

# *Nova Law Review*

---

*Volume 18, Issue 3*

1994

*Article 2*

---

## Unwritten Constitution Invisible Government

Anthony Chase\*

\*

Copyright ©1994 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

## Introduction:

# Unwritten Constitution, Invisible Government

**Anthony Chase\***

---

What surprised everybody, including Mao Zedong, was that none of the conspirators attempted suicide. Instead, in the limited time available before being arrested they tried to destroy as much incriminating evidence as possible.

YAO MING-LE, *THE CONSPIRACY AND MURDER OF MAO'S HEIR* 179 (1983)

Even the history of science, as philosopher Georges Canguilhem observes, is not itself a science.<sup>1</sup> Thus, it comes as no surprise that the history of law, and its construction in both academic and popular literature, should be denied characterization as a form of science or scientific activity. Nevertheless, legal history and theory, sometimes labeled Jurisprudence in law school seminars, a discipline even Langdell was not always prepared to denominate the science of law,<sup>2</sup> can be said to achieve discoveries or breakthroughs. Whether one follows Bachelard and Canguilhem or, on this side of the Atlantic, Thomas Kuhn, some notion of *epistemological break*, of a sharp separation from previous theory, is essential in order to describe those moments in the history of theory when radical reformulation actually becomes a possibility.<sup>3</sup>

---

\* Professor of Law, Nova Southeastern University Shepard Broad Law Center.

1. GEORGES CANGUILHEM, *A VITAL RATIONALIST: SELECTED WRITINGS FROM GEORGES CANGUILHEM* 52 (Francois Delaporte ed. & Arthur Goldhammer trans., 1994).

2. See, e.g., CHRISTOPHER C. LANGDELL, *ANNUAL REPORT ON THE LAW SCHOOL, FIFTY-SECOND ANNUAL REPORT OF THE PRESIDENT OF HARVARD COLLEGE 1876-1877* (1878).

Law has not the demonstrative certainty of mathematics; nor does one's knowledge of it admit of many simple and easy tests, as in [the] case of a dead or foreign language; nor does it acknowledge truth as its ultimate test and standard, like natural science; nor is our law embodied in a written text, which is to be studied and expounded, as is the case with the Roman law and with some foreign systems.

*Id.* at 96-97.

3. CANGUILHEM, *supra* note 1, at 31-35; *PARADIGMS AND REVOLUTIONS: APPRAISALS & APPLICATIONS OF THOMAS KUHN'S PHILOSOPHY OF SCIENCE*, (Gary Gutting ed., 1980).

Two such instances can be cited from the development of twentieth-century jurisprudence: The first discovery was that of the *unwritten constitution*, the second was of *invisible government*. Each of these breakthroughs represented the potential, at least, for a dramatic rewriting of contemporary legal theory. During a critical juncture in twentieth-century United States political history, the first discovery produced such a change. The second, not yet made general to the field of legal thought in the United States, at least could become a common assumption of ongoing legal studies, indeed of popular legal consciousness as a whole. Whether it will depends largely on the same kind of historical and political factors which not only shaped the reception of legal realism and its systematic exposure of the unwritten constitution but, necessarily, grounds the success or failure of any theoretical innovation in philosophy or natural science.

The social context within which the discovery of the unwritten constitution took place should by now be familiar. The liberal capitalist road to modernization (represented by Britain, France, and the United States) had increasingly come into conflict with the authoritarian capitalist model (Germany and Japan), as sociologist Barrington Moore describes in his classic study of the social origins of dictatorship and democracy.<sup>4</sup> When President Franklin Roosevelt assumed office in 1933, he confronted a situation where, according to world-systems theorist Immanuel Wallerstein, the liberal capitalist approach was challenged sharply from the right by Germany and, equally disconcerting to those whose task it was to manage the state apparatus, from the left by the Soviet Union. Both the New Deal program engineered by Roosevelt and the Nazi program led by Hitler were carried out within the confines of a capitalist political economy. But the rise of the Nazis in Germany (and, to be sure, emperor-system fascism in Japan) facilitated, as Wallerstein observes, Roosevelt's development of "the New Deal as an alternative type of political solution," one that was liberal rather than authoritarian in Moore's terminology, "centrist" rather than "rightist" in Wallerstein's.<sup>5</sup> Once the international right wing, the Axis powers, had been defeated (and the Red Army was in Berlin), the United States shifted from a left of center strategy (aimed at defeating authoritarian forms of capitalist rule) to a right of center strategy, becoming as Wallerstein puts it, "the leader of a 'free world' alliance against the world left

