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of Powers Law is Not "Richard Nixon" Law

Mark Tushnet

Why Didn't Nixon Burn the Tapes and Other
Questions About Watergate

Stephen E. Ambrose

ARTICLES AND ESSAYS
Who Will Guard the Guardians?:
Independent Counsel, State Seizure,
and Judicial Review

Matthew W. Kaplan

Watergate and the Reconsideration of Restitution

Steven M. Richman

NOTES AND COMMENTS
Sexual Harassment After Harris v. Forklift Systems Inc.—Is it Really Easier to Prove?

Mary C. Gomez

Buckley v. Freytag: The Beginning of the
End for Absolute Prosecutorial Immunity?

Deborah S. Place

VOLUME 18 SPRING 1994 NUMBER 3
TABLE OF CONTENTS

INTRODUCTION

Unwritten Constitution, Invisible Government  .......... *Anthony Chase*  1703

WATERGATE ERA SYMPOSIUM

WATERGATE ERA SYMPOSIUM  ........................................  1717

Congress’ Spotlight on the Oval Office:
The Senate Watergate Hearings  ......................... *Samuel Dash*  1719

In the Shadow of Watergate:
Legal, Political, and Cultural Implications .......... *Stanley I. Kutler*  1743

The Ambiguous Legacy of Watergate for
Separation of Powers Theory: Why Separation
of Powers Law is Not "Richard Nixon" Law ........ *Mark Tushnet*  1765

Why Didn’t Nixon Burn the Tapes
and Other Questions About Watergate ............ *Stephen E. Ambrose*  1775

ARTICLES AND ESSAYS

Who Will Guard the Guardians? Independent
Counsel, State Secrets, and Judicial Review .......... *Matthew N. Kaplan*  1787

*Winterset* and the Recrudescence
of Ressentiment .............................................. *Steven M. Richman*  1863
NOTES AND COMMENTS

Sexual Harrassment After *Harris v. Forklift Systems, Inc.*—Is it Really Easier to Prove? .......... *Mary C. Gomez* 1889

*Buckley v. Fitzsimmons:* The Beginning of the End for Absolute Prosecutorial Immunity .......... *Deborah S. Platz* 1919
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.


Even the history of science, as philosopher Georges Canguilhem observes, is not itself a science.1 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,2 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.3

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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.


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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. 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. 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

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) 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.

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, 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. The Constitution itself, following Llewellyn’s

6. Id. at 71.
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. 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,” 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.


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." 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," 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 . . . ." 15

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

14. Llewellyn, supra note 8, at 1.
15. ANTONIO LABRIOLA, ESSAYS ON THE MATERIALISTIC CONCEPTION OF HISTORY 198-99 (1908).
16. See WILLIAM APPLIEMAN 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 con-
ventional 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.17 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 turgescent 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

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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 Kirchheimer & Franz
sovereignty (and an inevitably hard won universal suffrage), civil rights and liberties, and public government.\textsuperscript{18} 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 \textit{Lueckentheorie}, 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.”\textsuperscript{19}

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.”\textsuperscript{20}

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


\textsuperscript{19} Gordon Craig, GERMANY 1866-1945, at 174 (1978).

\textsuperscript{20} Fritz Fischer, FROM KAISERREICH TO THIRD REICH: ELEMENTS OF CONTINUITY IN GERMAN HISTORY, 1871-1945, at 42 (1986); see SEBASTIAN HAFFNER, THEAILING 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.”

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. 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.”

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.” 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.
Nicaragua from communism, their support for the United States-manufac-
tured 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). 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. 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. 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. 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, 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. 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. 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).


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).

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. 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, 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”), 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


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.\textsuperscript{35} 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."\textsuperscript{36} 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. . .”\textsuperscript{37} 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.”\textsuperscript{38} 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.\textsuperscript{39}

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


\textsuperscript{36} Draper, supra note 33, at 26.


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

\textsuperscript{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, it did have Cointelpro and the Plumbers and bagmen and the “White House horrors,” as Attorney General John Mitchell famously called them. 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. 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.
WATERGATE ERA SYMPOSIUM

On March 26-27, 1993, the Watergate Era Symposium was held at Nova University Shepard Broad Law Center in Fort Lauderdale, Florida. Participants in this Symposium included Samuel Dash of Georgetown University Law Center, Stanley Kutler of the University of Wisconsin, Mark Tushnet of Georgetown University Law Center, and Stephen Ambrose of the University of New Orleans. All are recognized authorities on this period in U.S. history. The four essays which follow comprise the edited remarks, or were the basis for remarks, delivered by these participants at the Symposium.
It is the twentieth anniversary of the Senate Watergate hearings, and I think it is both remarkable and commendable that the Shepard Broad Law School at Nova University is holding this Watergate conference.

The exposure of Watergate was a very special event in our history. It was a turning point, when we began to look at our government differently. When we began, perhaps, to grow up and implement, as we have from time to time in our history, what the Framers wanted America to do, the people to do—and that is to hold their government accountable.

It's a great time to remember what happened twenty years ago, to rethink it, and to learn again some of the lessons that we gained from it. I know that there are students who, when they hear Watergate, at least know generally what that is about, but not very specifically. However, even those who watched the hearings, and have some sort of memory of what they were all about, have forgotten many of the details. I still hear references to things that came later in the press that sort of memorialized Watergate, but that really had nothing to do with Watergate.

When I now come to class to teach my students (I think they were about four or five-years-old at the time of the Watergate hearings), some of them come up and say, "My mother told me that you had something to do with Watergate." They don't know what I had to do with Watergate, and

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In addition to the Senate Watergate investigation, Professor Dash has performed a number of significant investigations and international missions: he conducted undercover investigations of the Chicago municipal courts; he investigated the actions of British paratroopers in Northern Ireland; he served as Chief Counsel to the State Senate impeachment proceedings against the Governor of Alaska; and he was appointed Special Counsel to the President of the Senate of Puerto Rico for a political murder investigation. Professor Dash also assisted with the exit of a Russian dissident from the former Soviet Union, and he was the first American allowed by the South African government to interview Nelson Mandela while in prison.

This essay comprises the edited remarks of Professor Dash delivered at the Watergate Era Symposium held at Nova University Shepard Broad Law Center in Fort Lauderdale, Florida on March 25-26, 1993.
so I have to remind them that I didn’t go to prison. I was asking the questions, not answering them.

Watergate was much more than a break-in. But the break-in was the thread that began to unravel the whole ordeal. There was a burglary of the Democratic National Committee ("DNC") headquarters at the Watergate office complex. Nixon called it a "third rate burglary." It looked like the Keystone Cops; they didn’t even know their way around, and they got caught.

The man who directed the burglars, G. Gordon Liddy, is now a radio celebrity and has a large audience in Washington, D.C. He regales his listeners with stories about his will and his strength, and he calls me the "hapless Sam Dash," who was so incompetent that he couldn’t find his way to the Watergate Hotel itself. On the twentieth anniversary of the break-in this past June 17, 1992, Gordon Liddy took his microphone, went down to the Watergate, and interviewed the cops who arrested him. Only in America!

The burglars actually broke into the Watergate twice. When they went in the first time and placed their bugs, apparently, they weren’t getting good reception. Liddy told White House counsel John Dean that Attorney General Mitchell had called him into the office and said, "It isn’t worth [expletives deleted], I want you to go back in there again and put them in a better place." Liddy said to Dean, "It’s my reputation at stake, we gotta go back in again."

So they went back in again. There is a very funny story, which is not well known, that shows Watergate also involved providence. We would never have known about the break-in, we would never have conducted the hearings, and we would never have known about Nixon’s involvement, but for a very strange quirk of history.

When the burglars went in the second time, in order to keep going back and forth with their tools, Jim McCord (the wire-tap expert and former CIA agent) put tape around the door latch so that the door that otherwise locked automatically would not lock. The Watergate security guard, who became very famous in the newspapers, was coming down on his route and he saw the tape. That didn’t really alert him because he said there were carpenters in the building earlier who were doing some construction work, and he thought they must have put the tape on. So the guard took the tape off. McCord came back and saw the tape was off, and he rushed back to Liddy. "We’ve been found out! We gotta get out of here!" he said. Liddy replied, "No. Mitchell told me I had to do the job right, we’re staying. Put more tape on." Well, McCord put more tape on and when the guard came back the next time around he saw the tape on the door lock again. The guard
Dash knew that couldn't be from the carpenters—it had to be a very current event—so he called the police.

This is when providence intervened. The call went out to a uniform police patrol in a marked car, and they were supposed to come and search for the burglars. They ran out of gas, however, and they radioed, “Is there any other car in the area?” A nearby drug investigation team dressed in dirty jackets and caps and sitting in an unmarked car (undercover, of course) answered, “We’re just around the corner.” And they responded.

Across the street from the Watergate, in the Howard Johnsons Hotel, was a lookout for the burglars. He was a man named Baldwin who, while the burglars were inside, was supposed to see if any cops were coming. He had a walkie-talkie so he could call ahead and say, “Get out! The cops are coming!” But, all he saw was this beat-up car, and guys getting out wearing these dirty jackets and caps. He didn’t think they could possibly be the cops. He didn’t get alarmed until he saw the lights go on as the undercover detectives began to search the building from the ground floor up.

When Baldwin saw the undercover officers reach the 7th floor where DNC headquarters was located, he became concerned that there may be something wrong. Baldwin watched the detectives come out on the balcony, close to the burglars who were just inside the offices. So he radioed Liddy and said, “Are our people in plain clothes, or are they in formal street wear?” Liddy said, “formal street wear.” Baldwin could only respond, “Ah-Oh!”

Right at that point the burglars were apprehended by the police, who had their guns drawn. It was too late. But for the marked police-car running out of gas, and the plain clothes team coming on, we would have never learned of Watergate. The burglars would have been alerted if a marked car had shown up, and they would’ve gotten out. This is just one of a number of fascinating examples of providence, luck, fate—whatever you want to call it—which include, perhaps, our finding of the Oval Office tapes.

But, as I said, Watergate was more than the break-in. It was about the pervasive abuse of power, and not just the burglary of the Watergate. The White House that Richard Nixon ran had a fear of dissent and a fear of demonstration. His coterie of aides believed that the only person who was good for America and could save America from subversives was Richard Nixon.

These were men who wore little American flags on their lapels. These were men blinded by a terribly distorted sense of patriotism. Mitchell testified that, “I would’ve done anything to keep Nixon in power and to keep McGovern out, who would’ve destroyed our country.” I remember
one of the Senators asking Mitchell, “You say ‘anything’? Would you commit murder?” And Mitchell smoked his pipe and said, “That’s a hard question, Senator.”

Gordon Liddy recently told Larry King on a radio program that he had been commissioned by the White House to rub-out investigative journalist Jack Anderson. Anderson had somehow received a leak from a national security staffer and had published it in his column. Liddy said, “He deserved to die, and I was the hit-man.” King, who was somewhat taken aback, said, “Well, you didn’t do it. He’s alive now.” “Yes, yes,” Liddy said, “The White House chickened out. I think that he should have been killed, and I would’ve killed him. But they chickened out.”

There’s another funny little story about Liddy. When the burglars were caught, he had not been in the DNC offices with them. He and Hunt were in a suite of rooms in the Watergate Hotel. Liddy immediately ran the next day to Dean to tell him everything had gone wrong. He said to Dean, “I screwed up. I was not supposed to get involved because I could be identified with the Committee to Re-elect the President. Therefore, I deserve to be executed. I’m a Catholic. I can’t commit suicide. So I will stand on any street corner in Washington you want, and you can come around in a black car and shoot me with a machine gun.” Dean told me, “That’s got to be crazy. He thinks I’m gonna come around and shoot him with a machine gun.”

These were the people who were involved; the Keystone Cops. Nevertheless, although the stories are amusing now, they reflect a shocking willingness by those misguided men to abuse the powers of the presidency. In order to ferret out dissenters, the Nixon Administration authorized burglaries all over the country—the “black bag” jobs.

Liddy and Hunt were sent out to break into the office of Daniel Ellsberg’s psychiatrist. Ellsberg had leaked the Pentagon Papers. They broke into the publisher of the Las Vegas Sun’s office to get what they thought were incriminating documents against Nixon. They wire-tapped, they bugged, and they blacklisted dozens of people who had done nothing more than criticize the president.

These men also planned to set up a boat outside Miami on the water, just when the Democrats were holding their national convention in the city. The boat was to be equipped with concealed cameras, microphones, and hired prostitutes. Then, they would lure democratic candidates and big-wigs onto the boat to photograph them in all kinds of compromising scenes. And that wasn’t the end of it. They actually had a plan to kidnap dissenters all over the country, put them on a plane, and drop them in the jungles of Central America.
Gordon Liddy had devised a master plan incorporating all these schemes. The principal operation (code-named “Gemstone”) was to burglarize the DNC office files at the Watergate. Liddy had a proposed budget, detailing how much each operation would cost. Mitchell’s only response was, “The budget’s too big.” He did not say, “You can’t do that. That’s criminal.” No, his concern was the expense, “Cut it down, cut it down.” Finally, they narrowed down their options, and they only had enough money to break into the Watergate.

It is an almost inconceivable image: Mitchell, the Attorney General of the United States—the chief law enforcement officer in the nation—sat in his office at the Department of Justice and listened to Liddy present a briefing with an easel and charts outlining these unlawful plans to harass, embarrass, and undermine the Democrats. Mitchell would later refer to these actions as “the White House Horrors.”

There was a secret police agency inside the White House. The President’s men didn’t trust the FBI or the CIA, and they used their own small police agency called the “Plumbers” in the basement of the White House. They were called the Plumbers because Nixon was driven to obsession over the leaks coming out of the White House, and these guys were going to plug the leaks. But they were also doing much more. They were burglarizing, wire-tapping, and doing everything else.

The cover-up was not to cover up the break-in itself. Rather, the White House palace guard was worried that if the Watergate burglars actually were convicted and went to jail, they would disclose their involvement in all these other “black bag” jobs. They would reveal the White House Horrors—this persistent, pervasive criminal activity that Nixon and the Plumbers were involved in.

The exposure of these outrageous actions through the Senate Watergate hearings had a tremendous impact on the public. It really changed how we perceived our government. The ripples of Watergate, even twenty years after it happened, are still felt today. As we are looking back after twenty years, we should ask the question: “Why? Why did it provoke such an enormous response?” There have been other congressional exposures of government wrong-doing in the past without this impact. However, because of the Senate Watergate hearings, we had a unique, classic demonstration of what the Framers expected in the operation of the separation of powers.

Congressional investigations are not new in America. During the time of Watergate, some people said, “Well here it is. A Democratic Senate is exploiting political power to embarrass a Republican president,” as though congressional investigations were invented by the Watergate hearings.
complained that it was an exploitation of power—raw partisan politics rather than the proper utilization of a constitutional prerogative.

Even though the power of Congress to investigate, to call witnesses, and to hold hearings is not explicit in the Constitution, the Supreme Court has held, over and over again, that the investigative power of Congress is an inherent part of both its legislative function and its public-informing function. Watkins v. United States¹ is one of the leading cases which established this concept. That case came up during the House Un-American Activities Committee hearings and shortly before the McCarthy hearings. Those hearings represent the great potential for abuse of the congressional power to investigate. Under the pretext of Executive branch oversight, the committees tried to impose a philosophy of life on all Americans. They wanted to find out who the communists were in Hollywood, in government, in newspapers, and in business. It was a terrible exploitation of congressional power and a tragic misuse of the constitutional powers of Congress.

In Watkins, the Supreme Court found the purpose of that congressional investigation was exposure for exposure's sake. The Court said that, although the power of Congress to investigate is broad, it does not include the power to call citizens before its committees simply to expose them. Congress has to base whatever it does in the legislative power or the public-informing function.²

The Court's opinion quoted Woodrow Wilson when he was an academic at the turn of the century. This quotation is constantly invoked to identify the powers of Congress in holding such investigations:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the

2. See id. at 199-201.
only really self governing people is that people which discusses and
interrogates its administration.3

That was a foundation which the Court has restated many times. The
Congress has the important responsibility to inquire into how the govern-
ment works and to talk about it to the people.

Wilson's essay was written before radio and before television. The
kinds of hearings that Wilson was discussing were hearings that only a few
people could attend and maybe the newspapers would report. We've gone
much further than that. Picking up on what Wilson wrote and what the
Court said in Watkins, with television today we can become once again a
town meeting. During the Watergate hearings, millions and millions of
people all over this land, and in every town and city, were glued to the
screen as though they were sitting in the Senate Caucus room watching the
hearing. They actually had a better seat because there were close-ups, and
we were so crowded in the Caucus room that the people in the rear couldn't
necessarily see the witnesses.

Through television, we have enabled the philosophy Wilson set forth
to work on a grand scale. We should take full advantage of this tool so that
the people can be instructed. It will only work, though, if the committee
that is conducting the investigation knows what its function is, knows how
to accomplish that function, and knows how to communicate to the public.

Congress has been investigating the Executive ever since George
Washington was President of the United States. In 1792, Major General St.
Clair, Commander in Chief of the U.S. Army, was sent by Washington to
quiet the Indians in the Ohio area. Five tribes out-maneuvered the U.S.
Army and decimated the troops. St. Clair came back in tatters to Wash-
in.gov. A House Select Committee wanted to find out how the Indians could
so destroy the American Army (this was the Army that beat the British in
the Revolution). How could the Indians do this to our army?

General St. Clair claimed that he had been given wet powder, leaky
tents, and—believe it or not—no bells for his horses. In one of the more
interesting notes about this episode, it seems that the army needed bells on
its horses at night because they would stray, and the soldiers couldn't find
them quickly without following the sound of the bells. So the army was in
a vulnerable position when the horses could not be corralled.

The House in 1792 subpoenaed the War Department, the first subpoena
of the Executive by the Congress. The War Department secretary ran to

3. JAMES HAMILTON, THE POWER TO PROBE 127-28 (1938) (quoting WOODROW
WILSON, CONGRESSIONAL GOVERNMENT 303 (Houghton, Mifflin & Co. (1900)).
President Washington and said, “Do we have to honor a subpoena of the Congress?” Washington called in Jefferson and Hamilton, and they said there surely must be occasions when they don’t have to reveal executive information to the Congress. But they said something then that presidents have said over and over again, up until this time: “We don’t want to look like we’re holding things back from the public [a cover-up], so this time let us give it to them.”

They didn’t have duplicating machines at that time, and the House clerk had to come up with quill pen and ink to copy the records of the War Department. Unfortunately, the inquest was not very successful. There was an investigation, witnesses were called, and the newspapers played up the controversy. But St. Clair never was vindicated because politics entered in and the Executive branch didn’t want to have the War Department embarrassed too much. So, even though the evidence was pretty clear that they had been very negligent in equipping the troops, the investigation concluded without much result.

In 1808, General Wilkinson, another Commander in Chief of the Army, entered into a treasonous pact with the King of Spain. The general and the king planned to organize a separate army, cut off the western lands of the United States, and claim the Louisiana Territory for Spain. Aaron Burr was somewhere involved in this conspiracy. The House began an investigation, but General Wilkinson burned all the evidence. So, well before Watergate, there was destruction of evidence to block a congressional investigation. The House couldn’t prove anything, and Wilkinson died a very rich man in Mexico, still wearing his uniform to impress the Mexicans.

In 1818, Old Hickory, Andrew Jackson, invaded Spanish Florida. The issue then was—to borrow a question made famous during Watergate—what did the President (Monroe) know and when did he know it? The congressional committee sought to learn whether President Monroe had authorized Jackson’s invasion. They weren’t able to prove it; they weren’t able to show anything.

Of more recent fame, there was the Teapot Dome scandal in 1924, and, at the close of World War II, Congress conducted an investigation to determine how the Japanese were able to surprise us at Pearl Harbor. In the 1950s, as noted earlier, there was the shameful spectacle of the McCarthy hearings and the House Un-American Activities investigations. As this list demonstrates, there has been a long, colorful history of congressional investigations prior to Watergate.

The Senate Watergate Committee hearings were not the first to target a president. The first time a president was targeted was in 1814, and the
target was James Madison. The British had burned Washington, D.C. during the War of 1812, and Congress wanted President Madison to be held to account for his negligence in failing to provide an effective military defense of the city.

In 1860, President Buchanan was exposed for corrupt activities. Although Congress was considering impeachment, most congressmen did not think they could get the necessary votes. This was one case, however, in which a congressional investigation had the same effect as Watergate. Buchanan was defeated by Honest Abe Lincoln, who rode the wave of public sentiment against Buchanan generated by the congressional investigation. One can see again the separation of powers working.

In 1910, there was an investigation of President Taft, again for corruption. In 1912, Theodore Roosevelt was attacked and defeated for a third term partly on the ground of illegal campaign financing from corporations. Time and time again, presidential conduct was the subject of congressional investigations.

Finally, in this brief historical review, the Senate Watergate Committee was not the first to investigate criminal charges. Throughout Watergate there was a complaint: If Congress investigates, Congress should investigate broad areas for legislative remedial purposes. These critics said Congress did not have the right to sit in judgment as if it were a criminal case. They protested that Congress could not bring before it a person already charged by a grand jury and waiting for trial, and require that person to give testimony, or others to give testimony, on those same charges. Obviously, this would embarrass and prejudice criminal trials.

But, in 1962, the Supreme Court decided *Hutcheson v. United States*, and held that Congress had the power to do exactly that. A labor union president had been indicted and was then called before the McClellan Committee in Congress, which was looking into labor racketeering activities. This man was asked the same questions he was going to have to respond to (or take the 5th Amendment) at his trial. He said, “You can’t do this to me.”

His contempt citation was upheld by the Supreme Court on the ground that Congress has a separate public-informing function and legislative function, and Congress can look into the same activity which was the basis for the criminal prosecution. Obviously, Congress cannot prosecute,

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5. *Id.* at 602.
6. *Id.* at 611.
7. *Id.* at 622.
Congress cannot convict, and Congress cannot punish. It can, however, conduct an inquiry into matters within its legislative jurisdiction.

The Senate Watergate Committee was really, in 1973, the culmination of this history. In a sense, it was not extraordinary. It was not extraordinary for the Senate to appoint the Senate Select Committee for Presidential Campaign Activities.\footnote{That name was too long for the newspaper reporters, and so they referred to it as the Senate Watergate Committee. That’s what it is called all the time now.}

Although in light of history, it was not unusual to appoint such a committee, what was unusual was that the vote of the Senate was unanimous. The Republicans in the Senate were worried that it was a Republican Administration being investigated by a Democratic majority of the Senate. Therefore, the Administration ought to have had at least somebody overlooking what the Committee was doing to insure that it was fair and to protect the Administration as best as possible. The Republicans wanted to designate a minority counsel, and named Fred Thompson to the position.

Senator Ervin, who was the Chairman of the Senate Watergate Committee, and I readily agreed to this proposal. We certainly welcomed the particular person involved, Fred Thompson, who was a remarkable lawyer (although he is better recognized today for his talent as an actor in a number of major Hollywood films). Fred is a man of integrity, and I enjoyed working with him, although, as he said, we kept things from each other when we knew he was following a different agenda than mine.

In light of this long history of congressional investigations involving presidents, I wondered why none of them had the impact of Watergate. The Watergate hearings captured the people’s attention and brought them back into the role that the people are supposed to play in a democracy: The people are the sovereign, calling on their Executive to be accountable to them.

None of those other investigations had that impact. Why? Why Watergate? Not Watergate itself, but the Watergate Committee. I give primary credit to the chairman of that Committee. You can look at chairmen of investigating committees all through our history and not one of them was anything like Senator Sam Ervin.

By the time he was appointed, Sam Ervin was an elder statesman. He had been a Justice of the Supreme Court of North Carolina. He was a devoted constitutional scholar. He kept a little copy of the Constitution in his back pocket, and he could quote it word for word just as he could quote poetry and the King James Version of the Bible word for word. Many
people saw him do this at the hearings and thought that this was a kind of contrived display or political show on his part. But this was no affectation. It was authentic Sam Ervin in his office or on the telephone. He was a person who just was able to punctuate everything he said with quotations from the Bible, quotations from the Constitution, or various little poems that were dear to him. He was a man of great integrity who believed in the fundamental, sacred purpose of our Constitution. I think Sam Ervin would have been at home with the Founders. To him, this investigation was a mission. He strongly believed in our separation of powers and the role of the Congress in checking and balancing the Executive.

Of course, he once said, “President Nixon, I believe, also believes in the separation of powers. From what I see, he wants to separate the Congress from all its powers.” Those were some of the little things that Ervin would say from time to time.

