to the constitutional guarantees of freedom of religion, freedom of speech and the press, and racism and discrimination. Fourth is an outline of certain Trump emoluments clause violations. Fifth, the role of congressional oversight is covered. Sixth, the issue of impeachment is discussed. Seventh, the role of information silos and filter bubbles is explored. Eighth, the role of lying, fraud and false statements is presented. And last, I conclude.

II. PRE-PRESIDENTIAL CAREER OF DONALD TRUMP

In the early days we had a good number of tenants who didn't believe in paying rent. Sometimes, Irving would go out and collect himself. He'd ring the doorbell, and when someone came to the door, he'd go crazy. He'd get red in the face, use every filthy word he could think of, and make every threat in the book. It was an act, but it was very effective: usually they paid up right then and there.

Donald J. Trump
Trump: The Art of the Deal²⁵

Becoming president at age seventy provides a trail of almost half a century of business and professional career exploits, experiences, prejudices and litigation history. Donald Trump brings to the White House the experiences of a New York City real estate developer, failed builder and operator of Atlantic City casinos, and promotion-savvy businessman with a string of promotional activity and highly visible failures. Presented below is a mere outline of some of the more significant landmarks of Donald Trump's business career. Understanding Donald Trump's numerous past business decisions made under stress and/or difficult conditions will hopefully provide the reader with a more likely indication of how he may act in the future.

A. Donald Trump's Early Background

Donald Trump was born on June 14, 1946 as the fourth of five children to Fred and Mary MacLeod Trump.²⁶ At the time of Donald's birth, Fred

²⁵ See DONALD J. TRUMP & TONY SCHWARTZ, TRUMP: THE ART OF THE DEAL 60 (Random House 1987).

²⁶ See TIMOTHY L. O'BRIEN, TRUMP NATION: THE ART OF BEING THE DONALD 43 (2005). See also MICHAEL D'ANTONIO, NEVER ENOUGH: DONALD TRUMP AND THE PURSUIT OF SUCCESS 36, 38 (St. Martin's Press 2015).

Trump had already become a millionaire, with management of about twenty-five thousand New York City-area apartment units.²⁷

B. Trump's Study of U.S. Government and Constitution

At age thirteen Donald was “shipped... off to the New York Military Academy... spent two years at Fordham University, then transferred to the University of Pennsylvania’s Wharton School of Finance.”²⁸ Numerous scholars and media pundits have commented that President Trump seems to lack intellectual interest, preparation, and has no basic understanding of the norms, rules, demands, or traditions of the job.²⁹ Clearly, none of us are born with an understanding of U.S. Constitutional law or the evolution of the American system of government. Is it possible that Donald Trump became president without ever having taken a single course on these crucial topics? Is it possible that Khizr Khan, father of fallen U.S. soldier Capt. Humayun Khan who died on June 8, 2004 while on duty in Iraq, was correct when he posed the question, “Donald Trump... Let me ask you: Have you even read the United States Constitution?”³⁰ To answer this question I conducted research to determine which academic subjects Donald Trump may have systematically studied in preparation to become president.

My personal experience teaching college students about American Constitutional law provides me with some perspective about what a student tends to know before exposure to the language of our Constitution as modified by its Amendments, case law, and subsequent U.S. Supreme Court decisions. The serendipity of life has also afforded me an experience in teaching and grading hundreds of student exams on the topics of real estate law and finance. This further provides me with familiarity about the relevant curriculum offered by the University of Pennsylvania during the time of Donald Trump’s student years (1966 to 1968).³¹ Upon learning about Trump’s stint at Wharton it is easy to assume that Trump attended and graduated from Wharton’s prestigious graduate business school program.

²⁷ See O’BIEN, *supra* note 26, at 43.

²⁸ See O’BIEN, *supra* note 26 at 50. See also TRUMP & SCHWARTZ, *supra* note 25, at 73, 77.

²⁹ See Steve Chapman, Column, *Donald Trump is a Profoundly Incompetent President*, CHI. TRIB. (June 7, 2017), <http://www.chicagotribune.com/news/opinion/chapman/ct-donald-trump-incompetent-president-chapman-perspec-20201010-column.html>; Elizabeth Drew, *Trump: The Presidency in Peril*, N.Y. REV. BOOKS, June 22, 2017 at 59; Peggy Noonan, Opinion, *What Comey Told Us About Trump*, WALL ST. J., June 10-11, 2017 at A15; Lawrence H. Tribe, Opinion, *Trump Must Be Impeached. Here’s Why*, WASH. POST (May 13, 2017), https://www.washingtonpost.com/opinions/trump-must-be-impeached-heres-why/2017/05/13/82ce2ea4-374d-11e7-b4ee-434b6d506b37_story.html?utm_term=.f0bf3bf10b73;

³⁰ See Richard A. Oppel, *In Tribute to Son, Khizr Khan Offered Citizenship Lesson at Convention*, N.Y. TIMES, July 30, 2016 at A1 (describing his son in a speech before the 2016 Democratic National Convention).

³¹ See Andy Ostroy, *Is This Why Trump Won’t Release His College Transcripts*, HUFFPOST (Jan. 11, 2017), http://www.huffingtonpost.com/andy-ostroy/hey-trump-show-us-the-wha_b_8949332.html.

This is not so! It appears that Donald Trump graduated with an undergraduate degree from the University of Pennsylvania. Unfortunately, my search for evidence of Donald Trump's previous interest and/or formal study of either U.S. government or constitutional law produced no school transcripts for Mr. Trump; therefore, there is no ability to confirm whether he ever studied constitutional law or American Government, although several articles are readily available questioning his press claims of being first in his class at Wharton.³²

Perhaps an answer to the question of how much constitutional law Donald Trump has read may be found in a 2016 article appearing in *The New Yorker*, where Tony Schwartz, ghostwriter of Trump's book, *The Art of the Deal*, revealed, "I seriously doubt that Trump has ever read a book straight through in his adult life." During the eighteen months that he observed Trump, Schwartz said, he never saw a book on Trump's desk, or elsewhere in his office, or in his apartment."³³ *The New Yorker* reported:

Other journalists have noticed Trump's apparent lack of interest in reading. In May [2016], Megyn Kelly, of Fox News, asked him to name his favorite book, other than the *Bible* or *The Art of the Deal*. Trump picked the 1929 novel 'All Quiet on the Western Front.' Evidently suspecting that many years had elapsed since he'd read it, Kelly asked Trump to talk about the most recent book he'd read. 'I read passages, I read areas, I'll read chapters –I don't have the time,' Trump said.³⁴

C. Real Estate Development, Political Relationships and Government Programs

To understand Trump's development during his late teens and early twenties requires understanding the family real estate business. Fred Trump's real estate development career included building homes during the 1920s and 30s in the New York borough of Queens; military housing during World War II; Brooklyn housing for returning soldiers following the War; and purchasing properties out of bankruptcy and foreclosure proceedings.³⁵ The New York smart money during the 1930s reportedly, "swirled around the courthouses, where judges resolved bankruptcies and foreclosures and

³² See Nancy Dillon, *Trump's Classmates from UPenn Claim 'No One Remembers Him'*, N.Y. DAILY NEWS (July 21, 2015), <http://www.nydailynews.com/news/politics/trump-classmates-upenn-claim-no-remembers-article-1.2299753>.

³³ See Jane Mayer, *Donald Trump's Ghostwriter Tells All*, NEW YORKER (July 25, 2016), <http://www.newyorker.com/magazine/2016/07/25/donald-trumps-ghostwriter-tells-all>.

³⁴ *Id.*

³⁵ See O'BRIEN, *supra* note 26, at 43.

disposed of real estate at extremely low prices. As political creatures themselves, judges understood that while rules governed their actions, well-connected players could be favored whenever possible,” according to biographer Michael D’Antonio.³⁶ For example, “friends and allies would be named as trustees when prime properties were forfeited in bankruptcies and get first shot at them. With the right information, well-connected investors might even approach a homeowner who was behind on payments and make an offer to buy.”³⁷ Donald’s father Fred, “courted Brooklyn’s political power brokers By the late 1930s, Fred Trump was piecing together lots to create large tracts where he built developments ranging from a few dozen homes to hundreds.”³⁸

According to Trump biographer Timothy L. O’Brien, “[a]s much as Fred was self-made, he never would have become as wealthy as he did without having participated in an innovative public-private construction partnership administered at the time by the Federal Housing Administration.”³⁹ Unfortunately, a 1953 FHA kickback payment scandal resulted in Fred Trump being subpoenaed to testify before Congress.⁴⁰ Timothy O’Brien states that, “Fred was never charged with any wrongdoing in connection with the hearings, but the FHA subsequently banned him from participating in future projects.”⁴¹ Biographer Michael D’Antonio states:

Denied access to federal programs because of the problems aired during the Senate hearings on the FHA, Fred had found another game called the Mitchell-Lama program, which had been created under the Limited-Profit Housing Companies Act of 1955 . . . allow[ing] developers to build on land acquired by the government, supplied them with low-interest loans, and exempted them from certain taxes. Mitchell-Lama even guaranteed developers a 7.5 percent builder’s fee and a 6 percent annual profit

Fred Trump had finished a Mitchell-Lama project called Trump Village . . . (The sprawling site was assembled through the government’s condemnation of smaller properties. Those overseeing these condemnations, and setting the price paid for each parcel, were Brooklyn judges friendly to Trump). Trump Village had served as a kind of operating-room theatre for young Donald, providing him

³⁶ See D’ANTONIO, *supra* note 26, at 26.

³⁷ *Id.*

³⁸ *Id.* at 28.

³⁹ See O’BRIEN, *supra* note 26, at 44.

⁴⁰ See O’BRIEN, *supra* note 26, at 45. See also D’ANTONIO, *supra* note 26, at 15.

⁴¹ See O’BRIEN, *supra* note 26, at 46.

with an up-close view of something few people ever saw. In countless conversations and many visits to the building site, he learned how government officials, politicians, contractors, and tradesmen could be managed and massaged.⁴²

Author Timothy O'Brien discusses other instances of the Trump family business interests using political connections and public financing during the 1960s.⁴³ Political favors and use of political contributions to curry favorable treatment is a theme we will see repeated throughout Donald Trump's real estate development career. While estimates vary, biographer Michael D'Antonio places Fred Trump's fortune, "in excess of \$100 million [from] selling and renting homes to working-class New Yorkers."⁴⁴

D. Business Career Chronology: The 1970s and 1980s

Following college graduation in 1968, Donald Trump returned to Queens and "went door-to-door in Brooklyn collecting rents, often accompanied by thugs who would protect him if tenants got nasty."⁴⁵ At age 25, Donald Trump moved to Manhattan in 1971, renting a one-room apartment on the upper-east-side, "commut[ing] to Brooklyn where he continued to help manage his father's stable of apartments."⁴⁶

During the mid-1970s, Donald Trump made news by appearing on the front page of *The New York Times* announcing plans to develop properties acquired from the Penn Central bankruptcy proceedings, including the old Commodore Hotel at Grand Central Station and a parcel on the Hudson River between 59th and 72nd Streets known as the West Side Yards.⁴⁷ Real estate development, particularly in large metropolitan areas, often involves years of political and zoning approvals and negotiations for favorable tax incentives. Just such a scenario is shown by Timothy O'Brien when he explains Trump's efforts to get his Commodore Hotel project "an outsized package of real estate tax breaks worth \$111 million—the first ever given to a commercial property in New York and one that critics described as a sweetheart deal between political cronies."⁴⁸ Trump was not initially successful in receiving these tax incentives, but ultimately prevailed.⁴⁹

During 1983, Donald Trump's purchase of the New Jersey Generals US

⁴² See D'ANTONIO, *supra* note 26, at 50, 51.

⁴³ See O'BRIEN, *supra* note 26, at 46.

⁴⁴ See D'ANTONIO, *supra* note 26, at 10.

⁴⁵ See O'BRIEN, *supra* note 26, at 51.

⁴⁶ *Id.* at 52.

⁴⁷ *Id.* at 59.

⁴⁸ *Id.* at 62.

⁴⁹ *Id.* at 63.

Football League (USFL) franchise “generated scads of free press,”⁵⁰ but operations of the USFL were suspended in August 1986.⁵¹ Biographer Timothy O’Brien explains:

While Donald walked away from his USFL debacle a bit deeper in debt, the value of the publicity he received was incalculable. The attention he snared as the Generals’ owner placed him more squarely in the public eye than any of the hoopla surrounding Trump Tower. Rather than being cast as a rash rich kid undone by impatience and scorched-earth tactics, Donald’s run-in with the NFL solidified his image as an entrepreneurial underdog willing to take on all comers, no matter how much bigger they were than him. It was a theme Donald would mine again and again for the rest of his career.⁵²

Estimates of Donald Trump’s net worth have varied like a roller-coaster over the years. Unlike many wealthy individuals who work hard at keeping their name and finances out of the media, Trump seems to have worked very hard to achieve widespread name recognition and fame (brand value).⁵³ Despite Trump’s more elevated claims, a 1982 report by New Jersey casino licensing regulators, “said Donald earned a \$100,000 salary working for his father in 1982, had \$6,000 in savings, got a \$1 million commission on the Grand Hyatt deal, and had a \$35 million unsecured line of bank credit—in other words, short on cash and in debt up to his eyeballs.”⁵⁴

E. Business Career Chronology: 1990s Forward

While many books have been written about Donald Trump’s business career,⁵⁵ according to biographer Timothy O’Brien:

By 1992, dozens of banks had written off several hundred million dollars in loans to Donald, his Atlantic City bondholders had agreed to forgo debt payments for five years, and Donald had whittled down his mammoth personal debts to \$155 million by forfeiting his yacht, his jet, his 50 percent stake in the Grand Hyatt, and the Trump

⁵⁰ O’BRIEN, *supra* note 26, at 88.

⁵¹ *Id.* at 90.

⁵² *Id.* at 90–91.

⁵³ *Id.* at 149.

⁵⁴ *See id.* at 149–51 (illustrating *Forbes* coverage of Trump’s wealth estimates over the years).

⁵⁵ *See* LICHTMAN, *supra* note 17; JOHNSTON, *supra* note 19; O’BRIEN, *supra* note 26; D’ANTONIO, *supra* note 26.

Shuttle. The Trump Organization now owed \$2.2 billion instead of \$3.4 billion. A year later Donald's personal debts fell to \$115 million, but he had barely enough cash to remain in business.⁵⁶

Therefore, "[b]y 1993, with his casinos in hock, most of his real estate holdings either forfeit or stagnant, and his father slipping into the fog of Alzheimer's disease, Donald, at the age of forty-seven, had run out of money."⁵⁷ Trump's solution was to have the president of the Trump Organization, "call Donald's siblings and ask for a handout from their trusts . . . Donald got his loan [\$10 million], but about a year later he was almost broke again. When he went to the trough the second time, he asked his siblings for \$20 million more."⁵⁸ O'Brien reports that, "in 1995, Donald narrowly averted personal bankruptcy yet again when the deadline arrived for paying back all of the \$115 million; he got out of that corner when his banks gave him another three years to pay back the debt."⁵⁹

F. Conflict of Interest with Public Company Shareholders

In a hot Initial Public Offering (IPO) market, Trump was able to take public casino properties The Plaza and Taj Mahal during 1995 and 1996, "at a time when Donald was unable to make his bank payments and was heading toward personal bankruptcy. The stock sales allowed Donald to buy the casinos back from the banks and unload huge amounts of debt."⁶⁰ The not-so-generous assessment of this fact pattern is that "[t]he offering . . . left him with a 25 percent stake in a company he once owned entirely [I]n one fell swoop someone else became responsible for the debts that almost sank Donald and [He] went from gaming the bankruptcy system to gaming the world of publicly traded companies."⁶¹ Biographer Timothy O'Brien observes:

Trump Hotels, which never earned a profit in any year between 1995 and 2005, became Donald's private stockpile

⁵⁶ See O'BRIEN, *supra* note 26, at 164 (citing Trump, *The Art of the Comeback*, WASH. POST, Nov. 29, 1992 at 24).

⁵⁷ See O'BRIEN, *supra* note 26, at 143.

⁵⁸ *Id.* at 143-44.

⁵⁹ See O'BRIEN, *supra* note 26, at 164.

⁶⁰ See O'BRIEN, *supra* note 26, at 167. See also Trump Hotels & Casino Resorts Inc., Form S-1 (Feb. 1, 1996), <https://www.sec.gov/Archives/edgar/data/943320/0000950130-96-000349.txt>; Donald J. Trump, THCR Holding Corp., THCR/LP Corporation, Trump Atlantic City Associates, Trump Hotels and Casino Resorts Holdings, L.P. & Trump Hotels & Casino Resorts Inc., Amendment No. 4 to Schedule 13E-3 (Apr. 26, 1996), <https://www.sec.gov/Archives/edgar/data/871012/0000898430-96-001445.txt>.

⁶¹ See O'BRIEN, *supra* note 26, at 167.

of ready cash. Alan Sloan, the financial writer who had opined with great accuracy on many things Trump, offered a fair warning to Trump Hotel's investors: "Shareholders and bondholders have to be total fools to think that Donald Trump will put their interests ahead of his own"

Just a few months after Trump Hotels absorbed the Taj, Donald sold his last Atlantic City casino, the Castle, to the public company. That is, Donald sold his own casino, with all its heavy debts, to a public company he controlled. The \$490 million price tag for the Castle was about \$100 million more than analysts thought it was worth. A later valuation by Trump Hotels itself pegged the Castle's true price at \$314 million. Nonetheless, Trump Hotels paid \$490 million, sending the company's stock into a nosedive from which it never recovered About a decade later, the New York Stock Exchange delisted the shares entirely.⁶²

G. SEC Charges

The U.S. Securities and Exchange Commission (SEC) charged Trump Hotels & Casino Resorts Inc. with issuing "misleading statements in the company's third-quarter 1999 earnings release. The Commission found that the release cited pro forma figures to tout the Company's purportedly positive results of operations but failed to disclose that those results were primarily attributable to an unusual one-time gain rather than to operations."⁶³ Stephen M. Cutler, Director of the SEC's Division of Enforcement, observed, "This is the first Commission enforcement action addressing the abuse of pro forma earnings figures In this case, the method of presenting the pro forma numbers and the positive spin the Company put on them were materially misleading . . . illustrat[ing] how pro forma numbers can be used deceptively"⁶⁴

H. Law as a Weapon

Many business law scholars of have advocated the necessity for understanding use of the law as a strategic component of any effective

⁶² See O'BRIEN, *supra* note 26, at 168–69.

⁶³ Press Release, SEC 2002-6, SEC Brings First Pro Forma Financial Reporting Case: Trump Hotels Charged with Issuing Misleading Earnings Release (Jan. 16, 2002), <https://www.sec.gov/news/headlines/trumphotels.htm> [hereinafter SEC Press Release].

⁶⁴ *Id.* See also SEC Administrative Proceeding 3-10690, In the Matter of Trump Hotels & Casino Resorts, Inc. (Jan. 16, 2002), <https://www.sec.gov/foia/docs/trump-hotels-and-casino-resorts-inc.pdf>. This file provides 1,240 pages of associated documents made available by virtue of FOI Act request.

business strategy.⁶⁵ History Professor Allan Lichtman describes the 45th president as “a serial lawbreaker,” and states that, “since his early days in business, Trump has elevated himself again and again above the laws that govern others . . . has broken many laws for personal gain. No other president comes close to matching his history of violations.”⁶⁶ Professor Lichtman observes that while unlikely, Trump may still be vulnerable to an impeachment proceeding based upon his illegal activities committed before assuming office as president.⁶⁷ In many ways Trump can be characterized as using law as a weapon against those less able to defend themselves. USA Today is credited with compiling a total of 4,095 lawsuits involving either Donald Trump or his business entities during the past thirty years.⁶⁸ Candidate Trump said at a campaign rally, “Does anybody know more about litigation than Trump? . . . I’m like a Ph.D. in litigation.”⁶⁹

In Professor Lichtman’s words, “Trump has escaped serious retribution for his crimes and transgressions. He’s settled civil lawsuits charging him with breaking racketeering and civil rights laws, paid fines that he could well afford, protracted litigation, and concealed lawbreaking for many years.”⁷⁰ Professor Lichtman describes numerous general topic areas of Trump legal entanglements, including violations of the Fair Housing Act;⁷¹ allegations of fraudulent charity activity;⁷² potential illegal Cuban Casino development activities;⁷³ “Trump’s Fraudulent University;”⁷⁴ and exploitation of undocumented immigrants.⁷⁵ Biographer David Cay Johnson describes litigation as a core strategy wherein “Trump often threatens to sue journalists, ensuring caution from publishers and broadcasters who want to avoid a costly lawsuit—even one Trump cannot win. This tends to discourage investigation beyond the official talking points.”⁷⁶

In response to a taunt from comedian Bill Maher, “Trump filed a \$5 million lawsuit. Although . . . eventually dropped . . . the filing required a court’s attention, at taxpayer expense, and a defense by Maher.”⁷⁷ In another instance, when author Timothy O’Brien’s published an estimate of Donald

⁶⁵ See David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J. L. & BUS. 137 (2016); Lawrence J. Trautman et al., *Some Key Things U.S. Entrepreneurs Need to Know About the Law and Lawyers*, 46 TEX. J. BUS. L. 155 (2016).

⁶⁶ See LICHTMAN, *supra* note 17, at 45.

⁶⁷ See LICHTMAN, *supra* note 17, at 46.

⁶⁸ See Jonathan Mahler, *All the President’s Lawyers*, N.Y. TIMES MAGAZINE, July 9, 2017 at 30.

⁶⁹ *Id.*

⁷⁰ See LICHTMAN, *supra* note 17, at 45.

⁷¹ *Id.* at 46.

⁷² *Id.* at 48.

⁷³ *Id.* at 52.

⁷⁴ *Id.* at 54.

⁷⁵ *Id.* at 57.

⁷⁶ See JOHNSTON, *supra* note 19, at 147.

⁷⁷ See D’ANTONIO, *supra* note 26, at 3.

Trump's net worth at less than \$250 million, "Trump sued the author and publisher seeking \$5 billion in damages."⁷⁸ Biographer David Cay Johnston writes, "After a court dismissed the case, Trump made it clear that he merely wanted to harass O'Brien, not necessarily win damages. 'I spent a couple of bucks on legal fees and they spent a whole lot more. I did it to make his life miserable, which I'm happy about . . .'"⁷⁹ Biographer Johnston believes that Trump's propensity for litigation is consistent with his philosophy of revenge.⁸⁰

Biographer Timothy L. O'Brien, author of *Trump Nation: The Art of Being the Donald*, has the distinction of being one of many sued by Donald Trump. In his unflattering depiction of Trump's business career, author O'Brien writes about the genesis of the hit television show *The Apprentice*, by observing:

At the time that [producer Mark] Burnett hoisted Donald into *The Apprentice's* firmament, Donald was, more or less, a down-on-his-luck real estate promoter with a failing casino company whose mantra and appetites appeared to be stuck in a Reagan-era time warp. The Cheshire Cat of the business world, Donald had watched many of the assets he assembled a decade earlier evaporate around him until all that was left was a mesmeric, well-known name. He had morphed into "Trump," the human marquee. But *The Apprentice* rescued him from all of that.⁸¹

I. Trump and New York Real Estate Development

It appears that real estate development in New York City involves navigating numerous political, approval, tax and zoning issues. As an example, biographer Timothy O'Brien tells the story of Trump's May 1987 conflict with New York Mayor Ed Koch over Trump's application for a \$700 million tax abatement in support of Trump's construction of the West Side Yards project known as Television City. Mayor Koch's letter dated May 28, 1987, states in relevant part:

Dear Donald, I have received your letter of May 26. I was disappointed that you continue to believe that you can force the City's hand to your advantage through intimidation. It will not work . . . I also refuse to place hundreds of millions of dollars in future taxes at risk so that you can more easily

⁷⁸ See *id.* at 11.