---

4. BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* (1966).

5. IMMANUEL WALLERSTEIN, *The USA in the World Today*, in *THE POLITICS OF THE WORLD-ECONOMY* 69, 70 (1984).

. . . .”<sup>6</sup> This *volte-face* in United States policy (identified as a postwar response to communist expansion by some historians but as already taking place early in the war by critics like Gabriel Kolko)<sup>7</sup> provides an essential historical boundary alongside of which to locate legal realism’s rise and relative decline.

Thus, diplomatic recognition of the Soviet Union by the Roosevelt administration and equally unprecedented unemployment figures claimed center stage at the same time that Karl Llewellyn, at the political margin represented by professional culture, published his realist manifesto on the Constitution. “I am not arguing,” he declared,

that the United States *ought* to have the sort of constitution loosely designated as “unwritten.” I am arguing that they *have* such a constitution, and that nobody can stop their having such a constitution, and that whether anyone likes that fact or not, the fact has been there for decades, and must be dealt with by any theory that purports to do a theory’s work.<sup>8</sup>

What troubled Llewellyn, of course, and other realists at that moment was the Supreme Court’s obstruction of the New Deal; specifically, the roadblocks in the path of liberal capitalism’s reconstruction (under new and transparently dangerous circumstances) thrown up by a judiciary clinging to the conservative apologetics of substantive economic due process. If the Court ruled that *laissez-faire* had been written into the Constitution, the realists, echoing Holmes’ famous *Lochner* dissent,<sup>9</sup> replied that the constitution to which the Court should turn was, in fact, essentially unwritten and therefore no economic philosophy could be designated as permanent, unalterable, fixed.<sup>10</sup> The Constitution itself, following Llewellyn’s

6. *Id.* at 71.

7. See GABRIEL KOLKO, *THE POLITICS OF WAR: THE WORLD AND UNITED STATES FOREIGN POLICY 1943-1945* (1968); JOYCE AND GABRIEL KOLKO, *THE LIMITS OF POWER: THE WORLD AND UNITED STATES FOREIGN POLICY, 1945-1954* (1972).

8. Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 2 n.5 (1934).

9. *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); see HAROLD J. LASKI, *The Political Philosophy of Mr. Justice Holmes*, in *STUDIES IN LAW AND POLITICS* 146 (Archon Books 1969) (1932); HAROLD J. LASKI, *THE AMERICAN DEMOCRACY: A COMMENTARY AND AN INTERPRETATION* (1948).

10. See Robert W. Gordon, *The Elusive Transformation*, 6 YALE J.L. & HUMAN. 137 (1994):

The specific Realist project [Morton Horwitz] most admires, as I do, was the work demolishing the Classical categories, breaking the link between rights and

paradigm, was a kind of artifact, a reflection of social and historical circumstances, something put to use for particular purposes by a specific society at a given point in time. And if ever there was a context which cried out for a new constitutional verdict, it was the suddenly worldwide economic depression.

The cumulative weight of social and political events—from the instability in government precipitated by spectacular economic dislocation to the alarming cartelization of world markets, from the reelection of Roosevelt in 1936 to his bold, court-packing maneuver—effectively produced capitulation by the Supreme Court. Michael Ariens has recently described how, initially, it was taken for granted that politics, not some autonomous unfolding of constitutional principle, had caused the judiciary to change its tune. This theoretical reformulation of constitutional doctrine starkly revealed by the notorious “switch in time that saved the nine” was uniformly regarded as an adjustment by the Court, in the nick of time as far as most observers were concerned, to social and economic facts which were simultaneously new and inescapable.<sup>11</sup> An epistemological break within the history of American legal and constitutional theory was thus provoked, ultimately, by an evolution in forces and relations of production and by that transformation’s necessary political corollary.