I don’t want to put halos over every member of the Committee. The only halo I want to hand out is to Ervin. There were three other Democrats on the Committee and three Republicans. The three other Democrats were so-so, and they were not as committed to the exposure of the facts and the separation of powers as Sam Ervin. If it weren’t for the strength of Sam Ervin as a leader and a towering figure in the Senate, we wouldn’t have been able to accomplish what we did. The other senators were constantly trying to pull the rug a little; constantly saying, “Haven’t we stuck our neck out too far?”

One thing you learn about senators and congressmen when you are working on the Hill: they’re all cowards, with some exceptions to that rule. They’re scared, and they run scared. One has to only read a ripple of a rumor, and they’re all running around to find a shadow to hide in. They were so afraid of projecting themselves out too far and getting a backlash. They were continually saying, almost after the first day or two, “Haven’t we done well enough? Can’t we cool it off? Let’s close it down.”

When Fred Thompson and I first met in March of 1973, we went to lunch together at the Monocle Restaurant on Capitol Hill. I asked, “Is your family coming up? Where are you living?”

Fred said, “I’m staying at a hotel.”

I said, “All the time we’re going to be working?”

He said, “What do you mean all the time? Senator Baker told me I’m going home in June.”

I said, “Going home in June?”

“Well,” he said, “We’re gonna have a couple of weeks of investigation and hearings and close it down.”
I said, "You must be wrong. We're going to be here maybe a year or two." And Fred was shocked.

The original plan of the minority was to go through the motions and do nothing. That, perhaps, was also the thought of some in the majority. But Sam Ervin stood straight. Instead of doing what was usual in picking a Chief Counsel, Sam Ervin went outside the Congress to look for somebody he could trust, who would be able to do this investigation on the merits. He told me that he turned down anybody who applied for it. He said he had hundreds of people, judges and lawyers, some wanting to do it for nothing. He said, "You know what you get for nothing. Nothing. I don't know what their motives are, I need a lawyer who will know what the job is all about and have the courage to go forward in it and the ability to do it."

After using me for a while as a consultant, Senator Ervin telephoned me out of the blue. He said that he had checked me out, I had the qualifications, and he'd had the committee approve it, and then asked if I would be willing to serve as Chief Counsel.

At that time, I was beginning my spring semester at Georgetown. I had to tell him I could not do it, I had my classes. He got very upset and said, "I'll talk to the president of the university." I said, "No, I'll talk to the dean."

When I talked with the dean, he asked me, "You said yes of course?"
I said, "How could I do it? I have to teach my classes."

He said, "Hell, we can get any professor to teach your classes! Call him back before he changes his mind."

I had been district attorney, and I had been involved in controversial investigations. I knew that this was a major challenge I would be undertaking. And I had conditions. First condition: I hire my own staff. No one on the Committee should dictate who would work for me, and my staff should not be people out of the Senate staff. Not that they weren't capable people, but I didn't want anyone loyal to any of the political people on the Hill. The second condition: I had to have sufficient resources, budget. And the third condition: I had to be permitted to take the investigation as far as it would lead me, without any restriction or limitation by the Committee.

Ervin said to me, "If you hadn't asked for those conditions, you wouldn't be good for me. Do you want it in writing?" I was embarrassed, but I said, "Well, yes." He gave me a letter with all of those conditions and said, "If I ever go back on any of them, come to my office and throw it in my face."
That never happened. I was able to pick some of the finest young lawyers (mostly former prosecutors) and investigators. I had a staff of one hundred. These were people who had come from some of the best prosecutors’ offices in the nation, such as Robert Morgenthau’s in the Southern District of New York. He was one of the great United States Attorneys. They had worked on white collar crime and complex organized crime cases. They were used to dealing with complicated legal issues which involved hundreds or thousands of documents. Because so many of them wanted to work on this investigation, I was able to get the best.

There were no restrictions from Senator Ervin or the committee. Our charter was simple and direct: we had to make a thorough and complete investigation.

Congress has many powers to conduct an investigation. Don’t ever believe a congressional committee that tells you that it’s too difficult to investigate something or find out what happened—don’t believe it. A congressional investigating committee has as much power as a prosecutor. The committee has subpoena power and the power to hold people in contempt, which the Justice Department enforces in a criminal prosecution.

If it decides not to refer a case to the Justice Department, a congressional committee even has the power to call uncooperative witnesses (who refuse to respond to a subpoena or answer a question) before the Senate, hold them in contempt, and imprison them in a dungeon in the basement of the Senate. That is the separation of powers. That jail is still there, but I don’t remember when it was last used. Congress today prefers to send the matter over to the Justice Department to prosecute under an indictment for contempt. But the congressional committees still have that power. They have the power to grant immunity as well. These committees exercise awesome powers of Congress when they subpoena and bring before them witnesses and demand an explanation for various actions.

You have to be in the position of a witness called before the Congress to know the awe and (sometimes) solemnity of that process. It usually will produce information. Good investigators, utilizing all of the strategies, techniques, and tools of investigation will be able to ascertain the facts. It is a cop-out when a congressional committee says it can’t get the facts.

Before we could begin to make a thorough and complete investigation, we first had to define our role and function. Many of us had not worked on the Hill or in congressional investigations. It was a different role, a different function, and a different style than a trial lawyer has in a courtroom. You do not collect and present your evidence in the traditional way an attorney would prosecute a case.
I realized uppermost, that if we were going to serve the public-informing function Wilson had praised, we had to be able to reach the minds of the American people in such a way as to win their confidence. Therefore, underlying everything we did, there had to be fairness and objectivity. If we were seen as persecutors, if we were seen as unfair, no matter the facts that we presented, the reaction of the American people would be to reject us. The only way I knew to get the support of the American people was to convince them that we were doing an honest job and that we did not have an agenda to “get Richard Nixon.”

There was a hope on my part and on Senator Ervin’s part that the President of the United States was not involved. Whether you approved or disapproved of Richard Nixon, he was still our President. Nobody really wanted the President of the United States to be involved in crime, and we were hoping the evidence wouldn’t go that far. He was not our target.

We began with a very systematic method I called the “vacuum cleaner approach.” We swept up everything, every piece of information related to Watergate. Then we began to sift and analyze them.

We were the first Senate Investigating Committee to utilize the technology of computers. Committees before us were frightened of computer technology, even in 1973. The staff at the Library of Congress, which worked with computers to sort all of their documents and books, offered us their services. I readily accepted the offer. We developed a computer system so that every piece of information that came into our investigation—whether it was a newspaper clipping, a summary of an interview, or other investigative material—first had to be entered into a computer databank. The system was of remarkable value. When we began to put things together to prepare for hearings or prepare for a witness interview, we could request a chronological printout on John Mitchell, for example. The computer would then produce everything our files contained: every significant date, event, and witness associated with Mitchell. Imagine the great difficulty we would have encountered if we had to search the files by hand for this information. We were dealing with thousands and thousands of documents. There was some comfort in knowing that you could pull all this research back—and actually be surprised, because sometimes I reviewed important information that I had forgotten. I would say, “Do we know this? The computer must be wrong.”

We also copied every one of our documents and newspaper clippings onto microfilm. So, if the abstract from the computer printout told us that there was a news story on that matter, there was a corresponding document on microfilm. We went to the microfilm machine, punched in the number, and printed the document or newspaper article. We could get it in minutes.
I remember one instance when Attorney General Mitchell was before the Committee, and he was being asked about a very important event. Mitchell was the original stonewaller, who would smoke his pipe and say, "I just can't recall, I don't remember."

I asked him, "Wasn't that clearly on the front page, that event in which you participated, of the Washington Post?"

"Well," he said, "I don't remember."

A phone call was made to our computer staff and within minutes a clerk came up with a printout of the clipping. Just imagine trying to find by hand that one item in hundreds of files in time to cross-examine the witness. The clipping was handed to me, and I handed it to another staff member who showed it to Mitchell. He then conceded, "Oh yes, I remember that." We looked great, we were so prepared. It was the computer and the retrieval system that allowed us to do such remarkable things with the Watergate investigation. In addition, after the appointment of the special prosecutor, we gave his office all of the evidence we had assembled on our computer databank. We also presented the House Judiciary Impeachment Committee with all these thousands of documents on computer tapes.

The challenge to the Senate Watergate Committee was not the investigation because, as noted earlier, with all the powers that a congressional committee has, it can make a good investigation. The challenge was the hearings. How do you present all the facts that you collect in a way that you can communicate it to the viewing public so that they understand in the same way you understand it?

We all know the problems of communication. You can know things and try to communicate them to another, but what the other person hears and receives may not be the message you intended to convey. As there is an art form in telling a story, there is a special art form in telling a story on television. They do it all the time in the detective stories and entertaining shows that we watch everyday. It was important for us to be able to produce that kind of a "show"—but for educational purposes rather than entertainment.

I was immediately challenged by the networks who were going to cover the Watergate hearings on television. It was going to be very expensive for them, and they wanted to make sure they had an audience. In the beginning they didn't think we'd have an audience because congressional hearings were considered boring, even though the facts of the Watergate investigation were far more compelling than the routine congressional hearing. Some of their top executives met with me, and they said, "Of course we gotta talk about who your first witnesses are. You're gonna put on Haldeman and
Ehrlichman, the principal conspirators.” They said, “You gotta put on a sexy witness so the public will watch.”

“Well,” I said, “I wasn’t planning to do that. They’re the accused, and I don’t plan to put the accused on before I put on the accusers. First, it is usually done that way. Second, I want to teach the American people a civics lesson on how this all started.”

I wanted to begin with the re-election campaign. It all started from what was called CREEP, the Committee to Re-elect the President. Many of the campaign staff that were involved, like Liddy and Hunt, had been in the White House. Magruder, who directed the re-election committee, had been a White House aide working for Haldeman. I wanted to show how they had been shifted out of the White House and how they developed this Committee to Re-elect the President. This cast of characters was going to reappear as burglars and conspirators. That’s the only way I had to show it.

They said, “What does this mean?”

I said, “My first witness is going to be a man named Odle?”

“What is Odle?”

I said, “He’s a little staff guy at the Committee to Re-elect the President, and he’s going to have an easel. On television, he’s going to show the chart of the White House staff and show how these people ended up on the Committee to Re-elect. He will explain what their roles were.”

“Ugh-gh-gh, boring!! We’re gonna lose the public,” the television executives began to complain to Ervin. “This is going to cost us, and this guy Dash is going to put on a boring set of hearings!”

Through a good part of the hearings we presented, the media in the well of the Caucus room would yawn in an exaggerated gesture to express that they were bored. The American people, however, were riveted to their television sets, listening to the story evolve as each witness testified. That’s what I wanted to achieve. I wanted to begin by educating the American people as to the political process: examining the re-election committee, demonstrating the movement of the staff from the White House to this committee, then showing the burglary plan.

Figuratively speaking, we had to bring the public into Mitchell’s office to hear the illegal plans Liddy briefed to the then Attorney General. So we had McCord, who had worked closely with Liddy, testify to all those activities. In front of the cameras, he explained how to tap a phone and how to place a bug. Then we focused on the burglary and the arrest at the Watergate DNC office. We brought the cops in to reconstruct how they caught the burglars. Then we moved on to the cover-up.

John Dean was our principal witness. But he was only one little person—although a very ambitious little person—who had accused the
President of the United States. If it were his word against Nixon’s, I don’t think the American people would have come down against the President on the basis of that testimony alone. Therefore, our concern all along was to find corroborating evidence to support what John Dean said.

How could you corroborate such a secret set of meetings in the Oval Office? Who else was there but the President and his top aides? The President wasn’t going to tell us what happened. Haldeman wouldn’t tell us what happened. Ehrlichman wouldn’t tell us what happened. Fortunately, during a private session in his home, Dean recalled that in a meeting in the Oval Office, as he was talking to the President about “hush money” for the burglars, Nixon suddenly stood up and went over to a bookcase and whispered in the bookcase, “I guess I was wrong in telling Colson that he could go ahead and pay Hunt.”

Dean said to me, “I wondered why he [Nixon] whispered into the bookcase.” Could he have been recording this meeting and not wanting to get that part onto the tape?

I said, “Oh my god, if he was, we would have corroboration. You would have an ear witness at least, the tape.”

Dean wasn’t sure. He said “I don’t know, I don’t. It’s just a guess on my part. But, I don’t know.”

Without telling Dean, we then developed a strategy for my staff to find out if there could be any kind of recording in the Oval Office. We used a very interesting system we called “satellite charts.” We knew that, when people worked among others in the White House, there were always eyes and ears watching. Especially if you are the President, or even if you’re Haldeman or Ehrlichman, there are a lot of little eyes and ears watching you, they are so delighted to be in your presence. You don’t notice them if you’re the President, but they notice everything because it is something they want to remember for the rest of their lives—and they keep records.

So, we took each of the targets (Nixon, Haldeman, Ehrlichman) in the White House, and then we charted who were the people around them everyday: who transcribed and typed interviews, who purchased equipment for the Executive Office, who made the coffee, or anything. We actually developed over a hundred satellites. We called them all in and had a team of lawyers ask general questions not obviously aimed at the taping. But embedded into the questions were points concerning purchase of tapes, transcription of tapes, and maintenance of recording machines.

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9. After weeks of cross-examining him, and preparing him for his testimony, I believed that John Dean was credible.
Only three people in the White House knew about the taping system: Haldeman; his staff assistant, Higby; and Butterfield, who was in charge of the Secret Service detail in the White House and had his office and desk just outside of Haldeman’s office. Dean didn’t know about it. Rose Mary Woods, Nixon’s secretary, didn’t know about it. Ehrlichman didn’t know about it—and he got angry as hell when he found out that he had been bugged. Mitchell didn’t know about it. Kleindienst didn’t know about it. This was a tightly held secret. We didn’t think Butterfield knew anything, but the dragnet approach we designed proved invaluable.

With a congressional investigation, there is no threshold standard of probable cause or reasonable suspicion to bring in anybody. It’s called a grand inquest. It is like the grand jury in a sense. You can call anybody and ask any question if it is relevant to the inquiry delineated in the resolution. Butterfield was just one of a number of witnesses we had called in. Fred Thompson’s staff gets the credit for this revelation because it was one of his young investigators who actually put the question to the White House aide. Butterfield already knew that Haldeman had been called before the Committee, but he didn’t know what Haldeman told us. He also knew that Higby had been called; but again, he didn’t know what had been disclosed. Butterfield was under oath, and he wasn’t going to take a chance of committing perjury. So when the question was asked about a particular recording (we knew nothing about a system), he said, “Well, you probably already know this, but it’s not one recording. I put in a system that has been recording every conversation in the Oval Office for the last two years.”

It was a very sophisticated, automatic system. Wherever the President was, the Secret Service always followed him through a lighting system on a chart. The light would go on when he entered the Oval Office, the Cabinet Room, etc. In each one of these rooms, particularly the Oval Office, they put in a recording system. It was triggered by the lighting system when the President walked into the room. It only started to record when somebody spoke, because it was voice activated. That explained why the President incriminated himself—when you have an automatic taping system, you forget. In the Cabinet Room, the President had to move the switch himself, so he knew when he was recording. But in the Oval Office, it was automatic, and he frequently forgot about it. He said things I don’t think he would have wanted to go on tape. There are other times, however, that you know he’s speaking for the record.

That was the strategy that got us the taping system. We got to Butterfield. On that remarkable, historic Monday, July 16, 1973, we replaced the witness who was originally scheduled to testify with Butterfield. No one knew who Butterfield was. He was then Director of the Federal
Aviation Administration. He had refused, by the way, to be a witness because he said he was on his way to Russia to sign a treaty. Senator Ervin said it was more important that he talk about the taping system than sign a treaty in Russia. Ervin actually threatened that he would be jailed if he didn’t come. He came.

As a courtesy, I turned over the microphone to Fred Thompson. Since his staff member had first asked the question which brought this stunning information to light, Fred had the right to open the questioning of Butterfield. He called on Butterfield to talk about the recording of conversations in the White House. When Butterfield mentioned that there was an automatic taping system in the Oval Office of the President of the United States during all these events John Dean had recounted, the scene blew up! Just like in the movies, reporters scrambled for their phones. Imagine the heads of state all over the world who learned that their meetings with the President were recorded. That’s when everyone said he should have burned the tapes. I will leave that issue for another time.

My objective has been to highlight the strategy and techniques of an independent staff backed completely by a strong chairman. When I was investigating John Dean, his counsel told me that Dean could not come to the Senate Office Building because he suspected Senator Baker, who had been having private meetings with Nixon at the time he served on our Committee, was taking instructions from Nixon on how to destroy our investigation. If he came to the Senate Office Building to talk to me, Dean feared it would be leaked to Baker. Baker would then report it to the President, and he would be murdered. Dean was quite scared. So I agreed that I would come to his home (usually around midnight or 2:00 a.m.), and we would talk. The only person I would report these meetings to was Senator Ervin. The Senator agreed not to tell the other members of the Committee.

The purpose of those meetings on my part was to know whether Dean had enough information to justify granting immunity. After listening to him and seeing the documents he had secretly removed from the White House, I concluded that he did. I went back to Ervin and I said, “We have to grant immunity.” Such a grant required a two-thirds vote of the Committee. By that time, Senator Weicker had joined us (the only Republican to do so), and he was voting however the Chairman would vote. That gave us five members voting with the Chairman, and that was the necessary two-thirds.

I said, “You’ve got to present Dean for immunity, but you cannot tell them what Dean is saying.”
Imagine—those of you who know the word "chutzpah"—telling a United States Senator that he has to vote for immunity, but the Chairman and Chief Counsel won’t tell him what the witness is going to say.

Of course, Senator Baker and Senator Gurney blew up and said, "We’re the elected Senators. Who the hell is telling us that we’ve got to rubber stamp an immunity vote?"

Ervin said, "I’ve listened, I know what it is, I can’t tell you." Then Ervin, who always had a humorous and pithy remark, said, "My daddy used to say that when you hire a lawyer, you ought to listen to him or fire him. Since we’re not about to fire Sam Dash, let’s listen to him."

Everybody laughed out loud, and it sort of broke the ice. We got the two-thirds vote without the Committee knowing what Dean would say. Since there was no executive session for all the Senators and their staffs to hear Dean’s statements, we did not have to confront the serious risk of a calculated leak by the Republicans. We did not have to face the possible consequences of the White House attempting to undercut Dean and destroy him before his testimony was presented in open hearings.

With the backing of Senator Ervin, my staff had complete independence and virtually unlimited investigative authority. We were able to get to the truth and conduct the hearings in a way that we could tell the public the truth. By the end of the summer of 1973, the break in and cover-up had been exposed. We presented those hearings and dramatized them in a way that the public understood what we were saying. And they were outraged. That’s what brought the unprecedented response of the American people to Washington. Letters—millions and millions of letters—were written from every little town and city in the country. Families signed off: the mother, the father, the kids. Their messages were filled with blessings, support, outrage. These were genuine and spontaneous, not the result of orchestrated lobbying. Never before in the history of America did the American people talk back to its government the way they did after the Watergate hearings.

Nixon had called the American people “the Silent Majority.” He thought they didn’t care; he thought they were apathetic. Well, he was wrong. If you inform the American people, and they understand what’s going on, and you can reach their sense of outrage, they talk back. And I think that spirit has endured. I think Watergate had a tremendous impact on the American people. They found their voice again, and they demanded accountable government.

The Chief Counsel of the House Judiciary Committee came to see me and said that the Committee was getting a flood of letters from constituents. Nixon had said, “I don’t worry about impeachment. The House doesn’t have the guts to impeach me.” That’s true, they didn’t. They were
frightened. Yet, when their constituents wrote and when the hearings took place, they suddenly realized they had to hold impeachment hearings. They couldn’t avoid it.

But for the Watergate hearings in the summer of 1973, there would have been no impeachment. But for the Watergate hearings, there would have been no aroused public sounding off. But for the hearings, there would not have been such an overwhelming response to the “Saturday night massacre,” Nixon’s firing of special prosecutor Cox. That, ordinarily, would have just been the President firing a prosecutor. What was the big deal? Having watched the Senate hearings, the people understood in October 1973 what was going on. They realized the meaning of it, and they hit back so strong that the White House had to change its position and bring in Leon Jaworski as special prosecutor.

Watergate was a unique event. It doesn’t always work that way. After Watergate, we had Iran-Contra. People sometimes ask, “If you did the job so well, why Iran-Contra?”

As any student of history knows, you never win the fight for liberty through one battle. It is a constant war. The lesson of history is eternal vigilance. You must continue to watch.

I’ve always used this analogy because I think it’s apt. If you have roaches in the kitchen, you don’t spray once and get rid of them forever. One extermination doesn’t mean they won’t come back. You’ve got to keep spraying. The goddamn crooked politicians are roaches in the kitchen; they’ll always come back. Corruption always comes back. Unfortunately, many good people don’t have the stamina to continue the fight.

When the Iran-Contra scandal emerged, Congress didn’t have the will or the stamina to fight. Congress also didn’t have Sam Ervin. Many of the committee members were worried and scared about Reagan’s standing with the public, so they limited their investigation. They limited their witness list. They limited what they wanted to find out. They didn’t enforce their investigative powers, like the use of their executive sessions against North. They exposed themselves to a terribly messy situation, in which, far from informing the public about the scandal so that the American people understood what happened, the message they conveyed was a very ambiguous one. The public couldn’t tell who wore the White Hats and who wore the Black Hats. As a matter of fact, many came to view the congressmen themselves as the Black Hats. The Hill took a lot of heat on that one. Consequently, there was no follow-through, no culminating action, no real impact. In the eyes of most observers, it was a disaster.

This led, of course, to the investigative activity of the Independent Counsel. The Independent Counsel is a product of Watergate, part of the
Ethics in Government Act of 1978,\textsuperscript{10} which was one of our first recommendations for reform. Madison said, if men were angels, we wouldn’t need government. But men are not angels. We need this check and balance for protection. This was an additional safeguard Congress created to take care of those rare situations—and they are rare—when criminal charges are brought against the President of the United States, the Vice-President, or cabinet officers.

The Justice Department, under the Attorney General, should not prosecute because there is a potential conflict of interest. There is the perception that the White House may be able to exercise undue influence over the investigation. Not that the men and women who serve as Attorney General will be thieves or crooks. They usually are very honest people. But they shouldn’t be put in that awkward position because there is obviously a conflict of interest. Some Justice Department prosecutors, who would want to ensure that there was no possible charge of a cover-up, might bend over backwards to take measures that would leave no doubt as to their independence. This could have unfair consequences for the subject of the investigation where an Attorney General went forward with a weak prosecution just to demonstrate his or her integrity. The history of the Independent Counsel Act has shown that most of the independent counsel investigations (there have been about 12) have not found sufficient evidence to prosecute.

If the Department of Justice had made that finding in Meese’s case, there would have been a cry of whitewash and coverup. Yet, when Jacob Stein, who was the first of two independent counsel to examine Meese’s conduct, found no basis to prosecute Meese, there was no adverse reaction. There wasn’t a column in the newspapers, there wasn’t a letter to the editor; nobody complained, everybody accepted it. Why? Because the American public had confidence in that decision. It was an objective decision by an independent lawyer. No critic suggested that the Attorney General or the Justice Department was paying off favors to the President.

It was an act of cowardice on the part of Congress to let that legislation die on December 15. My guess, however, is that the Independent Counsel statute will be re-enacted. Unfortunately, the new legislation will probably have some restrictions because there has been criticism that Lawrence Walsh abused his powers. In an ironic sense, Walsh has been the victim of the targets of his investigation. He has been maligned by Executive branch

officials and by President Bush, who didn’t like him. They’ve smeared him. He had an absolutely impossible task when Congress granted immunity to North and Poindexter, an action that tainted the whole prosecution effort. The executive branch pulled the rug from under him every time they could.

Walsh has been condemned for the great expense and time his investigation cost. These critics compare the Walsh prosecutions with what the Justice Department does, pointing out that United States Attorneys don’t spend that kind of money or take that time. You cannot compare an ordinary criminal case the United States Attorney prosecutes with the investigation of the Iran-Contra scandal that the Independent Counsel had to undertake. You can more accurately compare it, for instance, to something like the Noriega prosecution. I assure you that the Justice Department spent more time and money investigating Noriega than the Independent Counsel did investigating Iran-Contra.

I think that at the end Walsh lost his temper and lost his judgment. I think there are some things he said towards the end that no prosecutor ought to say publicly with regards to the pardon and other related subjects. It was understandable but not acceptable for a professional prosecutor.