⁷⁹ See JOHNSTON, *supra* note 19, at 147.

⁸⁰ See *id.* at 148.

⁸¹ See O'BRIEN, *supra* note 26, at 16–17.

build a 15-million-square-foot luxury condominium and retail development If NBC chooses your site and you make a profit, that's fine and the American way, but it will not be on the backs of the New York City taxpayer⁸²

J. Racial Bias in Business

Allegations of racial bias in his housing business date back at least to the October 1973 lawsuit the U.S. Department of Justice brought against a Trump firm operating 14,000 apartments for violations of the Fair Housing Act of 1968.⁸³ A *New York Times* investigation “drawing on decades-old files from the New York City Commission on Human Rights, internal Justice Department prosecutors—uncovered a long history of racial bias at his family’s properties, in New York and beyond.”⁸⁴

During the early 1970s complaints mounted about racial rental policies at Trump properties, and “by 1967, state investigators found that out of some 3,700 apartments in Trump Village, seven were occupied by African-American families . . . the few minorities who did live in Trump-owned buildings often had to force their way in” through legal settlements.⁸⁵ *The Washington Post* reports that the 1973 case, “one of the biggest federal housing discrimination suits to be brought during that time, put a spotlight on the family empire [Donald] demonstrated the brash, combative style that would make him famous, holding forth at a news conference . . . to decry the government’s arguments as ‘such outrageous lies.’”⁸⁶ A settlement agreement was finally entered into on June 10, 1975, “prohibiting the Trumps from discriminating against any person in the terms, conditions, or privileges of sale or rental of a dwelling The decree makes clear . . . the settlement was ‘in no way an admission’ of a violation.”⁸⁷ *The New York Times* reports that the settlement agreement also “required that Trump Management provide the New York Urban League with a weekly list of all its vacancies. This did not stop Mr. Trump from declaring victory. In the end the government couldn’t prove its case, and we ended up making a minor settlement without admitting any guilt.”⁸⁸

⁸² See O’BRIEN, *supra* note 26, at 92–93.

⁸³ See Michael Kranish & Robert O’Harrow, *Inside the Government’s Racial Bias Case Against Donald Trump’s Company, and How He Fought It*, WASH. POST, Jan. 23, 2016, https://www.washingtonpost.com/politics/inside-the-governments-racial-bias-case-against-donald-trumps-company-and-how-he-fought-it/2016/01/23/fb90163e-bfbc-11e5-bcda-62a36b394160_story.html?utm_term=.982580695740.

⁸⁴ See Jonathan Mahler & Steve Eder, *‘No Vacancies’ for Blacks: How Donald Trump Got His Start, and was First Accused of Bias*, N.Y. TIMES (Aug. 27, 2016), <https://www.nytimes.com/2016/08/28/us/politics/donald-trump-housing-race.html>.

⁸⁵ *Id.*

⁸⁶ See Kranish & O’Harrow, *supra* note 83.

⁸⁷ *Id.*

⁸⁸ *Id.*

In addition to Trump's complaints during the 1960s and 1970s about being required to rent to welfare recipients, indications of racial bias appear to have been often documented. In one gracious account, Trump biographer Michael D'Antonio characterizes Trump's behavior as "insensitivity rather than bigotry. When he inserted himself into the Central Park jogger case, in which four of the accused were black and one was Hispanic, he added tension to a situation that was already fraught with racial overtones."⁸⁹ D'Antonio continues to recall that during a TV interview Trump had said, "I would love to be a well-educated black because they have an actual advantage."⁹⁰

K. Publicity as Trump's Key to Value Creation

Key to understanding business strategy and core beliefs held by Fred Trump and his son Donald may be found in the teachings of early self-help and personal improvement advocates such as Napoleon Hill, author of *Think and Grow Rich* (1937), and the teachings of Norman Vincent Peale, author of *The Power of Positive Thinking*.⁹¹ Indeed, the Reverend Norman Vincent Peale performed the marriage ceremony of Donald Trump to first wife, Ivana.⁹² Self-help guru Tony Robbins is credited by Trump biographer Michael D'Antonio to have, "offered Norman Vincent Peale updated for a new century."⁹³ "Fred Trump sought free publicity for everything he did," according to biographer Michael D'Antonio:

[i]n every period of his adult life The one consistent element in all of these interests was the value he placed on publicity, which he sought with the skill of someone who understood that celebrity is power, reporters are often lazy about facts, and image can trump reality. He moved from supplying the press with quotes and interviews to telling his own story in a 1987 book, *Trump: The Art of the Deal*, which he co-authored with a professional author.

More than a dozen Trump-authored books followed the first. Each one advanced the notion that he was brilliant and successful But the recognition they generated paled in comparison with the attention he received for his off-stated political ambitions. Although many political observers dismissed Trump's aspirations, his flirtations generated

⁸⁹ See D'ANTONIO, *supra* note 26, at 292.

⁹⁰ *Id.*

⁹¹ *Id.* at 52–54.

⁹² *Id.* at 119.

⁹³ *Id.* at 251.

valuable publicity. Politics also prepared Trump for . . . playing himself on a TV show called *The Apprentice*.⁹⁴

During the 2000 presidential cycle, while Donald Trump was conducting an exploratory presidential campaign for the Reform Party, he touted that he was offering voters “a businessman’s ‘eye for the bottom line,’ which was an odd kind of offer, given that his Trump Hotels and Casino Resorts operation was about to post a loss of \$34.5 million for the last quarter of 1999.”⁹⁵ During this period, Trump was paid to join with promoter Tony Robbins to headline a series of self-help seminars known as Results 2000, held in cities such as Hartford and St. Louis. At this time, “a Trump aide told a reporter for the *New York Daily News* that while others expended great amounts on their campaigns, Trump is *making* money running for president.”⁹⁶ Reform Party leader Patrick Choate is credited with saying, “Donald Trump came in, promoted his hotels, he promoted his book, he promoted himself at our expense”⁹⁷ Biographer D’Antonio concludes of this effort:

Trump never let on that his [2000] campaign was a joke. Instead he presented himself as a serious candidate whose business success qualified him for the highest office in the world. In this way, the Trump-for-president folly may have been the first true pseudo-campaign in the history of the presidency, a determined effort to exploit the political process by a man whose real purpose was profit.⁹⁸

L. Trump University

Soon after the November 2016 election, President-elect Donald Trump reached litigation settlement against wealth seminars known as “Trump University,” involving accusations of fraud, violations of consumer protection statutes, and racketeering.⁹⁹ One of these lawsuits had been brought during 2013 by New York Attorney General Eric T. Schneiderman against Donald Trump “for swindling thousands of innocent Americans out of millions of dollars through a scheme known as Trump University. Donald Trump fought us . . . filing baseless charges and fruitless appeals and refusing to settle for even modest amounts of compensation for the victims

⁹⁴ *Id.* at 12.

⁹⁵ See D’ANTONIO, *supra* note 26, at 249.

⁹⁶ *Id.* at 250.

⁹⁷ *Id.* at 251.

⁹⁸ *Id.* at 248–49.

⁹⁹ See Christopher L. Peterson, *Trump University and Presidential Impeachment*, 96 U. OR. L. REV. 57 (2017).

of his phony university.”¹⁰⁰ Attorney General Schneiderman observes that “Today’s \$25 million settlement agreement is a stunning reversal by Donald Trump and a major victory for the over 6,000 victims of his fraudulent university.”¹⁰¹

Professor Christopher Peterson provides an excellent account of the deceptive business practices alleged in the Trump University litigation.¹⁰² To begin, “unlike other universities, Trump University did not have a campus, grade students, or offer degrees [E]arly press descriptions . . . explained that ‘courses will cost \$300 and will take one or two weeks to complete.’ Advertising . . . focused almost exclusively on Trump’s role in developing the curriculum and selecting the instructors.”¹⁰³ Enrollment sales materials included “a letter signed by Donald Trump explaining, ‘my hand-picked instructors will share my techniques which took my entire career to develop. Then just copy exactly what I’ve done and get rich.’”¹⁰⁴ Unfortunately, it appears that most of the Trump University activity consisted of little more than up-selling activity by those involved.¹⁰⁵ As Professor Peterson states:

While complaints about Trump University three-day seminars were common, it was the students that purchased costly mentoring packages that suffered most. Despite paying as much as \$35,000, consumer complaints against Trump University reveal that many purchasers of Trump Elite mentoring packages did not receive meaningful real estate mentoring. Consumers complained that Trump University’s “Trump Elite” mentors:

- Did not return phone calls;
- Set up voicemail inboxes that did not accept messages;
- Were inexperienced or could not provide useful advice;
- Advised students to engage in illegal practices;
- Blamed students for their inability to make money;
- Frequently delayed or refused to provide refunds despite

¹⁰⁰ See Press Release, Statement by A.G. Schneiderman On \$25 Million Settlement Agreement Reached in Trump University Case (Nov. 18, 2016), <https://ag.ny.gov/press-release/statement-ag-schneiderman-25-million-settlement-agreement-reached-trump-university>.

¹⁰¹ *Id.*

¹⁰² See Peterson, *supra* note 99.

¹⁰³ See Peterson, *supra* note 99, at 59.

¹⁰⁴ See Peterson, *supra* note 99, at 60 (citing Letter of Donald J. Trump, Affirmation in Opposition to Respondent’s Motions for Partial Summary Judgment, Exhibit FF, p. 409, *New York v. Trump Educational Initiative, LLC* (June 3, 2016)).

¹⁰⁵ See Peterson, *supra* note 99, at 62.

promised “guarantees.”¹⁰⁶

Professor Peterson lists numerous examples of consumer dissatisfaction against Trump University. Representative of just one of these complaints involving older Americans is included here from an adult child of one Trump University victim:

This is the biggest SCAM I’ve ever seen! My 82 year old father went to a free seminar promising to make him rich through real estate. The seminar was solely for the purpose of upselling him into attending a \$1500 three day workshop by promising him they would teach him how to buy and sell foreclosures for huge profits . . . [H]e goes to the 3 day workshop and when he comes home we find out that they pressured him into spending \$35k MORE! . . . Then he proceeds to tell us how the majority of people there were SENIORS like him! These aren’t long term investors here, these are people being tricked into thinking they can make a quick profit! If this isn’t the definition of preying on the elderly then I don’t know what is.¹⁰⁷

The charges New York Attorney General Schneiderman brought during 2013 are instructive to an understanding of the Trump University scheme. The Attorney General alleged that the marketing of Trump University involved the following material misrepresentations:

- consumers would learn “everything [they] need[ed] to know” to become successful real estate investors;
- consumers would quickly recoup their investment by doing real estate deals, with some instructors claiming that consumers would earn tens of thousands of dollars within thirty days;
- instructors were “handpicked” by Donald Trump;
- consumers would be taught Donald Trump’s very own real estate strategies and techniques;
- consumers would receive access to private sources of

¹⁰⁶ See Peterson, *supra* note 99, at 67 (citing Request for Approval to File, Consumer Protection and Public Health Division, Houston Regional Office, Office of Texas Attorney General (May 6, 2010); Affidavit of Nelly Cunningham, Snell Affirmation, *supra*, at Exhibit K6, pp. 3-4). See also PLAYBOOK, *supra*, at 114 (“Mr. Trump won’t listen to excuses and neither will we. Excuses will never make you more money; they will just continue to cost you more missed opportunities in life.”).

¹⁰⁷ See Peterson, *supra* note 99, at 69 (citing Complaint at 37, *Makaeff v. Trump University, LLC.*, No. 3:10-cv-00940-CAB-WVG, 2010 WL 3341638 (S.D. Cal. Sept. 26, 2012) (quoting <http://www.moneystance.com/trump-universityreviews>)).

- financing (“hard money lenders”); and
- the three-day seminar would include a year-long “Apprenticeship Support” program.¹⁰⁸

Having devoted thousands of words to describe the Trump University fact pattern and examine the alleged fraudulent behavior, Professor Peterson then posed the question of “whether the United States House of Representatives could lawfully impeach and the United States Senate could convict President Trump for fraud and racketeering in connection with Trump University?”¹⁰⁹ In conclusion, Professor Peterson remarks:

The evidence assembled in over six years of litigation could lead reasonable people to believe that the President and his band of traveling salesmen engaged in a nationwide fraudulent marketing campaign to push a personal coaching scam on vulnerable people who trusted him. President Trump promised that his hand-picked instructors would teach consumers his own real estate secrets, mentoring them to get rich quick. But the evidence suggests these promises were lies. Judges looking at that evidence decided reasonable jurors could conclude that the President committed fraud and racketeering. The President of the United States agreed to pay \$25 million to prevent a jury from reaching precisely that conclusion.

Just as these jurors could have concluded the president committed fraud or racketeering, Congress could reasonably conclude that the President’s actions constitute “high crimes or misdemeanors” under the Presidential impeachment clause. Although the attorneys in these civil lawsuits have reached a settlement agreement with the President, those agreements do not legally affect Congress’s “sole” right to impeach and remove the president . . .

The gravity of the allegations against him have already pitted two of the Republic’s most treasured values against each other. On the one hand Americans have always believed in our electoral process. And yet on the other hand,

¹⁰⁸ See Peterson, *supra* note 99, at 73 (citing Press Release, A.G. Schneiderman Sues Donald Trump, Trump University & Michael Sexton for Defrauding Consumers Out of \$40 Million with Sham “University” (Aug. 25, 2013), <http://www.ag.ny.gov/press-release/ag-schneiderman-sues-donald-trump-trumpuniversity-michael-sexton-defrauding-consumers>).

¹⁰⁹ See Peterson, *supra* note 99, at 58.

Americans have also always held to the view that no one is above the law. Today, the Trump presidency now forces Congress to choose between the two. In the future, the republic would be well advised to avoid presidential candidates with pending allegations of criminal activity.¹¹⁰

M. Early Career: Lying, Fraud and False Statements

Most casual observers to Mr. Trump's rise to prominence are well-aware of his difficulty in limiting his utterances to truthful statements. Just a few examples of actions brought against Donald Trump or any of his various business entities sounding in illegality include the New York Attorney General's lawsuit over Trump University;¹¹¹ misleading financial statement pro forma financial projections by Trump Hotels and Casinos Inc.;¹¹² and exploitation of undocumented Polish immigrant labor.¹¹³ While a full recital of lying and false statements from Mr. Trump is well beyond the scope of this article, the following brief account courtesy of *The Art of the Deal* ghostwriter Tony Schwartz may prove sufficient. Beginning in 1985, Tony Schwartz was in close proximity to Donald Trump for about eighteen months as he drafted *The Art of the Deal* (1987).¹¹⁴ Schwartz soon discovered that Trump "has no attention span . . . it's impossible to keep him focused on any topic other than his own self-aggrandizement, for more than a few minutes . . . Trump's short attention span has left him with 'a stunning level of superficial knowledge and plain ignorance.'"¹¹⁵ Schwartz concludes, "That's why he so prefers TV as his first news source —information comes in easily digestible sound bites." An article appearing in *The New Yorker* states, "While working on *The Art of the Deal*, Schwartz kept a journal in which he expressed his amazement at Trump's personality, writing that Trump seemed driven entirely by a need for public attention . . ." ¹¹⁶ In addition:

"Lying is second nature to him," Schwartz said. More than anyone else I have ever met, Trump has the ability to convince himself that whatever he is saying at any given moment is true, or sort of true, or at least *ought* to be true." Often, Schwartz said, the lies that Trump told him were about money— "how much he had paid for something, or

¹¹⁰ See Peterson, *supra* note 99, at 121.

¹¹¹ See Trump University discussion, *supra* notes 100–11.

¹¹² See SEC Press Release, *supra* note 63.

¹¹³ See D'ANTONIO, *supra* note 26, at 131; JOHNSTON, *supra* note 19, at 71.

¹¹⁴ See Mayer, *supra* note 33.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

what a building he owned was worth, or how much one of his casinos was earning when it was actually on its way to bankruptcy”

Schwartz says of Trump, “He lied strategically. He had a complete lack of conscience about it.” Since most people are “constrained by the truth,” Trump’s indifference to it “gave him a strange advantage.”

. . . In his journal Schwartz wrote, “Trump stands for many of the things I abhor: his willingness to run over people, the gaudy, tacky, gigantic obsessions, the absolute lack of interest in anything beyond power and money.” Looking back on the text [of *The Art of the Deal*] now, Schwartz says, “I created a character far more winning than Trump actually is.”

Will Mr. Trump’s continued propensity for lying, fraud, and false statements, demonstrated often throughout his early career and life, ultimately prove to be the dysfunctional personality trait that leads to his eventual demise?

III. THE 2016 PRESIDENTIAL ELECTION CAMPAIGN

When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.

Donald J. Trump
 Presidential Announcement Speech
 June 16, 2015¹¹⁷

Professor Eric A. Posner writes, “Many of Trump’s methods, promises, and statements during the campaign violated constitutional understandings shared by liberal and conservative intellectuals, as well as by politicians, journalists, and civic leaders.”¹¹⁸ Professor Posner continues, “Trump, the

¹¹⁷ See Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST, July 8, 2015, https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.f87f56b27329.

¹¹⁸ See Posner, *Can It Happen Here?*, *supra* note 10, at 605.

billionaire, ran for office as a classic populist. He hit all the populist themes: the domination of the elites; the failure of technocracy; the corruption of the political class; and its neglect of the people.”¹¹⁹ Herein lies, “the paradox of populist government is that a candidate who runs against the establishment cannot govern without the establishment What is unique about Trump is that his populist rhetoric was significantly more intense and, in light of lack of political experience, more credible.”¹²⁰ Republican U.S. Senator Jeff Flake from Arizona says:

In politics, it is difficult to win an argument with complexity and facts when the other side offers easy answers and free stuff without worrying about the details. This is largely how Donald Trump vanquished the Republican field in 2016. A tone that many of his supporters took for candor—*Our leaders are so stupid! I alone can fix it!*—combined with easy answers to hard questions, sweetened by free stuff. Candidate Trump was giving—and we, the Republican electorate, bought—the late-night infomercial: “Health Care for Everybody! Much Better, at a Fraction of the Cost! Free Border Wall! Super-Colossal Trade Deals! But Wait! There’s More!”¹²¹

A. Political Office Strategy and Brand Trump

As a university educator who teaches ethics in the classroom, my interest in chronicling the ethical challenges created by the Trump presidency began in earnest very early during the 2016 presidential campaign. To a considerable extent, Donald Trump’s candidacy was empowered by his strategy of making a daily barrage of outrageous statements, thus attracting and sucking all the oxygen out of the news cycle. Trump’s strategy proved amazingly effective and resulted in the equivalent of hundreds of millions of dollars of free media coverage.

Donald Trump’s business interests are essentially about his *brand*, i.e., name recognition. According to biographer Michael D’Antonio, Donald Trump believes that his name:

Just like that of Disney or Ford, added value to products, services, and assets he offered in the marketplace. Brand names are worth money. Apple is the most valuable brand name in the world, estimated in 2013 by the ranking service Interbrand to be worth \$28 billion. Interbrand pegged the

¹¹⁹ *Id.* at 2.

¹²⁰ *Id.*

¹²¹ See JEFF FLAKE, CONSCIENCE OF A CONSERVATIVE: A REJECTION OF DESTRUCTIVE POLITICS AND A RETURN TO PRINCIPLE 68 (Random House 2017).

value of the Gap clothing brand at \$3.9 billion. Trump didn't show up in the firm's public ranking of valuable names, but in a 2010 deposition [Trump] testified that an independent evaluation set it at \$3 billion.¹²²

Is it possible that Trump's presidential bid was nothing more than a ploy to garner millions of dollars of free publicity (brand building), thus enhancing his brand at essentially no out-of-pocket cost to Donald Trump (an infinite return on his investment)? Did Trump view his 2016 presidential campaign as a "no way to lose" proposition where worldwide publicity was guaranteed—and the more outrageous his candidacy and statements, the more media coverage he received? Is it likely that candidate Trump never expected to win and had no real interest in governing? Now, a look at the 2016 presidential campaign is presented.

B. 2016 Election Outcome

As noted previously, the Trump election victory came with less than a roaring mandate to govern, having lost the popular ballot by 2,868,519 votes.¹²³ And 2016 was, like most, a messy presidential campaign. Many Democratic voters came to believe the fix was in for Hillary Clinton, as evidenced by Democratic National Committee (DNC) chairwoman Debbie Wasserman Schultz's abrupt resignation on the eve of the party's convention, following (Russian hack?) disclosures of Democratic Party bias against the popular primary campaign of Senator Bernie Sanders.¹²⁴

Results from a Gallup survey of 125,000 American adults disclosed that Trump's "supporters are less educated and more likely to work in blue collar occupations, but they earn relatively high household incomes and are no less likely to be unemployed or exposed to competition through trade or immigration."¹²⁵ In addition, it appears that "living in racially isolated communities with worse health outcomes, lower social mobility, less social capital, greater reliance on social security income and less reliance on capital income, predicts higher levels of Trump support."¹²⁶

¹²² See D'ANTONIO, *supra* note 26, at 9.

¹²³ See *Presidential Results: Donald Trump Wins*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/elections/results/president> (304 votes for Donald J. Trump versus 232 electoral college votes for Hillary Clinton; and 7 votes for others).

¹²⁴ See Anne Gearan et al., *DNC Chairwoman Will Resign in Aftermath of Committee Email Controversy*, WASH. POST (July 24, 2016), https://www.washingtonpost.com/politics/hacked-emails-cast-doubt-on-hopes-for-party-unity-at-democratic-convention/2016/07/24/a446c260-51a9-11e6-b7de-dfe509430c39_story.html?utm_term=.9b99dbe7c634.

¹²⁵ See Jonathan T. Rothwell & Pablo Diego-Rosell, *Explaining Nationalist Political Views: The Case of Donald Trump 1* (Working Paper No. Nov. 2, 2016).

¹²⁶ *Id.*

C. Campaign: Lying, Fraud and False Statements

In editorial comment, *The Los Angeles Times* states that Trump “targets the darkness, anger and insecurity that hide in each of us and harnesses them for his own purposes . . . [in] an apparent disregard for fact so profound as to suggest that he may not see much practical distinction between lies, if he believes they serve him, and the truth.”¹²⁷ *The Los Angeles Times* continues that while Trump “is neither terribly articulate nor a seasoned politician, he has a remarkable instinct for discerning which conspiracy theories in which quasi-news source, or which of his own inner musings, will turn into ratings gold . . . If one of his lies doesn’t work—well, then he lies about that.”¹²⁸

Why then is truth important enough to value in our general political discourse and as a foundation for the relationship between all citizens and their government? The importance of truth has been the subject of philosophical thought for many centuries.¹²⁹ It is hard to imagine a topic that has produced more pages of theoretical debate and heated discussions over the centuries by scholars, theologians, and philosophers than that of pursuit of truth. The controversy continues among the professions regarding possible circumstances where lying is permissible (or if at all) in the practice of law enforcement,¹³⁰ medicine,¹³¹ or commerce.¹³² This article discusses: the issues of truthfulness, duplicity, pretense and deceit; the erosion of public trust in the most important of our societal institutions of commerce, education, government and philanthropy; and issues surrounding the pragmatic case for organizational truth-telling.

