

# **The Rule of Law Versus the Rule of Lobbyists**

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Thank you for the opportunity to be here today. I'm truly honored. Having served in and out of government for the past decade I have noticed something ironic. As a law professor I have so much to say, but so few are eager to listen. But as a senior government official, I have many eager to listen, but there is little I'm allowed to say. So today I'm in the fortunate position of being a law professor and recent senior government official who has so much to say and so many who are eager to listen.

I'm here today as someone who is happy and grateful, and hopeful that in the wake of the HPE/Juniper merger scandal, the Department of Justice may course correct with a few policy and personnel changes. Although challenging, I loved my time at the Department of Justice as the second highest official in the Antitrust Division. But I love being back home at Notre Dame even more. It feels a little like I've returned to the Shire after fighting the Orcs in the Battle of Helm's Deep.

I want to speak with you today about the battle within the Republican party over the future of the second Trump Administration. I am not talking about the well-known ideological battle between traditional conservatives and Trump supporters. I am talking about the battle between genuine MAGA reformers and MAGA-In-Name-Only lobbyists. It's a fight over whether Americans will have equal justice under law, or whether preferential access to our justice system is for sale to the wealthy and well-connected.

Will America be governed by the rule of law or the rule of lobbyists? For the words "equal justice under law" to be more than just a phrase etched in marble, it must be practiced by those privileged to enforce it. Attorney General Pam Bondi [testified](#) about this in her confirmation hearing. "If confirmed, I will work to restore confidence and integrity to the Department of Justice .... America must have one tier of justice for all."

The true MAGA Republicans know that we cannot restore integrity and protect the interests of the average American by allowing wealthy and powerful corporations to hire politically connected lobbyists to receive special treatment. Officials like my boss Assistant Attorney General Gail Slater and so many others are working hard to remain true to President Trump's core message that resonated so well with working-class Americans. Antitrust enforcement that applies equal justice under the law can prove that the DOJ is not for sale and deliver tangible results for millions of

Americans. As I said in my Senate Judiciary [testimony](#) last December, we are committed to “common sense populism [that] seeks to make housing more affordable, reduce the cost of higher education, promote choice and competition in healthcare, and adopt economic policies that drive down the cost of living and prices for everyday goods and services.”

The MAGA-In-Name-Only lobbyists and DOJ officials enabling them are pursuing a different agenda. Their loyalty is not to the President’s antitrust agenda or to rebuild confidence and integrity in the DOJ. Regardless of the outcome, their commitment is to exert and expand their influence and enrich themselves as long as their friends and supplicants are in power. If the rule of lobbyists prevails, the Republican vision of a realignment toward the average American will die.

The current front in this battle is being fought within the Department of Justice. It will not surprise you when I say that AAG Slater and Deputies Mark Hamer, Dina Kallay, Bill Rinner, and Chetan Sanghvi have been wonderful colleagues, and we are united in the battle to protect the average American by vigorously enforcing the antitrust laws. The same cannot be said for senior leadership above and around her.

Similar to my mentor [James Buckley’s call](#) for Richard Nixon to resign in March 1974, I’m speaking out reluctantly as a friend because I know that what I have to say will bring pain and distress to many people I respect. I’m asking for statesmanship and courage by senior government officials to promote this Administration’s antitrust agenda, restore integrity to the DOJ, and serve the greater interests of the nation.

I am speaking out now because it is still early days in this Administration and I think correcting the problems at the DOJ is still possible, either by political will or judicial decree. I experienced nothing remotely like this when I served at the DOJ the last time, and hopefully this is a short-term aberration.

To be clear, I have absolutely no reason to think the White House or other departments are involved in the current HPE/Juniper merger scandal. Nor do I think Deputy Attorney General Todd Blanche is involved. I met with him almost every week and I never had a negative experience with him. There are things I don’t know, but I perceive him to be a man of character who is leading the DOJ under extremely difficult circumstances.

But I cannot say the same about a small set of actors in senior leadership within the DOJ. I met with the most senior officials of the DOJ regularly, and my concerns expressed today are not based on conjecture. The core problem is simple: AG Bondi has delegated authority to leaders like her Chief of Staff Chad Mizelle and Associate Attorney General nominee Stanley Woodward who do not share her commitment to the rule of law and to one tier of justice for all. With the DOJ led by a mix of officials with varying commitments to restore integrity to the Department of Justice, good may yet prevail, but at least with respect to senior DOJ oversight of antitrust enforcement, we are on a path toward injustice.

Let me discuss the battle lines that have been drawn between true MAGA Republicans and MAGA-In-Name-Only lobbyists and offer just a few reflections on the difference between the rule of law and the rule of lobbyists.

First, under the rule of law, rules matter and must be respected, both in substance and in procedure. Sir Thomas More in a *Man for All Seasons* put it this way in his [famous quote](#) about giving the devil the benefit of the law: “This country is planted thick with laws from coast to coast, man’s law not God’s! And if you cut them down, ... do you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil the benefit of law, for my own safety’s sake.” When Thomas More explained to Richard Rich why he could not accept even a small bribe such as a silver cup, he said with real power there will be offers of all sorts of things—homes, manors, and coats of arms. Only those with principles strong enough to reject the little temptations are worthy to serve in senior government where there will be offers of big temptations.