The focus of Ariens’ essay is on the way in which the theoretical understanding of what had happened during the constitutional crisis of 1937 was subsequently revised to fit new social needs. The breakthrough of realism was thus remanded, using a lawyer’s term, for further review in the light of cold war exigencies. Just as the left of center strategy described by Wallerstein was, in the postwar period, converted to one right of center, and just as the United States abroad pursued what in Japan was actually called “the reverse course,”<sup>12</sup> by the 1950s, American legal culture was also being reoriented by key figures such as Felix Frankfurter who knew precisely what

---

remedies, disintegrating the concept of property, trashing the public-private distinction and the presumptions that state action was normally ‘coercive’ and market relations normally ‘free,’ and above all, recognizing that the capitalist economy has a socially contingent constitution that is neither natural nor necessary, but alterable by deliberate collective action (‘policy choices’).

*Id.* at 159-60.

11. Michael Ariens, *A Thrice-Told Tale, Or Felix the Cat*, 107 HARV. L. REV. 620, 622-23, 631-33 (1994).

12. MICHAEL SCHALLER, *THE AMERICAN OCCUPATION OF JAPAN: THE ORIGINS OF THE COLD WAR IN ASIA* 122 (1985); see THEODORE COHEN, *REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL* (1987); J.W. DOWER, *EMPIRE AND AFTERMATH: YOSHIDA SHIGERU AND THE JAPANESE EXPERIENCE, 1878-1954* (1988).

they were doing. “What is most important,” concludes Ariens regarding Frankfurter’s turnabout, is that “his revised history of the constitutional crisis of 1937 became the accepted history in legal academia. This new version allowed legal academics to conclude that the decisions of Justice Roberts in the spring of 1937 were the product of legal reflection, not political pressure.”<sup>13</sup> Not for nothing does Canguilhem emphasize the social origins of knowledge.

Given this background, it becomes easier to understand why the second critical discovery of modern jurisprudence, that of invisible government, has managed to make so little headway when it comes to redrawing the road map of even academia’s conception of legal reality. Just as historical events conspired to bring forward and then rudely cast aside the progressive legal realism of the 1930s, the late twentieth-century critique of invisible government has been pressed forward by a quite contradictory ensemble of historical circumstances, only the outline of which can presently be identified. This special issue of the *Nova Law Review* contributes to an urgent charting of that outline as its definition takes form against the horizon of contemporary legal theory.

Before proceeding to this second dramatic innovation within modern jurisprudence, however, we must be sure to understand what legal realism did and did not represent. Certainly it challenged those legal notions which placed law in a privileged position above, or at least outside, the realm of politics. Just as Llewellyn had relied upon Bryce, Beard, and Bentley, the last of whom “saw and said in 1908 all that should have been necessary to force constitutional law theory into total reconstruction,”<sup>14</sup> another writer whose work appeared in the United States in 1908, upon whom Llewellyn apparently did not rely but certainly could have, made transparent the extent to which legal theory had been seeking a new paradigm for decades. Italian political philosopher Antonio Labriola observed that “legislating has become an epidemic; and reason enthroned in legal ideology has been dethroned by parliaments. . . . [N]ew legislation has more than once been revised, and the strangest oscillations may be observed in it . . . .”<sup>15</sup>

During the momentous transition from a mercantilist to a capitalist political economy in the United States,<sup>16</sup> the legal system and its rules had