It has been observed that “some level of truthfulness has always been

¹²⁷ See *Why Trump Lies*, L.A. TIMES (Apr. 3, 2017), <http://www.latimes.com/projects/la-ed-why-trump-lies/>.

¹²⁸ *Id.*

¹²⁹ See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu> (last visited June 14, 2018). The ideas of Socrates, Plato, Aristotle, Descartes, Lock, Hume and Kant have been joined more recently by those of Moore, Russell, Wittgenstein, Peirce, Tarski, Field, Armstrong, Dummett, Horwich, and Davidson.

¹³⁰ See *U.S. v. Kontny*, 238 F.3d 815, 817 (2001) (holding that trickery, deceit, even impersonation do not render a confession inadmissible, certainly in noncustodial situations and usually in custodial ones as well, unless government agents make threats or promises) (citing *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *United States v. Byram*, 145 F.3d 405, 408; (1st Cir. 1998) (“trickery is not automatically coercion. Indeed the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect. While the line between ruse and coercion is sometimes blurred, confessions procured by deceptions have been held voluntary in a number of situations.”); *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992); *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990) (“far from making the police a fiduciary of the suspect, the law permits the police to pressure and cajole, conceal material facts, and actively mislead”).

¹³¹ See BARRON H. LERNER, *THE GOOD DOCTOR: A FATHER, A SON, AND THE EVOLUTION OF MEDICAL ETHICS* (2014).

¹³² See M. Neil Browne et al., *Legal Tolerance Toward the Business Lie and the Puffery Defense: The Questionable Assumptions of Contract Law*, 37 SO. ILL. U. L.J. 69 (2012) (discussing concept of mere puffery).

seen as essential to human society, no matter how deficient the observance of other moral principles . . . A society, then, whose members were unable to distinguish truthful messages from deceptive ones, would collapse . . .”¹³³ Moreover, “those who learn that they have been lied to in an important matter —say, the identity of their parents, the affection of their spouse, or the integrity of their government —are resentful, disappointed, and suspicious.”¹³⁴ Sissela Bok observes, “When we undertake to deceive others intentionally, we communicate messages meant to mislead them, meant to make them believe what we ourselves do not believe. We can do so through gesture, through disguise, by means of action or inaction, even through silence.”¹³⁵

During recent years, bribery and corruption have become a particularly expensive trap for those conducting business internationally. Fines, penalties, and outrageous legal and accounting expenses have resulted from the payment of bribes to foreign officials in violation of the Foreign Corrupt Practices Act (FCPA).¹³⁶ Numerous examples of the proceeds from worldwide political bribery and corruption finding their way into secret bank accounts have been disclosed by the efforts of journalists in publications known as *The Panama Papers*.¹³⁷

D. Presidential Leadership and Truthfulness

Presidential scholar Stephen Wayne states that any leader has to:

create an environment where subordinates bring you the bad news fast . . . presidents have a tendency to surround themselves with believers, [those] who come up from the ranks . . . who work very hard . . . are very loyal . . . and who just aren’t critical enough to keep the president in touch with reality . . .¹³⁸

¹³³ SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1989).

¹³⁴ *Id.* at 20.

¹³⁵ *Id.* at 13.

¹³⁶ See Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on Enforcement and SEC and DOJ Guidance*, 41 SEC. REG. L.J. 241 (2013); Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Guns and Money—The Bribery Problem and U.K. Bribery Act*, 47 INT’L LAW 481 (2013); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145 (2011); Lawrence J. Trautman & Joanna Kimbell, *Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act* (unpublished manuscript), <http://ssrn.com/abstract=3239193>.

¹³⁷ See Lawrence J. Trautman, *Following the Money: Lessons from the “Panama Papers,” Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807 (2017).

¹³⁸ *The Diane Rehm Show: Analysis of President Obama’s Leadership and Management Style*, NPR (Nov. 4, 2013), <http://thedianerehmshow.org/shows/2013-11-04/analysis-president-obamas-leadership-and-management-style>;

David Gergen observes that “it is very hard for subordinates, whose power may be thought of as derivative of their boss, to have the confidence and perceived autonomy to deliver bad news.”¹³⁹ Will Mr. Trump’s life-long propensity for lying and false statements, demonstrated often throughout his 2016 presidential campaign, ultimately lead to his eventual demise?

E. Financial Disclosure and Tax Returns

During the 2016 presidential campaign, despite claims from candidate Donald Trump that he would release copies of his personal tax returns, he failed to disclose tax returns for any years whatsoever.¹⁴⁰ The Trump campaign released numerous pages of financial information which was represented by the campaign as sufficient to satisfy any critics. Unfortunately, no information was forthcoming that would enable American voters to understand details of his complex web of business relationships, nor the identity of business partners.

A *New York Times* story appeared on October 1, 2016 disclosing that Donald Trump claimed a \$916 million tax loss on his 1995 federal tax return that “could have allowed him to legally avoid paying any federal income taxes for up to 18 years.”¹⁴¹ Professor Calvin H. Johnson contends that “Trump did not lose anything like that in economic substance because he never put that much money into his transactions. If he never put it, he did not lose it. Trump must have treated \$3.4 [billion?] bank debt as a cost and tax basis . . . while inconsistently, not correcting his cost when it turned out [to] not be paid.”¹⁴² Commentator Steven M. Rosenthal concludes that had the tax authorities “successfully disputed Trump’s exclusion of income from just these three bond restructurings, it might have eliminated half of his \$916 million of NOLs. And Trump might have begun to pay taxes sooner. We may never know, of course, unless Trump discloses his tax returns, which seems unlikely.”¹⁴³

F. Appeal to Racism

As it may later impact Administration policy and U.S. constitutional law, what evidence is there as early as the 2016 presidential campaign that the future president engages in racially biased behavior? *The Huffington*

¹³⁹ *Id.*

¹⁴⁰ *But see* David Barstow et al., *Donald Trump Tax Records Show He Could Have Avoided Taxes* disclosing that by 1995 deductions for interest, depreciation, and operating losses totaled and carried for *Nearly Two Decades*, N.Y. TIMES (Oct. 1, 2016), <https://www.nytimes.com/2016/10/02/us/politics/donald-trump-taxes.html> (forward of \$916 million, leading to conjecture that the candidate had probably not paid personal income taxes for many years).

¹⁴¹ *See id.*

¹⁴² *See* Calvin H. Johnson, *Were Trump’s Fake Losses Legal as Tax Deductions?*, 153 TAX NOTES 581 (2016).

¹⁴³ *See* Steve Rosenthal, *Protecting Trump’s \$916 Million of NOLs*, 153 TAX NOTES 829 (2016).

Post reports, “Steve Bannon, Trump’s chief strategist and senior counselor, was executive chairman of Breitbart, a news site that Bannon dubbed the “home of the alt-right”—a euphemism that describes a loose coalition of white supremacists and aligned groups.”¹⁴⁴ *The Huffington Post* story further observes that “under Bannon’s leadership, Breitbart increased its accommodation of openly racist and anti-Semitic writing, capitalizing on the rise of white nationalism prompted by Trump’s campaign.”¹⁴⁵ Biographer Michael D’Antonio observes that Trump’s early “birtherism” campaign “was a blatant attempt to paint Obama as an ‘other’ whose claim to office was illegitimate.”¹⁴⁶

While a comprehensive look at Donald Trump’s history of racism is beyond the scope of this journal article, a single *Huffington Post* story mentions the following: histories of prejudice by some of Trump’s top advisors and cabinet members; Muslim-targeted travel ban; attack by Trump on Muslim Gold Star parents; prior lawsuits against Trump real estate entities for not renting to black people; Trump’s refusal to renounce support from white nationalist and former KKK-leader David Duke; and anti-Semite comments, just to name a few.¹⁴⁷

I. Mexican Slurs

Candidate Trump made building a wall on the U.S.-Mexico border a major issue in his campaign agenda. In addition, Trump stated, “[W]e have some bad hombres here and we’re going to get them out.”¹⁴⁸ Also memorable is Trump’s comment, “When Mexico sends its people, they’re not sending their best. They’re not sending you . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”¹⁴⁹ On July 6, 2015, then-candidate Trump said, “What can be simpler or more accurately stated? The Mexican Government is forcing their most unwanted people into the United States. They are, in many cases, criminals, drug dealers, rapists, etc.”¹⁵⁰ Candidate Trump’s

¹⁴⁴ See Lydia O’Connor & Daniel Marans, *Here Are 16 Examples of Donald Trump Being Racist*, HUFF POST (Dec. 13, 2016), http://www.huffingtonpost.com/entry/president-donald-trump-racist-examples_us_584f2ccae4b0bd9c3dfe5566.

¹⁴⁵ *Id.*

¹⁴⁶ See D’ANTONIO, *supra* note 27, at 2.

¹⁴⁷ See O’Connor & Marans, *supra* note 144.

¹⁴⁸ See Jennifer Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. FORUM 243 (2017) (citing *Donald Trump: We Need to Get out ‘Bad Hombres’*, CNN (Oct. 19, 2016), <http://www.cnn.com/videos/politics/2016/10/19/third-presidential-debate-trump-immigration-bad-hombres-sot.cnn>) (observing Trump’s use of Spanish not-so-subtly telegraphed the notion that he believed these individuals would be Latino).

¹⁴⁹ See Lee, *supra* note 117.

¹⁵⁰ *Id.*

implication that U.S. judge Gonzalo Curiel (born in Indiana), because of his Mexican heritage, was biased against Trump in presiding over the Trump University lawsuit has also been cited as an example of Trump's racism.¹⁵¹

2. Muslim Slurs

As *The Los Angeles Times* has stated, "if we harbor latent racism or if we fear attacks by Muslim extremists, then [Trump] elevates a rumor into a public debate: Was Barack Obama born in Kenya, and is he therefore not really president?"¹⁵² *The Huffington Post* observes that, "Trump's retaliation against the parents of a Muslim U.S. Army officer who died while serving in the Iraq War was a low point in a campaign full of hateful rhetoric."¹⁵³ In addition, *The Huffington Post* considers that "the most memorable moment" of the 2016 Democratic National Convention was when "Khizr Khan, the father of the late Army Captain Humayun Khan, spoke out against Trump's bigoted rhetoric and disregard for civil liberties."¹⁵⁴

J. Lewd Remarks Demeaning Women

By now, anyone who has been in the United States during the past few years (and those in touch with their cultures throughout the world) are very familiar with the many insulting comments made by Donald Trump to and about various women, often about their appearance or sexual attractiveness. Observing that "Fat. Pig. Dog. Slob. Disgusting animal. These are just some of the names that Donald Trump has called women," *The Telegraph* of London publishes an ongoing account which memorializes Trump's comments from the 1980s to date.¹⁵⁵ During the 2016 U.S. presidential campaign, candidate Trump made disparaging remarks about: Hillary Clinton; journalist Megyn Kelly; Rosie O'Donnell; Carly Fiorina (several times); Meryl Streep; and Venezuelan actress Alicia Machado, just to name a few.¹⁵⁶ However, the 2005 *Access Hollywood* video recording, obtained by *The Washington Post* of Trump's "they'll let you grab them by the pussy" comment is likely the most famous of this genre of comments made by Mr. Trump.¹⁵⁷

¹⁵¹ See O'Connor & Marans, *supra* note 144.

¹⁵² See *Why Trump Lies*, *supra* note 127. For discussion of The Travel Ban, see *infra* PART IV.

¹⁵³ See O'Connor & Marans, *supra* note 144.

¹⁵⁴ *Id.*

¹⁵⁵ See Claire Cohen, *Donald Trump Sexism Tracker: Every Offensive Comment in One Place*, TELEGRAPH (June 28, 2017), <http://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/>.

¹⁵⁶ *Id.*

¹⁵⁷ See *Donald Trump's Lewd Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/video/us/politics/10000004698018/donald-trumps-lewd-comments-about-women.html>.

K. Russia and the 2016 U.S. Presidential Election

The Russians interfered in our election during the 2016 cycle. They did it with purpose. They did it with sophistication. They did it with overwhelming technical efforts. And it was an active-measures campaign driven from the top of that government

It is a high confidence judgment of the entire intelligence community, and —and the members of this committee have —have seen the intelligence. It's not a close call. That happened. That's about as un-fake as you can possibly get, and is very, very serious

James Comey
Former FBI Director
Testimony Before U.S. Senate
Intelligence Committee¹⁵⁸

By October 2016 it was clearly demonstrated that the Russian government played an active role in disrupting the 2016 U.S. presidential elections.¹⁵⁹ Many reasonable, thoughtful Americans consider the Russian assault on the integrity of the U.S. political process to constitute a grave constitutional crisis. To the dismay and alarm of many, President Donald Trump and the chief legal officer of the United States, Attorney General Jeff Sessions, have indicated a highly suspicious lack of interest in pursuing discovery of facts associated with the Russian's election meddling. At a White House press briefing held on June 20, 2017, a reporter prefaced his question by stating, "there are 16 [U.S.] intelligence agencies saying that Russia interfered with U.S. elections; the former FBI director said that without a doubt they did —Does [President Trump] share these views?"¹⁶⁰ More than six months following the 2016 election, Press Secretary Sean Spicer's answer was, "I have not had a chance to sit down and ask him about his specific reaction to them."¹⁶¹ This yet additional suspicious indication of highly unusual indifference at the White House about all things Russian takes place one day after *The Wall Street Journal* quotes former prisoner-of-

¹⁵⁸ See *Full Transcript and Video: James Comey's Testimony on Capitol Hill*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/us/politics/senate-hearing-transcript.html>.

¹⁵⁹ See Scott Shackelford et al., *From Russia with Love: Understanding the Russian Cyber Threat to U.S. Critical Infrastructure and What to Do About It*, 96 NEB. L. REV. 320 (2017).

¹⁶⁰ See *Press Briefing with Press Secretary Sean Spicer*, WHITEHOUSE.GOV (June 20, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-062017/>.

¹⁶¹ *Id.*

war and U.S. Senator John McCain depicting Russia as America's primary long-term adversary. Senator McCain states, "Vladimir Putin's behavior is more and more aggressive and provocative, whether it be in the conventional weapons as far as continued aggression in Ukraine to the cyberattacks throughout the region. The guy is hellbent on returning the Russian Empire. And that's what he wants to do."¹⁶²

As *The New York Times* observes, "a rival foreign power launched an aggressive cyberattack on the United States, interfering with the 2016 presidential election and leaving every indication that it's coming back for more—but President Trump doesn't seem to care."¹⁶³ By mid-2017, with investigations underway by Special Counsel Robert Mueller and various Congressional oversight committees, a non-exhaustive list of the following individuals have emerged as probably having knowledge about this matter: Michael D. Cohen; Gen. Michael T. Flynn; Donald Trump, Jr; Jared Kushner; Paul D. Manafort; Carter Page; Jeff Sessions; and Roger J. Stone, Jr.

This article goes to press before a full account of Russian meddling in the 2016 U.S. political elections is known. Because of the critical importance of understanding any Russian influence on the American election process, a brief synopsis of what is known to date is provided below.

I. Sources and Methods of Russian Intelligence

Any attempt to understand Russian cyber efforts to disrupt the 2016 U.S. political elections requires an inquiry into well-known Russian intelligence sources and methods. In testimony before the U.S. Senate Select Committee on Intelligence, Professor Thomas Rid explains the basics of the Russian practice known as *active measures*, where "semi-covert or covert intelligence operations [are employed] to shape an adversary's political decisions. Almost always active measures conceal or falsify the *source*: intelligence operators try to hide behind anonymity, or behind false flags. Active measures may also spread forged, or partly forged, *content*."¹⁶⁴ Professor Rid observes:

The tried and tested way of active measures is to use an adversary's existing weaknesses against himself, to drive wedges into *pre-existing* cracks: the more polarized a

¹⁶² See Gerald F. Seib, *What Worries John McCain the Most*, WALL ST. J., June 19, 2017 at B4.

¹⁶³ See *Mr. Trump's Dangerous Indifference*, N.Y. TIMES, June 18, 2017 at SR10.

¹⁶⁴ See *Disinformation: A Primer in Russian Active Measures and Influence Campaigns: Hearing Before the S. Select Comm. on Intel.*, 115th Cong. 1–2 (2017) (statement of Thomas Rid, Professor of Security Studies, King's College London), <https://www.intelligence.senate.gov/sites/default/files/documents/os-trid-033017.pdf> [hereinafter *Disinformation*].

society, the more vulnerable it is —America in 2016 was highly polarized, with myriad cracks and fissures to drive wedges into. Not old wedges, but improved high-tech wedges that allowed Moscow's operators to attack their target faster, more reactively, and at far larger scale than ever before

First: in the past 60 years, active measures became the norm. Russia's intelligence services pioneered *dezinformatsiya* in early twentieth century. By the mid-1960s, disinformation—or active measures—were well-resourced and nearly on a par with collection in the KGB, the Stasi's HVA, the Czechoslovak StB, and others. The Cold War saw more than 10,000 individual Soviet bloc disinformation operations. The pace of Russian operations subsided during a short lull in the early 1970's, followed by an all-time high-water mark in the mid-1980s, and then a long intermission throughout the 1990s. Only in the late 2000s did disinformation begin to pick up speed again. By 2015 and especially 2016, the old playbook had been successfully adapted to a new technical environment.

Second: in the past 20 years, aggressive Russian digital espionage campaigns became the norm

Third: in the past 2 years, Russian intelligence operators began to combine the two, hacking and leaking—or digital espionage and active measures. By early 2015, GRU [Russian intelligence] was targeting military and diplomatic entities at high tempo, especially defense attachés worldwide

Then, in May and June 2015, the first publicly known large-scale disinformation operation, dubbed “Saudi Cables,” tested an innovative tactic: hacking a target, exfiltrating compromising material (*kompromat*), setting up a dedicated leak website under false flag, and then passing files to Wikileaks for laundering and wide distribution. Between June 2015 and November 2016, at least six front organizations sprung up as outlets for compromised files by GRU: Yemen Cyber Army, Cyber Berkut, Guccifer 2.0, DC Leaks, Fancy Bears Hack Tema, and @ANPoland.

Finally, in the past year, the timeline of US-election operations began to align.¹⁶⁵

L. Russian Disruption of 2016 U.S. Presidential Election

A brief summary of known Russian efforts to disrupt the 2016 U.S. presidential campaign is provided by *The New York Times* when they observe:

The unprecedented nature of Russia’s attack is getting lost in the swirling chaos of recent weeks, but it shouldn’t be. American intelligence agencies have concluded that Russia took direct aim at the integrity of American democracy, and yet after almost five months in office, the commander in chief appears unconcerned with that threat to our national security. The only aspect of the Russia story that attracts his attention is the threat it poses to the perceived legitimacy of his electoral win.

If not for the continued investigation into possible collusion between the Trump campaign and the Russians —and whether Mr. Trump himself has obstructed that investigation —the president’s indifference would be front page news. So let’s take a moment to recall the sheer scope and audacity of the Russian efforts.

Under direct orders from President Vladimir Putin, hackers connected to Russian military intelligence broke into the email accounts of senior officials at the Democratic National Committee and of Hillary Clinton’s campaign manager, John Podesta. They passed tens of thousands of emails to the website WikiLeaks, which posted them throughout the last months of the campaign in an attempt to

¹⁶⁵ See *id.* at 2 (mentioning some of the senior defense civilians and US military officers, including the private accounts of the “current chairman of the Joint Chiefs of Staff, General Joseph F. Dunford; Generals Philip Breedlove, Wesley Clark, and Colin Powell; Navy Captain Carl Pistole, or current Assistant Secretary of the Air Force Daniel Ginsberg. Among the diplomatic targets were the current US Ambassador to Russia, John F. Tefft; his predecessor Michael McFaul; former Permanent Representatives to NATO Ivo Daalder and Kurt Volker; and well-connected security experts Anthony Cordesman, Julianne Smith, and Harlan Ullman. The targets also included a large number of diplomatic and military officials in Ukraine, Georgia, Turkey, Saudi Arabia, Afghanistan, and many countries bordering Russia, especially their military attachés, all legitimate and predictable targets for a military intelligence agency. Russian intelligence also targeted well-known Russian critics, for example the author Masha Gessen, Garry Kasparov, and Alexei Navalny, as well as the Russian-based hacker group Shaltay Boltai.”).

damage the Clinton campaign.

Even more disturbing, hackers sought access to voter databases in at least 39 states, and in some cases tried to alter or delete voter data. They also appear to have tried to take over the computers of more than 100 local election officials in the days before the Nov. 8 vote.

There is no evidence that these efforts affected the outcome of the election. But that's beside the point. The Russians have engaged in behavior like this in other countries, and they're getting better at it. An American presidential election may be the biggest target to date, but it's hardly their first. In the last decade they have hacked computer networks in Estonia, Ukraine, Poland, Germany, France, and Bulgaria—often stealing data. They have disseminated fake news stories and other disinformation to interfere with elections in other countries, as they did here.

It's a global threat, and serious people treat it that way. In December [2016], President Barack Obama responded by punishing Mr. Putin with a new round of sanctions, expelling dozens of suspected Russian intelligence operatives and barring access to estates they used for intelligence activities. On June 14 [2017], the Senate voted 97 to 2 to block Mr. Trump from lifting those sanctions unilaterally. Meanwhile, a majority of Americans accept the intelligence community's consensus that Russia interfered with the election.

Yet Mr. Trump has been dismissive at best. As a candidate, he encouraged Russian hackers to find thousands of emails that he said Mrs. Clinton had illegally deleted. His response as president-elect to the reports that Russia had attempted to swing the election in his favor was to challenge the intelligence community's credibility and say it was time "to move on"

Even if the investigations find no evidence that Mr. Trump's campaign colluded with the Russians, the president's refusal to accept the truth about this attack on our democracy denies reality and leaves the country vulnerable to more damaging attacks. The true obsession is

Mr. Trump's with his own brand, and it's distracting him from his most important duty—to protect the nation.¹⁶⁶

M. Russian-Trump Historical Relationships

Many more details regarding the extent of historic Russian-Trump business relationships should be expected within coming months. Despite candidate Trump's July 27, 2016 claim that "I have nothing to do with Russia. I have nothing to do with Russia—for anything," the following Trump-Russian indications of business relationships have been disclosed.¹⁶⁷

- Trump sold a Palm Beach, Florida mansion during 2008 to Russian oligarch Dmitry Rybolovlev for a purchase price of \$95 million, having paid just \$41.4 million less than four years prior.
- During a 2007 deposition, Trump is reported to have said, "We will be in Moscow at some point Russia is one of the hottest places in the world for investment."¹⁶⁸
- During 1987, Trump is reported to have traveled to Moscow to find a site for [a] luxury hotel; no deal emerged.
- In 1996, he sought to build a condominium complex in Russia that also did not succeed.
- In 2005, Trump signed a one-year deal with a New York development company to explore a Trump Tower in Moscow, but the effort fizzled.
- During a 2008 speech, Trump's son, Donald Jr., made it clear that the Trumps want to do business in Russia, but were finding it difficult.
- Russians make up a pretty disproportionate cross-section of a lot of our assets, Trump's son told a real estate conference in 2008.
- Trump Jr. noted that he traveled to Russia six times in 18 months, and several buyers have been attracted to our projects there.
- The Post report also said that the Trump Organization had partnered with Aras Agalarov, the so-called "Trump of Russia," on a project in Moscow in 2013 that didn't come to fruition¹⁶⁹

Donald Trump is reported by *Politico* to have stated under oath that his relationship with Russian-born businessman Felix Sater, as "distant . . . and that he would not recognize Sater if the two were sitting in the same

¹⁶⁶ See *Mr. Trump's Dangerous Indifference*, N.Y. TIMES, June 18, 2017 at SR10.