I believe that it is absolutely essential that we have the Independent Counsel. It is one of the achievements that we were most proud of recommending in Watergate.

There is good reason to remember the exposure of Watergate and to remember the Senate Watergate hearings. There is good reason to remember a public servant like Sam Ervin, who played the role that a Senator was expected to play by the Framers of our Constitution. Watergate was a classic. It had impact. It rearranged government power and brought Congress back into power. We redefined for ourselves, who we are as the American people, and what we expect from our government. And I don’t think we’re going to forget it for a long time—regardless of the scandals that we will continue to have and regardless of wishy-washy congressional committees in the future.

The example of Watergate and the Watergate Committee has to remain a model for future committees. I believe that there will be future scandals. There will be abuses of power by high officials, including the President. The American people must ensure that Congress has its feet held to the fire to do its job when that happens.
In The Shadow of Watergate: Legal, Political, and Cultural Implications

Stanley I. Kutler

Sometimes Watergate seems doomed to be trivialized or, at best, only memorialized on “significant” anniversaries. Richard Nixon has sought desperately to induce national amnesia, but being Richard Nixon he can succeed only in part. Indeed, his very presence has the perverse effect of eventually reminding us of what he did.

Richard Nixon eventually will leave us, and then what do we do to commemorate and learn from Watergate? For nearly two decades, the record has been dismal. In 1992, the media was awash in an orgy of recapitulation, speculation, and inevitable inaccuracy, as it marked the twentieth anniversary of the burglary. Convicted felon G. Gordon Liddy, who has made a career implicating the criminality and involvement of others, seems to be a required presence in any of these memorializations—illustrating once again that the media does not recognize what is anything but a fine line between news and entertainment. The usual suspects appear—Colson, Ehrlichman, and Haldeman, for example—to put their special twist on past events. Never mind that they use such occasions to backstab one another (carrying on a fine old Nixon White House tradition), but they also manage periodically to make new allegations, much of it grist for publishing proposals. Did Nixon have advance knowledge of the break-in? The writings and public comments of the late H. R. Haldeman will give you a wide array of answers. Yes, Nixon knew; no, he did not—whatever it takes to sell. After all, Haldeman made his fortune in advertising (while being the heir to a plumbing fortune).

If the media is to be believed, Watergate’s most enduring impact seems to be the legacy of a suffix. References to Nixon’s deeds and the Watergate controversy soon became a shorthand for amorality, abuse of power, and official criminality. “Watergate” provided a ready suffix for a range of public scandals. And thus: Koreagate, Irangate, Irqqgate, Debategate, and even more recently, Nannygate and Whitewatergate. The language became global when the Japanese used “Recruitgate” to describe a government scandal in the late 1980s. Watergate encouraged a routinized response to official breaches of public law and confidence. I am disappointed, but not

surprised, by the media's incessant trivialization of an event of such transcendent importance.

Watergate, in fact, served as a prescription to alter the political and legal landscape (not always successfully, of course) in the United States, and it became a standard for analyzing political behavior. It did not halt or decisively reverse the long-term trend toward greater executive power and responsibility. Eight years after Nixon's resignation, the Supreme Court upheld presidential immunity in civil cases, and warned against the "dangers of intrusion" on presidential authority and functions. But the perceived abuses of power during the Nixon presidency led to various "reforms," ranging from attempts to institutionalize the special prosecutor, to curbs on presidential manipulation of executive agencies for personal political gain, to new campaign-financing laws. Watergate had a substantial influence on the political parties and political ideology. It also profoundly affected the foreign policy of the Nixon administration, with consequences for the future as well.

As symbol and memory, Watergate shaped public discourse even when distorted or exaggerated. In 1980, Ronald Reagan attacked a federal court ruling against abortion restrictions as "an abuse of power" as bad as Watergate. Senator Edward Kennedy criticized President Reagan in 1987 for reaching into the "muck of Watergate" to nominate Judge Robert H. Bork to the Supreme Court. Bork was never able to shake his image as a bloody accomplice, however innocent, to the events of October 1973; he had, Kennedy charged, executed "the unconscionable assignment" of firing Archibald Cox, "one of the darkest chapters for the rule of law in American history." In 1986, Richard Nixon, serenely confident that he had been "rehabilitated," suddenly found Watergate alive and well, hauntingly compared to the Iran-Contra affair that erupted that fall. Watergate proved to be more than the "dim and distant curiosity" that one historian described.1

We have an abiding interest in the "lessons" of history. In this case, that would center on whether Watergate provided any enduring changes or reforms. The verdict at best is mixed. Perhaps, then, it is best to focus on how Watergate touched American society, and what it meant, in an immediate sense.

Watergate's impact involved a sweeping range of so-called reform legislation. But Watergate is, as I said, an event of transcendent importance;

it consumed the nation’s attention for nearly two years. Inevitably, the events of Watergate affected the nation’s institutions, politics, and perceptions of itself in a variety of areas, foreign as well as domestic.

Watergate profoundly shaped struggles for leadership and ideological control in the major political parties. Richard Nixon’s fall from grace strengthened the claims of Republican conservative ideologues, who had captured the party in 1964 only to find their goals frustrated by the rise of the “pragmatic” Nixon. At the same time, Watergate spurred the elections of Democrats bent on a reform agenda for the political process, yet who had virtually no cohesive program for national policies. Perceived at first as a Democratic triumph and a Republican debacle, Watergate, in reality, facilitated the conservative takeover that reinvigorated the Republican Party, and although the Democrats temporarily profited, they left unattended the fissures in their old coalition and ignored the need for fashioning programs that would reverse the corrosion of that coalition.

Barry Goldwater’s 1964 defeat left the Republican conservatives no alternative but Nixon in 1968. Yet, when President Nixon reached out for rapprochement with China and as his domestic programs mounted deficits and produced inflation, conservatives found themselves politically estranged. For conservatives, Watergate discredited Nixon personally; it also dealt a blow to the “middle ground” in the Republican Party that Nixon had preempted in the 1960s between the liberal Rockefeller forces and the Goldwater Right. With Nixon’s departure and Ford’s defeat in 1976, the conservative movement captured the field against the relatively feeble challenges from its intra-party foes.

Except for the brief Ashbrook insurrection in the 1972 primaries, conservatives had muted their criticism of Nixon, confining it to occasional attacks on isolated policies. But with Nixon’s resignation, conservatives launched an ideological assault on his overall policies, and excoriated Ford for maintaining them. William Buckley assailed Nixon for the “humiliating defeat” in Vietnam, for a budget deficit “larger than any Democrat ever dared to endorse,” and for the “baptism of détente” with its attendant talk of the “peace-loving intentions of the Communist superpowers.” Other conservatives blamed Nixon for passing strategic superiority to the Soviets, for sowing the seeds of economic destruction because of his inability to make difficult choices, for dismantling the American Navy, and for expanding the Great Society contrary to his campaign promises. Foolishly, according to such sources, Nixon believed that if he appeased the Left on policy matters, he would have a respite from his Watergate difficulties.

As President Ford continued the same policies, conservatives disdained party loyalty and spurned an incumbent they had once admired. In May
1975, Ronald Reagan condemned Ford for a projected fifty-one million dollar budget deficit. *Conservative Digest* reported a poll in June of 1975 claiming that seventy-one percent of its readers thought Ford was doing a "poor" job, and ninety-one percent opposed his nomination for the 1976 election.²

The conservative fury nearly resulted in denying the 1976 Republican nomination to Ford, an event that would have been unprecedented in the twentieth century. Senators James Buckley and Pat Buchanan called for an "open convention." The conservatives massed behind a Reagan candidacy and failed to carry it through only by a scant margin; many believed that a second ballot would have given the nod to the former California Governor. When Reagan spoke to the 1975 Conservative Political Action Conference, he invoked the sacred appeal of the "Mandate of 1972," a mandate that conservatives believed had been given to them to implement their political and social agenda, and not to be used by Nixon personally. The election, they claimed, had emphatically repudiated the ideology of "radicalism" and "social permissiveness" that had captured the Democratic Party. "The mandate of 1972 still exists," Reagan proclaimed. "The people of America have been confused and disturbed by events since that election, but they hold an unchanged philosophy." Reagan and his advisers held to that faith. In the 1980 campaign, they used the conservative indictment against Nixon and Ford to telling effect against a Democratic President. Ironically, as President Reagan concluded his second term in 1988, conservative spokespersons, such as Buchanan, once more assailed the nation's continued "leftward drift."³

Richard Nixon's Republican opponents finally enjoyed a measure of revenge. Periodically, he invoked conservative slogans and labels, but he remained a distrusted and embarrassing figure, even to his own party. The former President had the unique distinction of not being invited to the four Republican presidential nominating conventions that followed his leaving the White House. When President Clinton invited Nixon to the White House in March 1993, the press was given no access.

Watergate swelled the ranks of congressional Democrats in the 1974

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and 1976 elections. In 1974, at the height of interest in the scandal, the Democrats added seventy-five new members to the House, most of whom promised electoral reform. In the meantime, however, the attention given to procedural reforms ignored the growing schisms in the Democratic Party, schisms that reflected changing social and economic concerns among the electorate. The 1972 election pointed to the growing strains within the party; Watergate, however, obscured, then postponed, any real understanding or reckoning of the party’s dilemmas. “The Real Majority,” political analysts warned, no longer consisted of the “have-nots” who had formed the basis for Democratic coalitions for more than forty years. The “haves” had new concerns, which made the Democratic Party’s “politics of inclusion” paradoxical, even contradictory.

Many of the new Democrats represented marginal districts, often suburban, middle-class, and domesticated to the politics of affluence. The programmatic concerns of the AFL-CIO, minority coalitions, and women’s groups had limited appeal in such districts. The reform-minded new representatives struck a Faustian bargain: the Democratic leadership gave them their “reform” proposals but demanded that they toe the line on policy concerns originating in the party’s traditional constituencies. The newcomers’ support for the leadership’s desired social and economic policies only aroused organized opposition in their local districts from pro-business organizations, as well as from ideological groups demanding a reduced welfare state and support for anti-abortion measures.

Jimmy Carter rode to victory in 1976 on promises of greater morality and efficiency in government. “We were responsible for Jimmy Carter,” Richard Nixon admitted in 1977. The historical accident of Watergate produced President Carter, but unlike the Great Depression, Watergate by itself was not an issue that could sustain power. Carter seemed to offer little in the way of a program that would broadly appeal to the nation; his seeming aimlessness reflecting the Democrats’ lack of cohesiveness and purpose. Altogether, the situation was a prescription for disaster, particularly as inflation corroded the earning power of the Democrats’ electoral base. Meanwhile, the Republicans united behind Ronald Reagan, a candidate who attractively expressed the conservative ideology which had been dominant


in the party since 1964 but which had always lacked a charismatic leader. Reagan led his party to two presidential triumphs and a six-year control of the Senate, and he successfully transferred his aura and image to George Bush in 1988. Three consecutive presidential defeats left the Democrats floundering in search of their identity as a party. Watergate diverted the party from that quest and left it in disarray for nearly two decades.

Watergate spurred demands for "reform" to prevent future abuses of power, as scandals inevitably do; paradoxically, however, the affair also produced assertions that "the system worked." In the spring of 1974, a distinguished academic panel headed by Yale Law School professors Alexander Bickel and Ralph Winter warned that Watergate was a "poor vehicle" for addressing major reforms. The panel's report contended that both existing law and legal institutions had responded adequately to the crisis. The Watergate scandal had been that of an individual and not of the political-legal system itself. Yet the panelists warned that reducing presidential power required Congress to reform itself and to accept its proper responsibilities for shared governance, rather than damaging the institution of the presidency. Watergate, they concluded, might result in "history less in danger of being ignored than misunderstood."  

Still, the temptation to rectify lawbreaking with more law was irresistible. Ethical standards, guidelines for institutional behavior, restraints on power, and the enforcement of the new rules flowed from Congress in the aftermath of Watergate. The results produced years of bickering over the meaning of the reforms and the willingness to follow them. Samuel Johnson once characterized patriotism as the last refuge of a scoundrel. Roscoe Conkling, a scandal-plagued nineteenth-century Senator, added that Johnson had "underestimated the potential of reform.

In the years since Watergate, Congress has flirted with reform legislation essentially focusing on ethical considerations or on the nature of the political process. For the latter, it seems nothing has been as futile as campaign financing legislation, ironically, the original subject of the Senate Watergate investigation.  

The 1992 elections ended the partisan division

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between the Executive and Legislative branches, offering some prospect that the two-decade long gridlock on this subject might be broken.

The institutionalization of the Independent Counsel, formerly known as the Special Prosecutor, probably is the most visible and controversial remnant of Watergate. The reality of divided government in 1973 forced Richard Nixon to accept the idea of a Special Prosecutor, who was to be independent of the Justice Department, free to carry on his own investigations. After the President summarily dismissed Archibald Cox, Congress and Leon Jaworski pushed for firmer guarantees of independence for the Special Prosecutor. When the Nixon Administration raised substantial constitutional objections centering on separation-of-powers doctrine, the move to some observers seemed to be merely a ploy to limit the authority of the Special Prosecutor.  

One year after the House Judiciary Committee had voted to impeach Nixon, Congress first considered institutionalizing the Office of Special Prosecutor and codifying ethical standards. In 1978 Congress passed the Ethics in Government Act, a law that perhaps more than any other symbolized the lingering concerns of Watergate. When Congress first considered the bill in 1975, Senator Abraham Ribicoff (D-CT) declared that Congress had the responsibility to prevent future Watergates. In a subsequent hearing, a Justice Department official acknowledged, "in the shadow of Watergate . . . the appearance of justice is almost as important as justice itself."

The 1978 ethics law required financial disclosures by executive and judicial branch officials, although not by members of Congress. The law restrained the "revolving door" through which public officials readily moved into the private sector and immediately used knowledge and contacts gained in their previous positions for private gain. The act established the Office of Government Ethics to monitor its financial disclosure and conflict-of-interest provisions.

Demands for such reforms antedated Watergate. But Watergate specifically inspired the creation of mechanisms for judicial appointment of

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CONTEMPORARY AMERICA 60 (1984); Gregg Easterbrook, What's Wrong with Congress? THE ATLANTIC, Dec. 1984, at 57; see also Paul Huston, Fat Cat Contributions in the 1988 Campaign, L.A. TIMES, Dec. 9, 1988. The disclosure requirements of the 1974 legislation have remained largely intact and have provided useful information as to the source of campaign funds.


https://nsuworks.nova.edu/nlr/vol18/iss3/1
a special prosecutor to investigate allegations of wrongdoing by officials of the Executive branch. The 1978 law required the Attorney General to investigate such allegations and then to report to a three-judge panel within ninety days on whether the charges were unfounded or whether the judges should appoint a special prosecutor. The judges defined the prosecutor’s jurisdiction. Once selected, the prosecutor had authority to perform the investigative and prosecutorial functions of Justice Department officials. Finally, the prosecutor could not be removed, except by impeachment, conviction of a crime, physical incapacity, or by the Attorney General in the event of extraordinary impropriety. The Attorney General must justify such action to the Senate Judiciary Committee; moreover, the prosecutor might appeal to the courts for review. The Ethics Act institutionalized the memory of the Saturday Night Massacre.

The measure passed both houses overwhelmingly. Congressman Charles Wiggins, however, sounding what some viewed as irrelevant sour notes from the past, led a corporals’ guard of resistance in the House. He was joined, interestingly enough, by Robert McClory and Caldwell Butler, both of whom had voted to impeach Nixon. The minority contended that the government’s prosecutorial machinery had not broken down, that Watergate was exceptional and did not justify the creation of a new mechanism. “If an attorney general cannot be trusted to enforce the law against the executive,” the minority contended, “the remedy is impeachment and not the cloning of an additional attorney general to do the job of the first.” The responsibility, in short, rested with Congress. Henry Petersen, who regretted his “slowness” in recognizing the necessity for a special prosecutor in 1973, nevertheless opposed the bill as well, believing that “political safety” too often would result in narrowing prosecutorial discretion, with unfair consequences to the accused.9

Two Carter Administration officials became the first targets of the Ethics in Government Act, as a result of allegations of drug use and conflicts of interest. The lengthy, predictably sensational investigations resulted in no charges. Doubtless, their ordeals impaired the reputations and undermined the effectiveness of both men. When Congress reviewed the operation of the law in 1981, disenchantment was apparent, particularly marked by complaints that the special prosecutor provisions were too easily

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triggered. Former Attorney General Benjamin Civiletti, who had served under Carter, warned that “we have selected a weapon which must be used with greater care.” He argued that the Justice Department could have conducted the necessary investigations of Carter’s men and that applying the law against 480 Executive branch officials was simply too broad and expensive.

The Reagan Administration opposed the Ethics in Government Act as well, and focused on constitutional and cost objections. Judicial appointments of prosecutors, the Justice Department contended, involved executive functions but did not allow executive control, an unconstitutional arrangement. But the need for a special prosecutor to provide the “appearance of justice” still had a powerful appeal. The Reagan Administration eventually dropped its opposition, although it proposed a wider latitude for removal of the prosecutor. Interestingly, the Justice Department suggested adding the President’s friends and family as objects of attention of a special prosecutor. Two years of wrangling produced a series of amendments to the Ethics Act in 1983. The changes renamed the Special Prosecutor an “Independent Counsel” (a less “inflammatory” title, one Senator suggested). The changes gave the Attorney General more discretion in the decision to name a counsel, reduced the list of officials who might be investigated, provided for reimbursement of attorney’s fees for the subject of an investigation if no indictment was brought, and allowed the Attorney General to remove the counsel for “good cause.”

Four years later, the legislation again had to be revised. By then more than half a dozen independent counsel investigations had been launched. Now the Reagan Administration openly opposed continuation of the office. Attorney General William French Smith assailed the independent counsel process as “probably unconstitutional.” He believed it negated the ends of justice and that it was “cruel and devastating in its application to individuals, falsely destroying reputations and requiring the incurring of great personal costs.” The investigations, he contended, resulted in media circuses and had yielded little at high cost to the taxpayers. Democratic senators accused the Administration of “re-interpreting” and weakening the law when it refused to apply the act on several occasions. For its part, the Administration

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stressed the unconstitutionality of the system. But pending investigations only strengthened the opposition to changes. Meanwhile, the Administration offered regular Justice Department appointments to the then-acting independent counsels on a dual basis, pending the settlement of court challenges to the constitutionality of the position.

Watergate reverberated as Congress debated extending the Ethics Act in 1987. The bill’s chief Senate sponsor, Carl Levin (D-MI), had no illusions about the Reagan Administration’s real attitudes. The Reagan Justice Department, he complained, “would have us return to the days of Watergate and Nixon’s ‘Saturday Night Massacre’ when public trust in our criminal justice system hung in the balance. We don’t want to go to the brink again.” On June 17th, the fifteenth anniversary of the Watergate break-in, the Justice Department reiterated its opinion that all prosecutors must be responsible to the President. During the Senate debate in October, Levin reminded his colleagues that Watergate had raised doubts about the integrity and independence of criminal investigations directed at the President and his entourage. Since then, the statutory arrangements for an independent counsel, Levin insisted, had won wide acceptance from the American people. The ready support for an independent counsel in the pending Iran-Contra affair contrasted sharply with the “public’s consternation over the Watergate investigation,” demonstrating that the arrangement had restored “public confidence in the integrity” of the criminal-justice system. “That is an invaluable achievement,” Levin concluded.

The renewal measure passed overwhelmingly by a margin making it vetoproof and Reagan signed it on December 15, despite Justice Department opposition. Given four pending investigations of the President’s actions as well as those of his advisers, the “appearance of justice” compelled him to sign the bill. Coincidentally, one day later, an Independent Counsel secured the first conviction under the Ethics Act when a jury found Michael Deaver guilty of perjury. Michael Deaver was a former White House aide who had close personal ties to President Reagan and his wife. After Deaver’s conviction, Independent Counsel Whitney North Seymour complained that the Ethics in Government Act had too many loopholes and exemptions. Whatever its inadequacies, the law nevertheless remained imperative, he said, because there was “too much loose money and too little concern in Washington about ethics in government.” Seymour assailed the Reagan Administration’s failure to instill an ethical sense throughout the government. Critics from another direction used the occasion to chastise Congress again for having immunized its members from outside investigations for
violations of ethical standards.  

With the open support of the Reagan Administration, individuals under investigation pursued a constitutional challenge to the Office of Independent Counsel. Three former Attorneys General and the Solicitor General lent their considerable prestige to the campaign. The issue boiled down to differences over the power of the Executive branch to conduct all criminal prosecutions, on the one hand, and the significance of constitutional language authorizing Congress to vest in the Judiciary the appointment of "inferior officers," on the other. Left largely unspoken in the formal briefs was any recognition of the importance of the "appearance of justice."

In January, 1988 the Court of Appeals, divided two-to-one, invalidated the Independent Counsel provision as an unwarranted intrusion on Executive authority. Speaking for the majority, Judge Lawrence Silberman articulated a strict construction of separation of powers. The decision came down amid growing doubts whether the independent counsel statute was workable. Critics charged that the Counsels' investigations had become at times outright harassment of public officials. Predictably, former Nixon aides assailed what one called an "orgy of investigation" and "prosecutorial politics." But even former members of the Cox and Jaworski staffs noted that the independent counsel operations had become elephantine, given the large expenditures and resources required for investigations, maintenance, and security. Still, public support for the probe of the Iran-Contra affair remained strong. Meanwhile, independent counsels secured convictions of two more former Reagan aides, lending some weight to the idea that only a disinterested prosecutor could proceed against the Executive branch.

The Supreme Court put its imprimatur on the independent counsel statute in a surprisingly firm and broad decision.  

Reversing the appellate court, Chief Justice William Rehnquist led the Court in rebuffing the Administration. The Justices found no violation of separation of powers doctrine. The Court held that the Ethics Act in no way inhibited the President from performing his constitutionally assigned duties. Unlike the lower court, Rehnquist rejected any notion that the law constituted

13. Id. at 657.
"Congressional usurpation" of executive functions. In a lone dissent, Justice Antonin Scalia bitingly referred to "our former constitutional system," as he lamented the Court's refusal to uphold what he believed to be a proper and absolute scheme of separation of powers.\(^{14}\)

The Independent Counsel nevertheless remained the bane of both the Reagan and Bush Administrations which made no secret of their desire to abolish the office. Congressional Republicans kept up a steady drumfire of criticism, particularly scoring the alleged excesses of Lawrence Walsh, who headed the Iran-Contra investigation. Walsh was accused of lavishing excessive amounts of money and, in effect, pursuing a vendetta against President Bush and other figures. During the 1992 campaign, Walsh presented new charges against former Defense Secretary Caspar Weinberger, infuriating Bush and his party.

The Independent Counsel Law expired on December 15, 1992. Still, three Independent Counsels remained in office continuing their investigations. Besides Walsh, Arlin Adams headed an investigation of Reagan's Department of Housing and Urban Development and Joseph diGenova, who was appointed just before the law expired, was exploring the State Department's involvement in the search of President Clinton's passport files during the election campaign. Subsequent disclosures of Clinton's possible involvement in unethical business dealings prompted Republicans to demand (and receive) an independent counsel to investigate the matter, but at the same time, made it difficult for them to resist renewed pressures for the Independent Counsel Reauthorization Bill.

The charges that President Nixon had abused his office by improperly using such powerful executive agencies as the FBI, the CIA, and the IRS produced a sharp reaction in Congress and in the nation. Loosening presidential controls, however, conceivably could enlarge the independence of those same groups, a prospect that gave pause to those who had watched the practically unbridled power of the bureaucracies.

The Watergate years brought into sharp relief the practices and

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behavior of almost sacrosanct institutions. Questions and challenges to authority invariably raised the issue of accountability. In the years following Nixon's resignation, Congress periodically wrestled with that problem, but it often backed away from fundamental reforms affecting the structure or the role of the FBI, CIA, and IRS. That reluctance reflected the prevailing views, either that the abuses discovered in the Watergate years were mere aberrations, or that later transgressions were so minor that reform might do more harm than good.

Clarence Kelley, who became FBI Director in 1973, thought that the Watergate "nightmare" had served "as a much needed cleansing agent for the Bureau," one that enabled him to initiate "long overdue reforms." Responding to criticisms of the FBI counterintelligence program of the late 1960s and early 1970s, as well as to other allegations of misconduct often sanctioned by J. Edgar Hoover, Kelley supposedly reduced the Bureau's role in domestic intelligence probes and instituted wide-ranging organizational changes. Kelley and the Carter Administration also sought a posthumous verdict against the practices of the previous era when they brought criminal indictments for unauthorized burglaries against two high ranking Hoover aides. The FBI officials were convicted and fined in December 1980, but they appealed the decision, and Reagan pardoned them. The President contended that the officials had acted in the belief that their actions were authorized at "the highest levels of government," and cited Carter's "unconditional pardon" of those who had violated the Selective Service laws during the Vietnam war.