13. Ariens, *supra* note 11, at 652.

14. Llewellyn, *supra* note 8, at 1.

15. ANTONIO LABRIOLA, *ESSAYS ON THE MATERIALISTIC CONCEPTION OF HISTORY* 198-99 (1908).

16. See WILLIAM APPLEMAN WILLIAMS, *THE CONTOURS OF AMERICAN HISTORY* (1961); MAURICE DOBB, *STUDIES IN THE DEVELOPMENT OF CAPITALISM* (1947); Mitchell Franklin,

been turned inside out. By the end of the nineteenth-century, it was evident that the notion of law as immutable, “reason enthroned,” was no longer acceptable even to those in power. Why, then, should it be passively accepted by those seeking admission to the circle of citizenship, access to power itself? Although the realists, as a result of their challenge to conventional legal ideology (“a government of laws and not of men,” in the popular reference) were sometimes accused of moral relativism or of harboring anti-democratic sensibilities, the charge was groundless. The crucial point to make was that constitutional democracy had never been secured in the first place merely through deployment of the myth of legal certainty, the idea that legal rules could somehow be made impervious to manipulation by power. The real constitution, the real guarantee of democracy was something that could not be protected by language standing alone, no matter how sacred, even if memorized by every elementary school student and recited, hand on heart, by each newly sworn citizen. Even when men and women rule through law, it remains nevertheless men and women who rule, as political theorist Franz Neumann, among others, has so persuasively demonstrated.<sup>17</sup> Equating realism, simple recognition of the true political face of law, with anti-democratic or totalitarian sentiment was a total fraud, but a shrewdly intelligent one from the perspective of those devoted to insulation of the status quo from all criticism. No African-American, the legendary civil rights attorney and Dean of Howard Law School, Charles Hamilton Houston, was fond of observing, needed to be reminded of the difference between law in the books and law in action. But others, without such direct personal experience of the disparity between the system’s claims and its performance, could fall victim to precisely the ideology which realism sought to derail.

If not legal certainty, *stare decisis*, original intent, the elaborate rigmarole of law review footnotes and turgescient casebooks—on which little reliance should ultimately be placed according to the realist critique—what are the irreducible components of political freedom, the minimum structure of constitutional democracy? The three essential elements are popular

---

*Legal Method in the Philosophies of Hegel and Savigny*, 44 TUL. L. REV. 766 (1970); Mitchell Franklin, *Dialectical Contradictions in Law*, in DIALECTICAL CONTRADICTIONS: CONTEMPORARY MARXIST DISCUSSIONS 149 (Erwin Marquit, Philip Moran, Willis H. Truitt, eds., 1982).

17. See FRANZ NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE: ESSAYS IN POLITICAL AND LEGAL THEORY (1957); FRANZ NEUMANN, THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY (1986); OTTO KIRCHEIMER & FRANZ NEUMANN, SOCIAL DEMOCRACY AND THE RULE OF LAW (1987).

sovereignty (and an inevitably hard won *universal* suffrage), civil rights and liberties, and public government.<sup>18</sup> The historic struggle to establish the power of parliaments and legislatures against kings and dictators and to secure such basic liberties against state power as the right to speak or organize trade unions has proved essential to the construction of modern democracy. But the guarantee of *public*, rather than *secret*, government remains on a par with the first two components of a free society and may, indeed, have become the most precarious of the three pillars supporting constitutional rule in the United States. The reason, once again, arises from historically specific political conditions.

It was, to be sure, the first two aspects of constitutional government which Hitler and the Nazis, in the 1930s, went after with a vengeance. Their hatred for parliamentary sovereignty was of a piece with Bismarck's assault on the Social Democratic and liberal parties in the nineteenth century. In the 1860s, Bismarck had advanced the notorious *Luecken-theorie*, or "theory of the gap," to provide what Gordon Craig calls "a spurious legal justification" or legal cover for defiance of the Prussian Chamber of Deputies and, decades later, Bismarck offered a further argument which could be used to dissolve the Reichstag: "It can very well happen," he boasted in 1886, "that I will have to destroy what I made."<sup>19</sup> The linkage between Bismarck and the fascist period is made explicit by Fritz Fischer who observes that the rise of Social Democracy to the "position of strongest party in the German Reichstag in January 1912 served as an alarm signal," precipitating a demand by the big industrialists and great landowners, the alliance of steel and rye, that "the Reichstag be neutered and the trade unions suppressed, for it seemed to them that their economic and social position could be guaranteed only in an authoritarian corporate state: here the nexus with Papen's ideas of 1932, even with the year 1933, becomes palpable."<sup>20</sup>

Early in February, 1933, taking full advantage of a presidential decree drafted by those who held power prior to Adolf Hitler and designed to

---

18. See IMMANUEL KANT, *KANT: POLITICAL WRITINGS* (Hans Reiss ed. & H.B. Nisbet trans., 2d ed. 1991); ANTHONY ARBLASTER, *THE RISE AND DECLINE OF WESTERN LIBERALISM* (1984); Anthony Chase, *The Rule of Law and the Capitalist State: Bills of Rights in Jeopardy*, 65 ST. JOHN'S L. REV. 85 (1991).