¹⁶⁷ See Glenn Kessler, *Fact Checker: Trump's Claim that 'I Have Nothing to do With Russia'*, WASH. POST (July 27, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/07/27/trumps-claim-that-i-have-nothing-to-do-with-russia/?utm_term=.8d8cfb30ad41.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

room.”¹⁷⁰ Despite Trump’s assertion, *Politico* reports that “around 1999, Sater joined Bayrock, a real estate firm that had offices in Trump Tower and pursued business ventures with Trump. Bayrock is now being rocked by allegations . . . of unexplained cash infusions from Russia and Kazakhstan and receiving financing from a firm used by Russians ‘in favor with’ Putin.”¹⁷¹ In addition, “around 2010, Sater went to work for Trump directly, carrying a Trump Organization business card that described him as a ‘senior advisor to Donald Trump.’”¹⁷² *Politico* reports further that Sater’s company was a co-developer of “a major Trump project in New York and who was later hired by Trump to drum up business in the former USSR, and said that he closely associated with Trump and his family, while Trump has suggested he wouldn’t even recognize Sater.”¹⁷³

N. Obstruction of Justice Probe

On June 14, 2017 *The Washington Post* reports special counsel Robert S. Mueller III has now expanded his probe to include whether President Trump is guilty of obstruction of justice.¹⁷⁴ This line of inquiry will include questioning of several of the nation’s Intelligence Community leaders.¹⁷⁵ On August 3, 2017, *The Wall Street Journal* first reports that Special Counsel Robert Mueller has begun issuing subpoenas and is using a Washington-D.C.-based grand jury to look into a June 2016 Trump Tower meeting with a “Russian government lawyer.”¹⁷⁶ In addition, CNN reports “that Mueller’s probe has now expanded well past the 2016 election . . . alongside the ongoing scrutiny of possible illegal coordination with Russian spy agencies . . . alleged attempts . . . to obstruct the FBI investigation . . . [and] potential financial crimes.”¹⁷⁷

O. Cyber Threats from Nation State Actors: Russia in Spotlight

By now, cyber threats to American business, institutions, and citizens

¹⁷⁰ See Ben Schreckinger, *Trump’s Mob-Linked Ex-Associate Gives \$5,400 to Campaign*, POLITICO (Aug. 26, 2016), <http://www.politico.com/story/2016/08/donald-trump-russia-felix-sater-227434>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Devlin Barrett et al., *Special Counsel is Investigating Trump for Possible Obstruction of Justice, Officials Say*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/world/national-security/special-counsel-is-investigating-trump-for-possible-obstruction-of-justice/2017/06/14/9ce02506-5131-11e7-b064-828ba60fbb98_story.html?utm_term=.caced1d4d89e.

¹⁷⁵ *Id.*

¹⁷⁶ See David A. Graham, *Mueller Plunges Across Trump’s Red Line*, THE ATLANTIC (Aug. 2, 2017), <https://www.theatlantic.com/politics/archive/2017/08/mueller-grand-jury/535875/>.

¹⁷⁷ *Id.*

have been highly documented.¹⁷⁸ A robust body of literature describes cyber threats imposed by nation-state actors.¹⁷⁹ Professor Thomas Rid reports that during early March 2016, Russian intelligence “began to train its well-established, semi-automated targeting tools from worldwide military and diplomatic targets to US political targets.”¹⁸⁰ At least 109 members of the Clinton campaign staff were targeted between March 10 and April 7, “with 214 individual phishing emails (with 8 more attempts on 12 and 13 May). 36 times Clinton staffers clicked a malicious link (the success rate of actually breaching the account after a victim clicked this link is 1-in-7).”¹⁸¹ Professor Rid’s 2017 testimony before the U.S. Senate Select Committee on Intelligence provides additional details of successful cyber tricks targeted at DNC staffers and states that “the *publicly available* evidence that implicates Russian intelligence agencies in the 2016 active measures campaign is extraordinarily strong.”¹⁸² With overtones evoking memories of the Watergate break-in, Professor Rid observes that “The DNC hack can be compared to a carefully executed physical break-in in which the intruders used uniquely identical listening devices; uniquely identical envelopes to carry the stolen files past security; and uniquely identical getaway vehicles.”¹⁸³

According to Professor Rid, “three different types of unwitting agents

¹⁷⁸ See Lawrence J. Trautman & Peter C. Ormerod, Corporate Directors’ and Officers’ Cybersecurity Standard of Care: The Yahoo Data Breach, 66 AM. U. L. REV. 1231 (2017); Lawrence J. Trautman, The Board’s Responsibility for Crisis Governance, 13 HASTINGS BUS. L. J. 275 (2017); Lawrence J. Trautman, Managing Cyberthreat, 33 SANTA CLARA HIGH TECH. L.J. 230 (2016); Lawrence J. Trautman, E-Commerce and Electronic Payment System Risks: Lessons from PayPal, 17 U.C. DAVIS BUS. L. J. 261 (2016); Lawrence J. Trautman & George Michaely, The SEC & The Internet: Regulating the Web of Deceit, 68 CONSUMER FIN. L. Q. REP. 262 (2014); Lawrence J. Trautman et al., Corporate Information Technology Governance Under Fire, 8 J. STRAT. & INT’L STUD. 105 (2013); Lawrence J. Trautman & Kara Altenbaumer-Price, The Board’s Responsibility for Information Technology Governance, 29 J. MARSHALL J. COMPUTER & INFO. L. 313 (2011); Lawrence J. Trautman & Janet Ford, Nonprofit Governance: The Basics, 52 AKRON L. REV. (forthcoming), <https://ssrn.com/abstract=3133818>; Lawrence J. Trautman, How Google Perceives Customer Privacy, Cyber, E-commerce, Political and Regulatory Compliance Risks, 10 WM. & MARY BUS. L. REV. (forthcoming), <https://ssrn.com/abstract=3067298>.

¹⁷⁹ See Lawrence J. Trautman & Peter C. Ormerod, Industrial Cyber Vulnerabilities: Lessons from Stuxnet and the Internet of Things, 72 UNIV. MIAMI L. REV. 761 (2018), <http://ssrn.com/abstract=2982629>; Lawrence J. Trautman & Peter C. Ormerod, WannaCry, Ransomware, and the Emerging Threat to Corporations (unpublished manuscript) (on file with author); Lawrence J. Trautman, Is Cyberattack The Next Pearl Harbor?, 18 N. C. J. L. & TECH. 232 (2016); Lawrence J. Trautman, Congressional Cybersecurity Oversight: Who’s Who & How It Works, 5 J. L. & CYBER WARFARE 147 (2016); Lawrence J. Trautman, Cybersecurity: What About U.S. Policy?, 2015 U. ILL. J. L. TECH. & POL’Y 341 (2015); Lawrence J. Trautman, Bitcoin, Virtual Currencies and the Struggle of Law and Regulation to Keep Pace, 102 MARQ. L. REV. (forthcoming), <https://ssrn.com/abstract=3182867>.

¹⁸⁰ See Disinformation, *supra* note 164, at 4.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

stand out in the 2016 campaign. The first is Wikileaks The second major unwitting agent has been Twitter The third groups of unwitting agents of 2016 were those journalists who aggressively covered the political leaks while neglecting or ignoring their provenance.”¹⁸⁴ It seems that “Soviet bloc active measures have skillfully fed forgeries and selected documents to journalists many hundreds of times,” according to Professor Rid’s congressional testimony.¹⁸⁵

P. Investigation into Russian Election Meddling Continues

As this article goes to press major developments apparently related to the meddling by Russia in the 2016 U.S. elections include the dismissal by President Trump of FBI Director James Comey; naming of Robert Mueller as Special Counsel; importance of the Comey June 8, 2017 testimony before the U.S. Senate Intelligence Committee; and inquiry into undisclosed historical relationships between any Trump business and family interests and Russia.

IV. THE TRUMP ADMINISTRATION

Few businessmen are capable of being in politics--- They don’t understand the democratic process ---they have neither the tolerance nor the depth it takes--- Democracy isn’t a business.

Malcolm Forbes (b.1919)
American Publisher and
Financier¹⁸⁶

By inauguration day 2017, there were numerous examples demonstrating the president’s tone-deafness or actual contempt for the rule of law, U.S. constitutional law, ethical issues and his inability to seemingly place any premium on truthfulness in his discourse with the American people. Criticized by many for conduct unbecoming the president of the United States, Trump’s behavior may resemble that of a thin-skinned Mafioso character from a highly implausible movie script. As Professor Eric A. Posner observes:

The paradox of populism is that it comes to power on a wave of anti-elite, anti-establishment, anti-technocracy anger, but then it must govern, and how can the ‘people’ or their leader

¹⁸⁴ *Id.* at 5.

¹⁸⁵ *Id.* at 6.

¹⁸⁶ See HENRY O. DORMANN, *THE SPEAKER’S BOOK OF QUOTATIONS*, 160 (Fawcett 2000).

government without relying on the establishment? The government exerts its power through a bureaucracy. The bureaucracy is a typical establishment institution—on par with the courts, the universities, and big business. Bureaucracies are staffed by university-trained technocrats who hold a large stake in the status quo. They are constrained by rules and governed by law. They move slowly, and so are, with minor exceptions, wholly unable to respond to popular sentiment when it changes rapidly.¹⁸⁷

In the pages to follow, an attempt is made to describe the litany of events that raised ethical concerns early on and to explore how it is that so many Americans did not care about these apparent ethical lapses and continued to have no interest in any facts that might depict the president in accurate, but unfavorable terms.

In many ways, the entertainment value of the political campaign and election of President Donald J. Trump is like a dream come true for comedy performers, the cast of television show *Saturday Night Live*, and those who teach constitutional law. However, for more than half of all U.S. voters, the election of President Trump is an ongoing nightmare.¹⁸⁸ The *Los Angeles Times* describes as troubling, “Trump’s shocking lack of respect for those fundamental rules and institutions on which our government is based. Since Jan. 20, he has repeatedly disparaged and challenged those entities that have threatened his agenda, stoking public distrust of essential institutions in a way that undermines faith in American democracy.”¹⁸⁹

Almost immediately upon assuming office, President Trump demonstrated a bizarre sensitivity (obsession) to allegations that his presidency was illegitimate. His obsession manifested itself in a clear lack of truthfulness despite clear visual proof about crowd size attending his inauguration, where “if broadcast footage and photos show a smaller-sized crowd at his inauguration than he wanted—then he targets the news media, falsely charging outlets with disseminating ‘fake news’ and insisting, against all evidence, that he has proved his case.”¹⁹⁰ Only in the fullness of time would Trump’s behavior start to make sense as a defense to allegations that the Russian influence ran deeper than many American citizens want to believe. These numerous attacks on American institutions of checks and

¹⁸⁷ See Posner, *Can It Happen Here?*, *supra* note 10, at 6.

¹⁸⁸ See Amina Dunn, *Trump’s Approval Ratings So Far Are Unusually Stable – and Deeply Partisan*, PEW RESEARCH CENTER (Aug. 1, 2018) (Stating, “his current rating is nearly identical to the 39% who said they approved of his performance in February 2017, shortly after his inauguration), <http://www.pewresearch.org/fact-tank/2018/08/01/trumps-approval-ratings-so-far-are-unusually-stable-and-deeply-partisan/>.

¹⁸⁹ See Editorial, *Our Dishonest President*, *supra* note 1.

¹⁹⁰ See *Why Trump Lies*, *supra* note 127.

balances include: a full scale battle to discredit the role of journalists by dismissing any story critical of Trump as “fake news;”¹⁹¹ “questioned the qualifications of judges and the integrity of their decisions, rather than acknowledging that even the president must submit to the rule of law”;¹⁹² and early disparagement of the entire U.S. intelligence community.¹⁹³

A. Assault on Women Continues

On June 29, 2017, a day when GOP repeal-and-replace Obama Care legislation was floundering, and important meetings were to be held with the President of South Korea, President Trump awoke and Tweeted:

I heard poorly rated @Morning_Joe speaks badly of me (don't watch anymore). Then how come low I.Q. Crazy Mika, along with Psycho Joe, come to . . . Mar-a-Lago 3 nights in a row around New Year's Eve, and insisted on joining me. She was bleeding badly from a face lift. I said no!¹⁹⁴

In an op-ed the following day, television hosts Mika Brzezinski and Joe Scarborough state:

The president's unhealthy obsession with our show has been in the public record for months, and we are seldom surprised by his posting nasty tweets about us. During the campaign, the Republican nominee called Mika “neurotic” and promised to attack us personally after the campaign ended. This year, top White House staff members warned that the National Enquirer was planning to publish a negative article about us unless we begged the president to have the story spiked. We ignored their desperate pleas. . . .

More significant is Mr. Trump's continued mistreatment of women. It is disturbing that the president of the United States keeps up his unrelenting assault on women. From his menstruation musings about Megyn Kelly, to his fat-

¹⁹¹ See Laura King, Trump Calls Russia Talk 'Fake News' as Calls for Special Prosecutor Grow Louder, L.A. TIMES (Feb. 26, 2017), <http://www.latimes.com/politics/la-pol-updates-everything-president-trump-says-russia-talk-fake-news-as-1488138553-htmlstory.html>; Amy B. Wang, *Trump Renews Attack on 'Fake News CNN' After Retraction*, WASH. POST (June 27, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/27/trump-renews-attack-on-fake-news-cnn-after-retraction/?utm_term=.4428fd4d7283.

¹⁹² See Editorial, *Our Dishonest President*, *supra* note 1.

¹⁹³ *Id.*

¹⁹⁴ See Eli Stokols, *Trump Tweets Prompt Backlash*, WALL ST. J., June 30, 2017 at A5.

shaming treatment of a former Miss Universe, to his braggadocio claims about grabbing women's genitalia, the 45th president is setting the poorest of standards for our children. We were heartened to hear a number of Republican lawmakers call out Mr. Trump for his offensive words and can only hope that the women who are closest to him will follow their examples. It would be the height of hypocrisy to claim the mantle of women's empowerment while allowing a family member to continue such abusive conduct.¹⁹⁵

B. Presidential Assault on Truth: Trump's Lying and False Statements

Most casual observers to President Trump's administration are well aware of his personal difficulty in limiting his utterances to truthful statements. Just a few examples of untruths uttered by President Trump include: "easily disprovable boasts about the size of his inauguration crowd or his unsubstantiated assertion that Barack Obama bugged Trump Tower."¹⁹⁶ While a full recital of lying and false statements from President Trump is well beyond the scope of this paper, among his prominent untruthful statements is the observation that "President Donald Trump's political rise was built on a lie (about Barack Obama's birthplace)."¹⁹⁷ *The New York Times* also reports that President Trump's "lack of truthfulness has also become central to the Russia investigation, with James Comey, the former director of the F.B.I., testifying under oath about Trump's 'lies, plain and simple.'"¹⁹⁸ Why is it important that "the new president regularly muddies the waters of fact and fiction?"¹⁹⁹ *The Los Angeles Times* observes:

It's difficult to know whether he actually can't distinguish the real from the unreal—or whether he intentionally conflates the two to befuddle voters, deflect criticism and undermine the very idea of objective truth. Whatever the explanation, he is encouraging Americans to reject facts, to disrespect science, documents, nonpartisanship and the mainstream media—and instead to simply take positions on the basis of ideology and preconceived notions. This is a recipe for a divided country in which differences grow

¹⁹⁵ See Mika Brzezinski & Joe Scarborough, *Donald Trump is Not Well*, WASH. POST (June 30, 2017), https://www.washingtonpost.com/opinions/donald-trump-is-not-well/2017/06/30/97759ee0-5d0f-11e7-9b7d-14576dc0f39d_story.html?utm_term=.112e868e30ab.

¹⁹⁶ See Editorial, *Our Dishonest President*, *supra* note 1.

¹⁹⁷ See David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES (June 25, 2017), <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html>.

¹⁹⁸ *Id.*

¹⁹⁹ See Editorial, *Our Dishonest President*, *supra* note 1.

deeper and rational compromise becomes impossible.²⁰⁰

On June 25, 2017 *The New York Times* stated, “we believe his [Trump’s] long pattern of using untruths to serve his purposes, as a businessman and as a politician, means that his statements are not simply careless errors.”²⁰¹ *The New York Times* continues, “We are using the word ‘lie’ deliberately. Not every falsehood is deliberate on Trump’s part. But it would be the height of naïveté to imagine he is merely making honest mistakes. He is lying.”²⁰² Why is it important that *The Los Angeles Times* warns that President Trump:

is dangerous. His choice of falsehoods and his method of spewing them . . . as if he spent his days and nights glued to his bedside radio and was periodically set off by some drivel uttered by a talk show host . . . are a clue to Trump’s thought processes and perhaps his lack of agency

He has made himself the stooge, the mark, for every crazy blogger, political quack, racial theorist, foreign leader or nutcase peddling a story that he might repackage to his benefit as a tweet, an appointment, an executive order or a policy. He is a stranger to the concept of verification, the insistence on evidence and the standards of proof that apply in a courtroom or medical lab—that ought to prevail in the White House.²⁰³

By mid-2017, even members of President Trump’s own party were expressing concerns about the long-term impact of the Administration’s lack of truthfulness. For example, U.S. Senator Jeff Flake, Republican from Arizona, warns that “a steady diet of bad information, conveyed in bad faith, can over time become a serious threat to a democracy.”²⁰⁴ Senator Flake continues:

We haven’t always had the willingness and brazenness of certain politicians to exploit the gullibility of certain voters by pushing fake news. Perhaps most destructive of all, we haven’t ever had an occupant of the White House who so routinely calls true reports that irk him ‘fake news’ while giving his seal of approval to fake reports that happen to

²⁰⁰ *Id.*

²⁰¹ See Leonhardt & Thompson, *supra* note 197.

²⁰² *Id.*

²⁰³ See *Why Trump Lies*, *supra* note 127.

²⁰⁴ See Flake, *supra* note 121, at 29.

support his position. This is tremendously damaging...²⁰⁵

C. Trump Tells Lies Every Day

By late June 2017, *The New York Times* concluded and documented that “Trump told public lies or falsehoods every day for his first 40 days.”²⁰⁶ In publishing a comprehensive list of these lies, *The New York Times* states:

The quotes surrounding this article use the conservative standard of demonstrably false statements. By that standard, Trump told a public lie on at least 20 of his first 40 days as president. But based on a broader standard—one that includes his many misleading statements, or falsehoods (like exaggerating military spending in the Middle East)—Trump achieved something remarkable: He said something untrue, in public, every day for the first 40 days of his presidency. The streak didn’t end until March 1.

Since then, he has said something untrue on at least 74 of 113 days. On days without an untrue statement, he is often absent from Twitter, vacationing at Mar-a-Lago in Florida or busy golfing.²⁰⁷

Will President Trump’s propensity for lying and false statements, demonstrated often throughout his life, ultimately lead to his eventual demise?

D. Donald Trump and the U.S. Constitution

On numerous occasions during the 2016 campaign, candidate Donald Trump demonstrated a remarkable case of tone deafness to fundamental concepts of ethics and/or Constitutional law. Trump’s blind spot about the American rule of law continues into his presidency. Just several examples include a lack of appreciation for issues involving: freedom of religion, freedom of speech and the press, racism, and discrimination, and ongoing emoluments clause violations.

E. Freedom of Religion

The First Amendment to the U.S. Constitution states, in relevant part, “Congress shall make no law respecting an establishment of religion, or

²⁰⁵ *Id.*

²⁰⁶ See Leonhardt & Thompson, *supra* note 197.

²⁰⁷ *Id.*

prohibiting the free exercise thereof”²⁰⁸ During the 2016 presidential campaign, the candidate announced, “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on.”²⁰⁹ U.S. Senator Jeff Flake of Arizona, who happens to be Mormon reacts to President Trump’s Muslim announcement by writing, “when we say ‘No Muslims’ or ‘No Mexicans,’ we may as well say ‘No Mormons.’ Because it is no different.”²¹⁰ Senator Flake contends, “[t]hat kind of talk is a dagger in the heart of Mormons. It is a dagger in my heart. Because we know firsthand that America was made great not by giving in to these impulses but by fighting them, and defeating them.”²¹¹ According to Senator Flake, “[i]n America, we do not favor one religion over another, and we do not believe in guilt by association, no matter what any man might think of any given religion.”²¹²

F. The Travel Ban

On January 27, 2017 President Trump issued an immigration travel ban executive order,²¹³ prohibiting entry into the United States of certain aliens considered detrimental from Iraq, Iran, Libia, Somalia, Sudan, Syria, and Yemen.²¹⁴

Senator Jeff Flake believes restricting, “Muslims from America, or even appearing to do so, apart from being unconstitutional, would give the jihadists precisely the struggle they want, with the vast and varied Islamic world caught in between, some small percentage of them vulnerable to a radicalization that we could plausibly bear some responsibility for.”²¹⁵ Senator Flake believes that President Trump’s “decision to bar entry from certain majority-Muslim countries is profoundly misguided —both because it runs counter to American values and because it makes no strategic sense.

²⁰⁸ U.S. CONST. amend. I.

²⁰⁹ See Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.37eb8425376a.

²¹⁰ See Flake, *supra* note 121, at 51.

²¹¹ *Id.*

²¹² *Id.* at 21.

²¹³ 8 U.S.C. § 1182 (2012).

²¹⁴ See Josh Blackman, *The 9th Circuit’s Contrived Comedy of Errors in Washington v. Trump*, 95 TEX. L. REV. (2017); Antje von Ungern-Sternberg, *Religious Profiling, Statistical Discrimination and the Fight Against Terrorism in Public International Law*, RELIGION & INT’L LAW, Robert Uerpman-Witzack, Evelyne Lagrange and Stefan Oeter (eds.), (forthcoming), <https://ssrn.com/abstract=2969111>; Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363 (=2017); Shawn Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. (2017); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NORTHWESTERN U. L. REV. (2017).

²¹⁵ See Flake, *supra* note 121, at 51.