Congress, in its fashion, sought to retaliate against Hoover when, in 1976, it established a ten-year term for future FBI directors. The impetus for the limitation came from congressional concern both over Hoover's excessive independence, developed over his nearly fifty-year reign, and over the cooperation which Acting Director L. Patrick Gray had given to Nixon's blatant political manipulation of the Bureau. The conflicting motives for imposing the limited term passed almost unnoticed.15

Congressional investigations in 1975 had dramatically illustrated the extent of FBI abuses of power and had demonstrated Hoover’s willingness to serve the political goals of different presidents, to ingratiate himself, and to augment his power. But Congress failed to develop a legislative charter defining proper FBI activities. Instead, in March 1976, Attorney General Edward Levi established a series of guidelines to restrain FBI domestic security investigations and prevent questionable activities.

Less than a decade later, the nation learned that the more things changed, the more they remained the same. Attorney General William French Smith announced that he had relaxed rules governing domestic spying by the Bureau and claimed that the changes had enabled the government to successfully combat domestic terrorism. A special American Bar Association committee, composed of lawyers who had served on various intelligence agencies, praised Smith’s revisions of the Levi guidelines for their “healthy degree of balance” between First Amendment rights and the demands of domestic security. Yet it recommended some changes in Smith’s rules to “ensure that while the security goals . . . are met, the civil liberties of all of our citizens are protected.” In a pointed eulogy, the report praised Levi’s work. Smith brushed off any implied criticism, claiming that the ABA report merely reflected “issues of policy and style rather than fundamental disagreements on matters of law.” His assessment probably was correct. The American Civil Liberties Union, however, thought that the Administration’s interpretation of the guidelines granted “overly broad authority” to the FBI.16

In December 1974, Seymour Hersh’s New York Times articles accused the CIA of wholesale violations of its charter and of the law, as a result of its massive involvement in domestic political-intelligence activities. Hersh based his disclosures on the CIA’s internal inquiry into some questionable operations, an inquiry ordered by Director James Schlesinger in 1973. Those activities, subsequently dubbed the “Family Jewels,” included not only domestic intelligence activities, but also such questionable legal and moral policies as the assassination of foreign leaders.

The Hersh revelations were eagerly seized upon by the newly-elected members of the Ninety-fourth Congress, who felt committed to restoring an

ethical compass to governmental affairs in the wake of Watergate. Many of the new congressional members, as well as the veterans, had campaigned against abuses of official power and had promised a new direction. William Colby, Schlesinger's successor, perceived that the "radically altered nature of the Congress" gave focus to increasing demands to harness and control his agency. President Ford attempted to preempt Congress when he appointed a commission, chaired by Vice President Rockefeller, to investigate CIA activities. But three weeks later, the Senate and the House each authorized a select committee to conduct an investigation of CIA operations.

"The Year of Intelligence had begun," a Senate staffer wrote, and the long, cozy relationship between Congress and the CIA came to a halt. "All the tensions and suspicions and hostilities that had been building about the CIA since the Bay of Pigs, and had risen to a combustible level during the Vietnam and Watergate years, now exploded," Colby remarked.17

Years later, in seeming innocence, Nixon praised Richard Helms, the CIA Director he had so summarily sacked for, among other things, his failure to fully cooperate in the Watergate cover-up. Nixon deplored Helms' subsequent criminal conviction for lying to Congress—"great injustice," Nixon called it—for Helms, he said, simply had been carrying out a presidential assignment. Nixon went on to denounce the "attempt to castrate the CIA in the mid-seventies [as] a national tragedy." But Helms dismissed Nixon's hypocrisy, for the former Director had "no doubt that the whole Watergate business fueled" the CIA's difficulty with Congress. Nixon's attempt to entangle the CIA in Watergate, Helms contended, had been "the battering ram" for the subsequent congressional inquiry.18

The Rockefeller Commission, the Senate investigation headed by Senator Frank Church (D-ID), and the House inquiry chaired by Otis Pike (D-NY), highlighted the "black" side of CIA activities. But the image that most clearly emerged in the public eye was Howard Baker's depiction of the CIA as a "rogue elephant," an agency that had operated without authorization or audit, either by Congress or the President. Baker's characterization seemed innocent; yet to put all the blame on the Agency masked the reality that if neither Congress nor the President knew what the CIA was doing, it

was because neither wanted to know.

The resulting uproar over the revelations led to two results. First, the CIA itself now had an excuse to institute an internal housecleaning. Both Colby and his successor, Admiral Stansfield Turner, forced the resignation and retirement of bureaucratic barons who had built great power bases of their own, often independent of the Director. Second, Congress developed a greater interest in oversight and established the institutional means to that end.

Hersh’s reports spurred Congress to pass the Hughes-Ryan Amendment at the end of 1975, requiring the President to approve and report all covert operations to Congress. Two years later the Senate formalized the procedure by establishing a standing committee for oversight of the intelligence agencies, and the House followed a year later. Executive orders by President Carter tightened the guidelines on domestic intelligence activities, including a requirement that the CIA obtain warrants from the Attorney General to carry on surveillance activities within the United States. In October 1978, Congress enacted the Foreign Intelligence Surveillance Law, which, among other things required that the CIA obtain court orders to wiretap. Two years later, the Intelligence Oversight Act provided new requirements that the CIA report to Congress on its covert activities.

Executive orders are subject to new executive orders, however; relations between the CIA and the Attorney General are subject to the compatibility of their interests; and congressional oversight is dependent, first, on what information the CIA or the President chooses to provide, and second, on the extent of Congress’ own vigilance and interest. President Reagan’s Executive Order 12333 of December 4, 1981, substantially weakened Carter’s 1978 directives and restored a large measure of discretion to CIA activities. (That order also upset the Levi Guidelines on the FBI and, in general, “unleashed” the intelligence agencies, as the President noted.) The Iran-Contra affair in 1986-87 demonstrated that the CIA and the Administration had acted without congressional consultation and hence lacked that degree of consent that might have provided some cover of legitimacy to what clearly was a dubious enterprise. The result was predictable; renewed demands to force full CIA disclosure of its activities were followed by expressions of concern that the CIA not be inhibited or compromised in its activities.

When FBI Director William H. Webster moved to head the CIA in March 1987, he remarked wistfully that the “post-Watergate period . . . included some very searching and at times devastating inquiries that affected not only us [the FBI] but the other components of the intelligence community.” Reagan’s CIA Director, William Casey, undoubtedly agreed, and when
he proceeded to act on the premise that congressional oversight inquiries and their conclusions mattered not a whit, no one effectively challenged him. During his tenure, Casey readily secured presidential authorization for aggressive covert operations, and he consistently proved uncooperative with congressional oversight committees. Only the Iran-Contra fiasco and Casey’s death emboldened critics to demand more effective control again.19

In an immediate sense, Watergate altered public perception of the presidency and the relationship between the executive and other institutions. How much of those changes has endured, however, is questionable. Watergate transformed and reshaped American attitudes toward government, and especially the presidency, more than any single event since the Great Depression of the 1930s, when Americans looked to the President as a Moses to lead them out of the economic wilderness. World War II and the Cold War, with their attendant dangers to the physical and ideological security of the nation, only exalted that faith. Professor Woodrow Wilson, who often expressed his low opinion of Congress, wrote in 1908 that the presidency “must always, henceforth, be one of the great powers of the world. . . . We have but begun to see the presidential office in this light; but it is the light which will more and more beat upon it . . . .”20

Intellectuals, liberal and conservative alike, celebrated Wilson’s prophecy. “The President is not a Gulliver immobilized by ten thousand tiny cords nor even a Prometheus chained to a rock of frustration,” political scientist Clinton Rossiter wrote in the late 1950s. “He is rather a kind of magnificent lion, who can roam widely and do great deeds, so long as he does not try to break loose from his broad reservation. . . . He will feel few checks upon his power if he uses that power as he should.” John F. Kennedy’s election in 1960 made that a canonical doctrine of the liberal faith. But by the end of the decade, such glorifications of the presidency seemed embarrassing (when they were not forgotten), and Rossiter’s restraints, largely written in as an afterthought, became the new gospel.21

Watergate bestowed a new vulnerability on the presidency. Americans


20. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 78 (1908).

alternately inflicted anger and derision on the office and the man. Ford’s pardon of Nixon added an element of cynicism. Slander and malice toward presidents, of course, was not new. Washington suffered his share, as did Jefferson, Lincoln, and Franklin D. Roosevelt. But the invective now appeared on a massive scale. Once peerless and invincible, presidential majesty seemed diminished, and Nixon and his immediate successors served as easy prey for cruel, contemptuous humor. The media criticism of the presidency, and the preoccupation with presidential sins of omission or commission, had gathered such momentum in the Nixon years that it seemed impossible to turn off the spigot. Jimmy Carter fared no better; indeed, his self-avowed status as an outsider, his mannerisms, and his alternating shifts between doubt and assured faith provided tailor-made targets for equally biting humor and criticism. The Ford and Carter Administrations, especially, offered the spectacle of president as victim.

Clinton Rossiter notwithstanding, the President of the United States now appeared to be an immobilized Gulliver—or worse yet, a Lilliputian. “A feeble Executive implies a feeble execution of the government.” Hamilton wrote in Federalist No. 70. “A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.” By the end of the 1970s, the nation seemed to view its government as “feeble,” and hence “bad.”

Although Watergate gave rise to the criticism of the “imperial presidency,” the leitmotif in the early Reagan years was that the nation could ill afford a crippled Chief Executive. Ford spoke of an “impeled Presidency.” Yet power and authority were not so much at issue during the Watergate years as were responsibility and accountability. Richard Nixon endlessly stressed the importance, the infallibility, and the uniqueness of the “Presidency”—reiteration designed, it seemed, to insulate the President from accountability. Nothing in the historical traditions of executive power, nothing in the Constitution, nothing even in the modern celebrations of executive authority justified Nixon’s rationalizations. Indeed, had he acknowledged responsibility for Watergate, Nixon might have had a different fate. The President’s foes—and the nation—needed more than he offered. Nixon had underestimated the historical tradition of skepticism toward unrestrained power.22

In subsequent years, references to Nixon’s deeds and the Watergate controversy became a shorthand for amorality, abuse of power, and official criminality. In turn, Watergate encouraged a routinized—some would argue a trivialized—response to official breaches of public law and confidence. A succession of congressional investigations, special prosecutors, and media pressures followed the various allegations, some well founded, some not.

Watergate established historical traces as standards for future political behavior. For those who thought the scandal a “dim and distant curiosity,” the Iran-Contra affair in 1986-87 offered a rude reminder. The Reagan Administration’s secret shipment of weapons to Iran, clearly intended as ransom for American hostages held there, and the diversion of profits to the Contra rebels in Nicaragua vividly revived the memories, the lessons, and even the language of Watergate, sometimes inappropriately so. Almost instantaneously, the media raised the familiar Howard Baker question: “What did the President know, and when did he know it?”

Watergate veterans weighed in with experienced advice. Alexander Haig urged President Reagan to take responsibility for the scandal and immediately dismiss underlings suspected of violating the laws. The President, he continued, should refuse to appoint a special prosecutor, nor should he allow congressional hearings (as if it were in his power to bar them). Finally, Haig thought Reagan should tell the American people: “And if you don’t like it, impeach me!” He later lamented that Reagan did not follow his advice and instead “went along with a six-month orgy” of independent-counsel investigations and congressional hearings. Richard Nixon told Reagan that the affair would not be “another Watergate, as long as you stay ahead of the curve.” More familiar language: Thirteen years earlier, he had told Assistant Attorney General Petersen that he wanted “to stay one step ahead of the curve.”

Reagan and his advisers had learned a great deal from the Watergate experience. The President appointed the Tower Commission to investigate the Iran-Contra affair. He generally cooperated, and more importantly, gave the appearance of cooperation (if not of truthfulness). He never asserted executive privilege; he instructed relevant agencies and individuals to cooperate with Congress and with the independent counsel he appointed (ignoring Haig), and even made available to the congressional committee

material held by his designated biographer as well as extracts from his personal diaries. One congressman, however, was unimpressed and thought the Reagan Administration had learned a different lesson from Watergate: "they learned to destroy as much evidence as possible and to appear cooperative." The next perpetrators of misdeeds, he thought, would do "even better" at covering their tracks.

The Iran-Contra affair may or may not have been a greater threat to the American constitutional order than had Watergate, yet its dénouement was not nearly as dramatic. Reagan undoubtedly suffered a loss of credibility, but unlike Nixon he retained a substantial measure of public trust. For some, nevertheless, there was a sinister aspect in what was perceived as the privatization of foreign policy by the White House and the adventurism of presidential subordinates. More than anything, perhaps, the affair revealed the shortcomings of Reagan's careless management style. But the congressional inquiry demonstrated that the constitutional arrangements for shared governance remained contested ground in the American system. And within those conflicts, as within that system, "trust," as Secretary of State George Shultz admitted, "is the coin of the realm." Watergate sounded its haunting tones throughout the episode.

Watergate became a permanent part of the American political language after 1972, but its meaning could be easily forgotten. At a 1978 press conference, a reporter asked President Jimmy Carter if he would consider reducing or withholding federal revenue-sharing funds from those cities or states that did not follow his wage guidelines. "I think this would be illegal under the present law," the President said. The reporter, as if oblivious to Nixon's extra-legal policies, persisted and repeated the question. "No," Carter responded very firmly, "we could not do that under the present law." Yet for others, Watergate was more instructive. In 1983, revelations indicated that the Solicitor General's office had suppressed evidence that might have helped the cause of the Japanese-Americans when the Supreme Court heard arguments in 1944 regarding the constitutionality of their

wartime internment. A Justice Department attorney, who later went on to a distinguished career as a civil libertarian, was asked some forty years later why he had not publicly exposed the alleged chicanery when he found himself tormented between conscience and loyalty to superiors in 1944. “Watergate,” he responded, “hadn’t happened yet.” With President Clinton embroiled in a controversy over his allegedly questionable private business dealings, the Republican House leader complained that the President’s behavior was “Nixonish.”

Watergate, on the whole, has lingered in public memory. The public traditionally has been disposed to expect the worst of legislators “and at the same time believe in the high virtues of the president and his entourage.” But for a while, at least, the situation has been reversed. When the expectation of executive virtue is disappointed, the weight of such disappointment almost inevitably produces a massive response which, however naively, attempts to ensure against any repetition of executive offenses. Some of the resulting measures succeed; some amount to little more than an exercise in futility or wrongheadedness. And so, the judgment of the effectiveness of post-Watergate reforms results is a mixed verdict.

Perhaps above all, however, Watergate revitalized and nourished the tradition of constitutional responsibility. It also elevated moral considerations in the judgment of public officers and in the conduct of public business. Whether involving limitations on campaign funds, ethical standards for elected and appointed officials, governmental intervention in the private sphere, or the conduct of foreign policy, a national consciousness of the need of checks on powerholders was sparked by Watergate. That concern has remained vital in the years since, prompting both legislation and criticism that reinforced some standards for the proper conduct of political leaders and governmental officials. However excessive, faulty, or even misguided the responses to Watergate may have been, they reflected an understanding that public officials must themselves adhere to the same rule of law they so piously demand that the governed obey. What is not acceptable is Nixon’s 1977 rationalization that “when the President does it, that means that it is not illegal.” Richard Nixon’s most ardent and passionate defenders must either agree, or defend the alien proposition that a president is above the law.

26. FISHER, supra note 22, at 333.
27. FROST, supra note 5, at 183.

Mark Tushnet

TABLE OF CONTENTS

I. INTRODUCTION ............................................ 1765
II. SEPARATION OF POWERS AS “RICHARD NIXON” LAW 1766
III. GOVERNMENTAL INNOVATIONS AND SEPARATION OF POWERS ............................................. 1769

I. INTRODUCTION

For many years it was easy to succumb to the temptation to teach separation of powers theory as “Richard Nixon” law. The leading cases about executive privilege arose out of Watergate, and controversies over impoundment, war powers, and impeachment were directly connected to the Watergate experience. In this essay, I want to suggest that treating separation of powers law as “Richard Nixon” law is descriptively accurate and distorted at the same time, and normatively misleading. It is descriptively accurate because the modern law of separation of powers has been shaped by the legacy of Watergate, which includes a substantial period of divided government. It is descriptively distorted because important separation of powers controversies cannot easily be linked to Watergate. It is normatively misleading because the political context—the sense that contemporary separation of powers controversies are indeed the legacy of Watergate—has obscured the fact that separation of powers controversies now arise because of the transformation of modern government into a complex bureaucratic state. This transformation has torn separation of powers theory away from its traditional base, described by the metaphor of “checks and balances,” and has left separation of powers theory without a new base.

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II. SEPARATION OF POWERS AS "RICHARD NIXON" LAW

A list of Watergate-connected cases establishes the importance of Watergate for separation of powers theory. First there are the executive privilege cases. United States v. Nixon, the leading case raising questions of privilege in criminal prosecutions, was obviously part of Watergate. Cases that claimed damages from high executive officials including the President, who then raised claims of privilege, gained credibility because Watergate had discredited Nixon. The independent counsel case dealt with the statute adopted to avoid future “Saturday Night massacres.” Buckley v. Valeo disposed of a challenge to the means of selecting the Federal Election Commission. It arose out of campaign finance reforms adopted to eliminate one type of abuse that, it was felt, contributed to Watergate. Finally, there is the Walter Nixon case in which the Court held that judicial review of impeachment processes was barred by the political question doctrine. The Chief Justice’s opinion was more than typically confused, but its motivation appears to have been concern over the possibility that the courts might be called upon to review a presidential impeachment, a concern triggered in part by the Watergate experience.

Beyond the cases directly connected to Watergate, other separation of powers controversies seem part of its legacy. The War Powers Resolution, for example, a perennial source of issues for classroom discussion, resulted from the inter-branch suspicion that, on the President’s side, led to Watergate. Even the legislative veto decision might be understood as part of Watergate’s legacy. Congress had been using legislative vetoes for a generation, and presidents had been interposing mild objections for as long.

1. I examined the chapters on separation of powers in several leading constitutional law casebooks to determine what proportion of their pages was devoted to cases closely linked to Watergate. WILLIAM COHEN & JONATHAN VARAT, CONSTITUTIONAL LAW (9th ed. 1993), had the smallest proportion (16%), followed by GEOFFREY STONE ET AL., CONSTITUTIONAL LAW (2d ed. 1991), with 23%, and GERALD GUNTHER, CONSTITUTIONAL LAW (12th ed. 1991), with 26%. Taking account of the fact that casebooks tend to be dominated by recent cases, these proportions seem high enough to be noteworthy.
6. Id. Buckley is more widely known, of course, for its holding that free speech principles limit Congress’ power to regulate campaign finance.
It might be argued, however, that the issue came to a head because Watergate exacerbated tensions between the departments.

The standard account of Watergate’s legacy for separation of powers theory is directly normative. On this account, Watergate demonstrated the dangers of concentrated governmental power. To put it perhaps overdramatically, the New Deal, the Warren Court, the New Frontier, and the Great Society had lulled Americans into believing that a powerful national government was always a benign force for progress; Richard Nixon and Watergate showed that it was not. Before Watergate, constitutional theory and decisional law concentrated on the individual rights provisions of the Constitution. These were seen as the primary mechanisms, enforced by the courts, by which the Constitution protected individual rights. Watergate directed scholarly and judicial attention back to the indirect protections of individual rights in the Constitution, that is, to separation of powers.

There are other, and in my view more important, connections between Watergate and modern separation of powers controversies. Those controversies arise when Congress and the President are at odds, which is most likely to occur when the departments are controlled by different political parties. Accordingly, the most significant political phenomenon of the past generation was the permanently divided government, with Congress controlled by Democrats and the presidency by Republicans. Until 1993, the only period of unified government, the Carter presidency, was itself a direct consequence of Watergate.

In an important way, though, divided government may well have resulted from Watergate too. In 1968, it seemed to some that the New Deal coalition had crumbled and was about to be replaced by a new national Republican coalition, which would control both the presidency and Congress.9 Watergate interrupted that process. The public, wary of concentrated power as a result of Watergate, appears to have concluded that divided government is attractive.

Divided government, however, produces separation of powers controversies. Policy differences between the departments generate legislative proposals and executive initiatives to which the other department takes exception. Ordinarily, these controversies are resolved by political negotiation during which the departments reach compromises acceptable to each. But over an extended period, divided government produces separation of powers cases as well, because it affects bargaining strategies. Specifically, after an extended period in which one party controls the presidency, the

President will be more reluctant to compromise with Congress. For predictable political reasons, a sustained period of divided government will lead to a judiciary dominated by appointees of the President’s party; the Senate cannot resist more than sporadically the transformation of the federal courts that the President’s power to initiate appointments allows. As a result, litigators may think that the courts have become allies of one side in separation of powers controversies. Partisans of the President may think that the possibility of prevailing in litigation is great enough to allow them to stiffen their positions in political negotiations. Therefore, controversies that might have ended through negotiation instead turn into court cases.

These are structural characteristics that lead to more separation of powers cases after a sustained period of divided government. The particular form division took in the past generation contributed to the proliferation of such cases as well. The competing parties had different views about the importance of strong presidential authority. Republicans desired a strong presidency in foreign affairs and a weak national government in domestic affairs, whereas Democrats wanted a weak presidency in foreign affairs and a strong national government in domestic affairs.

Thus, in foreign affairs, the parties were directly opposed on questions of presidential power, and the Democrats, in control of Congress, were in a position to transform this opposition into separation of powers controversies. Watergate itself arose from President Nixon’s concern about opposition to his conduct of foreign policy. The repeated controversies about war powers and the Iran-contra affair are similar in structure.

The impoundment issue, which briefly flared up during the Nixon presidency, typifies separation of powers controversies in the domestic arena. Though not new, the issue recurred during the Nixon Administration when President Nixon “transformed an occasional practice into a special test of wills with Congress.” Impoundment became an issue because Democrats wanted a strong national government, and found the President thwarting their desires. To no one’s surprise, Democrats tried to develop

10. Impoundment occurs when the President or other U.S. government officers take action, or fail to take action, that precludes the obligation or expenditure of Congress’ budget authority. BLACK’S LAW DICTIONARY 756 (6th ed. 1990).


12. Id. at 133. During a press conference on January 31, 1973, President Nixon stated that “the Constitutional right for the President of the United States to impound funds[,] and that is not to spend money, when the spending of money would mean . . . increasing prices or increasing taxes for all the people, that right is absolutely clear.” Id.
ways to accomplish their goals without the President’s participation, and Republican Presidents tried to develop ways to reduce the domestic role of the national government.\textsuperscript{13}

The normative and political accounts of Watergate’s legacy are connected, as a matter of constitutional theory. “Checks and balances” is one of the central images of separation of powers theory, or, as James Madison put it, separation of powers protects liberty by setting ambition to counteract ambition.\textsuperscript{14} Politicians are ambitious, in the Madisonian sense, when they seek to protect the prerogatives of their offices against intrusions by occupants of other offices. Following this logic, divided government epitomizes how separation of powers serves liberty.

The foregoing account of Watergate’s legacy for separation of powers theory is surely correct, in one sense. Watergate did heighten concern for concentrated power, and it did contribute to the development of divided government. As I argue next, however, viewing modern separation of powers law as “Richard Nixon” law has distorted that law and, more importantly, has obscured deeper sources of modern separation of powers problems.

III. GOVERNMENTAL INNOVATIONS AND SEPARATION OF POWERS

Intensification of partisan conflict, caused by a divided government and principled concern for controlling concentrated power, has heightened the stakes in separation of powers controversies. One result, ironically, has been to mislead scholars about the nature of those controversies. This is the underside of seeing separation of powers law as “Richard Nixon” law. Rather than expressing deep conflict between a Republican president and a Democratic Congress, the conflicts arise because of the modernization of the national government.

Viewing the modern law of separation of powers as the legacy of Watergate induces scholars to consider the implications of divided government and partisan conflict. The Madisonian emphasis on ambition counteracting ambition seems to address those questions as well. Yet, unless we place Madison’s concerns into a modern context, that emphasis is likely to be normatively misleading and descriptively distorted. Unfortunately, adjusting those concerns to take account of modern conditions proves quite

\textsuperscript{13} This is a formula for repeated clashes, some of which will end up in court.