19. GORDON CRAIG, *GERMANY 1866-1945*, at 174 (1978).

20. Fritz Fischer, *FROM KAISERREICH TO THIRD REICH: ELEMENTS OF CONTINUITY IN GERMAN HISTORY, 1871-1945*, at 42 (1986); see SEBASTIAN HAFFNER, *THE AILING EMPIRE: GERMANY FROM BISMARCK TO HITLER* (1989); HANS-ULRICH WEHLER, *THE GERMAN EMPIRE 1871-1918* (1985).



control the Nazis themselves, Hermann Goering initiated massive censorship of newspapers, public meetings, and radio broadcasts which “abused, or treated with contempt,” organs or leading officials of the government. At the end of that month, the Reichstag building was burned to the ground, probably by Heydrich’s SA/SS, while “Hitler and Goering wasted no time in laying the deed at the doorstep of the Communist party and in using this charge to justify a crippling blow at what was left of the democratic system.”<sup>21</sup> Hitler promised in a newspaper interview that individual liberties would be restored once the Communist menace had been liquidated but this was, of course, immediately followed by an assault on all enemies of the Nazi party.<sup>22</sup> The next step was a full-scale *Gleichschaltung*, putting into the same gear the whole of society, which meant purging the administrative apparatus, incorporation of trade unions, dismantling of governmental structures in the federal states, destruction of the Weimar political party system, finally abolition of the Reichstag as a “genuine parliamentary chamber, and, after July 1933, an independent speech from the floor on any subject would have caused the very pictures to fall from the walls.”<sup>23</sup>

It is precisely these techniques, striking against civil liberties and the elimination of parliamentary opposition (hopefully even of the legislative body itself), which have proved so tempting and yet elusive to more recent politicians uncomfortable with democratic institutions. Of course the desire to provide some sort of legal justification, however strained, for official conduct remains. After the Bay of Pigs fiasco, President John Kennedy turned to Richard Nixon, a bitter adversary, for advice as to what course of action to follow next. “I would find a proper legal cover and I would go in,” Nixon recommended. “There are several justifications that could be used,” he continued, “like protecting American citizens living in Cuba and defending our base at Guantanamo. The most important thing at this point is that we do whatever is necessary to get Castro and Communism out.”<sup>24</sup> Thus a perceived need to provide some semblance of “legal cover” for governmental action (however illegal the action may be) remained strong, as did willingness to employ the standard, all purpose justification of anti-communism, at least until recently when western rulers were denied that excuse by an internal collapse of the Stalinist system. President Ronald Reagan and his secret government used their commitment to saving

---

21. CRAIG, *supra* note 19, at 572, 574.

22. *Id.* at 575.

23. *Id.* at 582.

24. Richard M. Nixon, *quoted in* RICHARD REEVES, *PRESIDENT KENNEDY: PROFILE OF POWER* 99 (1993).

Nicaragua from communism, their support for the United States-manufactured Contra army whom Reagan dubbed the moral equivalent of our Founding Fathers, as justification for trading American arms for hostages held by Iran (contrary to stated United States policy) and for bankrolling and equipping Contra “freedom fighters” (contrary to United States law).<sup>25</sup> The deployment of retroactive as well as “mental” Presidential Findings during Iran-Contra (ultimately no more credible than outright, illegal destruction of documents, which also occurred) carried the effort to fabricate legal cover stories to a pathetic, perhaps tragicomic extreme.<sup>26</sup>