Under the rule of lobbyists, antitrust laws are nuisances or obstacles to overcome. Rather than the legitimate lobbyists who have expertise and perform traditional functions of education and engagement, corrupt lobbyists with no relevant expertise are perverting actual law enforcement through money, power, relationships and influence. In a *Man for All Seasons*, Thomas Cromwell beckoned Richard Rich to betray Sir Thomas More in exchange for a bribe. Rich did so and immediately felt guilty. Cromwell reassured Rich that while Sir Thomas More is a man of incorruptible principle, Rich has common sense, and accepting bribes gets easier with time. The corrupt Richard Rich rose to the heights of power, while the principled Thomas More resigned and then was imprisoned and martyred for insubordination.

There are people within the DOJ who follow the law and care deeply about protecting Americans from anticompetitive behavior. That is true of the leadership and career staff at the Antitrust Division. They believe in the principles that undergird the antitrust laws and want to enforce those laws for the common good. They reject the silver cup of temptation to betray the law for personal gain.

Sadly, there are other people inside and outside government who offer and accept the silver cup and who care little for the antitrust laws. They consider law enforcement not as binding rules but an opportunity to leverage power and extract concessions. They have, shall we say, a loose relationship with the law.

It goes without saying that the most senior law enforcement officials in the United States should care deeply about the rule of law. They should know the law and follow it. And they should not punish those who defend it.

Although I am limited in what I can say, it is my opinion that in the HPE/Juniper merger scandal Chad Mizelle and Stanley Woodward perverted justice and acted inconsistent with the rule of law. I am not given to hyperbole, and I do not say that lightly. As part of the forthcoming Tunney Act proceedings, it would be helpful for the court to clarify the substance and the process by which the

settlement was reached. Although the Tunney Act has rarely served its intended purpose, this time the court may demand extensive discovery and examine the surprising truth of what happened. I hope the court blocks the HPE/Juniper merger. If you knew what I knew, you would hope so too. Someday I may have the opportunity to say more.

The second distinction between the rule of law and the rule of lobbyists is that those who follow the rule of law show no special favors to the parties and counsel appearing before them. By contrast, the rule of lobbyists cares deeply about benefits they can extract in transactional relationships with perceived friends. At the Antitrust Division we routinely have lawyers appear before us whom we know and respect, but we also meet lawyers who are unethical scoundrels and malcontents—the kind who game the system and crow about it. We ignore the affiliations of these lawyers—whether friend or foe, Republican or Democrat—and attempt to treat everyone equally. That’s how we maintain one tier of justice and restore the integrity of the Department.

Others at the DOJ and elsewhere in government consider some parties, counsel, and lobbyists to be on the “same MAGA team” and worthy of special solicitude. They consider others to be “enemies of MAGA” that merit particular disfavor. In my opinion based on regular meetings with him, Chad Mizelle accepts party meetings and makes key decisions depending on whether the request or information comes from a MAGA friend. Aware of this injustice, companies are hiring lawyers and influence peddlers to bolster their MAGA credentials and pervert traditional law enforcement.

Third, the rule of law provides predictability while the rule of lobbyists guarantees instability. Violations of antitrust laws impose grave risks to companies, including criminal prosecution, massive civil penalties, company breakups, and the blocking of mergers. Lawyers and their clients need a stable and predictable environment to do business. The Antitrust Division uniformly seeks to promote the rule of law in both litigation and merger enforcement. I personally have heard lawyers say that the political uncertainty of this Administration is more difficult than the predictable but hostile environment of the Biden Administration.

I should emphasize that I welcome all lawful competition and all procompetitive mergers. Before recent events, the original topic for my talk today was in praise of Little Tech innovation and procompetitive mergers. Nor is there anything wrong with lobbying done the right way. But this new pay-to-play approach is so far removed from legitimate lobbying or traditional antitrust enforcement that it is creating massive legal and economic uncertainty. Those adopting this new approach care little about the instability this creates for the markets.

The cost to the country of this new pay-to-play approach to antitrust enforcement is enormous. For thirty pieces of silver, MAGA-In-Name-Only lobbyists are influencing their allies within the DOJ and risking President Trump’s populist conservative agenda. This goes far beyond traditional lobbying functions. Their goal is to line their own pockets by working for any corporation that will pay top dollar to settle antitrust cases on the cheap. Doing so undermines the rule of law and desperately harms the average American. At risk are President Trump’s antitrust goals of

reforming health care, addressing monopoly abuses, promoting deregulation, and helping renters, farmers and blue-collar workers.