\textsuperscript{14} \textsc{The Federalist} No. 51, at 356 (James Madison) (Benjamin F. Wright ed., 1974).
difficult, and may partially explain why the image of Watergate continues
to dominate separation of powers thinking; we have nothing to put in its
place.

The standard account I have given is descriptively distorted because it
fails to explain some of the most important characteristics of modern
separation of powers law. Although "Richard Nixon" law makes United
States v. Nixon the paradigmatic case, a better paradigm is the Sentencing
Commission decision, Mistretta v. United States. Mistretta does not
easily fit into the standard account, yet it exemplifies modern separation of
powers problems in several ways.

First, the Sentencing Commission was clearly a technical adaptation to
deal with what national law-makers saw as a modern problem: sentencing
disparity resulting from the proliferation of federal crimes and the expansion
of the federal bench. Second, the decision adopted what has come to be
called a "functional" analysis of separation of powers issues. According to
proponents of functional analysis, courts should assess innovations in
government structure by considering whether the innovation is a sensible
attempt to deal with a difficult modern problem in a way that does not
threaten to undermine fundamental constitutional values. Functional
analysis almost inevitably leads the Court to uphold governmental innova-
tions against separation of powers challenges.

The Court's functional analysis is not a well-suited tool for dealing
with sharp partisan conflicts between the President and Congress. The
Court has sometimes used a more formal analysis, particularly in the
legislative veto decision. Most commentators, however, believe that the
Court's formalistic decisions are deviations from a more consistent
commitment to functionalism. Mistretta and the independent counsel
decision are more typical of the functionalist pattern: Despite occasional
invalidations, as a general matter the Court has rejected separation of power

several grounds including separation of powers).
17. Id. at 363-65.
18. For my analysis of this issue, see Mark Tushnet, The Sentencing Commission and
Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory, 66 S. Cal. L.
19. See id.
20. One reason for the belief that separation of powers controversies are more serious
and more contentious than they were in the past may be that Justice Scalia, the newspapers'
and scholars' favorite justice, is an articulate proponent of a formalism that the Court, in fact,
has by and large rejected.
challenges to federal statutes. The Court’s implicit judgment in preferring functionalism appears to be that most separation of powers controversies are not the product of sharp partisan conflict in which they are called upon to side with either the President who appointed them or the Senate that confirmed them.\footnote{Note, however, that a more careful phrasing of the proposition about the Court’s role is that the perception among partisans, that the Court will be an ally, can generate litigation in cases that otherwise might be negotiated to a solution. Eventually, however, a perception that experience proves to be inaccurate presumably disappears.}

The standard account relies on the Madisonian vision. For Madison, the President’s ambition counteracted Congress’s. Direct political confrontations were the mechanism by which separation of powers protected liberty, as each side sought to advance its own interests and found itself checked by the other. Equally important, the disputes were personalized, as the term \textit{ambition} suggests. That is, political interests led particular people to fight other people over competing agendas. One small indication of what can be called the personalization of ambition is the Framers’ choice of a unitary over a plural executive. By placing the executive power in the hands of a single person, the Framers believed that they could promote both energy and responsibility in the Executive, and individual responsibility would be enforced by impeachment to remove “the” wrong-doer from office.

The Madisonian perspective leads to a positivist account of separation of powers law. On this view, the Constitution does not prescribe any particular outcome in separation of powers controversies. Rather, it establishes a framework for political contention, and validates whatever results from that contention.\footnote{For some qualifications and elaborations, see Tushnet, supra note 18, at 582.}

This positivism, however, is hard to sustain under modern conditions. Although strongly originalist contemporary discussions of the separation of powers continue to speak in personalized terms,\footnote{See, e.g., Steven Calabresi & Kevin Rhodes, \textit{The Structural Constitution: Unitary Executive, Plural Judiciary}, 105 HARV. L. REV. 1153 (1992).} they are difficult to employ in connection with a modern, bureaucratic government. We can say that the legislative veto is a mechanism by which Congress (seen as a unit) attempts to control the President (seen as an individual). The reality, however, is that the veto is an attempt by congressional committees and their staffs to exercise some continuing supervision over the behavior of lower-level bureaucrats. In \textit{Chadha}, for example, “Congress” was not concerned that “the President” had adopted too generous a standard for determining when to waive deportation in hardship cases; rather, the chair
of the House subcommittee with jurisdiction over the Immigration and Naturalization Service was concerned that the bureaucrats in charge of making hardship decisions were using too generous a standard.

Similarly, when Justice Scalia criticized the innovation of the independent counsel statute in *Morrison v. Olson,* his description of the Commission as an effort to aggrandize one “department” at the expense of another did not capture the more complex reality. Noting, as the Watergate legacy suggests, the immediate partisan context of contemporary disputes, Justice Scalia saw the independent counsel statute as “Congress’s” attempt to reduce “the President’s” power by allowing it to compel investigations that the President would not otherwise allow to go forward. If we move back a bit from the immediate context of divided government, though, we might see the independent counsel statute as an effort to deal with problems that arise precisely when we can no longer personalize the presidency because the President has so many subordinates over whom he has little direct control. Because the executive is in fact no longer unitary, it is misleading to insist on “the President’s” responsibility for all that happens in the executive departments.

Once we abandon the personalization of ambition, the Madisonian positivist perspective cannot be sustained, for it relied on counterbalancing forces of political ambition, which can no longer be located anywhere in the complex bureaucracies of the modern state. Ambition, of course, remains: members of the House of Representatives want to run for the Senate, senators want to run for the presidency, presidents (and members of Congress) want to be reelected. These ambitions, though, are not rooted in the *institutions* themselves. Ambitious politicians look out for themselves, not for the prerogatives of the departments in which they find themselves.

Other originalist perspectives are equally flawed, for more familiar reasons. Suppose, contrary to Madison, that the Framers did embed in the Constitution a particular vision of the proper relation between “the executive” and “Congress.” As critics of originalism have shown, the transformation of government means precisely that the Framers’ vision cannot resolve contemporary controversies.

More generally, the complexity of governing in the contemporary world—the problems of a national economy’s integration into an international system and the problems of establishing or maintaining a just and orderly society in an ethnically and socially pluralist nation—means that new

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26. Id. at 703.
instruments of government are likely to be developed. We have become accustomed to one such innovation: the administrative agency. Separation of powers purists suggested that such agencies are unconstitutional, but the Court, in Bowsher v. Synar, went out of its way to indicate its disapproval of that position. It is only because we had not adjusted to other innovations, such as the independent counsel or the Sentencing Commission, that constitutional challenges seemed credible.

In this sense, the novel methods of government that have generated separation of powers cases are not the legacy of Watergate. They are, instead, the products of modern life. As such, however, analyzing them with constitutional concepts predicated upon images of a government such as existed in 1789 is not likely to be helpful. If neither the presidency nor Congress is unitary, for example, the personalization associated with the Madisonian idea of ambition counteracting ambition simply does not speak to the institutions of government we now have. Analyses that pursue that idea, or indeed any other predicated on an understanding of the constitutional order of older institutions, may be faithful to the Constitution in an originalist sense yet unfaithful to the constitutional project.

That project is to assure that the institutions we actually have be regulated by law, and that all who exercise public power are governed by the rule of law. The question then becomes whether it is possible to develop an approach to separation of powers analysis that is both descriptively accurate—that captures the fundamentals of modern government—and normatively acceptable—that ensures the rule of law. The difficulty is particularly acute in connection with separation of powers disputes. In the constitutional scheme, the separation of powers might be called a "trans-substantive" method of protecting liberty and promoting effective government. Separation of powers controversies ought to be resolved, according to this method, without regard to the underlying political issue provoking the controversy. So, for example, whether the Constitution has room for a special counsel must be decided without regard to the actions of

29. Id. at 725 n.4.
Richard Nixon or Ronald Reagan, except to the extent that those actions reveal something systemic about how the modern presidency operates.

To decide these questions trans-substantively, courts must ask whether, taking the way the modern government operates into account, liberty and efficiency will be better promoted by allowing some governmental innovation or by barring it. The functionalist approach now prevailing on the Court is problematic because it so often amounts to a rubber-stamp for institutional innovations: If Congress believed that the innovations serve useful functions without threatening the balance of power that promotes liberty, the courts are not well-positioned to disagree. The Court's functionalism, thus, may simply be how it expresses its resigned acceptance of what the Justices understand to be the inevitable modernization of the national government. If in this view modernization might not be a transcendentally good thing, but it is going to happen no matter what, then why bother to pretend that there are constitutional barriers to modernization?

Understood in this way, functionalism may satisfy the demand for a descriptively accurate approach to separation of powers problems. It hardly seems to satisfy the demand for a normatively attractive one. The view that such problems are the legacy of Watergate may stand in the way of developing a more satisfactory approach. Somehow, judges and scholars have to figure out a way to identify which of the innovations modern life is likely to bring forward ought to be rejected as unconstitutional. Treating the problems as the legacy of Watergate does not seem likely to help in that endeavor.
Why Didn’t Nixon Burn the Tapes and Other Questions About Watergate

Stephen E. Ambrose*

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 1775
II. WHY DID THEY BREAK IN? .......................... 1776
III. WHO WAS DEEP THROAT? .......................... 1777
IV. WHY DIDN’T NIXON BURN THE TAPES? ........ 1778
V. VICE PRESIDENT FORD AND THE PARDON ...... 1780

I. INTRODUCTION

For almost two years, from early 1973 to September, 1974, Watergate dominated the nation’s consciousness. On a daily basis it was on the front pages—usually the headline; in the news magazines—usually the cover story; on the television news—usually the lead. Washington, D.C., a town that ordinarily is obsessed by the future and dominated by predictions about what the President and Congress will do next, was obsessed by the past and dominated by questions about what Richard Nixon had done and why he had done it. Small wonder: Watergate was the political story of the century.

Since 1974, Watergate has been studied and commented on by reporters, television documentary makers, historians, and others. These commentators have had an unprecedented amount of material with which to work, starting with the tapes, the documentary record of the Nixon Administration, other material in the Nixon Presidential Materials Project, plus the transcripts of the various congressional hearings, the courtroom testimony of the principal actors, and the memoirs of the participants. But despite the billions of words that have been written and said about

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This essay comprises the edited remarks of Professor Ambrose delivered at the Watergate Era Symposium held at Nova University Shepard Broad Law Center in Fort Lauderdale, Florida on March 25-26, 1993.
Watergate, fundamental questions about the scandal remain. These questions include: Why did the burglars break into the offices of the Democratic National Committee ("DNC")? Who was Deep Throat? Why didn’t Nixon burn the tapes once Alexander Butterfield had revealed their existence? Did Nixon cut a deal with Vice President Gerald Ford—a resignation for a pardon? These are the questions I will take up in this essay.

II. WHY DID THEY BREAK IN?

The day after the arrest of the burglars in the offices of the DNC, Nixon scribbled some comments on a Ron Ziegler memo that characterized the break-in as a “third-rate burglary.” Nixon wrote, “He [Ziegler] understated. Attempt at burglary. Bizarre business. There was no involvement whatsoever by W[ith] H[ouse] personnel.”

Thus did the cover-up begin, and to this day those words constitute Nixon’s basic defense; he knew nothing about it and he could not for the life of him figure out why anyone would want to break into the DNC.

In a lifetime of bold and brazen acts, this was the boldest and most brazen, as well as the most successful. Two decades later, Nixon’s query still dominates discussion and investigation of Watergate. Why break into the DNC? Who on earth ordered such a foolish thing?

The answer revolves around the strange relationship between Howard Hughes, Larry O’Brien and Richard Nixon. Hughes gave money to both the Democratic and Republican parties and, Nixon believed, had paid off a nine million dollar debt from Hubert Humphrey’s 1968 campaign. Nixon knew that Hughes had O’Brien on his payroll. Nixon also knew that Hughes had, at various times over the preceding twenty-five years, given money to him [Nixon]—often large amounts, in cash. Further, Nixon had made some big money from Florida real estate investments made with Bebe Rebozo—and evidently Hughes was in on the operation, and Nixon was afraid that O’Brien knew about the whole scheme.


Another Nixon defense is his question: Why should I have taken chances when I knew I was a sure-thing winner in the 1972 election? The effectiveness of the argument relies on the public’s short and faulty memory.
In early 1972 Nixon was trailing Senator Edmond Muskie in the polls. His big lead did not come until after the Democrats nominated George McGovern—by which time he had already put the pressure on CREEP Chairman John Mitchell to get more intelligence on what O’Brien knew. Also remember, in 1968, Nixon had a twenty-eight point lead over Humphrey, but almost got beat. He was ahead of John Kennedy in 1960, too, only to lose. To sum up, in the spring of 1972, Nixon was by no means a certain winner and he wanted every edge he could get.

“To this day,” Haldeman said at a 1987 conference at Hofstra University, “no one knows who ordered the break-in.” That is true in the strictest sense—no one has ever found an order reading, “break into the DNC, signed RN.” Nixon and his associates and defenders have raised all sorts of dark possibilities: that it was a CIA or JCS plot, or a John Dean/Al Haig plot, or that the Democrats set it up themselves.

In my opinion, John Mitchell ordered the operation; his principal agent was Jeb Magruder; the operatives were men hired by Chuck Colson, G. Gordon Liddy and H. Howard Hunt; all these men were responding to unrelenting pressure from Nixon to find out what O’Brien knew.

III. WHO WAS DEEP THROAT?

Next question: Who was Deep Throat? Once again, I don’t have an answer, only an opinion. Deep Throat was a composite character made up by Carl Bernstein and Bob Woodward for dramatic purposes (and it surely worked). Their information came from a variety of sources, none of whom met them in underground garages in the middle of the night. This is based on my judgment that no one person in the Administration knew as much as Deep Throat supposedly knew.

A more substantial question is: What was the role of the press in general, and Woodward and Bernstein in particular, in forcing Nixon’s resignation? The media, naturally enough, thought that it was central, critical, and the *sine qua non* of the entire Watergate story. In my view, the press played a peripheral role. Had there been no press coverage, or no *Washington Post* investigative reporting, there still would have been a trial in Judge John Sirica’s court, there still would have been the Ervin Committee Hearings, and there still would have been impeachment proceedings. What brought Nixon to resignation was not the press but his own conduct, as revealed by the constitutional process that was based on the separation of powers. The courts and the Congress did their jobs. The system worked.
IV. WHY DIDN’T NIXON BURN THE TAPES?

What many people believe to be the most puzzling question of all is actually the easiest to answer. The question is: When Butterfield revealed the existence of the tapes, why didn’t Nixon pile them up on the White House lawn, call in the reporters, pour some gasoline over the tapes, say, “watch, you bastards!” and toss a match on the pile?

John Connally urged him to do just that. Connally sent a message to Haldeman: “Please, Bob, use your influence to convince the President to burn the tapes . . . . Say they must be destroyed now that their existence has been made public.”

There was a perfect cover. Nixon could say that the conversations dealt with national security affairs and matters highly embarrassing to politicians from both parties. Since that was true, and since every politician who had been in the Oval Office since 1971 was at that moment racking his brain to remember what he had said there, a bonfire would have elicited protest and criticism, but it would not have destroyed the President. Nor would it have been illegal. Nixon regarded the tapes as his personal property, a position upheld by the precedent that any President’s papers are his personal property, and a position upheld by the courts in 1992. As the tapes had not been subpoenaed, burning them would not be destroying evidence in a criminal case.

Still, a bonfire would have raised another storm. Leonard Garment warned that it would forever seal an impression of guilt in the public mind. Spiro Agnew agreed with Garment.

Haldeman also opposed destroying the tapes, but his reason had nothing to do with public opinion. Rather, it got straight to the heart of the matter. As Nixon later put it, “Haldeman said that the tapes were still our best defense, and he recommended that they not be destroyed.”

Later, Nixon’s standard response to the question, what is the lesson of Watergate? became, “burn the tapes.” But at the time, in 1973, that was the last thing he would do.

To understand why, it is first necessary to point out that only two men in the Oval Office knew that a tape recorder was running. They were Richard Nixon and H.R. Haldeman. That makes everything they said suspicious—were they speaking spontaneously and truthfully, or were they speaking for the record? It is impossible to tell. Listening to the tapes today, when you hear Nixon tell John Dean, “but that would be wrong,” you just can’t tell if he means wrong in a political sense, or a moral sense, or a constitutional sense, or a legal sense—or if he just wants to get that sentence on the tape, just in case.
Now flash forward to Nixon’s situation had it come to an impeachment and a trial before the Senate. Nixon’s lawyer walks into the Senate chamber with a tape recorder, and delivers the following speech: “Senators, you have heard Mr. Dean accuse the President of paying blackmail money, hush money, to Howard Hunt. Now, Senators, I want you to hear the President himself, to hear his response when Dean told him the money had to be paid.” And with that, the lawyer hits the start button on the tape recorder, and the Senate hears Nixon say, “but that would be wrong.” The lawyer hits the stop button. “Senators, you heard it yourselves. I rest my case.”

There are two basic factors at work here. First, the tapes were Nixon’s best defense, just as Haldeman said, for the obvious reason that they contained so many exculpatory statements by Nixon; statements that he had made in his own transparent way whenever he remembered that the recorder was running. Nixon had already drawn on that asset in the preparation of a summary he had given Fred Buzhardt, which Buzhardt in turn had given to the Republican staff members of the Ervin Committee. This summary was what led to the Butterfield admission that a taping system existed in the White House (Butterfield was responding to a question about how the President could have such a good memory as to quote directly from conversations more than a year old; in other words, as so often, Nixon had no one to blame but himself for his problems).

The second factor was explained by Haldeman, who pointed out that Nixon “just never dreamed it was possible that the tapes would ever be heard by anyone other than himself.” They were his property. They were protected by executive privilege. Everything Nixon had said in his July 7, 1973 letter to Ervin (“I shall not permit access to Presidential papers”) applied equally to the tapes.

Nixon did not destroy the tapes because they constituted his best defense, if used selectively, and because he was certain he could command complete control of them. What Nixon failed to anticipate was the persistence with which Ervin, the Special Prosecutor, and Judge Sirica would demand access to the tapes, or the power of public opinion that would muster behind that demand, or the independence of the Supreme Court.

The Supreme Court was critical. Right up to the end of July, 1974, Nixon was fairly confident the Court would rule that the tapes were his to do with as he saw fit, or at least that the Court would divide, with two, three, or possibly four votes upholding executive privilege, which would allow him to defy an order to yield up the tapes. It was the unanimous Court ruling that forced him to release the smoking gun tape of June 23, 1972.
On July 21, 1973, Nixon wrote a private note on the subject: “If I had discussed illegal action, I would not have taped. If I had discussed illegal action and had taped, I would have destroyed the tapes once the investigation began.”

Whether this was self-deception or pure cynicism, or something in between, is impossible to say. He certainly had discussed illegal action on March 21, 1973, with John Dean; indeed he had ordered illegal action (the payment to Hunt) and it had been carried out. The attempt to use the CIA to turn off the FBI back in June 1972, the break-in to Daniel Ellsberg’s psychiatrist’s office, and other Nixon Administration actions had some cover of national security, but the Hunt payment was in direct response to blackmail.

With regard to Nixon’s second sentence, he explained in his memoirs that he decided the tapes were “my best insurance.” If other aides turned against him, as Dean had done, “the tapes would give me at least some protection.” They would provide a defense to sum up, so long as Nixon could make selective use of the tapes. His greatest fear, repeated innumerable times to Haldeman, was that Dean had his own tape, made on a machine hidden in his lapel.

V. VICE PRESIDENT FORD AND THE PARDON

Before beginning my discussion of the pardon, I want to take this opportunity to quote Richard Nixon on the subject of pardon and forgiveness.

At a news conference on January 31, 1973, Courtney Sheldon of the Christian Science Monitor asked Nixon if, now that the war was over, he had given any thought to amnesty for draft evaders.

Nixon replied that “it takes two to heal wounds,” and, in view of the criticism he was getting over the settlement, “it makes one [wonder] whether some want the wounds healed.” He said he had achieved “peace with honor,” even though “I know it gags some of you to write that phrase.” As to “healing the wounds . . . certainly I have sympathy for any individual who has made a mistake. We have all made mistakes. But also, it is a rule of life, we all have to pay for our mistakes.”

He went on:

Amnesty means forgiveness. We cannot provide forgiveness. . . . Those who served paid their price. Those who deserted must pay their price, and the price is not a junket in the Peace Corps, or something like
that, as some have suggested. The price is a criminal penalty for disobeying the laws of the United States.

Now, why did Nixon choose Ford for his Vice President, and why did Ford pardon Nixon? Spiro Agnew’s resignation in October 1973, triggered the Twenty-fifth Amendment, which required Nixon to select a new Vice President, subject to confirmation by a majority of both Houses of Congress.

Who can say what went through Nixon’s mind? As Ford aide Robert Hartmann has commented, “no man living can outguess Richard Nixon when it comes to figuring things out to the third, fourth, and fifth degree of indirection.” Certainly, there were a lot of nuances and complexities—much to think about.

The terms of the Twenty-fifth Amendment gave Nixon an invaluable asset; in the event of his resignation, impeachment, or death, it was nothing less than the ultimate prize in American politics. He was sure to spend it in such a way as to do himself the most good. But because the wording of the Twenty-fifth Amendment was mandatory, he had to spend it quickly. Nor could he spend it freely, as his selection was subject to congressional confirmation.

Under ordinary circumstances, Nixon would have given his full attention to his momentous decision, but October 10, 1973, was not an ordinary occasion. Nixon’s biggest problem was not selecting a replacement for Agnew, but finding someway to avoid the demands of Special Prosecutor Archibald Cox for Watergate related tapes. The case was before the United States Court of Appeals, which was scheduled to hand down its ruling in a day or two.

When Nixon saw Attorney General Richardson on the afternoon of October 10, his first words were, “now that we have disposed of that matter [Agnew’s resignation], we can go ahead and get rid of Cox.”

But if the ruling of the court of appeals went against him on the tapes, even getting rid of Cox would not solve his problems. If he refused to comply, he would set off a major constitutional crisis. Uppermost in his mind, then, was not the Twenty-fifth Amendment, but Section 2 of Article I of the Constitution, which states that the House of Representatives “shall have the sole Power of Impeachment.” In short, if the firing of Cox and the defiance of a court order set off a serious impeachment proceeding, Nixon’s fate would rest, first of all, with the Republican members of the House.

Nixon could not count on their unquestioning support. Aside from his Watergate problems, there was the Christmas bombing. Coming immediately after Henry Kissinger’s election-eve claim that “peace is at hand,” the bombing had led to widespread criticism of the President, from Republicans...
as well as Democrats. There was a further cause for worry, one that was expressed by Nixon’s Congressional liaison aide, William Timmons, in a post-election memorandum: “Unfortunately, many GOP members feel the President was interested in his own reelection and didn’t do enough to help them in their campaigns. This could result in an independent attitude toward the President.” Worst of all, in part because of Nixon’s single-minded concentration on his own reelection, the Democrats controlled the House.

To sum up the situation on the afternoon of October 10, what Nixon most needed to buy with the asset the Twenty-fifth Amendment gave him was some Republican support in the House of Representatives.

Immediately after receiving Agnew’s resignation, Nixon began conferring with congressional leaders, cabinet members, and his aides. Washington was agog; the atmosphere was likened to a political convention. In the midst of intense speculation, the names most often mentioned were Governors Nelson Rockefeller and Ronald Reagan, along with John Connally, Elliot Richardson, and Barry Goldwater. Gerald Ford’s name, however, was not mentioned.

Nixon’s most important conference on October 10 was with presidential advisors Bryce Harlow and Mel Laird. Between them, they knew the House as well as any two men in the country. Laird had been a congressman for sixteen years; Harlow had been President Dwight Eisenhower’s liaison with Congress for eight years and Nixon’s for two years. They told the President he had but one choice, Gerald Ford.

The Speaker of the House, Carl Albert, told the President bluntly that Ford was the only Republican who could be quickly confirmed. Late that evening, Laird made a telephone call to Ford. “Jerry,” he said, “if you were asked, would you accept the Vice Presidential nomination?” Laird did not say that he was inquiring for Nixon, but as Ford noted, “someone had told him to call.”

In short, Nixon had made up his mind before he saw the results of his poll. The poll itself (recently released by the National Archives) showed how popular Ford was in the House, as well as how little support he had outside that body. In the House, there were eighty votes for Ford, thirty-five for Rockefeller, twenty-three for Reagan, and sixteen for Connally.