But to whatever lengths contemporary politicians seem willing to go in an effort to evade democratic accountability, abolition of the legislature itself (at least in the United States) appears beyond their grasp. Admittedly, Eisenhower and Kennedy transformed the national security bureaucracy into a new and competing branch of government. Lyndon Johnson created his own Gulf of Tonkin incident and prosecuted a savage and unpopular “police action” in Vietnam without a Congressional declaration of war. Richard Nixon had his enemies list, bugging devices, and successfully conspired to run against the opposition candidate of his choice. Reagan’s “can do” NSC staffer, Lt. Colonel Oliver North, bragged of his willingness to lie to Congress if he felt the end justified the means. But actually dissolving the legislature seems a political gambit about which American authoritarians can only fantasize. In the 1930s, President Franklin Roosevelt unsuccessfully sought to pack the United States Supreme Court and in *Gabriel Over The White House*, a Hollywood film made during Roosevelt’s first year in office, the President in fact suspends a deadlocked United States Congress for the duration of the Great Depression.<sup>27</sup> But by the end of the twentieth-century, if not by the 1930s themselves, such extreme alternatives as

---

25. Not only did anti-communism drive United States policy in Nicaragua but, as Theodore Draper points out, United States fear of Soviet influence in Iran at least contributed to the Reagan administration’s desire to become convinced that there were anti-terrorist “moderates” in the Iranian government who could be won over by sophisticated weapons supplied first by Israel, then the Pentagon and CIA; see THEODORE DRAPER, *A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS* (1991).

26. *Id.* at 212-16. For the bottom line conclusion drawn by the Iran-Contra Independent Counsel, see LAWRENCE E. WALSH, *FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, VOL. I: INVESTIGATIONS AND PROSECUTIONS* (1993). “President Reagan, the secretary of state, the secretary of defense, and the director of central intelligence and their necessary assistants . . . skirted the law, some of them broke the law, and almost all of them tried to cover up the President’s willful activities.” *Id.* at 561.

27. See ANDREW BERGMAN, *WE’RE IN THE MONEY: DEPRESSION AMERICA AND ITS FILMS 110-20* (1971).

outright redesign or elimination of a branch of government (or rescinding of the franchise) had apparently been declared off limits by the ground rules of the liberal capitalist state.<sup>28</sup> It is for this very reason, this historical shift in “the rules of the game,” that the third component of constitutional democracy has become absolutely crucial to the maintenance of a free society: *Public government* is critical if secrecy is to be prevented from providing the cloak by which those who seek democracy’s subversion can achieve their main aims *without* actually having to risk construction of a police state or straightforward abolition of the legislature. Nixon may have engineered the Saturday Night Massacre, George Bush may have stolen the Presidency in 1988 through “flagrant misrepresentations” of his part in Iran-Contra,<sup>29</sup> but Nixon could not abolish the courts and Bush could not avoid an eventual confrontation with the record (and the electorate) in 1992, unless he chose (like Lyndon Johnson) not to run again. Where contemporary authoritarians have done their greatest damage to the democratic state is in secret, not in public where they realize they could actually lose.<sup>30</sup> What brought down Nixon’s regime was the bungled burglary of the Watergate complex. What Reagan and his co-conspirators did not count on was Nicaragua shooting down the Hasenfus plane. Even Rodney King’s assailants ended up being convicted of felonies for one reason—someone had a video camera, ready and able to make public the secret brutality of the Los Angeles Police Department. Without the videotape, the beating simply did not happen.<sup>31</sup> Secrecy is a final refuge within modern constitutional democracy for the totalitarian impulse.

In spite of thousands of pages of law reviews and legal textbooks devoted to constitutional law and its practice as well as tens of thousands of law school classroom hours devoted to separation of powers analysis and the

---

28. Though not, of course, liberal capitalism’s sponsorship of such “extreme alternatives” in *someone else’s country*; see, e.g., WILLIAM BLUM, *THE CIA: A FORGOTTEN HISTORY, U.S. GLOBAL INTERVENTIONS SINCE WORLD WAR 2* (1986).

29. Peter Kornbluh & Malcolm Byrne, *Iran-Contra: A Postmortem*, 27 *NACLA REPORT ON THE AMERICAS* 29, 33 (Nov./Dec. 1993).