Is this the new normal, with every law firm hiring an influence peddler to dual track and sidestep the litigation and merger review process? That's what law firms are now considering. The Department of Justice is now overwhelmed with lobbyists with little antitrust expertise going above the Antitrust Division leadership seeking special favors with warm hugs. On numerous occasions in a variety of matters we implored our superiors and the lawyers on the other side to call off the jackals. But to no avail. Today cases are being resolved based on political connections, not the legal merits.

Which case is the next casualty? Will the same senior DOJ officials ignore the President's Executive Order just because Live Nation and Ticketmaster have paid a bevy of cozy MAGA friends to roam the halls of the Fifth Floor in defense of their monopoly abuses? I wonder what the national security arguments will be in that case.

What must the antitrust bar think? If the new game in town is to hire well-connected lobbyists ignorant of the law to get your deal done or your case dismissed by going around and above AAG Slater, what role are respected, ethical antitrust lawyers supposed to play? Why did the lawyers advising the parties in the HPE/Juniper merger scandal not appreciate the risk they were generating, not only for their clients and their law firms, but for the entire antitrust bar?

Lastly, there are real costs for the lobbyists, the companies and lawyers who hired them, and the officials within government. Their reputations are forever linked to their unethical behavior. Mike Davis and Arthur Schwartz have made a Faustian bargain of trading on relationships with powerful people to reportedly earn million-dollar success fees by helping corporations undermine Trump's antitrust agenda, hurt working class Americans, break the rules, and then try to cover it up. Outside the small circle of transactional MAGA friends seeking and giving favors, do these lobbyists and their friends in power actually know what traditional or populist conservatives think about them? When lobbyists like Mike Davis and Will Levi go to their Supreme Court clerkship reunions, how do honorable conservative lawyers who clerked for the great Justices Alito and Gorsuch view their shenanigans? Do the executives and the lawyers who hire these lobbyists know what the antitrust bar and the Division's leaders and lawyers think of their behavior? They have long memories.

Those who forsake the rule of law are violating fundamental moral principles. "A just king gives a country stability, but one who demands bribes destroys it." ([Proverbs 29:4](#)). "You shall not pervert justice. You shall not show partiality.... Justice, and only justice, you shall follow." ([Deuteronomy 16:19-20](#)). "A wicked man receives a bribe in secret to pervert the ways of justice." ([Proverbs 17:23](#)). "Do not show partiality in judging; hear both the small and great alike." ([Deuteronomy 1:17](#)). I know many in and out of government who sincerely respect these moral principles. Perhaps now is the time to implement them. The influence peddlers and allies in government will hide behind their friends in power, excuse their behavior, claim we are naïve, and

hope this all goes away. But many of their friends in power have principles and want to avoid further scandal.

How will the Department of Justice recover from the current crisis? Will there be policy or personnel changes among the senior leadership at the Department of Justice? Will AAG Slater have the freedom to enforce the law and fire or hire her deputies consistent with the Administration's true antitrust agenda? At a minimum, will the Department of Justice remove the compromised Chad Mizelle and Stanley Woodward from any antitrust oversight, and have Gail Slater report directly to Todd Blanche? In the absence of reforms at the DOJ, must State AGs now join every DOJ antitrust lawsuit and merger challenge as a check on influence peddling? The status quo is simply unsustainable.

When I began my service at the DOJ, I swore a solemn oath to well and faithfully discharge the duties of my office. What will be done when senior DOJ officials betray their oath? What will be done to a nominee who has already shown he cannot be trusted to honor such an oath?

Let me conclude with a personal reflection. President Roosevelt was one of the great antitrust reformers and lately I've been thinking about his [famous speech](#) "The Man in the Arena."

"Credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly."

In my first tour of duty at the DOJ, I loved that quote because I could relate to the triumph of high achievement as AAG Makan Delrahim and I successfully negotiated an agreement on fundamental due process signed by over seventy countries. In my second tour of duty at the DOJ, I love that quote for what it says about failing while daring greatly.

My position while I served in government was simple: lobbyists and lawyers are subordinate to the law. Yet by stating this truth, I was dismissed for insubordination. My termination letter is now framed and hangs on the wall in my office at Notre Dame. I joke with friends that I've never been fired before, and I've been working since my first job as a young teenager at the Dairy Queen in Sherman, Texas. All it took to be fired were lobbyists exerting influence on my superiors to retaliate against me for protecting the rule of law against the rule of lobbyists.

A final thought on the subject of taking risks to serve our country in these difficult times. Is it really worth leaving the Shire to battle the Orcs? On both occasions that I was offered a senior position within the DOJ I was told that I should not accept the offer because the risks were just too great. For me that was not a sufficient reason to say no. I knew I would be attacked. I knew it would be difficult. But I also know that the rule of law is not just an inheritance, it also an

opportunity and obligation. Soldiers are willing to go to war and risk their lives to serve our country. So why shouldn't we take lesser risks to serve our country and protect the rule of law? The principles inscribed in marble at the Department of Justice building only survive if each generation takes up the fight. Failure is always a possibility. But so too is triumph. I would rather fail while daring greatly than not serve at all. Thank you.