In fact, it could end up producing the opposite strategic effect that is intended—making us less, not more, secure.”²¹⁶

Professor of Law Jennifer M. Chacón tells the story of attending a February 2017 meeting in a southern California Latino (more than seventy-five percent Latino) community “and a sizable population of unauthorized immigrants live and work alongside U.S. citizens here. In addition to inflicting widespread emotional pain, full enforcement of the nation’s immigration laws would hurt the local housing market and general economy, with inevitable ripple effects throughout the regional and state economies.”²¹⁷ In many parts of the United States, “Immigrants, whether lawfully present or not, are a critical part of the lifeblood of the community,” states Professor Chacón.²¹⁸ Senator Flake states “[t]hat the [Muslim ban] executive orders were among the first acts of a new presidency sent a troubling signal to Americans of all backgrounds, as well as to the rest of the world, about what the next four years might bring.”²¹⁹ From its first few days in office, the strategy of the Trump Administration appears to be designed intentionally to increase the already heightened insecurity among immigrants. Professor Jennifer M. Chacón observes that within his first two weeks:

President Trump and his Department of Homeland Security issued executive orders and memoranda that called for a temporary ban on the admission of certain foreign nationals and almost all incoming refugees, the addition of 15,000 new CBP and ICE agents.”²²⁰ In addition to the construction of a U.S.-Mexico wall, other administration actions include: “the broad extension of streamlined removal processes to many individuals formerly given more robust immigration hearings, the greatly expanded use of immigration detention, the extension of priority removal status to many immigrants not covered by the Obama Administration’s priorities, federal funding cuts for jurisdictions that decline to cooperate with federal enforcement initiatives, increased delegation of immigration enforcement powers to state and local law enforcement agents, and an exploratory study of the construction of a wall on the U.S.-Mexico border.”²²¹

²¹⁶ *Id.* at 23.

²¹⁷ *See* Chacón, *supra* note 148, at 243.

²¹⁸ *Id.*

²¹⁹ *See* Flake, *supra* note 121, at 21.

²²⁰ *See* Chacón, *supra* note 148, at 243.

²²¹ *See id.* at 243, 254. *See also* Amy L. Moore, *Even When You Win, You Lose: Trump's Executive Order & the Depressing State of Procedural Due Process in the Context of Immigration*, 26 WM. &

G. Freedom of Speech and the Press

The First Amendment to the U.S. Constitution states, in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press”²²² Much of this article deals with Donald Trump’s difficulty in discerning between truth and falsehood. This is particularly problematic when it comes to President Trump’s contempt for and relationship with journalists. As *The Los Angeles Times* has observed in an editorial, “In Donald Trump’s America, the mere act of reporting news unflattering to the president is held up as evidence of bias. Journalists are slandered as ‘enemies of the people.’”²²³ In addition, “[f]acts that contradict Trump’s version of reality are dismissed as ‘fake news.’ Reporters and their news organizations are ‘pathetic,’ ‘very dishonest,’ ‘failing,’ and even, in one memorable turn of phrase, ‘a pile of garbage.’”²²⁴ Citing presidents George W. Bush and Barak Obama, *The Los Angeles Times* contends that Trump:

has escalated the traditionally adversarial relationship in demagogic and potentially dangerous ways. Most presidents, irritated as they may have been, have continued to acknowledge—at least publicly—that an independent press plays an essential role in American democracy. They’ve recognized that while no news organization is perfect, honest reporting holds leaders and institutions accountable; that’s why a free press was singled out for protection in the 1st Amendment and why outspoken, unfettered journalism is considered a hallmark of a free country.

Trump . . . [o]n his very first day in office, he called journalists “among the most dishonest human beings on earth.”

Since then he has regularly condemned legitimate reporting

MARY BILL OF RTS. J. 65 (providing the history of procedural due process in the context of immigration law and analyzes Exec. Order 13,769, Jan. 27, 2017, and the Ninth Circuit’s review of a stay request of the temporary resystraining order enjoining its enforcement. The Ninth Circuit focused on the Government’s probable success on the issue of procedural due process).

²²² U.S. CONST. amend. I.

²²³ See *Trump’s War on Journalism*, L.A. TIMES (Apr. 5, 2017), <http://www.latimes.com/projects/la-ed-trumps-war-on-journalism/>. See also Carol Pauli, *Enemy of the People: Negotiating News at the White House* (Texas A&M Univ. Sch. of Law Legal Studies Research Paper No. 17-49, 2018), <https://ssrn.com/abstract=3007970>.

²²⁴ See *Trump’s War on Journalism*, *supra* note 224.

as “fake news.” . . . Trump’s strategy is pretty clear: By branding reporters as liars, he apparently hopes to discredit, disrupt or bully into silence anyone who challenges his version of reality. By undermining trust in news organizations and delegitimizing journalism and muddling the facts so that Americans no longer know who to believe, he can deny and distract and help push his administration’s far-fetched storyline

But it’s an effective strategy. Such attacks are politically expedient at a moment when trust in the news media is as low as it’s ever been, according to Gallup And they’re especially resonate with Trump’s supporters, many of whom see journalists as part of the swamp that needs to be drained.²²⁵

The Los Angeles Times states that “[t]he news media remain an essential component in the democratic process and should not be undermined by the president.”²²⁶ In defending the Constitution and the important role performed by a free press in U.S. democracy, *The Los Angeles Times* contends:

The role of an institution like the Los Angeles Times (or the New York Times, the Wall Street Journal or CNN) is to be independent and aggressive in pursuit of the truth—not to take sides. The editorial pages are the exception: Here we can and should express our opinions about Trump. But the news pages, which operate separately, should report intensively without prejudice, partiality or partisanship.

Given the very real dangers posed by this administration, we should be indefatigable in covering Trump, but shouldn’t let his bullying attitude persuade us to be anything other than objective, fair, open-minded and dogged.

The fundamentals of journalism are more important than ever. With the president of the United States launching a direct assault on the integrity of the mainstream media, news organizations . . . must be courageous in our reporting

²²⁵ *Id.*

²²⁶ *Id.*

and resolute in our pursuit of the truth.²²⁷

H. National Security Threats

In addition to the concerns about improper relationships between members of the Trump family, Trump business entities, as we will see in the Emoluments Clause discussion, President Trump continues to have potentially compromising relationships and business transactions that leave him vulnerable to the influences of foreign nation state financial inducements and those of foreign leaders, including directly from: Afghanistan; Azerbaijan; Bahrain; China; Georgia; India; Indonesia; Kuwait; Qatar; Saudi Arabia; United Arab Emirates; and United Kingdom, “and other ‘foreign state[s],’ without seeking or obtaining ‘the Consent of Congress.’”²²⁸ For example, when asked about China’s South China Sea territorial claims during March 2016, the candidate Trump responded to *The Washington Post*, “I do deals with them [China] all the time. The largest bank in the world, 400 million customers, is a tenant of mine in New York, in Manhattan.”²²⁹

I. Racism and Discrimination

The due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution states, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²³⁰

Early Trump Administration examples of racism and discrimination include: histories of prejudice by cabinet picks and top advisors; travel ban targeting seven Muslim-majority countries;²³¹ and Trump’s insufficient statements upon the August 12, 2017 violence and deaths in Charlottesville, Virginia, “as white nationalists and counter-protesters clashed in one of the

²²⁷ *Id.*

²²⁸ See Complaint at 59, Citizens for Responsibility and Ethics in Washington (“CREW”) v. Trump, Civ. A. No. 1:17-cv-00458-RA (S.D.N.Y. Apr. 18, 2017), (filed by, among others, Professors Laurence H. Tribe, Erwin Chemerinsky, Zephyr Teachout, and Richard W. Painter) [hereinafter CREW v. Trump].

²²⁹ *Id.* at 17.

²³⁰ U.S. CONST. amend. XIV. § 1.

²³¹ See O’Connor & Marans, *supra* note 144.

bloodiest fights to date over the removal of Confederate monuments across the South.”²³² David Duke, a former imperial wizard of the Ku Klux Klan, “told reporters . . . that the protesters were ‘going to fulfill the promises of Donald Trump’ to ‘take our country back.’”²³³ President Trump’s tepid condemnation of the Charlottesville violence was criticized by both Republicans and Democrats for its vagueness. However, “Mr. Duke was among the few Trump critics who thought the president had gone too far. ‘I would recommend you take a good look in the mirror & remember it was White Americans who put you in the presidency, not radical leftists.’”²³⁴ Professor Dawn Bennett-Alexander observes:

This administration has drawn a line in the sand and made their position about employment discrimination and civil rights clear For instance, the Department of Education’s budget proposed at least 40 civil rights positions being eliminated and the Department of Justice issued verbal instructions to no longer default to entering into the powerful tool of consent decrees to enforce civil rights violations. That tells us a lot about his [President Trump’s] views on civil rights and his vision for it in his administration.²³⁵

J. “Good People on Both Sides”

As the writing for this article concludes, public outrage is significant over president Trump’s apparent comfort with White Nationalists and Neo-Nazi groups, as indicated by President Trump’s comment about violence in Charlottesville, Virginia, when he characterized the situation as having “good people on both sides.”²³⁶ The list of those denouncing President

²³² See Sheryl Gay Stolberg & Brian M. Rosenthal, *White Nationalist Protest Leads to Deadly Violence*, N.Y. TIMES, Aug. 13, 2017 at A1.

²³³ *Id.* at A14.

²³⁴ See Glenn Thrush & Maggie Haberman, *Trump is Criticized for Not Calling Out White Supremacists*, N.Y. TIMES, Aug. 13, 2017 at A14.

²³⁵ See Dawn D. Bennett-Alexander, *Employment Discrimination and Civil Rights Issues Under the Trump Administration: We’re Definitely Not in Kansas Anymore* 3, 4 (unpublished paper, presented to the 2017 National Meeting of the Academy of Legal Studies in Business, Aug. 9, 2017). See also Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html?mcubz=0> (discussing “former Arizona sheriff whose aggressive efforts to hunt down and detain undocumented immigrants made him a national symbol of the divisive politics of immigration and earned him a criminal contempt conviction”).

²³⁶ See Michael C. Bender & Peter Nicholas, *Trump Adds Fuel to Race Furor: President Defends Initial Stance on Virginia Violence, Placing the Blame on ‘Both Sides’*, WALL ST. J., Aug. 16, 2017 at A1.

Trump's failure to strongly condemn the White Supremacists at the August 2017 Charlottesville, Virginia violence include: numerous CEOs who resigned from a White House advisory counsel,²³⁷ top military leaders,²³⁸ and a strong statement from former CIA Director John Brennan²³⁹ Because of its importance, considerable attention will now be devoted to a discussion of Donald Trump, his family, and their ongoing violations of the Emolument Clause to the U.S. Constitution.

V. EMOLUMENTS CLAUSE

Shall a few designing men for their own aggrandizement,
and to gratify their own avarice, overset the goodly fabric
we have been rearing at the expense of so much time, blood
and treasure? And shall we at last become the victims of our
own abominable lust for gain?

George Washington (1732-1799)
1st President of the United States²⁴⁰

Bribery and corruption in government is a plague upon mankind, resulting in poverty and death to the less fortunate among us.²⁴¹ More than ever before, voters in the United States have elected a President having secret, complicated and vast undisclosed business relationships with governments and their leaders worldwide. As discussed below, these numerous violations of the U.S. Constitution constitute a great threat to the citizens and ultimate viability of the United States.

A. Brief Background of Foreign Emoluments Clause

The Framers of the Constitution were very concerned about the threat of any influence from foreign powers corrupting the government of the United States. Accordingly, the Foreign Emoluments Clause was inserted into the U.S. Constitution, providing at Article I, Section 9, Clause 8 that “No Title

²³⁷ See Vanessa Fuhrmans, *CEOs Rethink Ties with White House*, WALL ST. J., Aug. 16, 2017 at A1; Emily Glazer, Sarah Krouse & Elena Cherney, *Trump's Business Councils Disband After CEOs Defect*, WALL ST. J., Aug. 17, 2017 at A1.

²³⁸ See W. H. Hennigan, *U.S. Military Leaders Condemn Racism Following Trump's Comments on Charlottesville Violence*, L.A. TIMES (Aug. 16, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-u-s-military-leaders-condemn-racism-1502898652-htmlstory.html>.

²³⁹ See Melissa Quinn, *Former CIA Director John Brennan in Letter to CNN: Trump's Comments on Charlottesville are 'a National Disgrace'*, WASH. EXAMINER (Aug. 16, 2017), <http://www.washingtonexaminer.com/former-cia-director-john-brennan-in-letter-to-cnn-trumps-comments-on-charlottesville-are-a-national-disgrace/article/2631775>.

²⁴⁰ See GEORGE SELDES, *THE GREAT QUOTATIONS* 725 (Citadel Press 1983).

²⁴¹ See Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Guns and Money—The Bribery Problem and U.K. Bribery Act*, 47 INT'L LAW. 481 (2013).

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 whatsoever, from any King, Prince, or foreign state.”²⁴² According to Professors Donald O. Mayer and Adam J. Sulkowski, the Founders understood that “[p]rivate gain does not have to be a direct bribe or ‘kickback.’ The private gain contemplated by the Emoluments Clause includes anything of value, although the U.S. courts have seldom had opportunities to construe the clause.”²⁴³ Of these few cases available, Professors Mayer and Sulkowski cite *Hoyt v. United States*,²⁴⁴ defining “. . . the term emoluments, that being more comprehensive, and embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office.”²⁴⁵ Mayer and Sulkowski also point to *Sherburne v. United States*, defining emoluments as, “indirect or contingent remuneration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes the nature of reimbursement.”²⁴⁶

B. Case against Donald Trump: A Brief Summary

As Professor Eric A. Posner has observed, Trump, “has refused to liquidate his business interests, and to disclose his tax returns or other sources of financial information beyond the limited requirements of federal election law.”²⁴⁷ And, President “Trump openly acknowledges that he has raised business issues in the course of calls to foreign public officials.”²⁴⁸

Professor Posner warns, “Trump’s conflict of interest vastly exceeds any of his predecessors in the modern history of the presidency, extending back at least a century. These conflicts of interest are deeply in tension with the traditions of bureaucratic rationality.”²⁴⁹ In addition, “in a bureaucracy, the leading figure is supposed to be neutral, and all officials are supposed to be hired and retained on the basis of merit. While these ideals are rarely satisfied in full, never have they been so flagrantly violated.”²⁵⁰

In their lawsuit brought in the U.S. District Court for the Southern District of New York, Citizens for Responsibility and Ethics in Washington

²⁴² U.S. CONST. art. I, §9, cl. 8.

²⁴³ See Mayer & Sulkowski, *supra* note 2, at 8.

²⁴⁴ *Hoyt v. United States*, 51 U.S. (10 How.) 109, 135 (1850).

²⁴⁵ See Mayer & Sulkowski, *supra* note 2, at 8.

²⁴⁶ *Id.* (citing *Sherburne v. United States*, 16 CT. CL. 491, 496 (1880)). See also John Mikhail, The Definition of ‘Emolument’ in English Language and Legal Dictionaries, 1523-1806 (June 30, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2995693>; David E. Weisberg, The Foreign Emoluments Clause: Will Pres. Trump Be in Violation by Virtue of Taking the Oath? (Jan. 19, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2888201>.

²⁴⁷ See Posner, *Can It Happen Here?*, *supra* note 10, at 11.

²⁴⁸ See Mayer & Sulkowski, *supra* note 2, at 9.

²⁴⁹ See Posner, *Can It Happen Here?*, *supra* note 10, at 11.

²⁵⁰ *Id.*

(CREW) are joined by noted constitutional law professors, Laurence H. Tribe, Erwin Chemerinsky, Zephyr Teachout, and others in bringing an action sounding in Constitutional Emoluments Clause violations against Donald J. Trump in his official capacity as President of the United States.²⁵¹ The CREW complaint reminds us of the recognition by the Framers of “the dangers of foreign influence and corruption, even in situations subtler than *quid pro quo* bribery, and thus they created a broad constitutional prophylactic applicable to anything of value given by any foreign government to any officer of the United States.”²⁵² CREW teaches that concerns leading to the Foreign Emoluments Clause can be traced back to 1651, “when the Dutch broke with classic European diplomatic customs and prohibited their foreign ministers from accepting ‘any presents, directly or indirectly, in any manner or way whatever.’”²⁵³ It appears that a similar provision, a precursor to our present Foreign Emoluments Clause, made its way into Article 6, Section 1 of the Articles of Confederation, as follows: “[N]or shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or Foreign State.”²⁵⁴ While Foreign Emoluments language was not initially included at the Constitutional Convention, Charles Pinckney was successful when he “urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence.”²⁵⁵ CREW also teaches that recognition of the necessity for this anti-corruption clause was echoed by Edmund Jennings Randolph when he observed, “It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.”²⁵⁶

Consisting of a highly complex web of business entities worldwide, the Trump family owns and controls, in whole or in part, hundreds of limited partnerships, limited liability companies, corporations, or businesses enterprises in any of several other forms, known to operate in “20 or more

²⁵¹ CREW v. Trump, *supra* note 228.

²⁵² *Id.* at 12. *But see* Andy Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639 (2017) (contending that an “emolument,” as used in the Foreign Emoluments Clause, refers to payments from a foreign government made in exchange for the U.S. Officer’s performance of services (office-related compensation). Contending the term does not refer to any and all payments from a foreign government. Concluding that market-rate transactions between the Trump Organization and foreign governments do not come within the clause. However, payments to the Trump Organization in excess of market rates may establish potentially unconstitutional gifts, emoluments, or bribes. Payments made to President Trump personally in exchange for services would also raise constitutional problems).

²⁵³ CREW v. Trump, *supra* note 228, at 11.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 11–12 (internal quotations omitted) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 389 (Max Farrand ed., 1967)).

²⁵⁶ CREW v. Trump, *supra* note 228, at 12 (internal quotations omitted) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 327 (Max Farrand ed., 1967)).

foreign countries.”²⁵⁷ The CREW lawsuit discloses that The “Trump Organization” serves as a loosely-organized umbrella organization under which interests of now President Donald Trump “include not only Trump Organization LLC d/b/a The Trump Organization and The Trump Organization, Inc., both of which are owned solely by [Trump], but also scores of other entities not directly owned by either ‘Trump Organization’ entity but that [Trump] personally owns, owns through other entities, and/or controls.”²⁵⁸ In addition, CREW points to numerous income streams from licensing agreements; all to the result that while serving as president of the United States, Donald J. Trump will be personally “enriched by any business in which they engage with foreign governments, instrumentalities, and officials.”²⁵⁹

A full treatment of the ethical case against Trump is beyond the scope of this paper at this time, both because of the page limits afforded any one law review article, and because investigations are currently being conducted to uncover many of the facts of President Trump’s business dealings with the equivalent of foreign powers so skillfully hidden from the American electorate to this point in time. The CREW lawsuit provides an excellent roadmap to some of the most visible violations of the Foreign Emoluments Clause known at this time, as follows:

- (a) Leases held by foreign-government-owned entities in New York’s Trump Tower;
- (b) Room reservations and the use of venues and other services and goods by foreign governments and diplomats at [Trump’s] Washington, D.C. hotel;
- (c) hotel stays, property leases, and other business transactions tied to foreign governments at other domestic and international establishments owned, operated, or licensed by [Trump];
- (d) payments from foreign-government-owned broadcasters related to rebroadcasts and foreign versions of the television program ‘The Apprentice’ and its spinoffs; and
- (e) property interests or other business dealings tied to foreign governments in numerous other countries.²⁶⁰

A brief recital of each of these alleged violation categories included in the CREW lawsuit is provided with additional details below.

²⁵⁷ *Id.* at 14 (citing Marilyn Geewax & Maria Hollenhorst, *Trump’s Business and Potential Conflicts: Sorting It Out*, NPR (Dec. 5, 2016), <https://www.npr.org/2016/12/05/503611249/trumps-businesses-and-potential-conflicts-sorting-it-out>).

²⁵⁸ CREW v. Trump, *supra* note 228, at 14–15 (citing Donald J. Trump, 2016 Executive Branch Personnel Public Financial Disclosure Report (May 16, 2016), <https://assets.documentcloud.org/documents/2838696/Trump-2016-Financial-Disclosure.pdf>).

²⁵⁹ CREW v. Trump, *supra* note 228, at 15.

²⁶⁰ *Id.* at 3–4.

1. *Trump Tower, New York City*

The Trump Tower is a prime mixed-use New York City landmark property located at 725 Fifth Avenue, New York, New York 10022.²⁶¹ President Donald Trump continues to own and/or exercise control over this property through various legal entities. The CREW lawsuit alleges that Donald Trump benefits by receiving money from major tenants such as the Chinese-government-owned Industrial and Commercial Bank of China (ICBC),²⁶² and an entity owned by the United Arab Emirates, the Abu Dhabi Tourism & Culture Authority.²⁶³ As President, Trump's:

acceptance of any such payments without congressional consent constitutes a violation of the Foreign Emoluments Clause; [and Trump], as a “Person holding any Office of Profit or Trust,” is accept[ing]” an “Emolument” from a “foreign State” or its agent or instrumentality without “the Consent of Congress.” Moreover, the expected negotiation of a new lease in Trump Tower with the ICBC—or any other lease in Trump Tower with a state-owned entity—presents an additional opportunity for [Trump] to violate the Foreign Emoluments Clause.²⁶⁴

Professors Mayer and Sulkowski warn, “the Trump Organization’s debts to foreigners and other civil or criminal inquiries are also worrisome.”²⁶⁵ For example, because “The Industrial and Commercial Bank of China—owned by the People’s Republic of China—is the single largest tenant in Trump Tower. Its valuable lease will expire, and thus come up for re-negotiation, during Trump’s presidency.”²⁶⁶

2. *Trump International Hotel, Washington, D.C.*

The next Trump asset to create an ongoing conflict with the Foreign Emoluments Clause and mentioned in the CREW lawsuit is the recently opened Trump International Hotel Washington, D.C., located at 1100

²⁶¹ *Id.* at 16.

²⁶² *Id.* (citing Caleb Melby, et. al., *When Chinese Bank’s Trump Lease Ends, Potential Conflict Begins*, BLOOMBERG (Nov. 28, 2016), <https://www.bloomberg.com/news/articles/2016-11-28/trump-s-chinese-bank-tenant-may-negotiate-lease-during-his-term>). See also Mayer & Sulkowski, *supra* note 2, at 9.

²⁶³ CREW v. Trump, *supra* note 228, at 17 (citing Abu Dhabi Tourism & Culture Authority, *Our Offices*, <http://tcaabudhabi.ae/en/who.we.are/our.offices.aspx>); Maria Villaseñor, *Trump’s Comments Cost Him Money in Middle East*, NBC News (Dec. 9, 2015), <https://www.cnbc.com/2015/12/09/trumps-comments-cost-him-money-in-middle-east.html>.

²⁶⁴ CREW v. Trump, *supra* note 228, at 12.

²⁶⁵ See Mayer & Sulkowski, *supra* note 2, at 9.