30. Bill Moyers, in his excellent Iran-Contra television documentary exploring reasons why the Reagan administration opted for secret government and against democracy, says to key Reagan official Michael K. Deaver: “You didn’t want the campaign for reelection [in 1984] to be fought out around Central America.” “Absolutely. Never,” replied Deaver, “because if we’d have fought the campaign on Central America, we might have lost.” Bill Moyers, *Frontline: High Crimes and Misdemeanors* (Corporation for Public Broadcasting, Nov. 27, 1990).

31. See JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993).

endless parsing of Supreme Court cases, only during the last two decades has this public/secret dichotomy been thrust onto the stage of national politics in such a way as to virtually compel its introduction within the canons of modern political theory. Thus only now can we acknowledge the *discovery of the invisible state* as one of the key breakthroughs of twentieth-century jurisprudence, poised to force a dramatic paradigm shift in legal knowledge.<sup>32</sup> Will this startling insight be used to transform the discipline or, on the contrary, will it be suppressed because of the threat it poses to normal political science, to law teaching (and law school casebooks) safely locked within a uniformly obscurantist doctrinalism? It is against such a resolute preservation of knowledge itself as one more guarantor of the status quo that this special issue of the *Nova Law Review* is published. Along with Judge Walsh's "sober and thoughtful" report on official United States government involvement in Iran-Contra,<sup>33</sup> and Jim Sheridan's Academy Award-nominated film, *In the Name of the Father* (revealing an "extraordinary climate of fear and censorship perpetrated by the British government in relation to the affairs of the North of Ireland"),<sup>34</sup> this issue of the *Nova Law Review* constitutes one of the year's most significant contributions to exposure of the secret state, to the developing critique of invisible government.

Matthew Kaplan's article takes as its focus one of the most important and yet least understood aspects of the Iran-Contra scandal: The way in which the executive branch of government was able to give an impression it was cooperating in the investigation at the very moment it was placing drastic limitations on the Independent Counsel's ability to secure criminal convictions. President Bush's notorious post-election defeat pardons, described by special prosecutor Lawrence Walsh as the final act in the Iran-Contra cover-up, received wide publicity and provided Christmas Day

---

32. See NORBERTO BOBBIO, *Democracy and Invisible Power*, in *THE FUTURE OF DEMOCRACY: A DEFENSE OF THE RULES OF THE GAME* 79 (1987); BILL MOYERS, *THE SECRET GOVERNMENT: THE CONSTITUTION IN CRISIS* (1990).

33. Theodore Draper, *Walsh's Last Stand*, 41 N.Y. REV. OF BOOKS 26, 29 (March 3, 1994).

34. Michael Mansfield, *Jurassic Justice*, 4 SIGHT AND SOUND (n.s.) 7, 7 (March, 1994); see GERRY CONLON, *IN THE NAME OF THE FATHER* (1993); Ronan Bennett, *Criminal Justice*, 15 LONDON REV. OF BOOKS 3 (June 24, 1993); STEPHEN DORRIL & ROBIN RAMSAY, *SMEAR! WILSON AND THE SECRET STATE* (1991). For films (available on video) which similarly attempt to cast light on Britain's secret government, see *A VERY BRITISH COUP* (WGBH Educational Foundation 1992); *HIDDEN AGENDA* (Hemdale Film Corp. 1991); *DEFENSE OF THE REALM* (Hemdale Film Corp. 1986).

headlines across the nation.<sup>35</sup> Even Democratic Congressmen have admitted that the legislative investigation of Iran-Contra was curtailed in order to protect Ronald Reagan and to prevent the development of evidence which might necessitate his impeachment or damage the Presidency at a time when Reagan administration posturing supposedly had the Soviet Union on the ropes. Yet it is still possible that the cover-up would have collapsed but for skillful deployment of a national security justification for limiting evidence available to the Independent Counsel. "Though Walsh was appointed at the initiative of the Reagan administration," observes Theodore Draper, "his investigation was not welcomed by it or by the Bush administration. They put various obstacles in his path, especially when it came to getting classified documents."<sup>36</sup> It is just this particular obstacle's legal twists and turns which Matthew Kaplan provides careful scrutiny in his detailed examination of the law of state secrets.