Nixon could hardly have been surprised by the results of his poll. He was one of the best at counting votes in the Congress, almost as good as Laird and Harlow. That was why he had picked Ford even before he opened a single ballot.

Figuring out Nixon’s motives for his decisions is a popular, if not frustrating, political parlor game. With regard to his selection of Ford, H.
R. Haldeman told me once that Nixon picked Ford because he reasoned that as the members of the House knew Ford so intimately, they would never impeach Nixon if it meant Ford would become President. Haldeman’s interpretation is that Ford was Nixon’s insurance policy. Others have adopted the same view.

If true, Nixon had made a fatal blunder. As the poll showed, Ford was widely popular among the Republicans in the House; as the event showed in August of 1974, republican congressmen could hardly wait to substitute Ford for Nixon as President. If Nixon wanted an insurance policy, he should have supported Agnew’s demand for an impeachment inquiry, as a way of keeping Agnew in office. How many Democrats would have been willing to vote to impeach Nixon if Agnew had been Vice President?

It is always dangerous to ascribe to Nixon a single, simple motive, but in this case it seems too clear that he selected Ford as a way of appeasing Republican members of the House of Representatives; with Cox, the tapes, and the defiance of a court order uppermost in his mind. Others would argue that what Nixon had in mind was further down the road; his own resignation, and consequent need for a pardon. In this interpretation, he felt he could count on “good old Jerry” more than anyone else.

On August 1, 1974, Haig met with Ford. Haig’s purpose, he later testified, was to tell Ford that Nixon was close to resigning and “to emphasize to him [Ford] that he had to be prepared to assume the presidency within a very short time.” But there was more to it than that. As Ford later testified, “it was his [Haig’s] understanding from a White House lawyer that a President did have the authority to grant a pardon even before any criminal action had been taken against an individual.” It was a private meeting. It inevitably raises suspicion that a deal was cut between Haig and Ford; a pardon for resignation.

The only two men who know for certain, both vehemently deny that a deal was made. Judging by the extensive written commentary, much of which was by men close to Nixon or Ford, their denials are hard to believe. But unless a tape recording emerges, or unless either Haig or Ford say something different from what they have already testified, no one will ever be able to prove that a deal was cut.

I cannot resist the temptation to do some speculation of my own. I begin with some observations. First, while Nixon and Ford were close professional associates, they were not intimate friends who trusted each other. At their October 10, 1973 meeting, Ford noticed that Nixon was relaxed, that he was wearing a sports jacket and slacks, and that he was smoking a pipe. Ford had never before seen Nixon relaxed, casually
dressed, or smoking. The fact that all this was new to Ford tells a great deal about how close their quarter-century old relationship was.

Second, Nixon owed Ford far more than Ford owed Nixon. It was characteristic of Nixon that he got more loyalty than he ever gave, and that was certainly true in this case. Ford had staunchly supported Nixon throughout his career, from the fund crisis of 1952 to the Watergate crisis of 1972-74, while Nixon had double-crossed Ford in the Douglas affair, and throughout his first term treated Ford with disdain that bordered on contempt. Nixon had lied to Ford from January of 1973 to August of 1974 when he insisted that he had no involvement in the Watergate cover-up. Nixon not only allowed, but encouraged Ford to make himself vulnerable by forthrightly and indignantly defending the President.

While it is true that Nixon had chosen Ford to become Vice President, both men knew that circumstances rather than admiration, friendship, or trust dictated that choice. Further, there is no evidence that Nixon attempted to get Ford to agree that in return for the Vice Presidency, Ford would grant a pardon if worse came to worst. Nixon did ask Ford to promise that he would not be a candidate for the Presidency in 1976; a promise Ford gave—which in itself is a reminder of how valuable private, personal promises are among American politicians.

Third, it was the Vice President, not the President, who occupied a position of strength at the beginning of August, 1974. Ford enjoyed deep and wide-spread support from the public and from the Congress; Nixon did not. Nixon could not say, "look, either you promise to pardon, or I’ll never resign." The Presidency was no longer Nixon's to give or keep.

Fourth, it is necessary to recall what Bryce Harlow said to Ford in a discussion following the August 1st meeting between Haig and Ford. Hartmann had arranged the get-together because he wanted to convince Ford to tell Nixon that there could be no deal, or even the appearance of one. Better the message came from Harlow than from Hartmann. Harlow told Ford,

it is inconceivable that [Haig] was not carrying out a mission for the President, with precise instructions, and that it is the President who wants to hear your recommendations and test your reaction to the pardon question. But the President knows that he must be able to swear under oath that he never discussed this with you and that you must be able to swear that you never discussed it with him.

Ford saw the point. He called Haig to say that he had no intention of recommending whether or not Nixon should resign. Ford added that
nothing he and Haig talked about (meaning the President’s pardoning power) should be given any consideration whatsoever as indicating any intent on his part to involve himself in Nixon’s resignation decision. Haig said he understood and agreed.

That sounds far more believable than the opposite conclusion, that Haig and Ford entered into a solid deal of pardon for resignation. My own reading of Nixon is that he had thought the whole thing through and concluded that the far greater risk was to have Haig ask straight out for a pardon agreement. That might have caused Ford to bristle, grow indignant, get angry, throw Haig out of his office, and set his feet in cement against a pardon. It is often true in American politics that what is not said, but that both sides can count on as being understood, leads to a more solid agreement than what is promised.

Fifth, Nixon could anticipate political developments accurately. Looking ahead, he knew President Ford’s problems in the late summer of 1974 would be many and difficult, and that the last thing the new President would want would be a flood of pre-Nixon trial publicity. For his own good, for the good of the Republican party, for the good of the country, Ford would want to avoid the orgy of Nixon-bashing that would accompany a Nixon indictment and trial.

Nixon could be confident that Ford would both be told and would figure out for himself that picking a jury for a Nixon trial would dominate the headlines for weeks, perhaps months, and still might prove impossible. An actual trial would be even worse. As to what might be revealed in a trial, again Nixon could count on Ford’s shuddering at the thought of that.

Nixon knew that Ford was going to have to pardon him, and he did not send Haig to see Ford to extract such a promise. Being Nixon, he could not help himself from meddling, manipulating, and seeking reassurance. So Nixon sent Haig to see Ford, not to make a deal, but to make sure Ford knew that as President he had the right to pardon even before an indictment. When Haig reported that Ford had been so informed, Nixon was satisfied. A week later, he resigned.

One month later, Ford pardoned Nixon for all crimes he may have committed. I confess that at the time I shared the feelings of helpless rage that overcame millions of Americans. My fury knew no bounds. I cursed, I screamed, I swore I’d never forgive Jerry Ford. I was certain Ford had entered into a corrupt bargain with Nixon.

Over the years, however, I have come to realize that Ford was absolutely right to do what he did. It may have been something he had to do, but he still deserves credit for doing it forthrightly, courageously,
quickly, and at his own expense. The last thing this country needed in 1975-76 was to tear itself yet further apart over the fate of Richard Nixon.

My subject has been Nixon’s selection of Ford for the Vice Presidency, and Ford’s pardon of Nixon. My conclusion is that in October of 1973, Nixon had no choice, and that in September of 1974, Ford had no choice. The circumstances that dictated the developments were the structure of the existing situations, not the personalities of the two men, nor any secret deals.
Who Will Guard the Guardians?
Independent Counsel, State Secrets, and Judicial Review

Matthew N. Kaplan

 TABLE OF CONTENTS

I. INTRODUCTION .................................. 1788
II. BACKGROUND ................................. 1791
   A. The Experience of the Iran-Contra
      Independent Counsel .................... 1791
         1. A Hamstrung Independent Counsel .... 1791
         2. A Remaining Gap in the Government’s
            System of Self-Policing .......... 1793
         3. The Appearance of Executive Bias .... 1794
            a. The North Case ............... 1794
            b. The Fernandez Case .......... 1799
   B. Availability of Judicial Recourse? ....... 1801
      1. The “No” Vote ..................... 1802
      2. The “Yes” Vote .................. 1805
         a. A Historical Review .......... 1805
      3. An Open Question ................ 1808
III. STATUTES .................................... 1809
    A. Title VI of the Ethics in Government Act .... 1809
    B. The Classified Information Procedures Act . 1812
IV. THE CONSTITUTION .......................... 1816
    A. A Constitutionally Based Executive State
       Secrets Privilege? .................. 1816
       1. Executive Privilege—Origins .... 1816
       2. A Special Executive Privilege for State
          Secrets? ........................ 1818
    B. The Independent Counsel Context Is Special .. 1820

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I. INTRODUCTION

"The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated . . . ."

- Letter from George Washington to Elias Dayton, July 26, 1777.¹

¹. 8 WRITINGS OF GEORGE WASHINGTON 478-79 (J. Fitzpatrick ed. 1933).
“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time.”

- THE FEDERALIST NO. 10 (James Madison).

This article considers whether Congress constitutionally may empower independent counsel to challenge presidential invocations of the state secrets privilege, and whether federal courts constitutionally may review such challenges. A case or controversy implicating these questions nearly arose out of the Iran-Contra Affair when the Reagan and Bush administrations opposed the public disclosure of evidence necessary for the trials of Oliver North, John Poindexter, Richard Secord, Albert Hakim, and Joseph Fernandez on the ground that disclosure would harm the national security. Lawrence Walsh, the Iran-Contra Independent Counsel, chose not to seek judicial evaluation of the executive national security claims, however, choosing instead to drop the central conspiracy charges against North, Poindexter, Secord, and Hakim and to acquiesce in judicial dismissal of the entire Fernandez indictment.

A threshold question also existed whether Congress actually had authorized independent counsel to challenge executive state secret claims. Two statutes governed this question: Title VI of the Ethics in Government Act of 1978 (which created independent counsel) and the Classified Information Procedures Act of 1980 (“CIPA”). Pursuant to a sunset provision, the independent counsel portions of the Ethics Act expired.

2. The state secrets privilege is a common law evidentiary privilege which the United States may invoke to prevent the disclosure of “national security information.” See infra note 61, section IV.A.2, and subpart IV.B.

“National security information” refers to information relating to military, intelligence, or foreign affairs matters the public disclosure of which could harm the national security of the United States. The term encompasses, but is not limited to, “classified information.”

“Classified information” refers to information the United States Government officially has designated as national security information pursuant to statute or executive order. See generally Bruce E. Fein, Access to Classified Information: Constitutional and Statutory Dimensions, 26 Wm. & MARY L. REV. 805, 807-09 (1985). By invoking the state secrets privilege, the United States can avoid disclosing or prevent the disclosure of national security information which has not been formally classified.


December 15, 1992. Construction of the expired statute continues to be important nonetheless. The Senate and House of Representatives each have passed bills which would reenact the relevant portions of the expired legislation, and President Clinton has advocated that the expired legislation be renewed.

Part II of this article recounts the experience of the Iran-Contra independent counsel, and surveys historical judicial practice regarding review of executive nondisclosure decisions in the national security area.

Part III examines the statutory framework which existed prior to the expiration of the independent counsel portions of the Ethics Act. Along with Independent Counsel Walsh, commentators appear uniformly to have concluded that the Ethics Act and CIPA did not empower independent counsel to seek judicial review of executive attempts to suppress trial evidence on grounds of national security. Part III offers a contrary view. The discussion in part three also applies to the statutory framework which would exist were Congress to renew the independent counsel portions of the Ethics Act.

Part IV is an extended argument that Congress constitutionally may empower independent counsel to challenge, and federal courts to review, presidential invocations of the state secrets privilege. It questions a contrary view recently expressed by Professor Ronald Noble, and suggested by a 1981 Gary Schmitt essay about executive privilege.


II. BACKGROUND

A. The Experience of the Iran-Contra Independent Counsel

Through their control of national security information, the Reagan and Bush administrations exerted significant leverage over Independent Counsel Lawrence Walsh, the Special Prosecutor responsible for investigating the Iran-Contra Affair. The Executive branch's opposition to the use of national security information as evidence in the Iran-Contra trials led the Independent Counsel to drop the central charges against former National Security Council aide Lieutenant Colonel Oliver North, former National Security Adviser Admiral John Poindexter, Major General Richard Secord, and Albert Hakim.\footnote{Third Interim Report to Congress by Independent Counsel for Iran/Contra Matters (June 25, 1992) [hereinafter Third Interim Report by Independent Counsel], relevant portions reprinted in 138 Cong. Rec. S9179-01 (daily ed. June 30, 1992) (statement of Sen. Kerry); see also Michael Wines, Prosecutor Asks for Dismissal of Key Charges Against North; Disclosure of Secrets Feared, N.Y. Times, Jan. 6, 1989, at A1; David Johnston, U.S. Drops Part of its Case Against Iran-Contra Figures, N.Y. Times, June 17, 1989, at A7.}

It also pressured him into acquiescing in Judge Claude Hilton's dismissal of the entire indictment of Joseph Fernandez, the former Central Intelligence Agency (“CIA”) station chief in Costa Rica.\footnote{Final Report of Independent Counsel, supra note 8, at xv, 37-38, 283, 288-93; see also United States v. Fernandez, 913 F.2d 148, 153 (4th Cir. 1990).}

The situation was novel in the independent counsel context. No party was seeking access to information. This distinguishes the Iran-Contra dynamic from the Watergate tapes case. There, the special prosecutor Leon Jaworski sought access to information only the President possessed.\footnote{See United States v. Nixon, 418 U.S. 683 (1974). That the Watergate prosecutions did not involve national security information also distinguishes them from the Iran-Contra prosecutions. See id. at 706, 710.}

In the Iran-Contra prosecutions, the judges, defendants, and prosecutor already were privy to the relevant information. At issue was whether the prosecution and the defendants could disclose it at trial.

1. A Hamstrung Independent Counsel

The most obvious and direct effect of an executive prohibition of the evidentiary use of national security information is to prevent the prosecution of particular allegations of criminal wrongdoing. Such prohibition, however, also may diminish an independent counsel's ability to carry out his or her overall investigative function—arguably the more important role an indepen-
dent counsel is expected to play in our governmental scheme. The threat of criminal sanction is a prosecutor's primary instrument for obtaining information or testimony from potential sources or witnesses, and it is a significant investigatory advantage an independent counsel has over Congress. Deprived of it, an independent counsel may be left groping for the light switch.

Walsh, for instance, most likely targeted North, Fernandez, and Poindexter as much to pry loose any incriminating knowledge they might possess about their superiors as for any retribution or deterrence objectives. It had been hoped that if the Fernandez prosecution progressed, for example, Fernandez would implicate higher-ups at the CIA in return for leniency. Almost two years after the Fernandez indictment was dismissed, Walsh allowed Alan Fiers, former chief of the CIA's Central American Task Force, to plead guilty to misdemeanor charges of withholding information from Congress. In return, Fiers provided information and

13. The Ethics Act required an independent counsel to file a final report with a supervisory judicial panel, and the panel in turn was permitted to transmit the report to Congress or publish any portions it deemed appropriate. 28 U.S.C. § 594(h) (1988) (expired 1992). Section 595(a)(2) authorized an independent counsel to submit reports to Congress whenever he or she wanted. Section 595(c) required an independent counsel to advise the House of Representatives of any information he or she discovered that might constitute grounds for an impeachment. See also THIRD INTERIM REPORT BY INDEPENDENT COUNSEL, supra note 10 ("Under the governing statute, Independent Counsel's responsibilities are threefold. First, he has an investigative role. Second, he has a prosecutorial role. Third, he has a reporting role."") (citations omitted); MacNeil/Lehrer Newshour (PBS television broadcast, Nov. 24, 1989) (transcript available in LEXIS, Nexis Library, Omni File) (statement of Scott Armstrong of the National Security Archives regarding the "role of the office").

14. Arthur Liman, Chief Counsel to the Senate Iran/Contra Committee, Congressional Investigations and Criminal Prosecutions: The Iran-Contra Experience, Remarks at NYU Law School, at 23 (Oct. 22, 1991) (unpublished text of speaker's prepared remarks on file with author) ("Without the power to indict," Senate Committee had little success convincing witnesses whose stories did not hold up "that they should be more forthcoming for us than they were for the Independent Counsel.").

15. Final Report of Independent Counsel, supra note 8, vol. I, at 106 (viewing North's cooperation as the key to the secrets behind the Iran-Contra Affair), 136 (noting that Independent Counsel's investigatory mandate could not be fulfilled until Poindexter was interrogated to find out about activities of other high-ranking officials); see also JEFFREY TOOBIN, OPENING ARGUMENTS, A YOUNG LAWYER'S FIRST CASE 170 (1991) (regarding Office of Independent Counsel's expectations about evidence North could offer).

16. Final Report of Independent Counsel, supra note 8, vol. I, at 292-93 (stating that Fernandez would have incriminated higher-ups at CIA had case gone to trial); see also MacNeil/Lehrer Newshour, PBS television broadcast, Nov. 24, 1989 (transcript available in LEXIS, Nexis Library, Omni File) (statement of Nina Totenberg).
testimony which enabled Walsh to indict Claire George, former CIA Director of Operations, two months later for perjury and obstruction of Congress, and enabled Walsh three months later to obtain guilty pleas from Elliot Abrams, former Assistant Secretary of State for inter-American affairs, for withholding information from Congress. Four months after the Fiers plea bargain, Walsh indicted Duane Clarridge, former head of the CIA’s Latin American Division and counterterrorism unit, for perjury and false statements. It is mere speculation (but illustrative nonetheless) to hypothesize that Walsh might have reached Fiers, George, Abrams, and Clarridge sooner if he could have brought more pressure to bear on Fernandez.

2. A Remaining Gap in the Government’s System of Self-Policing

A structural and procedural defect once thought to exist in our government’s system of self-policing, and which Congress sought to repair by creating independent counsel in the Ethics Act, reemerged during the Iran-Contra Affair in a slightly altered, narrower form. “Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive branch is called upon to investigate its own high-ranking officers.” Congress’s concern derived from a sentiment that fifty years of the nation’s history involving the Teapot Dome, Truman Administration, and Watergate scandals, has demonstrated a generally recognized inability of the Department of Justice and the Attorney General to function impartially with full public confidence in investigating criminal wrongdoing of high-ranking government officials of the same political party.


Slightly more than a decade after the passage of the Ethics Act, the Executive no longer was investigating its own high-ranking members, but it had successfully retained de facto responsibility for determining whether evidence could or could not be used in their criminal trials. Here, the issue remained whether the Executive was able to "function impartially with full public confidence."

3. The Appearance of Executive Bias

The specter of an executive conflict of interest pervaded the Walsh national security information setbacks.

a. The North Case

Professor Harold Koh writes: "Public suspicion that President Reagan had issued North a 'pocket pardon' was dampened only by the fact that neither the judge nor the independent counsel had challenged publicly the legitimacy of the nondisclosure."\(^{21}\) This "despite the Reagan administration's questioning of both the fitness of the case for judicial examination and the constitutionality of independent counsels" in amicus briefs it had filed prior to the dropping of the two North counts.\(^{22}\)

According to Koh, "classified information that later became public during the [North] trial cast doubt on the validity of the government's sweeping claims of secrecy."\(^{23}\) For instance, the intelligence agencies initially demanded that the entire pretrial CIPA order of Judge Gerhard Gesell be sealed, but when Gesell later ordered it unsealed, only two words in the ten-page order were redacted.\(^{24}\) Similarly, Koh and others\(^{25}\) adduce a memorandum the independent counsel introduced as evidence in edited form which, it was later discovered, had been made public in its entirety in a civil lawsuit the previous year. Koh finds "troubling" that this discovery

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21. See KOH, supra note 8, at 32.
22. See id. at 24, 28, 32 (citing Memorandum of Law of the United States Filed by the Department of Justice as Amicus Curiae with respect to the Independent Counsel's Opposition to the Defendant's Motions to Dismiss or Limit Count One at 6, United States v. North No. 88-0080-02 (D.D.C. filed Nov. 18, 1988); Brief on Behalf of Amicus Curiae United States in Nos. 87-5261, 87-5264, and 87-5265, In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1987), rev'd sub nom. Morrison v. Olson, 487 U.S. 654 (1988)).
23. KOH, supra note 8, at 32.
24. Id. (citing Sealed Memorandum and Order re North's CIPA § 5 Notices (D.D.C. Jan. 19, 1989)).
25. See, e.g., MacNeil/Lehrer Newshour, supra note 13 (statement of Nina Totenberg).
prompted Gesell to complain of a "looseness in Government dealings with this problem of classified information." Gesell, who mockingly dubbed the executive intelligence officials who monitored secrecy in the North trial "security gurus," also complained that he faced an "absurd situation where the press is accurately reporting information in the public domain while the court is confronted with representations that the same facts must never be officially acknowledged."

Jeffrey Toobin, an associate independent counsel to Walsh during the North trial, has characterized the intelligence agencies as "insatiable" and having "paranoid fantasies."

Virtually all of the information relevant to the trial of Oliver North had been disclosed during the time of the Iran-Contra hearings—either in the hearings themselves or in press reports about them. But that, as we came to learn, did not necessarily help us as we began our lengthy struggle over classified information. We were still discovering one true secret of the charmed circle of national security insiders: that what is labeled secret often is not.

According to Toobin, the administration took the position that diplomatic necessity required the nondisclosure of information that was widely known, but not officially acknowledged.
When a fact had merely been disclosed in the media... the administration could say to its allies that the United States government had not officially confirmed that fact—even if the newspaper stories cited, as they invariably did, unnamed government officials. So the classified information regulations did not apply to administration officials leaking classified information to their favorite reporters; but they did, apparently, apply to us—when we were only trying to play by the rules. In truth, then, the four-cornered debate among the judge, the defense, the prosecution, and the administration... had almost nothing to do with "secrets," as that word is conventionally used in the English language.32

Toobin recounts, for example, that on December 21, 1988, the administration held a cabinet-level meeting to discuss the national security issues in the North case and decided to "allow [the Independent Counsel] to disclose that Saudi Arabia had donated money to the Contras—a fact that had been common knowledge for approximately a year."33

According to Toobin, the administration did not limit its nondisclosure...
position to genuine secrets and unofficially disclosed "fictional secrets" only;\textsuperscript{34} it even opposed the evidentiary use of information which had been officially disclosed. A few days before the December 21 cabinet meeting, Walsh had submitted to the administration a forty-five-page list of press reports pertaining to the disputed evidence, as well as a list of official public disclosures which was almost as long. One item on the official disclosures list was a nationally televised news conference of November 25, 1986 in which Attorney General Meese had specifically said that the National Security Agency was involved in arms sales to Iran. Nonetheless, the administration not only continued to "acquiesc[e] in the NSA's demand that its role in the Iran arms sales be covered up," but it "agree[d] to censor the NSA's very existence.\textsuperscript{35}

Toobin writes that frustration with the administration led the Walsh office to consider threatening to resign, and that the office even drafted a public release in contemplation of making that threat.\textsuperscript{36} The impasse was broken, ironically, when North subpoenaed President Reagan and President-elect Bush on December 30, 1988.\textsuperscript{37} The subpoenas "soften[ed] the administration's positions on a broad range of classified information issues." According to Toobin: "North's presidential subpoenas demonstrated, more clearly than any other episode so far, that political rather than

\textsuperscript{34} TOOBIN, supra note 15, at 173.
\textsuperscript{35} Id. at 184-85; see also Second Interim Report by Independent Counsel, supra note 32, at 21 (On December 20, 1988, Independent Counsel supplied the Attorney General "an appendix of numerous public references to [certain Latin American countries and capabilities of a particular intelligence agency] both by government representatives and by private persons."). and at n.8 ("In mid-December 1988, the NSA rejected a critical substitution which might have preserved [North] Counts One and Two."); Final Report of Independent Counsel, supra note 8, vol. I, at 110 ("In advance of the meeting of the intelligence heads, Independent Counsel on December 20, 1988," provided Attorney General Thornburgh with "an extensive collection of press reports, including a book, to demonstrate that the information was not in fact secret. Independent Counsel offered to meet with the group to present his argument, but Thornburgh did not acknowledge the offer."). For press reports confirming Toobin's account of Attorney General Meese's press conference disclosure, see, e.g., John N. Maclean, Agency Detected Protected Iran Deal, CHI. TRIB., December 15, 1986, at 1; Doyle McManus, Messages on Arms Deal Intercepted, Not Acted on, L.A. TIMES, Nov. 28, 1986, at 1. Cf. also former CIA Director Stansfield Turner, Intelligence for a New World Order, Foreign Affairs, vol. 70, issue 4, Fall 1991 at 150, 150 n.1 (using pseudonym for U.S. intelligence agency responsible for satellites because "[f]or reasons that are difficult to comprehend, the true name of this agency is classified.").