²⁶⁶ *Id.*

Pennsylvania Avenue, N.W., Washington, D.C. 20004.²⁶⁷ Again, through various entities, President Trump owns and controls this hotel and “receives payments . . . by guests who stay in hotel rooms or pay for a venue or other goods or services in this hotel.”²⁶⁸ Numerous media reports state that since Trump’s election, “foreign diplomats have been flocking to [Trump’s] D.C. hotel, eager to curry favor with [Trump] and afraid of what [Trump] may think or do if they send their business elsewhere in Washington, D.C.”²⁶⁹ The CREW lawsuit observes that within days of the 2016 presidential election approximately 100 diplomats attended a special reception at the hotel where they were “greeted with champagne, food, a tour, a raffle for overnight stays at properties belonging to [Trump] around the world, and a sales pitch about the new D.C. hotel.”²⁷⁰ Trump’s D.C. Hotel strategy reportedly includes the hiring of a “director of diplomatic sales to facilitate business with foreign states and their diplomats and agents, luring the director away from a competitor hotel in Washington.”²⁷¹ As expected, reports abound of foreign diplomats doing exactly what might best be expected of them, as reported where an Asian diplomat is reported explaining: “Why wouldn’t I stay at [Trump’s] hotel blocks from the White House, so I can tell the new president, ‘I love your new hotel!’ Isn’t it rude to come to his city and say, ‘I am staying at your competitor?’”²⁷² Furthermore, a Middle Eastern Diplomat is reported to have told *The Washington Post*, “[b]elieve me, all the delegations will go there.”²⁷³ Numerous other foreign delegations are reported to have booked future events at the Trump International Hotel, including the Embassy of Kuwait

²⁶⁷ CREW v. Trump, *supra* note 228, at 18.

²⁶⁸ *Id.* at 18.

²⁶⁹ *Id.* (citing Jonathan O’Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel is the Place to Be*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html); Eric Lipton & Susanne Craig, *At Trump Hotel in Washington, Champagne Toasts in an Ethical ‘Minefield’*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/us/politics/trump-international-hotel-ethics.html>.

²⁷⁰ CREW v. Trump, *supra* note 228, at 18 (citing Jonathan O’Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel is the Place to Be*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html).

²⁷¹ CREW v. Trump, *supra* note 228, at 18–19 (internal quotations omitted).

²⁷² *Id.* at 19 (internal quotations omitted).

²⁷³ *Id.*

(reportedly moved from competitor's hotel),²⁷⁴ Bahrain,²⁷⁵ and Azerbaijan.²⁷⁶ Professors Mayer and Sulkowski write:

In being both a tenant and, as President, a landlord at the new Trump Hotel at the old Post Office Building on Pennsylvania Avenue, there is a direct conflict of interest domestically. (The lease provides that “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.”) Foreign government officials are also likely to stay there in order to please the U.S. President.²⁷⁷

3. *Gratuitous Chinese Trademarks*

A particularly instructive example of how Trump's business interests may influence or be influenced by American foreign policy is provided by the following example of Trump's efforts over many years to obtain Chinese trademark protection. The CREW lawsuit states that Trump first sought, “trademark protection in China for the use of his name in connection with building construction services in 2006. His application was rejected by the Trademark Office. He lost his appeals to the Trademark Review and Adjudication Board, the Beijing Intermediate People's Court, and the Beijing High People's Court.”²⁷⁸ For perspective, it appears that a month before declaring his presidential candidacy, during May 2015, Trump shouldered his most recent defeat.²⁷⁹ Then, on December 2, 2016, following his election victory, President-elect Trump had a direct conversation with:

Taiwan President Tsai Ing-wen. That conversation broke a

²⁷⁴ *Id.* at 20–21 (citing Jonathan O'Connell, *Kuwaiti Embassy is Latest to Book Trump D.C. Hotel, but Ambassador Says He Felt 'No Pressure'*, WASH. POST (Dec. 20, 2016), https://www.washingtonpost.com/news/digger/wp/2016/12/20/kuwaiti-embassy-is-latest-to-book-trump-d-c-hotel-but-ambassador-says-he-felt-no-pressure/?utm_term=.226fafbe8dc3); Judd Legum & Kira Lerner, *Under Political Pressure, Kuwait Cancels Major Events at Four Seasons, Switches to Trump's D.C. Hotel*, THINKPROGRESS (Dec. 19, 2016), <https://thinkprogress.org/under-political-pressure-kuwait-cancels-major-event-at-four-seasons-switches-to-trumps-d-c-1f204315d513/>.

²⁷⁵ CREW v. Trump, *supra* note 228, at 19 (citing Nolan D. McCaskill & Madeline Conway, *Bahrain to Host Event at Trump's D.C. Hotel, Raising Ethical Concerns*, POLITICO (Nov. 29, 2016), <https://www.politico.com/story/2016/11/trump-bahrain-hotel-dc-231941>).

²⁷⁶ CREW v. Trump, *supra* note 228, at 13 (citing Brent Griffiths & Kenneth P. Vogel, *Embassy of Azerbaijan to co-host event at Trump's D.C. Hotel*, POLITICO (Dec. 5, 2016), <https://www.politico.com/blogs/donald-trump-administration/2016/12/embassy-of-azerbaijan-to-co-host-event-at-trumps-dc-hotel-232214>).

²⁷⁷ See Mayer & Sulkowski, *supra* note 2, at 10.

²⁷⁸ See CREW v. Trump, *supra* note 228, at 26.

²⁷⁹ *Id.*

long-standing protocol, and suggested Defendant [Trump] might end the “One China” policy that the United States had observed for decades. Before taking office, Defendant [Trump] suggested that he might end the One China policy unless some benefit were received in exchange.

On February 9, 2017, Defendant [Trump] spoke with Chinese President Xi Jinping, and pledged to honor the One China policy.

Five days later, on February 14, 2017, China reversed its prior course and gave Defendant [Trump] trademark protection.

Chinese law prohibits awarding trademarks that are “the same as or similar to the name of leaders of national, regional, or international political organizations.”

Despite denying Defendant [Trump] trademark protection for over ten years, including in a ruling from an appellate court, and despite China’s law barring the use of foreign leaders’ names as trademarks, China gave Defendant [Trump] the trademark he had requested and valued. However, China only gave the trademark protection to Defendant [Trump] after he had been elected President, questioned the One China policy, was sworn in, and re-affirmed the One China policy.

The trademarks have considerable value by giving the Trump Organization the sole right to profit from the Trump brand in China. China’s granting of these trademarks constitutes a present or emolument provided to the Defendant [Trump].²⁸⁰

4. Additional Domestic and International Businesses and Properties

The CREW complaint references President Trump’s financial-disclosure report to illustrate that Trump continues to own, control, operate, and/or license many additional businesses and properties worldwide, “including other hotels, other properties for sale or lease, and golf courses and clubs.”²⁸¹ Focused on rural lower-income American hotel markets, *The*

²⁸⁰ *Id.* at 26–27.

²⁸¹ Donald J. Trump, 2016 Executive Branch Personnel Public Financial Disclosure Report, <https://assets.documentcloud.org/documents/2838696/Trump-2016-Financial-Disclosure.pdf>.

New Yorker described the mid-2017 announcement of American Idea Hotels as, “the most blatant instance yet of the Trump family’s profiting from its political power—in this case, by shifting from its long-standing focus on luxury markets in order to make money from the very demographic that put Trump in the White House.”²⁸²

5. *The Apprentice- International Versions and Distribution Rights*

The CREW complaint includes language to the effect that the successful television program “The Apprentice,” and various spinoffs such as “The Celebrity Apprentice” and “The New Celebrity Apprentice,” continues to earn President Trump royalties and other types of payments, by virtue of President Trump’s continued service as executive producer, and “international versions of the programs produced in other countries. In some instances, these payments originate from governments or their agents or instrumentalities. For instance, Trump is paid in the United Kingdom and Viet Nam for the program “The Apprentice,” where those programs air on foreign-government-owned broadcast stations.”²⁸³

C. *Claim of Foreign Emoluments Clause Violations*

Each of the above instances (New York City Trump Tower Property, Trump International Hotel Washington, D.C., other Domestic and International businesses and properties, and television rights and royalties derived from “The Apprentice” and similar properties) is believed by CREW to constitute a violation of the Emoluments Clause of the United States Constitution.²⁸⁴ In general terms, CREW’s complaint is based upon a claim that:

[Trump] regularly receives money –and, without judicial intervention, will continue to receive money during his presidency – through transactions involving these many other properties and businesses [as specified in detail above]. Now that he is President, [Trump’s acceptance of any such payments from foreign states or their instrumentalities or agents without congressional consent constitutes a violation of the Foreign Emoluments Clause; [Trump], as a “Person holding any Office of Profit or Trust,” is ‘accept[ing]’ an ‘Emolument’ from a ‘foreign

²⁸² See Adam Davidson, *Trump Hotels’ Weird Pitch*, NEW YORKER, June 26, 2017 at 21.

²⁸³ CREW v. Trump, *supra* note 228, at 28 (citing Madeline Berg, *Here’s How Much Donald Trump Will Earn Producing ‘Celebrity Apprentice’*, FORBES (Dec. 13, 2016), <https://www.forbes.com/sites/maddieberg/2016/12/13/heres-how-much-trump-will-earn-from-producing-celebrity-apprentice>).

²⁸⁴ CREW v. Trump, *supra* note 228, at 1–34.

State’ or its agent or instrumentality without ‘the Consent of the Congress.’²⁸⁵

The CREW complaint specifies entanglements believed to rise to violations of the Foreign Emoluments Clause in China, India, United Arab Emirates, Indonesia, Turkey, Scotland, the Philippines, Russia, Saudi Arabia, and Taiwan.²⁸⁶

Many adamant supporters of President Trump dismiss all Emoluments Clause issues, with an argument that goes something like:

Look; we know Trump was a successful businessman when we elected him, we knew (or didn’t care) about his complex web of business entanglements worldwide (even though he made only modest financial disclosures and released no detail tax information). Supporters argue they want an outsider to shakeup Washington. So; whatever Trump’s long-list of self-dealing entanglements, or history of organized crime relationships—it just doesn’t matter.

Yes! It appears that despite all of Trump’s character baggage, the 2016 American electorate preferred this inexperienced celebrity to the other major candidate. Professors Mayer and Sulkowski warn:

The G.O.P.’s silence on the Emoluments Clause early in the President’s first term is a symptom of the larger dysfunctions in our political system, dysfunctions that make Benjamin Franklin’s admonition about having a Republic “if we can keep it” all the more prescient. A sustainable political society requires ‘an aristocracy of virtue and talent’ rather than an aristocracy of power and wealth.²⁸⁷

D. The Standing Issue: Additional Plaintiffs Added to CREW Action

Soon after filing, many early commentators cast doubt about “CREW’s prospects for success, arguing that the organization cannot obviously show a ‘concrete and particularized injury’²⁸⁸ from any violation of the Emoluments Clause.²⁸⁹ In legalese, CREW seems to lack Article III standing

²⁸⁵ *Id.* at 15.

²⁸⁶ *Id.* at 1–21.

²⁸⁷ See Mayer & Sulkowski, *supra* note 2, at 21.

²⁸⁸ See Peter N. Salib & David K. Suska, *The Federal–State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing* 26 WM. & MARY BILL RTS. J. 1155, 1158 (2018) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

²⁸⁹ *Id.* (citing Andrew Hessick, *Standing and the Emoluments Clause*, YALE J. REG. NOTICE & COMMENT BLOG (Jan. 23, 2017), <http://yalejreg.com/nc/standing-and-the-emoluments-clause/>; Josh

. . . [which limits] federal jurisdiction to ‘Cases’ and ‘Controversies,’²⁹⁰ as embodied in the Supreme Court’s jurisprudence on standing.”²⁹¹

To strengthen the CREW’s ability to sustain the government’s motion for summary judgment, three additional plaintiffs were added, each of whom has suffered actual harm from President Trump’s illegal conduct.²⁹² These additional plaintiffs include: Eric Goode, an owner of hotels, event spaces, restaurants and bars in New York City;²⁹³ Jill Phaneuf, an event planner in Washington, D.C., whose compensation is directly tied to a percentage of gross receipts from events she books for hotels (also competing directly for diplomatic business against Trump entities);²⁹⁴ and an association of restaurant workers, Restaurant Opportunity Centers (ROC) United, Inc., “a non-profit, nonpartisan organization founded in 2008... [having] nearly 25,000 restaurant-employee members.”²⁹⁵

As Messrs. Salib and Suska observe, “many putative violations of federal law go unexamined because it is unclear whether anyone has standing to sue in federal court. Examples include certain violations of the Establishment Clause,²⁹⁶ Statement and Account Clause,²⁹⁷ and Incompatibility Clause.²⁹⁸ Scholars have . . . characterize[ed] these and other provisions . . . as functionally unenforceable.”²⁹⁹

E. Emolument Lawsuit Filed by Maryland and District of Columbia

An Emolument lawsuit was filed by the attorneys general of Maryland and the District of Columbia on June 12, 2017.³⁰⁰ The suit claims that President Trump’s “ownership of the Trump International Hotel in D.C.

Blackman, *CREW’s Self-Inflicted Injury in the Emoluments Clause Challenge*, JOSH BLACKMAN’S BLOG (Jan. 22, 2017), <http://joshblackman.com/blog/2017/01/22/crews-self-inflicted-injury-in-the-emoluments-clause-challenge/>.

²⁹⁰ *Id.* (citing U.S. Const. art III, §2).

²⁹¹ *Id.*

²⁹² See Amended Complaint at 5–7, *CREW v. Trump*, Civ. A. No. 1:17-cv-00458-RA (S.D.N.Y. May 10, 2017).

²⁹³ *Id.* at 7.

²⁹⁴ *Id.* at 6–7.

²⁹⁵ *Id.* at 5.

²⁹⁶ See Salib & Suska, *supra* note 288, at 1160 (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)).

²⁹⁷ See *id.* (citing *US v. Richardson*, 418 U.S. 166 (1974)).

²⁹⁸ See *id.* (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974)).

²⁹⁹ See *id.* (citing John M. Bickers, *Standing on Holy Ground: How Rethinking Justiciability Might Bring Peace to the Establishment Clause*, 60 CLEV. ST. L. REV. 415 (2012)) (observing that “the disputes are literally of only academic interest, however, as no one appears to have standing to complain”); David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases—Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123, 1128 (1997) (“When a constitutional violation injures a significantly large number of citizens, no one has standing to sue.”).

³⁰⁰ See Sharon LaFraniere, *Maryland and District of Columbia Sue Trump Over His Businesses*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/us/trump-lawsuit-private-businesses.html?mcubz=0>.

violates two Constitutional clauses barring elected officials from receiving personal gifts and payments.”³⁰¹ With respect to the issue of “standing” to bring this action, Maryland and the District of Columbia “may hope to avoid CREW’s difficulties by taking advantage of the ‘special solicitude’³⁰² states are afforded in the standing analysis.”³⁰³ Messrs. Salib and Suska state that “[t]he implication is clear; lawyers everywhere doubt that regular citizens can sue the President to stop him from violating the Emoluments Clause.”³⁰⁴ However, Messrs. Salib and Suska further contend that, “lack of Article III standing is essentially never a barrier to enforcing federal law. . . . without ever possessing the elements of standing.”³⁰⁵

F. Congressional Democrats File Lawsuit

On June 14, 2017, a third emoluments clause violation lawsuit was filed by Richard Blumenthal, Ranking Member of the Senate Judiciary Committee’s Constitution Subcommittee, John Conyers, Jr., Ranking Member of the House Judiciary Committee, and includes 29 additional senators and 165 other representatives.³⁰⁶ A former attorney general of Connecticut, Senator Blumenthal, “said the president’s companies did business in about 20 countries but were shrouded in secrecy, making it impossible for Congress to carry out its constitutional duty of determining whether he was receiving illegal benefits or emoluments. ‘The truth is we have no clue about the president’s investors.’”³⁰⁷ Like the two federal emoluments lawsuits filed earlier, this action “accuses Mr. Trump of illegally profiteering from his businesses in a variety of ways, including collecting payments from foreign diplomats who stay in his hotels and accepting trademark approval from foreign governments for his company’s goods and services.”³⁰⁸

³⁰¹ See Sylvan Lane, *Maryland, DC Seek President’s Taxes in Lawsuit over Trump Hotel*, THE HILL (June 12, 2017), <http://thehill.com/policy/finance/337437-maryland-dc-will-seek-presidents-taxes-in-lawsuit-over-trump-hotel>.

³⁰² See Salib & Suska, *supra* note 288, at 1159 (citing *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)).

³⁰³ See *id.* at 1158–59 (citing Aaron C. Davis & Karen Tumulty, *D.C. and Maryland AGs: Trump ‘Flagrantly Violating’ Emoluments Clause*, WASH. POST (Jun. 12, 2017), https://www.washingtonpost.com/politics/two-plaintiffs-join-suit-against-trump-alleging-breach-of-emoluments-clause/2017/04/17/1d4aaa70-238a-11e7-a1b3-faff0034e2de_story.html?utm_term=.0e04c6b83408) (acknowledging the question of whether the District of Columbia is entitled to special solicitude as a non-state).

³⁰⁴ See *id.* at 1159.

³⁰⁵ *Id.*

³⁰⁶ Complaint at 18, *Blumenthal v. Trump*, No. 1:17-cv-01154 (D.D.C. June 14, 2017).

³⁰⁷ See Sharon LaFraniere, *Democrats in Congress Sue Trump Over Foreign Business Dealings*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/us/politics/democrats-in-congress-to-sue-trump-over-foreign-business-dealings.html?mcubz=0>.

³⁰⁸ *Id.*

VI. CONGRESSIONAL OVERSIGHT

“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”

Alexander Hamilton (1757-1804)
American statesman³⁰⁹

A. Importance of Oversight Function

By virtue of the oversight process, Congress has played a crucial role in checking the abuse of executive powers . . . in the Teapot Dome scandal of 1923 . . . in the cases of Watergate and Iran-Contra . . . members of Congress have unearthed many policy failures, saved taxpayers billions of dollars, and identified corrupt or illegal behavior.³¹⁰

The concept of Congressional oversight is firmly rooted as fundamental to the American system of governmental checks and balances among the three branches of government.³¹¹ Walter Oleszek observes that “the first congressional investigation in American history, in 1792, delved into the

³⁰⁹ See SELDES, *supra* note 240, at 295.

³¹⁰ See LEE H. HAMILTON, *HOW CONGRESS WORKS AND WHY YOU SHOULD CARE* 106 (Ind. Univ. Press 2004).

³¹¹ See SCOTT H. AINSWORTH ET AL., *PRESIDENTIAL SIGNING STATEMENTS, EXECUTIVE ORDERS AND CONGRESSIONAL OVERSIGHT* (2014); CRAIG VOLDEN & ALAN E. WISEMAN, *LEGISLATIVE EFFECTIVENESS IN THE UNITED STATES CONGRESS: THE LAWMAKERS* (Cambridge Univ. Press 2014); Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT'L L. 1 (2013); Jack Michael Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); Jack Michael Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727 (2009); Kathleen Clark & Nino Lomjaria, *Limited Oversight: Legislative Access to Intelligence Information in the United States and Canada*, 6 J. PARLIAMENTARY POL. L. 523 (2011); Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915 (2011); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); Brian D. Feinstein, *Congressional Control of Administrative Agencies*, <http://ssrn.com/abstract=2304497>; Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J. L. ECON. & POL'Y 23 (2011); Brian D. Feinstein, Supplement To: *Congressional Control of Administrative Agencies* (2013), <http://ssrn.com/abstract=2073774>; Susan Freiwald & Sylvain M etille, *Reforming Surveillance Law: The Swiss Model*, 28 BERKELEY TECH. L. J. 1261 (2013) (discussing regulation of electronic surveillance and comparing the U.S. and Swiss approach); William P. Marshall, *The Limits of Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781 (2004); Stephen J. Schulhofer, *Secrecy and Democracy: Who Controls Information in the National Security State?* (NYU Sch. of Law, Pub. Law & Legal Theory Research Paper Series Working Paper No. 10-53, 2010); Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183 (2013).

conduct of the government in the wars against the Indians.”³¹² Professors Cochran, Mayer, Carr and Cayer observe that:

Government, first, exists to provide *security* from internal and external threats to the lives, liberties, and properties of its members. National defense and foreign policy are examples of this purpose. Another is crime policy, which intends to establish order and to protect citizens from each other through crime prevention and the punishment of criminals.³¹³

When it comes to the oversight of government, “committees are where the *real* work” of Congress is achieved.³¹⁴ Lee H. Hamilton, U.S. Representative from 1965 to 1999, observes that “good oversight helps Congress evaluate how programs are administered and how they perform—ferreting out waste and fraud, determining whether programs have outlived their usefulness, compelling the administration to explain or justify its policies.”³¹⁵

Congressional oversight activity can take any of several forms,³¹⁶ “formal committee and subcommittee oversight hearings are the most firmly rooted form of oversight.”³¹⁷ Brian Feinstein observes that while, “Congress

³¹² See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 264 (Cong. Quarterly 3d ed. 1989).

³¹³ See CLARKE E. COCHRAN ET AL., AMERICAN PUBLIC POLICY: AN INTRODUCTION 4 (Thomson Wadsworth ed., 2003).

³¹⁴ See TOM DASCHLE & CHARLES ROBBINS, THE U.S. SENATE 72 (2013); Brian D. Feinstein, *Congressional Government Rebooted: Randomized Committee Assignments & Legislative Capacity*, 7 HARV. LAW & POL’Y REV. 139 (2013).

³¹⁵ See HAMILTON, *supra* note 310, at 107.

³¹⁶ See Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences & Congressional Monitoring of the Administrative State*, 8 J. L. ECON. & POL’Y 23, 26 (2011), <http://ssrn.com/abstract=1747044> (citing JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 132 (1990)) (considering the informal communication between congressional staffers and agencies’ legislative liaisons as a form of oversight); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004); Carl J. Friedrich, *Public Policy and the Nature of Administrative Responsibility*, 1 PUB. POL. 3, 6 (Carl J. Friedrich & Edward Mason eds., 1940) (asserting that policymaking “is a continuous process, the formulation of which is inseparable from its execution”); WILLIAM T. GORMLEY, TAMING THE BUREAUCRACY 199 (1989) (arguing that some constituent casework can be considered a form of oversight); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures As Instruments of Political Control*, 3 J. L. ECON. & ORGAN. 243 (1987); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (describing alternative methods of oversight); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (administrative procedure design to facilitate oversight).

³¹⁷ Feinstein *supra* note 316, at 26–27 (citing CONG. RESEARCH SERV., CONGRESSIONAL INVESTIGATIONS 90, http://www.law.cornell.edu/anncon/html/art1frag9_user.html) (“The Court has long since accorded its agreement with Congress that the investigatory power is so essential to the

began holding oversight hearings as early as 1791[;]³¹⁸ [a]ccording to Arthur Schlesinger, Jr., the Constitution does not explicitly refer to Congress's oversight authority for the simple reason that such authority was considered implicit in the body's general legislative powers[;] [i]n other words, oversight was considered a given."³¹⁹

Hamilton observes, "Passing legislation and providing oversight are two key functions of Congress, but almost all the attention goes to legislating. I agree with Woodrow Wilson who said "Quite as important as lawmaking is vigilant oversight of administration."³²⁰ Almost "all legislation is referred to a committee, and sometimes to more than one. 'Writing legislation on the floor' – sending matters directly for full Senate debate – doesn't allow committee experts to shape the bill first, and is discouraged."³²¹ With the 1946 Legislative Reorganization Act, oversight responsibility was formally recognized by Congress in requiring "that the House and Senate standing committees exercise 'continuous watchfulness of the execution by the administrative agencies' of any law under their jurisdiction."³²² Although somewhat dated, *Congressional Quarterly* lists the following ways in which the oversight functions are exercised by Congress:

1. Hearings and investigations . . .
2. [Omitted, due to change in law] . . .
3. Authorizations . . .
4. Nonstatutory controls, such as informal contacts between executive officials and committee members and staff, and statements incorporated in committee reports and conference reports, hearings and floor debates . . .

legislative function as to be implied from the general vesting of legislative power in Congress."); *see also* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 64 (2006) (observing that "Congress is deeply involved in the day to day administration of the law" as "insufficiently noted in legal scholarship"); *id.* at 122 (explaining how the Legislative Reorganization Act of 1946 rearranged committee jurisdictions and formed professional oversight staffs for certain committees, thereby establishing long-lasting oversight institutions). *But see* Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L. J. 1059 (2001); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992).

