AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers/Emoluments

*Laurence H. Silberman*, **Conflict of Interest Problems Arising out of the President’s Nomination of Nelson A. Rockefeller** (1974)[[1]](#footnote-1)

*In the fall of 1973, Vice President Spiro Agnew resigned while pleading no contest to federal criminal corruption charges arising from his earlier service as a government official in Maryland. The Twenty-Fifth Amendment to the U.S. Constitution provided a mechanism for filling a vacancy in the office of the vice president, and the Nixon administration used that mechanism for the first time to have Republican congressman Gerald Ford to fill the vacancy. When Richard Nixon subsequently resigned as president over the Watergate scandal in August 1974, Ford became president and the vice presidency was again vacant. President Ford then nominated New York governor Nelson Rockefeller to be vice president. Rockefeller was an heir to a family fortune that traced back to the Standard Oil company in the late nineteenth century. Nelson Rockefeller himself had an extensive business career in banking and oil before he entered politics. His nomination for the vice presidency raised questions about the extent to which federal conflict of interest statutes applied to that office. The deputy attorney general provided a legal opinion to an assistant to the president that was overseeing the nomination, which included an argument that the federal statute governing conflicts of interest in the executive branch could not be constitutionally applied to the president or vice president. The opinion also considered the options in case it was determined that the statute did apply, or if the Senate insisted as a condition of confirmation that potential conflicts of interest be addressed.*

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Preliminarily, we have no knowledge of the extent, scope, or nature of Mr. Rockefeller’s financial interests, nor do we know to what degree the President will delegate functions to the Vice President, the discharge of which may possibly give rise to an actual conflict of interest or create the appearance of a conflict of interest. . . .

If there is any statutory provision which deals with possible conflicts of interest of a Vice President, it is 18 U.S.C. 208. . . . .

Section 208(a) prohibits an “officer or employee of the executive branch” from participating as such in a particular matter in which, “to his knowledge,” he, his spouse, minor child, partner or other business associates with which he is connected, have a financial interest. In this respect section 208 is unqualified. However, section 208 does not refer to, or specifically cover, the President or Vice President. Moreover, the legislative history of sections 202-209 (the conflict of interest provisions), as evidenced by committee reports and debates in the Senate and the House of Representatives, fails to demonstrate that section 208 was intended to apply to the Chief Executive and his immediate successor. . . .

. . . . It seems most unlikely that disagreement on so important a portion of the Bar Association’s position, that personal conflict of interest problems of the President and the Vice President “must inevitably be treated separately from the rest of the executive branch,” would have gone without mention in both congressional committees and in floor debate. It seems more reasonable to conclude from this legislative history that congress in speaking of an “officer or employee of the executive branch” in section 208 meant to include solely those “officers of the United States” who receive their appointment from the President under Article II, section 3, of the Constitution and those subordinate employees who are employed by various departments and agencies of the executive branch. . . .

These considerations of legislative history and statutory language are buttressed by two canons of statutory construction applicable in this case. The first is that interpretations which give rise to serious questions of constitutionality should be avoided if reasonably possible. The effect of applying section 208 to the President is arguably either to disempower him from performing some of the functions prescribed by the Constitution or to establish a qualification for his serving as President (to wit, elimination of financial conflicts) beyond those contained in the Constitution. The same may be said with respect to the Vice President, unless the Vice President’s only constitutionally prescribed function (presiding over the Senate) is not covered by section 209 because it is not an executive act. . . .

Another canon of construction calls for strict construction of a criminal statute – which is what is at issue here. It would be strange for Congress to subject the President and Vice President to possible criminal prosecution without naming them explicitly on the basis of such converted issues as those discussed above. This is not a situation like the bribery statute, where from the nature of the offense changed, no one, however exalted his position, should safely feel that he is above the law.

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If section 208(a) were to be construed as applying to a Vice President, this factor does not disqualify Mr. Rockefeller from serving in that office. In order to comply with that provision, he is merely required to disqualify himself from participating in particular matters in which, “to his knowledge,” he, members of his family or business associates have a financial interest. However, section 208 does not require the officer subject to it to remove himself from every situation. Section 208(b) authorizes the Government official responsible for the appointment of the officer or employee (here the President) to grant the latter an ad hoc exemption if the outside interest in the matter is deemed not substantial enough to have an effect on the integrity of his services. . . .

We have seen that section 208(a) requires as an element of the offense that the officer or employee have personal knowledge of his disqualifying interest.

Prior to enactment of the conflict of interest law in 1962, a procedure had been established for President Eisenhower and other officeholders . . . intended to obviate conflict problems arising from substantial stockholdings and other financial interests. This was the so-called “blind trust.” The official entering Government service placed his securities in a trust held by an independent trustee, the trust to terminate on the official’s completion of his Government service. The official was not informed as to the sale or purchase of securities in the trust, nor did he have any power of control or distribution.

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This does not mean that in the view of the Department of Justice a blind trust *ipso facto* immunizes the settlor from the operation of 18 USC 208. If, for example, Mr. Rockefeller owned $10 million worth of Standard Oil stock, he might be under a legal duty to assume that he still owned the stock uness he received notice that the stock had been sold. Accordingly, if Mr. Rockefeller decides to utilize a blind trust of his financial interests he should disqualify himself from those transactions which possibly relate to companies in which he holds substantial blocks of securities until he ascertains that in fact those securities are no longer held in his portfolio. . . .

Beginning about 1953, and until David Packard took office as Deputy Secretary of Defense in 1969, it was customary for the Senate Armed Services Committee to require Defense Department appointees to dispose of their stockholdings in companies doing business with the Pentagon. When David Packard was under consideration by the Senate Committee to serve as Deputy Secretary of Defense, he explained that his holdings in the Hewlett-Packard Company, a Defense contractor, amounted to about 3,550,000 shares, and that the sale of the stock on the open market would have a harmful effect upon the company and its stockholders. Mr. Packard stated that he was willing to establish a charitable trust which would devote all income from this stock to charitable purposes for not less than two years and so long thereafter as his period of government service extended. This arrangement satisfied the Senate Committee as striking the right balance between the need for recruitment of key executive manpower for the Government and the need for preserving moral and ethical principles.

When Mr. Packard left the Government, about $6 million went to charity. The arrangement was relatively free from public criticism. . . .

1. Excerpt taken from Laurence H. Silberman, Memorandum for Richard T. Burress, Re: Conflict of Interest Problems Arising out of the President’s Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution (August 28, 1974). [↑](#footnote-ref-1)