Stanley Kutler, author of the definitive historical account of the Watergate scandal, warns us that the "Iran-Contra affair perhaps represented a greater threat to the American constitutional order than had Watergate. . ."<sup>37</sup> and Theodore Draper, reflecting on Iran-Contra, adds that "[i]f ever the constitutional democracy of the United States is overthrown, we now have a better idea of how this is likely to be done."<sup>38</sup> Watergate itself seems to have lost some of its cutting edge over the past twenty years. During the 1994 network television broadcast of the Superbowl, a cleverly written and directed soft drink commercial presented a Woodstock-like celebration staged in a farmer's field and featured aging rock stars (playing themselves) commenting, more or less, on the vicissitudes of time. A small boy watching the odd event from a hillside above informs his mates that "this is the anniversary of a historic event." "What event?" another inquires. "Watergate," he replies solemnly.<sup>39</sup>

But for those Americans, now aging themselves, who shared the existential experience of living through the scandal day to day, Watergate

35. See Owen Ullmann & Mark Thompson, *Bush pardons 6 in Iran-contra*, MIAMI HERALD, Dec. 25, 1992, at A1.

36. Draper, *supra* note 33, at 26.

37. STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 609 (1990).

38. Theodore Draper, *Foreword*, in *THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY* xiii, xiii (Peter Kornbluh & Malcolm Byrne eds., 1993).

39. This television spot was created to be shown during the Superbowl football game by the advertising firm of BBDO in New York and has since been shown during the Grammy Awards and as part of other programming. Telephone Interview with Maria Amato, Assistant Producer, BBDO Advertising (Mar. 13, 1994).

is likely to remain an indelible illustration of official misconduct and lawbreaking, having constituted an appalling (and at the time, almost unimaginable) demonstration of the capacity of those in power to govern through lies and deceit. In a word, what Watergate had was Nixon. It has subsequently influenced popular perception of political scandals, even helped name them as Professor Kutler records. Though Watergate did not have an “off-the-shelf, self-financing, stand-alone, full-service covert operation,” like Iran-Contra,<sup>40</sup> it did have Cointelpro and the Plumbers and bagmen and the “White House horrors,” as Attorney General John Mitchell famously called them.<sup>41</sup> And, like Iran-Contra, it did suggest that the Constitution belonged in the office document shredder. A retrospective collection of essays on Watergate could not bring together a more interesting group of authors than this one. Samuel Dash provides the most analytical and informed of insider’s views while Stanley Kutler updates the historical portrait which previously earned him professional acclaim among Watergate aficionados. Stephen Ambrose proposes his own intriguing answers to those annoying Watergate questions which continue to puzzle journalists and historians (e.g., why did Nixon fail to burn the tapes?) and Mark Tushnet provides scholarly reflection on Watergate’s impact on separation of powers doctrine.

Steven Richman’s meditation on the legal and moral dimensions of Maxwell Anderson’s 1935 verse play, *Winterset*, may at first seem an odd companion piece to essays on Iran-Contra and Watergate. But as Richman shows, Anderson’s play takes its theme from the Sacco and Vanzetti case and the issues raised by that prosecution and by Anderson’s drama are as meaningful today as ever. Curiously enough, the Sacco and Vanzetti case (and Roscoe Pound’s failure to speak out publicly about it at the time) may have had an independent influence on Karl Lewellyn’s growing commitment to reform and his increasing dissatisfaction with efforts to idealize the status quo.<sup>42</sup> And *that*, of course, brings us back to where we began, to the realist critique of the unwritten constitution. It is the subsequent (and equivalently iconoclastic) discovery of invisible government, however, which is given pride of place in this issue of the *Nova Law Review*, to which the reader seeking a certain intellectual provocation as well as legal and political critique may now confidently turn.

---

40. DRAPER, *supra* note 25, at 530.

41. KUTLER, *supra* note 37, at 365-66.

42. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 175 (1992).