³¹⁸ *See* Feinstein *supra* note 316, at 26–27 (citing M. Nelson McGeary, *Congressional Investigations: Historical Development*, 18 U. CHI. L. REV. 425 (1951)) (observing that the House of Representatives in 1791 convened a special committee to investigate the U.S. Army's defeat by Native American forces in the Battle of the Wabash).

³¹⁹ *See* Feinstein *supra* note 316, at 7 (citing ARTHUR M. SCHLESINGER, JR., CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, VOL. 1, xix (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975) ("[I]t was not considered necessary to make an explicit grant of such authority. The power to make laws implied the power to see whether they were faithfully executed.")).

³²⁰ *See* HAMILTON, *supra* note 310, at 106 (citing WOODROW WILSON, CONGRESSIONAL GOVERNMENT, 195 (1885)).

³²¹ *See* DASCHLE & ROBBINS, *supra* note 314, at 72.

³²² *See* HOW CONGRESS WORKS, CONGRESSIONAL QUARTERLY 88 (1983).

5. [Government Accountability Office] [GAO] audits of agencies and programs;
6. Requirements that executive agencies submit to Congress periodic reports on program implementation;
7. Informal groups within Congress and organizations outside Congress that inform members about specific problems in administering programs;
8. The Senate confirmation process . . .
9. Program evaluation through the use of social science and management methodology, such as surveys, cost-benefit analysis and efficiency studies;
10. Casework . . .; and
11. Studies by congressional support agencies, including the Congressional Research Service, the Office of Technology Assessment and the Congressional Budget Office.³²³

B. Inherent Tension Surrounding National Security Matters

Sensitive information having national security significance must be safeguarded to ensure the vital national security interests of any nation-state.³²⁴ So many aspects of cybersecurity have the potential for use by: terrorists; by foreign entities as a tool to conduct industrial espionage against U.S. business; and by nation-state adversaries, or others intent upon creating serious disruption. These various threats mean that cybersecurity policy in many ways must be treated just like the strategic and operational plans of a country at war.³²⁵

³²³ *Id.* at 88–89. See also Matthew M. Dull et al., *Appointee Confirmation and Tenure: The Succession of U.S. Federal Agency Appointees 1989-2009*, 72 PUB. ADMIN. REV. 902 (2012).

³²⁴ See Scott Shackelford et al., *Making Democracy Harder to Hack: Should Elections Be Classified as ‘Critical Infrastructure?’*, 50 U. MICH. J. L. REFORM. 629 (2017).

³²⁵ See Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SEC. J. 283 (2011); Kenneth Anderson, *Law and Terror*, 139 POL’Y REV. (Oct./Nov. 2006); William C. Banks, Keynote Address at the Texas A&M Law Review Symposium: Cyber Espionage, Surveillance, and Int’l Law: Finding Common Ground (Oct. 17, 2014), <http://ssrn.com/abstract=2558155>; Aaron Brecher, *Cyberattacks and the Covert Action Statute: Toward a Domestic Legal Framework for Offensive Cyberoperations*, 111 MICH. L. REV. 423 (2012); Mariano-Florentino Cuéllar, *‘Securing’ the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939-1953*, 76 U. CHI. L. REV. 587 (2009); David G. Delaney, *Cybersecurity and the Administrative National Security State: Framing the Issues for Federal Legislation*, 40 J. LEGIS. 251 (2013-14); Trey Herr & Allan Friedman, *Redefining Cybersecurity*, 8 DEFENSE TECHNOLOGY PROGRAM BRIEF, AMERICAN FOREIGN POLICY COUNCIL 1 (Jan. 2015); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008); Peter Margulies, *Sovereignty and Cyber Attacks: Technology’s Challenge to the Law of State Responsibility*, 14 MELBOURNE J. OF INT’L L. 496 (2013); Peter Margulies, *The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism*, 82 FORDHAM L. REV. 2137 (2014); Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006); Michael N. Schmitt, *The Law of Cyber Targeting: The Tallinn Papers*, no. 7 (2015); Scott Shackelford & Scott L. Russell, *Above the Cloud: Enhancing Cybersecurity in the Aerospace Sector*, 10 FIU L. REV. 635 (2015);

Admiral Bob Inman, USN (Retired) is former Director of the National Security Agency, Deputy Director of Central Intelligence, corporate director, and perhaps the most experienced senior executive of the U.S. intelligence community. During congressional testimony, Admiral Inman has counseled:

For the public support, [oversight] will be critical for funding and sustaining a significant level of intelligence activities by the country in the years ahead. There has to be oversight. The media would like to do it. It's not feasible with the issues of protection of sources and methods, so there must be mechanisms in both the Congress and the executive branch which work. Optimally, I would prefer a joint committee for oversight in the Congress. There may be other reasons that that's simply not achievable, not practical... The oversight activities must be bipartisan in their daily conduct for them to be fully effective... I don't have great confidence in an Inspectors General process for focusing on the broad issues. They're good for trying to ferret out corruption, criminal activity, but the President, any President needs wise advice that constantly is assessing, are the country's needs being met where they don't have the requirement for institutional loyalty.³²⁶

VII. IMPEACHMENT

Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel *confident enough in its own situation* to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers*?

William H. Rehnquist
Chief Justice
U.S. Supreme Court³²⁷

Scott Shackelford & Andraz Kastelic, *Toward a State-Centric Cyber Peace? Analyzing the Role of National Cybersecurity Strategies in Enhancing Global Cybersecurity* (Kelley Sch. of Business Research Paper No. 15-4 2014); Eric Lorber, Note, *Executive Warmaking Authority and Offensive Cyber Operations: Can Existing Legislation Successfully Constrain Presidential Power?*, 15 U PA. J. CONST. L. 961 (2013).

³²⁶ *Hearing of the Commission on the Roles and Capabilities of the United States Intelligence Community*, 104th Cong. (1996) (statement of Admiral Bob Inman, USN (Retired), former Director of the National Security Agency and Deputy Director of Central Intelligence).

³²⁷ See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORICAL IMPEACHMENTS OF JUSTICE* SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 277 (Wm. Morrow & Co. 1992).

Chief Justice William H. Rehnquist describes how the Framers of the U.S. Constitution decided to deal with each of the three distinct branches of government—“legislative, executive, and judicial... in a separate article. Article I grants legislative power to congress, Article II grants the executive power to the president, and Article III rests the judicial power in the federal courts.”³²⁸ Chief Justice Rehnquist writes, “but those who wrote the Constitution realized there could also be malfeasance by high officials of the government, and so they borrowed from England the concept of impeachment and removal of such officials.”³²⁹

The U.S. Constitution provides for presidential Impeachment in Article II Section IV as follows: “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.”³³⁰ It is the sole authority of the U.S. House of Representatives to initiate impeachment proceedings,³³¹ with trial conducted by the Senate.³³² Any such trial in the Senate will be presided over by the Chief Justice of the Supreme Court and requires the concurrence of two-thirds of the senators present.³³³

Because there have been relatively few impeachment proceedings, important to this discussion is the observation of Chief Justice Rehnquist, as he writes about the 1804 impeachment of U.S. Supreme Court Justice Samuel Chase. Taking place just a few years after the formation of the American government, Justice Rehnquist describes the Senate’s acquittal of Justice Samuel Chase as profoundly impacting the future stature of American judiciary:

First, it assured the independence of federal judges from congressional oversight of the decisions they made in the cases that came before them. Second, by assuring that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to safeguard the independence of that body.³³⁴

Recent American history has provided no shortage of scandals and scoundrels in the White House. A trip to any large library will disclose that stacks of books have been written about many presidents who have found

³²⁸ *Id.* at 9.

³²⁹ *Id.*

³³⁰ U.S. Const. art. II, § 4.

³³¹ U.S. Const. art. I, § 2.

³³² U.S. Const. art. I, § 3.

³³³ *Id.*

³³⁴ See REHNQUIST, *supra* note 327, at 114.

themselves subject to or believed by someone to deserve impeachment. I will not attempt here to restate the lengthy coverage given elsewhere for any of these significant American chief executive officers. Rather, a brief history to provide perspective and context to our contemporaneous situation is offered.

A. History of U.S. Presidential Impeachment Proceedings

Presidential impeachment proceedings in the United States are punctuated by the following historical events: the 1868 case against President Andrew Johnson and the more recent proceedings against President Bill Clinton. While not resulting in impeachment, the resignation of Vice President Spiro Agnew (Nixon Administration), the break-in of the Democratic National Headquarters (Watergate burglary) and subsequent resignation of President Richard Nixon remains in the memory of many baby-boomer Americans. This may play a role in what has become known about the meaning of what constitutes “high crimes and misdemeanors” in contemporary impeachment jurisprudence. A review of the literature discloses that at least two authors found it necessary to call for the impeachment of President George W. Bush.³³⁵

B. President Andrew Johnson

During 1868, impeachment proceedings resulted when Abraham Lincoln’s successor Andrew Johnson removed Secretary of War Edwin M. Stanton from office.³³⁶ Based on a continued dispute about how the country would reconcile following the conclusion of the civil war, the U.S. House of Representatives promptly impeached Andrew Johnson.³³⁷ I will not attempt to recreate here the excellent discussion provided by Justice Rehnquist of the two-and-a-half-century history “of the American attitude toward Negro slavery,” necessary to understand the complex residue of animosities still lingering after conclusion of the civil war –(voting by former slaves, etc.) resulting in the impeachment of Andrew Johnson.³³⁸

Several attempts to impeach and remove President Andrew Johnson followed. First, on August 13, 1867 President Andrew Johnson notified Secretary of War Edwin Stanton that he was suspended from the office of Secretary of War effective immediately and that he should convey all “records, books, papers, and other public property now in your custody and

³³⁵ See DAVE LINDORFF & BARBARA OLSHANSKY, *THE CASE FOR IMPEACHMENT: THE LEGAL ARGUMENT FOR REMOVING PRESIDENT GEORGE W. BUSH FROM OFFICE* (St. Martin’s Press 2006).

³³⁶ See REHNQUIST, *supra* note 327, at 145. See also GENE SMITH, *HIGH CRIMES AND MISDEMEANORS: THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 212 (Wm. Morrow & Co. 1977). See also Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347 (2010).

³³⁷ See REHNQUIST, *supra* note 327, at 150.

³³⁸ *Id.*

charge” to his replacement General Ulysses S. Grant.³³⁹ In addition to the complaint that President Johnson had violated The Tenure of Office Act by removing Stanton, other miscellaneous charges against President Andrew Johnson included, “misuse of patronage, wrongful use of the pardon power by the president with respect to deserters in West Virginia, and even the possible complicity of Johnson in the assassination of Lincoln.”³⁴⁰ In December 1867, after two days of House debate, the motion to impeach was unsuccessful by a vote of 108 to 57 and Stanton remained in office.³⁴¹ Next, President Andrew Johnson decided to replace Stanton with General Lorenzo B. Thomas, triggering yet more impeachment activity in the House of Representatives.³⁴² This new set of facts resulted in a vote of 126 to 47 in favor of impeachment on February 24, 1868.³⁴³ Following several days devoted to drafting the Articles of Impeachment, ten articles were reported out on February 29, 1868.³⁴⁴ The trial by the Senate began on March 30, 1868. Chief Justice William Rehnquist describes the final charges against President Andrew Johnson as follows:

The central charge made against Andrew Johnson was that he had unlawfully removed Stanton in February 1868. Articles I, IV, V, VI, VII, and VIII accused him of violating the Tenure of Office Act by the removal. Articles II and III accused him of acting contrary to law when he designated Lorenzo Thomas an interim secretary of war in place of Stanton. Article IX accused him of having attempted to induce General William Emory to disobey the Act of Congress requiring Senate approval for the removal of the General of the Army. Article X was based on the disparaging public statements made by Johnson about members of Congress and Congress as a body in various speeches. Article XI, drafted by Thaddeus Stevens, was a potpourri which attempted to cast a broader net by lumping together several of the charges contained in the earlier separate articles.³⁴⁵

By an initial vote on the eleventh article only of 35 to convict, 19 to acquit, the Chief Justice, repeating the words of Aaron Burr fifty-three years earlier in the case of Chase, announced, “Two-thirds not having pronounced

³³⁹ *Id.*

³⁴⁰ *Id.* at 214.

³⁴¹ *Id.* at 215.

³⁴² *Id.*

³⁴³ See REHNQUIST, *supra* note 327, at 217.

³⁴⁴ *Id.* at 218.

³⁴⁵ *Id.* at 226.

guilty, the President is, therefore, acquitted upon this article.’ The motion to adjourn for ten days before considering other articles then passed the Senate by a vote of 32 to 21.”³⁴⁶ After the ten-day recess, a vote was taken as to Articles II and III, again resulting in acquittal. A motion to adjourn followed, “and the effort to convict Andrew Johnson ended without a formal vote ever having been taken upon eight of the articles presented.”³⁴⁷

C. Vice President Spiro Agnew Resignation

Richard Nixon’s Vice President, Spiro Agnew resigned on October 10, 1973, “after being indicted for accepting thousands of dollars in bribes while serving as Baltimore county executive, governor of Maryland and vice president.”³⁴⁸ Reflecting during 2016 about the importance of the vice presidency, Nicole Hemmer writes, “Nixon initially chose [Agnew] in 1968 because, as a moderate governor from a border state, he had both supported the civil-rights movement and made several tough-on-crime speeches. After the election, however, Nixon lost interest.”³⁴⁹ By at least one report, Nixon was anxious “to dump Agnew from the ticket when he ran for reelection in 1972, but he couldn’t. By then the vice president, with his attacks on the press and political elites, had become a darling of a different faction: conservatives.”³⁵⁰ And by 1972, conservatives, “were in open revolt, even running a protest candidate in the primaries, Ohio Representative John Ashbrook. Nixon needed Agnew—not to govern, but to campaign. So Agnew stayed.”³⁵¹ Upon his death in 1996 at the age of 77, The New York Times observed, “[h]e had to bargain as Vice President with prosecutors to avoid prison and finally pleaded no contest to tax evasion charges in a lucrative statehouse ward-healing scheme that dated from his public service in Maryland politics but continued to reap payoffs even to his days as Vice President.”³⁵² Less than a year later President Nixon would resign in disgrace.³⁵³

³⁴⁶ *Id.* at 234.

³⁴⁷ *Id.* at 235.

³⁴⁸ See Richard Kreitner, *October 10, 1973: Vice President Spiro Agnew Resigns*, THE NATION (Oct. 10, 2015), <https://www.thenation.com/article/october-10-1973-vice-president-spiro-agnew-resigns/>.

³⁴⁹ See Nicole Hemmer, *Why the Vice Presidency Matters*, THE ATLANTIC (July 21, 2016), <https://www.theatlantic.com/politics/archive/2016/07/why-the-vice-presidency-matters/492128/>.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² See Francis X. Clines, *Spiro T. Agnew, Point Man for Nixon Who Resigned Vice Presidency, Dies at 77*, N.Y. TIMES (Sept. 19, 1996), <http://www.nytimes.com/1996/09/19/us/spiro-t-agnew-point-man-for-nixon-who-resigned-vice-presidency-dies-at-77.html>.

³⁵³ *Id.*

D. Richard Nixon and Watergate

Following Andrew Johnson, the next serious attempt to impeach a president arises in the 1972 case of Richard Nixon.³⁵⁴ Richard Nixon enjoys a landslide victory over Democratic challenger George McGovern in November in both the electoral college and popular vote, with the Democratic party retaining control of both houses of Congress.³⁵⁵ While many comprehensive accounts of the Watergate burglary are available, Chief Justice William H. Rehnquist describes the purpose of the June 1972 break-in of the Democratic National Committee headquarters as, “apparently to bug –to place listening devices in –the [DNC] committee office.”³⁵⁶ As congressional hearings were conducted and efforts made to uncover the truth by a special prosecutor, “during the next two years, it gradually became evident that those involved in the burglary had ties to the Republican party, and that efforts to frustrate the investigation of the burglary had been made by persons on the White House staff.”³⁵⁷ Chief Justice William H. Rehnquist states:

The impetus for Nixon’s impeachment, of course, came from his alleged conduct in obstructing the investigation of the Watergate burglary. But here, too, the draft articles used that conduct as the basis of one count, and proceeded to add others. The Second article charged that Nixon had abused the power of the presidency by, for example, ordering the Internal Revenue Service to audit the tax returns of his political enemies. Article III was based on the president’s refusal to honor the subpoenas issued to him by the Judiciary Committee. Article IV charged that Nixon had made false statements to Congress about the bombing of Cambodia during the Vietnam war. The final charge was that Nixon had wrongly used public money to improve his home at San Clemente, and had also taken deductions on his income-tax returns to which he was not entitled. Just as with Chase and Johnson, what started out as a simple, focused charge would become a potpourri if approved by the Judiciary Committee.³⁵⁸

Events rapidly unfolded during the summer of 1974 that rendered moot any further action by the House Judiciary Committee. The case of *United States*

³⁵⁴ See REHNQUIST, *supra* note 327, at 271.

³⁵⁵ *Id.*

³⁵⁶ See *id.* at 272.

³⁵⁷ *Id.*

³⁵⁸ See *id.* at 273.

v. *Nixon*³⁵⁹ was decided by the Supreme Court during late July, holding that the Nixon tapes of oval office conversations were to be turned over to the special prosecutor, “and one in particular proved incriminating as to the charges of obstructing justice in connection with the FBI investigation of the Watergate burglary. This tape was made public on August 5, 1974, and President Nixon resigned on August 9.”³⁶⁰ Reflecting upon these events four decades later, John W. Dean, former counsel to President Nixon, writes, “These surreptitious recordings eventually revealed that [Nixon’s] public Watergate defenses were colossal deceptions, patent lies that eventually forced his resignation. Nixon’s secret recordings provided much of the overwhelming evidence that sent his former top advisors to prison, not to mention forced his own early retirement.”³⁶¹

E. William Jefferson Clinton

The proceeding against President William Jefferson Clinton, only the second time in American history that a sitting U.S. President is impeached, takes place on December 19, 1998. The proceedings were based upon charges of perjury before a grand jury and for “other crimes of obstruction of justice... in an effort to conceal a sexual affair with a young White House worker named Monica Lewinsky.”³⁶² In brief, a chronology of events leading up to and including President Clinton’s impeachment is included as

³⁵⁹ *United States v. Nixon*, 418 U.S. 683 (1974).

³⁶⁰ See REHNQUIST, *supra* note 327, at 273.

³⁶¹ See JOHN W. DEAN, *THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT* xvii (Viking 2014). See also Douglas Brinkley & Luke A. Nichter, *THE NIXON TAPES: 1973* (Houghton Mifflin Harcourt 2015) (providing transcriptions of actual 1973 oval office conversations held in the oval office).

³⁶² See RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON* 1 (Harvard Univ. Press 1999) (primarily witness tampering and subordination of perjury). See also Susan Low Bloch, *Assessing the Impeachment of President Bill Clinton from a Post 9/11 Perspective*, in *THE CLINTON PRESIDENCY AND THE CONSTITUTIONAL SYSTEM* 190 (Rosanna Perotti ed., Texas A&M U. Press 2012); DAVID P. SCHIPPERS & ALAN P. HENRY, *SELL OUT: THE INSIDE STORY OF PRESIDENT CLINTON’S IMPEACHMENT* (2000); Aviam Soifer, *The Gold Standard and Guilt-Edged Insecurities: The Impeachment Crucible as Tragic Farce*, in *AFTERMATH: THE CLINTON SCANDAL AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* (Len Kaplan & Beverly Moran, eds., NYU Press 2001); Daniel H. Erskine, *The Trial of Queen Caroline and the Impeachment of President Clinton: Law as a Weapon for Political Reform*, 7 WASH. U. GLOBAL STUD. L. REV. 1 (2008); Neal K. Katyal, *Impeachment As Congressional Constitutional Interpretation*, 63 LAW AND CONTEMP. PROBS. 169 (2000); Karen A. Popp, *The Impeachment Of President Clinton: An Ugly Mix Of Three Powerful Forces*, 63 LAW & CONTEMP. PROBS. 223 (2000); Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups”*, 12 CORNELL J.L. & PUB. POL’Y 503 (2003); Charles Tiefer, *The Controversial Transition Process from Investigating the President to Impeaching Him*, 14 ST. JOHN’S J. LEGAL COMMENT. 111 (1999); Charles Tiefer, *The Senate Impeachment Trial for President Clinton*, 28 HOFSTRA L. REV. 407 (1999); Peter M. Tiersma, *Did Clinton Lie?: Defining “Sexual Relations”*, 79 CHI.-KENT L. REV. 927 (2004); Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422 (2000).

Exhibit 1.

Professor Denis J. Brion lists additional accusations of President Clinton's lack of fitness for office, including: "the accusation that he had been engaged in an extramarital affair with Jennifer Flowers, a one-time staff member for Clinton during his incumbency as Governor of Arkansas. . . . [and] Travelgate, the removal of individuals employed in the White House travel office."³⁶³ As discussed by Professor Rapaport, the threshold moment seems to have taken place when, "in August [1998], after Lewinsky had testified before a grand jury and turned over a semen-stained dress, Clinton was forced to acknowledge an intimate relationship with the then twenty-two-year-old intern."³⁶⁴

³⁶³ See Denis J. Brion, *The Semiosis of the Clinton Impeachment Debate* 6, (Wash. & Lee Pub. Law & Legal Theory Research Paper Series, Working Paper No. 01-14, 2001), <https://ssrn.com/abstract=283687>.

³⁶⁴ See Elizabeth Rapaport, *Sex and Politics at the Close of the Twentieth Century: A Feminist Looks Back at the Clinton Impeachment and the Thomas Confirmation Hearings*, in *AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* 23 (Leonard V. Kaplan & Beverly I. Moran, eds., NYU Press 2001).

Exhibit 1
Chronology of Clinton Impeachment³⁶⁵

May 8, 1991	Bill Clinton, then governor of Arkansas, meets Paula Jones in a Little Rock, Arkansas hotel.
May 6, 1994	Based on the 1991 hotel encounter, a sexual harassment suit is filed by Paula Jones against President Clinton.
August 1994	An investigation into the troubled Whitewater real estate development is undertaken by Special Counsel Kenneth Starr.
May 27, 1997	Ruling by U.S. Supreme Court that suit may be brought against a sitting president for actions taking place before assuming office.
Fall 1997	Linda Tripp starts to secretly record telephone conversations with Monica Lewinsky discussing affair between Lewinsky and President Clinton.
Jan. 7, 1998	Lewinsky denies any relationship with President Clinton in an affidavit filed in the Jones lawsuit.
Jan. 17, 1998	Under oath, President Clinton denies any sexual relationship with Lewinsky.
Aug. 17, 1998	President Clinton submits grand jury testimony via videotape following public exposure of his relationship with Lewinsky.
Sept. 10, 1998	Special Counsel Kenneth Starr submits his report regarding Clinton's potential impeachable offences to Congress.
Sept. 30, 1998	Impeachment inquiry into Clinton allegations authorized by U.S. House of Representatives.
Nov. 13, 1998	Agreement reached with Paula Jones to settle lawsuit for \$850,000.
Dec. 19, 1998	Vote to impeach President Clinton by House of Representatives on two of four House Judiciary Committee articles.
Jan. 7, 1999	Impeachment trial of President Clinton opens in U.S. Senate.
Jan. 22, 1999	Announcement by Senator Robert Byrd that he will file a motion to dismiss the case.
Jan. 27, 1999	Scope of trial limited by Senate vote to allow only three witnesses to be questioned via videotape.
Feb. 12, 1999	Clinton acquitted on both charges by Senate vote.