\textsuperscript{36} TOOBIN, supra note 15, at 186-87.
\textsuperscript{37} See, e.g., Philip Shenon, Reagan and Bush Get Subpoenas To Testify as Witnesses for North, N.Y. TIMES, Dec. 31, 1988, at 1.
national security considerations governed the administration’s decisions on classified information. If the administration shut down the case now . . . the odor of cover-up would be too strong.”

The North subpoenas, and a bargain Walsh struck with Attorney General Thornburgh on January 4, 1989, enabled the North case to proceed to trial. For his end of the bargain, Walsh agreed to drop the broad conspiracy counts against North, and, in return, Thornburgh promised not to interfere with the trial of the remaining counts in the North indictment. After the conspiracy counts were dropped and the North case proceeded to trial, according to Walsh’s final report, “[o]nly one intelligence agency persisted in abusing its classification powers . . . by stubbornly refusing to consider declassifying even the most mundane and widely known ‘secrets’ under its jurisdiction.” Walsh’s report credits the Attorney General with declining to support the agency in its “extreme positions,” but the report’s tone regarding the Reagan administration’s overall treatment of security information issues in the North case is one of dissatisfaction and suspicion. “At the heart of the Iran/Contra affair,” the report states, “were criminal acts of Reagan Administration officials that the Reagan Administration, by

38. TOOBIN, supra note 15, at 189.
39. Id. at 190; see also Second Interim Report by Independent Counsel, supra note 32, at 22 (“On January 4, 1989, . . . Independent Counsel was encouraged by the Legal Advisor of the State Department and the Deputy Assistant Attorney General of the Criminal Division to believe that the trial on the remaining counts could probably be completed if Counts One and Two were dropped.”). Shortly after Walsh dropped the North counts, however, the Justice Department tried to appeal Judge Gesell’s CIPA orders. The eleventh-hour effort halted the North trial just before opening arguments, and “prompted the sharpest clash between an administration and an independent counsel since the 1974 ‘Saturday night massacre.’” KOH, supra note 8, at 33-34. Judge Gesell characterized the Justice Department’s attempt as “frivolous.” Id. at 241 n.93 (citing Order Denying Stay at 2 (D.D.C. Feb. 9, 1989)); see also TOOBIN, supra note 15, at 212-17. According to the final Walsh report, the attempt to proceed with the conspiracy counts against North ultimately bogged down over two categories of national security information.

The classified information at issue included the names of Latin American countries and officials referred to in certain documents, even though the country identities and the facts spelled out in the documents were publicly known. The intelligence agency heads also refused to permit the disclosure of the nature of intelligence reports circulated to [North’s superiors] . . . which exposed the U.S. arms sales and Iranian claims of being overcharged. Judge Gesell ruled that the nature of the intelligence enhanced its credibility and thus would be material to the defense.

41. Id.
withholding non-secret classified information, ensured would never be tried.\(^\text{42}\)

\textbf{b. The Fernandez Case}

The Executive was less flexible in the Fernandez case than in the North case.\(^\text{43}\) This is not surprising considering the Executive had successfully stood its ground in the North case already, and that the Fernandez case commanded far less public attention than the North case had. Koh writes that the Justice Department forced the dismissal of the Fernandez case when it "blocked disclosure of classified information regarding the location of CIA stations that had already been widely reported in the press."\(^\text{44}\) Significantly, Walsh did not drop the Fernandez indictment voluntarily as he had the two North charges, but made the Attorney General formally block the use of the disputed evidence pursuant to CIPA, which in turn led Judge Hilton no choice but to dismiss the case.\(^\text{45}\)

This time around, the contemporaneous statements which emanated from Walsh’s office were less obliging. After Thornburgh filed his blocking affidavit, Associate Independent Counsel Lawrence Shtasel declared: "We are troubled by the actions of the intelligence agencies and the Attorney

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\text{42. Id. at 55.}
\text{43. MacNeil/Lehrer Newshour, supra note 13 (statement of Nina Totenberg); see also SECOND INTERIM REPORT BY INDEPENDENT COUNSEL, supra note 32, at 28 ("[G]reater rigid-ity by the agencies ... became manifest in Fernandez."); at 31 ("[U]nlike the position the CIA had taken in the North trial," in the Fernandez trial the CIA requested that the Attorney General "prohibit[ ] the disclosure of ... the existence and location of CIA stations and a facility ... ").
\text{44. KOH, supra note 8, at 239-40 nn.83 & 86 (citing Ann Pelham, Walsh Clashes with Justice Department over Secrets, LEGAL TIMES, July 31, 1989, at 2; David Johnston, Case Dismissed in Contra Affair, Clearing Agent, N.Y. TIMES, Nov. 25, 1989, at A1); see also MacNeil/Lehrer, supra note 13 (statements of Nina Totenberg and Scott Armstrong); SECOND INTERIM REPORT BY INDEPENDENT COUNSEL, supra note 32, at 1.
\text{The information withheld by the Attorney General consists of ... a description of three United States programs in Costa Rica ... [and] the existence and location of [word deleted in unclassified report] CIA stations and a facility in Latin America. These facts are publicly known. The Administration withheld the information, however, solely to avoid government acknowledgment of these known facts, which would have been referred to in trial documents and in the testimony of witnesses.}
\text{Id.; see also THIRD INTERIM REPORT OF INDEPENDENT COUNSEL, supra note 10, at 5 ("Attorney General Thornburgh's refusal to declassify publicly known but officially secret information forced the dismissal of the government's entire case against ... Joseph Fernandez.").
\text{45. See United States v. Fernandez, 913 F.2d 148, 149-50, 153-54 (4th Cir. 1990).}
\end{flushleft}
General who have made bringing this case to trial extremely difficult."46 One news commentator, who attributed her account to conversations she had with members of Walsh’s office, reported: “What they have begun to think in the independent counsel’s office is that there’s a cover up. . . . The suspicion is that the very people who are saying you can’t have this evidence at trial because it compromises national security are the very people who could conceivably be implicated.”47

Walsh’s subsequent interim reports to Congress accused the Justice Department and the intelligence agencies of “unproductive litigation” and “an established routine of attrition and exhaustion,” and sharply criticized the administration’s nondisclosure positions in the Fernandez prosecution.48

46. MacNeil/Lehrer Newshour, supra note 13 (statement of Nina Totenberg).
47. Id.
48. Independent Counsel’s Supplement to Previous Reports Regarding United States v. Fernandez, submitted to House and Senate Intelligence and Judiciary Committees on October 24, 1990, at 3, 10 (copy of unclassified version on file with author); see Second Interim Report by Independent Counsel, supra note 32, at 39-43, 48, 54:

The Attorney General and the intelligence agencies conceded in their affidavits that the existence of the CIA stations and their locations are publicly known. The only question was whether acknowledgment of these facts during the Fernandez trial by government officers or through government documents would have created an unacceptable risk to our national security. We suggest that against the three-year widespread disclosure of truly sensitive information regarding these countries, the acknowledgment of these publicly known facts would barely add a drop to an already full bucket.

But for the gravity of the consequences, the Attorney General’s determination and the process by which it was reached have almost comic aspects: the solemn convention of the intelligence agency heads assuring each other that national security could not tolerate this additional acknowledgment, without including Independent Counsel, the officer responsible for the prosecution . . . .

[The intelligence agencies’ affidavits] are based largely on speculation about the effect government acknowledgment of the publicly known information at issue in Fernandez might have on United States intelligence-gathering capabilities. None of these assessments of risk are supported by hard data about the state of affairs in the countries at issue, about the sources of potential risk to United States interests, or about the measures, if any, that can be taken to compensate for the incremental risk of acknowledgment of the stations. Nor is there any effort to provide an accurate measure of the harm that might result from such a disclosure.

The Attorney General undercuts the credibility of his own affidavit by suggesting that, notwithstanding the consequences he believes could result in serious damage to the national security, he might reconsider his decision to
Walsh's final report states:

Independent Counsel did not challenge the need to protect . . . three CIA programs. He was willing to drop the charges to which the programs had been held to pertain. The critical information that would have permitted trial of the other charges was the location of two well-known CIA stations. Each had been identified in North. They were regularly mentioned in the press—even in the obituary of a former station chief. The intelligence agencies' submissions to the Attorney General were not specific enough to rebut this fact. They were general reiterations of the need to preserve "deniability" of well-known facts.49

B. Availability of Judicial Recourse?

In the face of all the publicly voiced suspicion, according to Koh, "[o]nly the independent participation of both Gesell and Walsh [in the North trial] allayed public doubts about President Reagan's motives for withholding the information."50 The same can be said of Walsh and Judge Hilton's participation in the Fernandez case (by which time George Bush was President). However, as Koh adds, "one cannot automatically infer from Walsh and Gesell's [or Hilton's] acquiescence . . . that the information was properly withheld."51

Of course, it would not have been appropriate for Gesell or Hilton to do anything but acquiesce. As judges, they could only adjudicate controversies placed squarely before them by the parties.52 But need Walsh have

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50. KOH, supra note 8, at 32.
51. Id. at 240 n.87.
52. See, e.g., United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990):
    Our role in this appeal is circumscribed. We are not asked, and we have no authority, to consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security . . . . Instead, we are faced with a series of very narrow, fact-specific evidentiary determinations and with the question whether the defendant could receive a fair trial without the aid of certain evidence.
    Id. at 154. Professor Sandra Jordan mistakenly states that the Fernandez court reviewed and upheld the executive classification decisions which derailed the Fernandez prosecution. Jordan, supra note 8, at 1682.
behaved as passively as the judges? Could he have sought judicial review of the Executive's claims about the need for secrecy? Section 594(a) of the Ethics Act specified that an independent counsel's "investigative and prosecutorial functions and powers shall include . . . contesting in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security." 53

1. The "No" Vote

According to Koh: "Walsh's options were limited even if he strongly disagreed with the president's decision to withhold disclosure" in the North case. "Had he either publicly challenged the president's decision or threatened to resign, he would have acted inconsistently with his statutory and judicial mandate to try the case to judgment." Koh does not consider, however, the most appropriate course of action for which the Ethics Act appears to provide—ind...
Under [CIPA], the attorney general has unrestricted discretion to decide whether to declassify information necessary for trial, even in cases in which Independent Counsel has been appointed because of the attorney general's conflict of interest. . . . This discretion gives the attorney general the power to block almost any potentially embarrassing prosecution that requires the declassification of information. 57

Furthermore, "No court can challenge the substance of [an attorney general's exercise of CIPA]; no litigant has standing to contest the attorney general's decision."

There are good reasons for an independent counsel to blanch at the prospect of asking a judge to reject an executive representation that information must be withheld from a public trial in order to protect the national security. The Supreme Court has strongly suggested that a degree of constitutionally based presidential discretion exists regarding the disclosure of national security information. 59 In addition, in many contexts, judicial decisions which ostensibly have been based not upon constitutional but upon common law and statutory grounds have accorded the "utmost deference" 60 to the President's responsibility for protecting security secrets. For example, the courts generally describe the common law evidentiary privilege which covers national security information—the state secrets privilege—as "absolute." 61 The courts also have exhibited extreme reluctance to embrace supervisory roles Congress has assigned to them which might entail review of executive decisions based upon national security information. For example, in Chicago & Southern Air Lines v. Waterman Steamship Corp., 62 in an admittedly "not . . . literal[ ]" reading of the Civil Aeronautics Act, the Supreme Court forswore any statutory authority to review denials by the

58. Id. at 565.
60. Nixon, 418 U.S. at 710 (citing Chicago & Southern Air Lines, 333 U.S. at 111 and United States v. Reynolds, 345 U.S. 1, 10 (1953)).
61. United States v. Reynolds, 345 U.S. 1 (1952), is the seminal state secrets privilege case, although it does not use the term "absolute." See id. at 11 ("even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake"); see also, e.g., Halkin v. Helms (Halkin II), 690 F.2d 977, 990 (1982); Jabara v. Kelley, 75 F.R.D. 475, 481 (E.D. Mich. 1977) (both using the term "absolute").
Civil Aeronautics Board of citizen air carriers’ applications to engage in overseas and foreign air transportation if the Board’s denials had been approved by the President. Similarly, Congress twice had to amend the Freedom of Information Act to overrule broad judicial interpretations of provisions in the act which enable the executive branch to withhold national security information.63

The courts have been wise to tread lightly where national security issues are at stake. When it is alleged that grave and irreversible national harm might result from a judicial misstep, judges understandably would prefer to err on the side of caution. In this regard, courts often have bowed to the Executive’s superior knowledge, experience, and expertise in military, intelligence, and foreign affairs matters.64 In occasional bouts of self-deprecation, courts have likened foreign intelligence gathering to the construction of an arcane “mosaic” which they inadequately fathom.65 “What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene. . . . The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications . . . Add to the Executive’s superior expertise the fact that the Executive is subject to more immediate electoral control than are the courts;67 add, too, the desirability that our nation speak with one voice where foreign affairs are concerned,68 and an appealing argument can be made that the courts should steer clear of executive security classifications.

63. For a brief recounting, see, e.g., Ray v. Turner, 587 F.2d 1187, 1200, 1202-03 (D.C. Cir. 1978) (Wright, C.J., concurring).
64. E.g., Chicago & Southern Air Lines, 333 U.S. at 111 ("[E]xecutive decisions as to foreign policy . . . are delicate, complex, and involve large elements of prophecy. . . . They are decisions . . . for which the Judiciary has neither aptitude, facilities nor responsibility . . .").
66. Halkin I, 598 F.2d at 9 (citing United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); see also Ellsberg v. Mitchell, 709 F.2d 51, 57 & n. 31 (D.C. Cir. 1983).
67. See, e.g., Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[D]ecisions as to foreign policy . . . should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.").
68. Baker v. Carr, 369 U.S. 186, 217 (1962), specifies that courts should be more wary to approach questions when "multifarious pronouncements by various departments" could cause embarrassment to the United States.
2. The “Yes” Vote

Notwithstanding the foregoing concerns, suggestions that the Executive branch has exclusive control over national security information, either as a matter of historical practice or textual legal authority, are greatly exaggerated. The Judiciary has frequently reviewed, and at times rejected, executive evaluations of the necessity for nondisclosure of national security information.

a. A Historical Review

In 1807, in United States v. Burr, Chief Justice Marshall directed subpoenas duces tecum to President Jefferson and to the Secretary of the Navy for the production of a letter General Wilkinson wrote to the President and of certain military orders, despite the Executive’s contention that the documents contained secrets pertaining to the nation’s relations with Spain. Regarding General Wilkinson’s letter, Marshall opined:

There is certainly nothing before the Court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter . . . which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed . . . .

Regarding the military orders (which Aaron Burr alleged had been published in the Natchez Gazette), Marshall wrote:

Such documents have often been produced in the courts of the United States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited.

In 1952, in United States v. Reynolds, while allowing the Secretary of the Air Force to withhold national security information from a civil litigant suing the United States under the Tort Claims Act, the Supreme Court nonetheless reviewed the Secretary’s contention that secrecy was necessary,

69. 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).
70. Id. at 37.
71. Id.
declaring: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."\(^{72}\)

In 1971, in New York Times Co. v. United States,\(^ {73}\) the Executive sought to enjoin the New York Times and Washington Post newspapers from publishing portions of a classified historical study on Vietnam (the Pentagon Papers). Upon consideration of the untoward consequences the Executive alleged could result from the material’s dissemination, the Supreme Court was not sufficiently impressed to grant an injunction. "I have gone over the material listed in the in camera brief of the United States," Justice Douglas wrote. "It is all history, not future events."\(^ {74}\) Justice Brennan hypothesized that potential consequences grave enough to warrant pre-publication censorship could exist, but that they were not present in the instant case:

Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented [sic] or even alleged that publication of items from or based on the material at issue would cause the happening of an event of that nature.\(^ {75}\)

Dissenting, Justice Harlan, joined by Justices Burger and Blackmun, agreed that "[t]he power to evaluate the 'pernicious influence' of premature disclosure is not ... lodged in the Executive alone," although the Justices were quick to minimize their derogation of executive power: "Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow."\(^ {76}\)

Unlike New York Times Co., neither Burr nor Reynolds involved the judicial rejection of an executive nondisclosure position. However, the exercise of judicial review, unless it be an empty form, is an assertion of the power to overturn (albeit not as firm an assertion as an actual overturning).\(^ {77}\)

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73. 403 U.S. 713 (1971) (per curiam).
74. Id. at 723 n.3 (Douglas, J., concurring).
75. Id. at 726 (Brennan, J., concurring).
76. Id. at 757-58 (Harlan, J., dissenting).
77. Compare, for example, Cohens v. Virginia, 19 U.S. 264 (1821), considered to have established the federal judiciary’s power to overturn state criminal proceedings even though the Supreme Court upheld the Virginia criminal decision it reviewed. See, e.g., McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dept. of Business Regulation, 496 U.S. 18,
While New York Times Co. marks the only time the Supreme Court has rejected an executive nondisclosure position in the national security context, courts of appeals and district courts have invalidated executive national security classifications on a number of occasions—although these are exceptional. In addition, in Central Intelligence Agency v. Sims, the Supreme Court implicitly legitimated the power a court of appeals and a district court below had exercised in invalidating certain CIA security classifications, even though the Supreme Court reversed the lower courts’ rulings on the merits.

At issue in Sims was the disclosure of the identities of researchers and research institutions who participated in the CIA’s MKULTRA program. The Supreme Court reversed the district court’s disclosure orders because it interpreted “intelligence source,” as protected from disclosure in the National Security Act of 1947, more broadly than the district court and the court of appeals and in such a way that encompassed the MKULTRA researchers. The Court did not declare that the district court, given the court of appeals’ more narrow construction of “intelligence source,” had lacked the authority to review and invalidate the CIA’s classification decision. Indeed, the Supreme Court’s upholding of the CIA classification decision was itself a review of that decision. If the courts had lacked authority to review the CIA’s decision, it would have been inappropriate for the Supreme Court to reach the substantive issues involved in construing the National Security Act.

Even judicial examinations which uphold executive classifications have tended to loosen the executive grip on improperly withheld national security


information. Courts have kept intelligence agencies on their toes by sending back unsatisfactory, "conclusory" agency affidavits, insisting that the agencies identify the specific harm that would result from disclosure and that they segregate truly sensitive wheat from non-sensitive chaff. In addition, the mere prospect of judicial review has induced greater voluntary disclosure by the intelligence community, presumably to avoid judicially mandated disclosure.

3. An Open Question

The preceding survey is offered as a demonstration that although the

81. See, e.g., id. at 977; Weberman v. National Sec. Agency, 490 F. Supp. 9, 13-14 (S.D.N.Y. 1980) (National Security Agency "has failed to show that confirmation or denial of the existence of . . . information would create potential harm to the national security," and NSA affidavits "do not logically support a Secret or Confidential classification by NSA."); Weberman v. National Sec. Agency, 668 F.2d 676 (2d Cir. 1982) (upon reviewing additional NSA affidavit, district court determined that information was properly classified); Ray v. Turner, 587 F.2d 1187, 1199 n.1 (D.C. Cir. 1978) (Wright, C.J., concurring) (agreeing with court's remand and its "conclusions that the CIA's affidavits in support of its claims of [FOIA's national security] exemption are ambiguous and unsatisfactory."); Clift v. United States, 597 F.2d 826, 829 (2d Cir. 1979) (Reynolds' requirement that Defense Secretary personally invoke state secrets privilege not necessary due to special facts of case, but "[g]overnment would be wiser not to put courts to this test in the future."); Patterson v. FBI, 705 F. Supp. 1033, 1039-40 (D.N.J. 1989) (district court refused to accept special agent's "vague" affidavit, insisting on in camera review of information at issue).

82. See, e.g., Ray v. Turner, 587 F.2d 1187, 1201 & n.7, 1212 n.51 (Wright, C.J., concurring) (Not until Freedom of Information Act claimants brought suit did CIA admit it possessed documents relevant to claimants' FOIA request and release portions to claimants, and not until claimants filed motion for in camera inspection did CIA submit additional affidavit giving "more detailed [ ] but still inadequate" descriptions of items withheld); Goland v. Central Intelligence Agency, 607 F.2d 339, 343-44 (D.C. Cir. 1978) (Not until FOIA claimants brought lawsuit did CIA voluntarily declassify and provide to claimants 80% of document it previously classified "secret" and withheld from claimants in its entirety); Washington Post v. U.S. Dept. of Defense, 766 F. Supp. 1, 5 (D.D.C. 1991) (in light of Special Master's conclusion that purported national security information already was in public domain, Defense Department withdrew FOIA exemption claim and released document to plaintiff); Halperin v. CIA, 446 F. Supp. 661, 666-67 (D.D.C. 1978) (Only after court examined documents in camera and requested supplemental affidavits from CIA explaining why disclosure to FOIA plaintiff would compromise intelligence sources and methods, did CIA voluntarily release portion of withheld material to plaintiff.; see also Wald, supra note 31, at 677 quoting Senate testimony of Morton Halperin regarding FOIA:

It is not that courts will often or even perhaps ever order the Agency to release material. Rather the knowledge that a judge may examine material in camera leads the Agency, its attorneys, and the Justice Department attorneys, to take a hard look at the requested material and to decide if its withholding is really justified.
courts accept the Executive's substantial responsibility for controlling the public dissemination of national security information, they have long recognized that in various contexts the Judiciary also has a role to play in making these determinations. How the judicial and executive roles would interact in the event an independent counsel sought to challenge an executive nondisclosure decision, however, is an open question. Unlike a prior restraint of the press (New York Times Co.), or a discovery request by a civil tort claimant (Reynolds), or a FOIA request by a private citizen without any particularized standing (Sims), such a challenge by an independent counsel would present a situation of first impression.

III. STATUTES

Part III of this article considers the statutory framework which existed before the December 1992 expiration of the Ethics Act's independent counsel provisions—and which will exist once more if H.R. 811 or S. 24 become law. Subpart A argues that the expired portions of the Ethics Act authorized (and that H.R. 811 and S. 24 would authorize) independent counsel to contest presidential invocations of the state secrets privilege. Subpart B argues that this authority did not (and would not) conflict with the Classified Information Procedures Act. Part IV will then argue that the relevant statutory law, as interpreted in this part, would be constitutional.

A. Title VI of the Ethics in Government Act

Section 594(a) of the expired portions of the Ethics Act enumerates the "investigative and prosecutorial functions and powers" of independent counsel. Paragraph six states that these include: "receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security." The plain meaning of the section appears to be that independent counsel may challenge executive security classifications and that courts may adjudicate those challenges.

The only qualifications within 594(a)(6) are the word "appropriate," which occurs twice, and the term "if necessary." Neither "appropriate" applies to the core act of "contesting in court." The first "appropriate" modifies the independent counsel's "receiving" of "national security

83. 28 U.S.C. § 594(a) (expired).
clearances." The simplest interpretation of this modification is that the independent counsel should have access to classified information only when it is necessary for the performance of his or her functions. This replicates the standard "need to know" guideline by which security information is dispensed within the intelligence community.

The second "appropriate" refers, again, not to the act of "contesting," but to a mechanism by which it can occur—"in camera proceedings." Two likely interpretations of this qualification exist. The first interpretation is that the court should not handle security information in camera unless its facilities are sufficient to safeguard the information.84 The second is that in camera proceedings should be a means of last resort because public proceedings are preferable whenever they are possible.85

Unlike the two "appropriates," the term "if necessary" does qualify the act of "contesting." Most likely, however, it means that an independent counsel cannot challenge executive security classifications simply because he or she disagrees with them. An independent counsel can only challenge security classifications if they also interfere with his or her own duties.