The Senate trial of President Clinton began on January 7, 1999 and ended with an acquittal on February 12, 1999.³⁶⁶ For many members of the baby boomer generation, media accounts of the facts and several-year drama of the President Clinton / Whitewater real estate debacle / Monica Lewinsky investigation is part of their personal history. However, for the benefit of younger readers, a brief sketch of the event pattern is presented in Exhibit 1. Many legal scholars have commented to the effect that the impeachment and near removal of President Bill Clinton over lying under oath about sexual infidelity has established a very low standard for constitutional impeachment

³⁶⁵ See NATHAN AASENG, *THE IMPEACHMENT OF BILL CLINTON* 100 (Lucent Books 2000).

³⁶⁶ See POSNER, *AN AFFAIR OF STATE*, *supra* note 362, at 1. See also PETER BAKER, *THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON* (Scribner 2000) (while many books have been written on the subject of the Clinton impeachment, I am particularly impressed with this detailed and particularly valuable account of the personal struggle by so many legislators over this matter).

proceedings.

A long list of commentators concur that the underlying offense in the Clinton matter, lying under oath about consensual sex with a 22-year-old does not rise to the level of “high crimes and misdemeanors,” as envisioned by the Founders. For example, Professor Susan Estrich, formerly campaign manager for Michael Dukakis is credited with writing, “The President [Clinton] had shown ‘bad judgment’ in engaging in sex with an intern, his conduct was ‘deeply troubling’; but a consensual relationship does not constitute sexual harassment, much less is it criminal, much less does it rise to the level of an impeachable offense.”³⁶⁷ Professor David E. Kyvig describes the Clinton impeachment process as, “the pouncing on a tawdry personal misstep after fruitless years of looking for malfeasance in governance and, finally, the inexorable pursuit of impeachment even after the electorate had registered disapproval of the effort.”³⁶⁸ Professor Susan Low Bloch was involved in the Clinton impeachment process, by arguing in an op-ed after Paula Jones filed suit against President Clinton in 1994, “that a private damage action against a sitting President must wait until the President is out of office . . . urged members of the House not to impeach. . . . [and] was also one of the law professors who drafted and circulated the letter arguing that the President’s actions did not warrant impeachment.”³⁶⁹ In addition, Professor Bloch testified before the House Judiciary Committee on Impeachment (one of nineteen constitutional scholars) and “counseled members of the Senate on their role in the President’s trial.”³⁷⁰ With the benefit of her unique perspective of the Clinton investigation and impeachment process, Professor Bloch recommends that Congress is well served to revisit many of the important questions left unanswered: “including questions of attorney-client privilege, executive privilege, protective function privilege, and temporary immunity for a sitting president. These questions will recur, whether or not there is another impeachment. . . . Congress should examine them in a non-partisan, dispassionate fashion.”³⁷¹

Publishing shortly after President Clinton’s acquittal, Judge Richard A. Posner observes that it is not possible to “write about the Clinton impeachment and related matters without touching on politically sensitive issues, and in particular without criticizing President Clinton’s conduct and

³⁶⁷ See Elizabeth Rapaport, *supra* note 364, at 23 (citing Susan Estrich, *Unimpeachable Evidence*, DENVER POST, Jan. 27, 1998, at A08).

³⁶⁸ See DAVID E. KYVIG, *THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960* 311 (U. Press of Kansas 2008).

³⁶⁹ See Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143, 144 (2000).

³⁷⁰ *Id.*

³⁷¹ *Id.* at 167.

that of members of Congress.”³⁷² In addition:

Apart from its sheer narrative intricacy, Clinton’s ordeal presents a number of distinct but interrelated issues that have to be sorted out and related to facts that are contested and incompletely known, and so in need of being weighed and sifted. There are issues of law, including criminal and constitutional law, the law of evidence, and the substantive and procedural principles that should guide impeachment and impeachment trials. There are issues of jurisprudence, concerning the appropriate roles of historical scholarship and pragmatic reasoning in answering questions of law and policy, the difference between popular and legal justice, and (a related point) the meaning and appropriateness of characterizing impeachment proceedings as ‘legal.’ There are issues of morality, both private and public, and of political theory, political history, political science, and the specialized branch of history and political science known as Presidential studies. There are issues that evoke the theory of conflict, or strategy, and numerous perplexing issues of political and cultural sociology, including the peculiar sociology of the ‘moralistic Right’ and of the ‘academic left.’ (These are crude, even offensive, categorizations, but I shall defend them).³⁷³

Professor Michael J. Gerhardt concludes the following about the Clinton impeachment proceedings:

First, it is practically impossible to remove a president from office without bipartisan support. A successful presidential impeachment requires making charges of sufficient gravity to draw bipartisan support in Congress. If past is prologue, such charges should show (1) serious injury to the republic and (2) a connection between an official’s misconduct and duties – or, in the absence of the latter, misconduct so outrageous or so thoroughly incompatible with an official’s duties that Congress has no choice but to impeach and remove the official.³⁷⁴

³⁷² See POSNER, AN AFFAIR OF STATE, *supra* note 362, at 3.

³⁷³ *Id.*

³⁷⁴ See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 192 (2d ed., 2000).

Despite daily news accounts focused on the President's sexual indiscretions and subsequent denials (for awhile at least), public opinion proved paradoxical. Professor Elizabeth Rapaport writes, "[a] constant feature of the scandal was the mildness of public reaction; although the public was having fun, it couldn't be persuaded that the scandal was the stuff of national political crisis."³⁷⁵ Professor Denis J. Brion writes, "opinion polls that revealed a strong disapproval of Clinton the person also revealed a strong approval of Clinton as president. . . . To the ultimate frustration of the Social Conservatives, the continued strong economy supported Clinton's survival."³⁷⁶ Stated another way:

During the long public debate over this matter, there was a substantial disconnect between the dominant view that Clinton was understood as a person of dubious morality and the dominant view that Clinton ought not be removed from office. At the same time, those who led the attempt to remove him from office were charged with engaging in a naked grab for power behind the facade of a hypocritical rhetoric of morality.³⁷⁷

And, as so eloquently put by professor Craig Lerner, "an impeachment trial that sets off an avalanche of law review articles, but garners fewer than ten million television viewers, is not a constitutional crisis."³⁷⁸ Professor Frank O. Bowman observes that:

The most common verdict on Watergate and President Nixon's resignation was that "the constitution worked." The principle lesson that should be drawn from the Clinton impeachment is ill-advised changes to the constitutional structure combined with short-sighted decisions by constitutional officers very nearly prevented the constitution from working again. In my own view, farce though it ultimately proved to be, the Clinton affair came nearer in many ways to being a long-term catastrophe for the conduct of American politics and government than Watergate. If the Republican fire-breathers had prevailed, if the culture of criminalized attack politics had triumphed, American public life would have been crippled for a

³⁷⁵ See Rapaport, *supra* note 364, at 23.

³⁷⁶ See Brion, *supra* note 363, at 14.

³⁷⁷ *Id.* at 1.

³⁷⁸ See Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Stafford Trial*, 69 U. CHI. L. REV. 2057, 2059 (2002).

generation and more. It was a near run thing. If such close calls are to be averted in the future, judges, legislators, prosecutors, and presidents will need to think hard about the adult lessons to be learned from William Jefferson Clinton's juvenile affair. The preservation of the Madisonian structure of the American constitution, of the American idea of governance itself, depends on the presence in government of people who understand it, believe in it, and act in each generation to preserve it.³⁷⁹

VIII. IMPEACHMENT AND TRUMP: WHAT ARE THE ODDS?

“We are living through a battle for the soul of this nation.”

Joe Biden
Former Vice President
United States³⁸⁰

Harvard Professor Laurence H. Tribe wrote an op-ed appearing in *The Washington Post* on May 13, 2017 titled, *Trump Must Be Impeached. Here's Why*.³⁸¹ Professor Tribe begins by stating that, “The time has come for Congress to launch an impeachment investigation of President Trump for obstruction of justice.”³⁸² Observing that, “[t]he remedy of impeachment was designed to create a last-resort mechanism for preserving our constitutional system. It operates by removing executive-branch officials who have so abused power through what the framers called ‘high crimes and misdemeanors’ that they cannot be trusted to continue in office,” Professor Tribe describes our current situation as unique.³⁸³ Republican U.S. Senator Jeff Flake observes:

In the tweeting life of our president, strategy is difficult to detect. Influencing the news cycles seems to be the principal goal; achieving short-term tactical advantage, you bet. But ultimately, it's all noise and no signal. And in the absence of preparation and a well-considered strategy—especially when one is moving global chess pieces—volatile unpredictability is not a virtue. We have quite enough volatile actors

³⁷⁹ See Frank O. Bowman III, *Falling Out of Love with America: The Clinton Impeachment and the Madisonian Constitution*, 60 MD. L. REV. 5, 25 (2001).

³⁸⁰ Joe Biden, *We Are Living Through a Battle for the Soul of This Nation*, THE ATLANTIC (Aug. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/08/joe-biden-after-charlottesville/538128/>.

³⁸¹ See Tribe, *supra* note 29.

³⁸² *Id.*

³⁸³ *Id.*

to deal with internationally as it is without becoming one of them.³⁸⁴

Professor Tribe warns, “Now the country is faced with a president whose conduct strongly suggests that he poses a danger to our system of government.”³⁸⁵ While many of Professor Tribe’s arguments and concerns center around the current Trump/Russian investigations:

Even without getting to the bottom of what Trump dismissed as “this Russia thing,” impeachable offenses could theoretically have been charged from the outset of this presidency. One important example is Trump’s brazen defiance of the foreign emoluments clause, which is designed to prevent foreign powers from pressuring U.S. officials to stray from undivided loyalty to the United States. Political reality made impeachment and removal on that and other grounds seem premature.

No longer. To wait for the results of the multiple investigations underway is to risk tying our nation’s fate to the whims of an authoritarian leader.³⁸⁶

Real life seems to have produced a crowding out of Emoluments Clause ethical concerns that may have attracted much more concern were it not for the daily chaos demonstrated during the first six months of the Trump Administration. Professor Tribe observes, “It will require serious commitment to constitutional principle, and courageous willingness to put devotion to the national interest above self-interest and party loyalty, for a Congress of the president’s own party to initiate an impeachment inquiry.”³⁸⁷

California Representative Brad Sherman introduced articles of impeachment, HR 438, against President Trump during early July. According to *The Los Angeles Times*, “the measure accuses Trump of obstruction of justice and seeking to ‘use his authority to hinder and cause the termination’ of an investigation into former national security advisor Michael Flynn, including ‘through threatening, and then terminating, James Comey.’”³⁸⁸ Texas Rep. Al Green is currently the only co-sponsor of the measure; therefore, technically a movement toward impeachment. However,

³⁸⁴ See Flake, *supra* note 121, at 5.

³⁸⁵ See Tribe, *supra* note 29.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ See Christine Mai-Duc, *Rep. Brad Sherman Introduces Articles of Impeachment Against Trump*, L.A. TIMES (July 12, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-rep-brad-sherman-just-introduced-1499883664-htmlstory.html>.

at this time there is no reason to believe that the bill will get anywhere in committee.

With Russian investigation developments overshadowing Emoluments issues, here is the best estimate as to the eventual outcome of any Trump impeachment effort. As Professor Michael Klarman writes, “presidents will be removed from office either when the objectionable conduct meets a threshold standard and the impeaching party has a two-thirds majority in the Senate or when the conduct is sufficiently egregious that bipartisan support for impeachment exists.”³⁸⁹

A. Does President Trump Have Complete Power to Pardon?

As the investigation into allegations of involvement between the Trump campaign and Russian 2016 election meddling continue, news reports abound regarding Trump attorneys researching the pardon power of the president as a potential solution to any adverse outcome to individuals involved with the Trump campaign, or otherwise involved.³⁹⁰ *The New York Times* reports:

President Trump on Saturday asserted the ‘complete power to pardon’ relatives, aides and possibly even himself in response to investigations into Russia’s meddling in last year’s election... [he] suggested in a series of early morning messages on Twitter that he had no need to use the pardon power at this point but left the option open.³⁹¹

IX. INFORMATION SILOS AND FILTER BUBBLES

We are only as good as our information, and if we lose our sense of objective truth, we lose everything. We must protect and preserve our healthy public sphere—that civic space in which we vigorously debate and negotiate, agree and disagree—or else.

Jeff Flake
U.S. Senate (R- Arizona)³⁹²

An apparent unintended consequence of the phenomenal growth of

³⁸⁹ See Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate* 23–24 (U. Va. L. Sch., L. Stud. Working Paper No. 99-2, 1999).

³⁹⁰ See Peter Baker, *Trump, Amid New Revelations on Russia, Asserts ‘Complete Power to Pardon’*, N.Y. TIMES, July 23, 2017, at A21.

³⁹¹ *Id.*

³⁹² See Flake, *supra* note 121, at 35.

social media and information technology is the development of *information bubbles*.³⁹³ While the near free availability of massive amounts of data is available to consumers worldwide, it seems that individuals have self-selected to consume social media isolated to essentially others holding the same social values or “cultural tribes.” In terms of our political systems, Senator Flake describes with concern:

[t]his impulse to dehumanize, to ascribe the worst possible motives to people who in more normal times would be regarded not as “the enemy” but merely as political opponents, is a signal that something is terribly wrong. It’s a symptom of a serious disease in the body politic—which my Senate colleague from Nebraska, Ben Sasse, has described as “a civilization-warping crisis of public trust” and which, left untreated, could be fatal to our democratic system of government.³⁹⁴

An example of insular *information bubbles* (silos) is evident from the 2016 American political campaign. Journalist Amanda Hess reports that “The *filter bubble* describes the tendency of social networks like Facebook and Twitter to lock users into personalized feedback loops, each with their own news sources, cultural touchstones and political inclinations.”³⁹⁵ Facebook and other social media sites employ algorithms “to decide which information to show you, based largely on your own tastes. The idea is to keep you engaged, but the result may be a worldview skewed to fit your own preferences and biases.”³⁹⁶ While filter bubbles may create the impression that a news feed is more personalized to an individual’s particular life, the curation of an individual’s news by sites such as Facebook may also influence how decisions are made in real life by millions of individuals. This is because 62 percent of Americans are believed to rely on social media for their news.³⁹⁷ Professor Martin Moore at King’s College London, warns that “if this window is filled with highly partisan and, in some cases, false news, then many people will be assessing political candidates and information on

³⁹³ See Lawrence J. Trautman, *Governing Risk and The Information Silo Problem: Engineering A Systemic Cultural and Communications Solution for Cyber* 6, (unpublished manuscript), <https://ssrn.com/abstract=2925352>, citing Amanda Hess, *Having Built a Bubble, Sites Sell a Way Out*, N.Y. TIMES, Mar. 5, 2017, at A1.

³⁹⁴ See Flake, *supra* note 121, at 34.

³⁹⁵ See Amanda Hess, *Having Built a Bubble, Sites Sell a Way Out*, N.Y. TIMES, Mar. 5, 2017, at A1.

³⁹⁶ See Sally Adey, *How Can Facebook and its Users Burst the ‘Filter Bubble’?*, NEW SCIENTIST (Nov. 18, 2016), <https://www.newscientist.com/article/2113246-how-can-facebook-and-its-users-burst-the-filter-bubble/>.

³⁹⁷ *Id.*

the basis of distorted and misleading information.”³⁹⁸ This, I fear, is an unintended consequence of technological growth and the increased importance of social media in various forms on our society. The brief coverage offered here about this important topic is presented to highlight the need for future research and greater understanding.

As the writing for this article nears completion, the Berkman Klein Center for Internet and Society at Harvard University issues an excellent research paper about the impact of online media and the 2016 U.S. presidential election.³⁹⁹ Major takeaways from this analysis include that “Donald Trump succeeded in shaping the election agenda. Coverage of Trump overwhelmingly outperformed coverage of Clinton. Clinton’s coverage was focused on scandals, while Trump’s coverage focused on his core issues.”⁴⁰⁰ Also, the right-wing extremist movement responsible for the August 2017 violence and death in Charlottesville, Virginia benefited from tech-savvy uses of the Internet.⁴⁰¹

X. LYING, PERJURY, FRAUD AND FALSE STATEMENTS

“The foundation of morality is to have done, once and for all, with lying.”

T.H. Huxley (1825—1895)
British author, *Science and Morals*, 1886⁴⁰²

The Los Angeles Times has observed, “Our civilization is premised on the conviction that such things as truth exists, that it is knowable, that it is verifiable, that it exists independently of authority or popularity and that at some point—and preferably sooner rather than later—it will prevail.”⁴⁰³ *The New York Times* warns that “[a]s regular as the lies have become, the country should not allow itself to become numb to them. Every president has shaded the truth or told occasional whoppers. But no other president—of either party—has behaved as Trump is behaving.”⁴⁰⁴ *The New York Times* cautions that Trump, “is trying to create an atmosphere in which reality is irrelevant.”⁴⁰⁵

³⁹⁸ *Id.*

³⁹⁹ See ROBERT FARIS ET AL., BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y AT HARVARD UNIV., PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION (2017).

⁴⁰⁰ *Id.* at 5.

⁴⁰¹ See Dan Frosch et al, *The New Extremism: Unified, Tech-Savvy*, WALL ST. J., Aug. 17, 2017, at A1.

⁴⁰² See DORMANN, *supra* note 186, at 88.

⁴⁰³ See *Why Trump Lies*, *supra* note 127.

⁴⁰⁴ See David Leonhardt & Stuart A. Thompson, *Trump’s Lies*, N.Y. TIMES (June 25, 2017), <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html>.

⁴⁰⁵ *Id.*

Trump:

[P]uts the nation in danger by undermining the role of truth in public discourse and policymaking, as well as the notion of truth being verifiable and mutually intelligible.

In the months ahead, Trump will bring his embrace of alternative facts on the nation's behalf into talks with China, North Korea or any number of powers with interests counter to ours and that constitute an existential threat. At home, Trump now becomes the embodiment of the populist notion (with roots planted at least as deeply in the Left as the Right) that verifiable truth is merely a concept invented by fusty intellectuals, and that popular leaders can provide some equally valid substitute. We've seen people like that before, and we have a name for them: demagogues.⁴⁰⁶

Let us all consider that, “[o]ur civilization is defined in part by the disciplines – science, law, journalism – that have developed systematic methods to arrive at the truth. Citizenship brings with it the obligation to engage in a similar process. Good citizens test assumptions, question leaders, argue details, research claims.”⁴⁰⁷ Professor Sissela Bok writes that over recent decades, “[n]ew examples have come to supplement those of Watergate and Vietnam and others... in political campaigns, and in the... schemes of the Iran-Contra scandal, we have seen how pervasive the resulting damage can be to those who lie, equivocate, and resort to innuendo as well as to their dupes.”⁴⁰⁸ Of greater importance, Professor Bok observes, “we have also seen the erosion of public trust as lies build up into vast institutional practices.”⁴⁰⁹ In addition:

We live at a time when the harm done to trust can be seen first-hand. Confidence in public officials and in professionals has been seriously eroded. This, in turn, is a most natural response to the uncovering of practices of deceit for high-sounding aims such as ‘national security’ or the ‘adversary system of justice’... The practices engendering such distrust were entered upon, not just by the officials now so familiar to us, but by countless others, high and low, in the government and outside it, each time for a

⁴⁰⁶ See *Why Trump Lies*, *supra* note 127.

⁴⁰⁷ *Id.*

⁴⁰⁸ See BOK, *supra* note 133, at xiii.

⁴⁰⁹ *Id.*

reason that seemed overriding.⁴¹⁰

The Los Angeles Times counsels that citizens should, “[i]nvestigate. Read. Write. Listen. Speak. Think. Be wary of those who disparage the investigators, the readers, the writers, the listeners, the speakers and the thinkers.”⁴¹¹ In addition, “be suspicious of those who confuse reality with reality TV, and those who repeat falsehoods while insisting, against all evidence, that they are true. To defend freedom, demand fact.”⁴¹² Republican U.S. Senator Jeff Flake writes:

And whether the embrace of ‘alternative facts’ at the highest levels of American life is intended as some sort of political strategy... it creates a state of confusion, dividing us along fissures of truth and falsity and keeping us in a kind of low-level dread, continually off-balance in a way that government should not do—and certainly never on purpose.

Near the beginning of the document that made us free, our Declaration of Independence, Jefferson writes: ‘We hold these truths to be self-evident...’ From the beginning, our freedom has been predicated on truth. Enduring democracies depend on the acceptance of shared facts, facts such as: certified elections are valid, millions of votes were not illegally cast in the 2016 election, vaccinations don’t cause autism, and two Hawaiian newspapers announcing the birth of Barack Obama more than fifty years ago probably means that Obama was born in Hawaii—just to highlight a few of the more colorful examples of the nonsense that has made the rounds in recent years.⁴¹³

A. *What About Perjury?*

Professor Stuart Green writes that, “the federal perjury statute requires five basic elements: (1) an oath authorized by a law of the United States; (2) taken before a competent tribunal, officer, or person; and (3) a false statement; (4) willfully made; (5) as to facts material to the hearing.”⁴¹⁴ In addition, Professor Green observes, “[t]he closely related crime of false declarations requires that a ‘false material declaration’ be made knowingly,

⁴¹⁰ *Id.* at 27.

⁴¹¹ See *Why Trump Lies*, *supra* note 127.

⁴¹² *Id.*

⁴¹³ See Flake, *supra* note 121, at 30.

⁴¹⁴ See Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 174 (2001).

under oath, in a proceeding ‘before or ancillary to any court or grand jury.’ At common law, perjury was considered one of the most odious of criminal offenses.”⁴¹⁵

XI. CONCLUSION

At this time it seems unlikely that President Trump will face impeachment. Given that both the U.S. House of Representatives and Senate are in control of the Republican Party, it appears that President Trump should be immune from impeachment proceedings. This is unless the Republican Party leadership determines that it is in their best interest to allow impeachment and removal, which is not a zero probability. Even if Trump is not impeached, his presidency and behaviors are doing real damage to our republic because they provide a precedent for future presidents (e.g., future candidates can point to Trump as a precedent for telling a constant stream of untruths, not releasing tax returns, dispensing with Emoluments Clause ethical issues... [and the list continues]).

Will President Trump’s propensity for lying and false statements, demonstrated often throughout his life, ultimately prove to be the dysfunctional personality trait that leads to his eventual demise?

⁴¹⁵ *Id.*