Without considering the foregoing construction of 594(a)(6), Sandra Jordan summarily concludes that the section only authorized an independent counsel to seek access to security information, and not to seek to use it in court.86 Jordan’s interpretation seems to comport with an equally conclussory Fourth Circuit dictum in United States v. Fernandez.87 That dictum can be read to suggest that “attempt to withhold evidence” refers only to withholding evidence from the independent counsel and not from a public trial. That is, if the Executive attempted to prevent public disclosure of evidence—already having provided the evidence to the independent counsel in private—the Executive would not be attempting to “withhold evidence” within the meaning of the Ethics Act. Even this strained reading of “withhold,” however, would not limit an independent counsel to seeking mere access to security information. The section still authorized an

84. Cf. Reynolds, 345 U.S. at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir.) ("In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have."); cert. denied, 421 U.S. 992 (1975).
85. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) ("in camera review ... is designed to be invoked when the issue ... could not be otherwise resolved"); Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) ("In camera review does not permit effective advocacy."); cert. denied, 112 S. Ct. 3013 (1992).
86. Jordan, supra note 8, at 1654, 1665 n.70.
87. 887 F.2d 465, 471 n.6 (4th Cir. 1989).
independent counsel to contest "any claim of privilege or attempt to withhold evidence on grounds of national security." Nor must "on grounds of national security" modify "any claim of privilege" via the disjunctive "or" for the section to have authorized independent counsel to contest security classifications. "Any claim of privilege," after all, encompasses the state secrets privilege.\(^8^8\)

The *Fernandez* dictum can also be read to suggest that an independent counsel would have lacked standing under 28 U.S.C. § 594(a)(6) to challenge an executive security classification where it was the defendant, and not the independent counsel, who sought to use the evidence at issue. Paragraph six of 594(a), however, contains no language to this effect, and paragraph three authorizes an independent counsel to "appeal[] any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity."\(^8^9\) That an independent counsel should have had standing to argue that the defendant's evidence could be presented is somewhat counterintuitive, but it makes sense considering that it was the independent counsel and not the defendant who would have been interested in enabling the trial to proceed.

Because section 594(a)(6) was never invoked for the purpose of contesting an executive security classification, the question of whether it could have been used for this purpose was never judicially resolved. In addition to the Fourth Circuit, however, Justice Scalia and the Court of Appeals for the District of Columbia Circuit have discussed the provision in dicta. Contrary to the Fourth Circuit, each construed the Ethics Act in substantially the same manner as I have (albeit to support their opinions that the Act was unconstitutional).\(^9^0\)

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Another preeminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary. The Justice Department and our intelligence agencies are often in disagreement on this point, and the Justice Department does not always win. The
B. The Classified Information Procedures Act

The Classified Information Procedures Act ("CIPA") is a set of procedural mechanisms for managing, during the course of criminal prosecutions, classified information the classification of which is not in dispute. If a court determines that a defendant must be allowed to use classified information as evidence in order to receive a fair trial, CIPA requires that the "United States" agree to disclose the evidence or forego enough of its prosecution so that the defendant can receive a fair trial without the evidence. Thus, CIPA forces the "United States" to balance its interest in secrecy against its interest in prosecution.

CIPA's forcing of a "disclose or dismiss" dilemma upon the United States was not new. It duplicated a rule which the courts already had fashioned. CIPA's innovations are procedural. These include, primarily, a requirement that the defendant notify the government before trial of his intention to introduce classified information as evidence, and a provision for pre-trial hearings on questions of admissibility.

Jordan, and perhaps Independent Counsel Walsh, too readily assume that CIPA absolutely empowers an attorney general to squelch an indepen-
dent counsel's prosecution on grounds of national security.\footnote{Jordan, \textit{supra} note 8, at 1653-54, 1666-67, 1671-72; Final Report of Independent Counsel, excerpts quoted \textit{supra} in text accompanying notes 57-58. As a Senate report on the Ethics Act stated: "It is a basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof." Senate Comm. on Governmental Affairs, Ethics in Government Act of 1978, S. Rep. No. 170, 95th Cong., 2d Sess. 6 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4222.} As Jordan points out, CIPA is silent on the question of independent counsel.\footnote{Jordan, \textit{supra} note 8, at 1653, 1666; \textit{see also} Final Report of Independent Counsel, \textit{supra} note 8, vol. I, at 565 ("Congress could not have intended that CIPA ... be used by the attorney general to control prosecutions of independent counsel.").} If the construction of the Ethics Act in subpart A above is correct, there is little reason to think that CIPA took away from independent counsel in 1980 what the Ethics Act had given them in 1978, especially since CIPA and the Ethics Act were easily harmonized.

From the standpoint of CIPA, security classification decisions occur in a black box. Referring to the decision-maker as the "United States" throughout, the Act does not specify whether a classification decision belongs to the President alone or might result from the judicial resolution of a dispute between the Chief Executive and an independent counsel (an inferior executive officer)\footnote{Independent counsel are inferior executive officers under the Appointments Clause of Article II of the Constitution. \textit{Morrison}, 487 U.S. at 670-72.} exercising his or her contestation power under another statute. Section 6(e)(1) of CIPA does specify that in order to prevent a defendant from disclosing classified evidence, the United States must file with the court an "affidavit of the Attorney General objecting to disclosure," but the "United States" and not the Attorney General remains the controlling power here, and section 6(e)(2) "afford[s] the United States an opportunity ... to withdraw its objection to the disclosure" with no reference to the Attorney General's opinion at all. In addition, the Act authorizes the United States to prevent only the disclosure of classified evidence by a defendant; it says nothing of preventing disclosure by a prosecutor.

CIPA does not contemplate and was not intended to handle disputes about the propriety of a classification, or the split-personality "United States" that exists during prosecutions by independent counsel.\footnote{\textit{Fernandez}, 887 F.2d at 469 ("We agree with the Attorney General that CIPA envisions a single decisionmaker balancing the cost of national security disclosure against the cost of aborting a prosecution.").} Congress
enacted CIPA in an attempt to alleviate the problem of “graymail.”

Graymail is the tactic of a criminal defendant who threatens to disclose national security information at trial in order to pressure the government to stop prosecuting him or her. Disputing the propriety of a security classification is the last thing in the world a graymailing defendant would do. The validity of a classification, the soundness of the estimation that public disclosure would harm the United States, is the very assumption which enables a defendant to commit graymail.

Nowhere does CIPA’s language suggest that courts are unable to review national security classifications. Indeed, some of the opinions cited in section II.B.2. above which review or invalidate executive classification decisions were written after the enactment of CIPA (although they did not involve CIPA cases). As the House Report on an early and substantially similar version of CIPA stated, CIPA “is not intended to . . . change the existing rules of evidence and criminal procedure.” When CIPA was enacted, contemporary rules of evidence and procedure, as they still do today, included the common law state secrets privilege which has been subject to judicial review since its beginnings.

Although CIPA’s legislative history does not contain an express legislative denial of any intention to nullify the now expired 28 U.S.C. § 594(a)(6), it is a “well-established principle of statutory interpretation that implied repeals should be avoided.” Considering that the powers


101. See generally Note, Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions, 31 CASE W. RES. L. REV. 84 (1980).

102. See supra notes 78-81.


granted to independent counsel under section 594(a) were granted "[n]otwithstanding any other provision of law," the presumption that CIPA did not implicitly repeal the powers granted in section 594(a)(6) should have been especially strong. Considering, too, that subsequent to CIPA's passage, Congress reenacted Title VI of the Ethics Act with the same "notwithstanding any other law" proviso, the presumption against implied nullification may have been insurmountable.

When two statutes are capable of co-existence, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." The construction of 28 U.S.C. § 594(a)(6) advocated in subpart A above would have retained CIPA's full effect. If an independent counsel had contested an executive security classification, the judicial determination whether to permit the President to shield the information would have been an event which logically preceded the application of CIPA. If the court found for the independent counsel, CIPA issues would never have arisen. If the court found for the President, then CIPA would have come into play, completely; the Attorney General would have had full discretion to disclose or to force dismissal.

On the other hand, if CIPA had nullified the independent counsel's contestation power under 28 U.S.C. § 594(a)(6), it would have significantly diluted not only that provision but all of Title VI of the Ethics Act. As a Senate committee report stated in its explanation of an independent counsel's powers under the Ethics Act: "The whole purpose of this chapter is defeated if a special prosecutor . . . does not have clear authority to conduct a criminal investigation and prosecution without interference . . . or control by the Department of Justice."

Finally, if CIPA were to preclude independent counsel from challenging executive classification decisions, CIPA itself would have a different practical effect in prosecutions by independent counsel than it would in prosecutions by Attorneys General. The careful balancing of incentives it works in the latter context would disappear in the former where the "United States" (i.e., the Attorney General) would possess weak prosecution

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106. 28 U.S.C. § 594(a) (expired). Section 594(a) excepts 18 U.S.C. § 2516—concerning the authority to conduct wiretaps—from its "[n]otwithstanding any other provision of law" exclusion. That Congress specified an exception seems to indicate that it was fully aware of how broad an exclusion it included in section 594(a).
107. Fernandez, 887 F.2d at 468 n.5.
incentives incapable of counterbalancing its desire for secrecy. Nothing in the history or language of CIPA implies that its application was meant to be so bifurcated. Such an arbitrary bifurcation would go against the very grain of the statute, enacted as it was to alleviate graymail and "to help ensure that the intelligence agencies are subject to the rule of law." It was only wrongdoing by the most senior intelligence agency officials which was likely to be prosecuted by independent counsel. Ironically then, if CIPA had precluded independent counsel from challenging executive security classifications, it would have treated the most senior intelligence officials—potentially the most serious wrongdoers, and the most effective graymailers—more leniently than any others.

IV. THE CONSTITUTION

Apart from the construction of the Ethics Act's now expired independent counsel provisions and the bills that would renew them, a larger and more difficult question looms in the background. If a statute creating independent counsel existed which everyone agreed assigned to independent counsel the authority to contest in court presidential invocations of the state secrets privilege, would the statute be constitutional? Part IV addresses this question. Subpart A reviews the origins of the constitutional executive privilege and the Supreme Court's suggestion that an "extra-strength" executive privilege for national security information might reside in the Constitution. Should the current common-law state secrets privilege be constitutionalized, it would be necessary to determine its application in the independent counsel context. For this reason, subpart B attempts to square judicial review of executive nondisclosure positions in the independent counsel context with the relatively sparse Supreme Court doctrine which already exists in two analogous state secret contexts—civil tort suits and prior restraints of the press. Broadening the focus, subpart C addresses the separation of powers doctrine, arguing that it is compatible with this article's conception of the role of judicial review in the independent counsel context.

A. A Constitutionally Based Executive State Secrets Privilege?

1. Executive Privilege — Origins

The text of the Constitution does not explicitly grant to the President any (much less exclusive) responsibility for regulating government secrecy.

Adducing this fact, at least one commentator has branded the notion of such a constitutionally based executive responsibility a “myth.” ¹¹¹ The Framers certainly knew how to grant secrecy privileges; they explicitly granted them to Congress and to its members in the Journal Clause and in the Speech or Debate Clause, and to all persons in the Fifth Amendment of the Bill of Rights. ¹¹² The argument has even been advanced, in United States v. Richardson, that the Constitution mandates certain disclosures of national security information. ¹¹³

In United States v. Nixon, ¹¹⁴ however, the Supreme Court ruled that the Constitution gives to the President a qualified confidentiality privilege for generic communications with his or her advisors. The Court acknowledged that no such privilege can be found in the text of the Constitution. ¹¹⁵ Rather, the Court derived the privilege from the sum of the President’s enumerated Article II duties. ¹¹⁶ The Court explained that powers which the Constitution does not grant to the President, but which are reasonably appropriate for the effective discharge of powers which the Constitution does grant the President, should be considered to accompany the granted powers. ¹¹⁷

The essential rationale the Nixon opinion offered was a common sense public policy prescription. The President and his or her aides should be assured a degree of confidentiality, the Court stated, to help them make better decisions. “Human experience teaches,” wrote Chief Justice Burger, “that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the


¹¹². U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . .”); id. § 6, cl. 1 (“[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”); id. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”).

¹¹³. United States v. Richardson, 418 U.S. 166 (1974). The Richardson argument was based on Article I, Section 9, Clause 7 of the United States Constitution which states: “[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” The Supreme Court did not reach the merits of the issue, however, because it ruled that the plaintiff’s taxpayer status was an insufficient basis for standing.

¹¹⁵. Id. at 705 n.16, 711.
¹¹⁶. Id. at 704, 705-07.
¹¹⁷. Id. at 705 n.16, 711.
decisionmaking process."\textsuperscript{118}

2. A Special Executive Privilege for State Secrets?

As for national security information (which was not involved in Nixon), the Court suggested without deciding the issue that an even stronger constitutionally derived executive privilege might exist.\textsuperscript{119} Thus, Nixon leaves intact \textit{United States v. Reynolds}. Reynolds avoided the question of a constitutional state secrets privilege, and grounded its recognition of the state secrets privilege in the common law of evidence.\textsuperscript{120} In contrast to Nixon, which hinted that a constitutional state secrets privilege would derive from the President's enumerated Article II duties as Commander in Chief and from his or her foreign affairs responsibilities,\textsuperscript{121} Reynolds suggested that it might reside more generally in the constitutional separation of power.\textsuperscript{122}

A future Supreme Court decision which elevated the state secrets privilege from common law to constitutional status would have important ramifications for congressionally created independent counsel.\textsuperscript{123} Such a decision is a plausible (even likely) synthesis and extension of \textit{Chicago &

\begin{itemize}
\item \textsuperscript{118} \textit{Id.} at 705.
\item \textsuperscript{119} \textit{Nixon}, 418 U.S. at 706-07, 710.
\item \textsuperscript{120} \textit{Reynolds}, 345 U.S. at 6; \textit{accord Environmental Protection Agency v. Mink}, 410 U.S. 73, 83 (1973).
\item \textsuperscript{121} \textit{Nixon}, 418 U.S. at 710 (citing \textit{Chicago & Southern Air Lines v. Waterman S.S. Corp.}, 333 U.S. 103, 111 (1948)); \textit{accord New York Times Co.}, 403 U.S. at 729-30 (per curiam) (Stewart, J., concurring).
\item The President's Commander in Chief power is found in Article II, Section 2, Clause 1 of the United States Constitution which states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ." The President's foreign affairs powers and duties are found in Article II, Section 2, Clause 2 and Article II, Section 3. The former provides: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ." The latter provides: "[H]e shall receive Ambassadors and other public Ministers . . . ."
\item \textsuperscript{122} \textit{Reynolds}, 345 U.S. at 6 n.9. See \textit{Halkin v. Helms (Halkin I)}, 598 F.2d 1, 14 n.9 (D.C. Cir. 1979) (Bazelon, J., and Wright, C.J., dissenting) (drawing distinction between contemplated derivations of state secrets privilege in \textit{Reynolds} and \textit{Nixon}).
\item \textsuperscript{123} It might not have the same ramifications for a presidentially appointed independent counsel (like the Watergate special prosecutors) if the President were to waive aspects of the constitutional privilege by the appointment.
\end{itemize}
Southern Air Lines, Reynolds, New York Times Co., and Nixon. Because the courts determine constitutional law as much as they do common law, the decision's effect on the courts' control over their own disposition of state secret issues would be limited to whatever constraints inhere in stare decisis. Congress, though, would lose its ability to modify the state secrets privilege through legislation. Also, if the state secrets privilege were constitutionalized, it is likely that some version of it would be extended from the contexts in which it already has been applied to the context of independent counsel prosecutions.

It is therefore incumbent upon those who advocate the renewal of the independent counsel provisions of the Ethics Act, and the construction of those provisions to authorize independent counsel to contest presidential invocations of the state secrets privilege, to make constitutional arguments why the independent counsel context is special. Otherwise, our legislative and/or interpretive efforts run a greater risk of being constitutionally mooted. To that end, subpart B below compares the as-yet hypothetical possibility of litigation over security-information disclosure in the independent counsel context with two contexts in which security-information disclosure already has been litigated. Subpart B postulates a Jacksonian sliding-scale of judicial deference among the contexts. It suggests that less judicial deference is appropriate in the independent counsel context than in the United States v. Reynolds civil tort suit context, but more deference is appropriate in the independent counsel context than in the New York Times Co. First Amendment context. (The analysis assumes that the courts would treat the Reynolds context no differently applying a constitutionalized state secrets privilege than they have so far applying the current common-law privilege.)

124. Justice Stewart wrote, in one of six concurring New York Times Co. opinions:

[I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—. . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. New York Times Co., 403 U.S. at 729-30.

125. Constitutional decisions might exert a stronger or weaker stare decisis pull than common law decisions, of course, but the significant comparison here is between the constraints a constitutionalized state secrets privilege would place on the judiciary and on Congress respectively.

126. Sandra Jordan acknowledges the possibility of such a ruling, but overstates its consequences, asserting that "no checks upon the executive for improperly refusing to release information needed by an Independent Counsel" would remain. Jordan, supra note 8, at 1680 n.142. Political pressure and impeachment still would serve as checks, albeit weak ones. See infra discussion in section IV.C.4.
B. The Independent Counsel Context Is Special

1. Executive Power Fluctuates—A Sliding Scale of Judicial Deference

By what rationale could a constitutionalized state secrets privilege apply differently to a dispute between an independent counsel and the President than it would in other situations? As Justice Jackson suggested in *Youngstown Sheet & Tube Co. v. Sawyer*:

"Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."

The concept applies with equal force to the conjunction or disjunction of Presidential powers with rights or powers the Constitution gives to anyone else.

Jackson's thesis is reflected in the various standards of review courts have applied in disputes over the Executive's control of national security information. Comparing these standards, a sliding-scale of judicial deference to the Executive can be discerned. In ascertaining how a constitutionalized state secrets privilege might properly be applied in an independent counsel situation, it helps to analyze the nature of the disputes which underlie the various existing standards.

To locate the independent counsel context on the sliding-scale, I will frame it with two other contexts. At the pole of maximum deference, represented by *United States v. Reynolds*, the courts accord the Executive more deference than they should in the independent counsel context. At the pole of minimum deference, represented by *New York Times Co.*, the courts accord the Executive less deference than they should in the independent counsel context. In absolute terms, these two cases probably do not represent actual constitutional poles. For the relative terms of this inquiry, however, they serve adequately as boundaries between which the independent counsel context may be pinpointed.

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127. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
128. See *Haig v. Agee*, 453 U.S. 280, 289 n. 17 (1981). The President's plenary power over foreign relations, "like every other government power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.* (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).
129. For instance, "in the criminal field, . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free." *Reynolds*, 345 U.S. at 12. This standard, which absolutely prevents the government from suppressing evidence which the defendant needs, is even less deferential than that of *New York Times Co.*
2. Pole of Maximum Deference: *United States v. Reynolds*

*Reynolds* firmly established the state secrets privilege, a common law evidentiary privilege which belongs to the “Government.” 130 From *Reynolds*, courts have derived a “reasonable danger” standard for invoking an absolute privilege against disclosure. 131 In a civil trial, 132 if the court is satisfied that a “reasonable danger” exists that disclosure of the information at issue would adversely affect the national security, then the court must uphold the government’s claim of privilege, 133 even if it harms the parties seeking disclosure.

The need of litigants seeking disclosure is not relevant to the question of whether the privilege is properly claimed. No balancing of the national interest in secrecy against any countervailing disclosure interests takes place. The proper balance has been predetermined—secrecy is always the weightier interest. The need for disclosure is only relevant in determining how far the court should inquire into the appropriateness of the claim of privilege. 134

For a number of reasons, courts should show less deference to executive nondisclosure positions in independent counsel cases than they do in *Reynolds* cases. These include the existence of a conflict between the congressional and executive functions; a heightened conflict between the judicial and executive functions; the heightened public interest in the disclosure of evidence in criminal trials and the President’s ability to pardon criminal defendants; the existence of an executive conflict of interest; the increased judicial power (in its naked sense) which comes from the possession of the disputed information; and the relative frequencies of the disputes. I will discuss each of these reasons in sequence.

130. *Id.* at 6-7, 12.


132. *Reynolds* distinguished criminal trials. See *supra* note 129.


a. Congressional Disjunction

As Justice Jackson stated in *Youngstown*: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . "\(^\text{135}\) In *Reynolds*, the President’s will was in conjunction, not disjunction, with that of Congress.\(^\text{136}\) If an independent counsel were to seek disclosure under a statute similar to the expired Ethics Act, however, Congress’s and the President’s powers would be in disjunction.\(^\text{137}\)

A related distinction between *Reynolds* and the independent counsel context derives from this congressional disjunction. The Executive’s authority to withhold security information from the Federal Tort Claims Act plaintiff in *Reynolds* was based partly on the concept of sovereign immunity.\(^\text{138}\) Sovereign immunity concerns do not exist in the independent counsel context for two reasons. First, Congress has specifically authorized the independent counsel to seek disclosure. Second, the relief sought is not retrospective compensation from the public fisc by a private citizen—traditionally barred by sovereign immunity doctrine—but rather an injunction to prevent an executive officer from interfering with the independent counsel’s or the defendant’s prospective presentation of evidence at trial.

b. Heightened Judicial Disjunction

Justice Jackson was only discussing a conflict between the congressio-
nal and executive functions when he characterized the executive power as being at its "lowest ebb." When the Executive asserts unqualified control over evidence necessary for a trial, a conflict occurs between the judicial and executive functions also. Hence, rhetorical impossibilities notwithstanding, in a disclosure dispute between an independent counsel and the President, the President's power would sink below the "lowest ebb" Justice Jackson described. More significantly, in the context of an independent counsel's criminal prosecution, the presidential and judicial functions would clash more strongly than in a civil case like *Reynolds*. In *Nixon*, the Supreme Court wrote:

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.139

As quoted in subsection c below, the Court felt that an unqualified privilege would be a greater impediment to the judicial function in the criminal context than in the civil context.

**c. Criminal vs. Civil Trials**

The heightened conflict between presidential and judicial responsibilities which occurs when executive secrecy privileges are invoked in a criminal case meshes with another important distinction between the *Reynolds* context and the independent counsel context. As the *Nixon* court articulated, the public interest in the disclosure of all relevant evidence is stronger in criminal trials than in civil trials:

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139. United States v. Nixon, 418 U.S. 683, 707 (1974). Regarding the proposition that the executive and judicial powers are in disjunction in a civil case too, see *Reynolds*, 345 U.S. at 8 & n.21 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege. . . . It is the judge who is in control of the trial, not the executive . . . .") (citation omitted); *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951) ("[T]o hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch . . . to infringe the independent province of the judiciary as laid down by the Constitution."); rev'd, 345 U.S. 1 (1953) (Third Circuit opinion adopted by Black, Frankfurter, and Jackson, JJ., dissenting in United States v. Reynolds, 345 U.S. at 12).

Regarding the proposition that the disjunction is less severe in a civil case than it is in a criminal case, see *Nixon*, infra text accompanying note 140.
[An executive] privilege must be considered in light of our historic commitment to the rule of law. . . . This is nowhere more profoundly manifest than in our view that "the two fold aim [of criminal justice] is that guilt shall not escape or innocence suffer . . . ." To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Production of all evidence at a criminal trial . . . has constitutional dimensions.

We are not here concerned with the balance between the President's . . . interest in confidentiality and the need for relevant evidence in civil litigation. . . . We address only the conflict between the President's assertion of . . . privilege . . . and the constitutional need for relevant evidence in criminal trials.140

Aside from historic commitments to the rule of law, a more mundane reason to accord the Executive less deference in independent counsel cases arises from the distinction between civil and criminal trials. In a civil suit, but for an evidentiary privilege, the Executive would be legally powerless to protect national security secrets.141 In the independent counsel context, however, the President has the practical option of pardoning the defendant if he or she feels strongly enough that the national interest in secrecy demands it.142

In theory, a pardon need not have broader effect than an unqualified evidentiary privilege. Issuing a conditional, piecemeal pardon would achieve the same end. Such a pardon might be phrased in the following manner: "I pardon the defendant for all offenses the trial of which would require the public disclosure of national security information x, y, and z, the substance of which I have apprised the independent counsel, the court, and the defendant."

140. Nixon, 418 U.S. at 708-12 & n.19 (citation omitted). Reynolds also distinguished the application of the state secrets privilege in criminal cases from its application in civil cases. See supra note 129.

141. Of course, where the government is a party, it can protect secrets by settling out of court or conceding liability. Settlements and concessions of liability are problematic, though, because they might expose the public fisc to an unacceptable number of strike suits. Also, solutions of this nature are less viable in suits where the United States intervenes to protect secrets but is not involved in the underlying dispute. See cases cited infra note 143.

142. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").
d. Executive Conflict of Interest

The biggest reason for differentiating an independent counsel prosecution from a \textit{Reynolds} case is that executive conflicts of interest are not such a concern in the latter context. In the \textit{Reynolds} context, high executive officials generally are not implicated in wrongdoing, and, if they are, the opprobrium and punishment risks they face usually are not as severe as the risks faced by a potential criminal defendant. Also, in those \textit{Reynolds} cases where the government invokes the state secrets privilege as an intervenor and is not a party to the underlying dispute, executive conflicts of interest most likely do not exist. \footnote{143} In independent counsel cases, however, the conflict of interest issue is paramount—it is an independent counsel's \textit{raison d'être}. \footnote{144} As President Carter articulated when he supported the creation of independent counsel, the purpose of independent counsel is to dispel even the \textit{appearance} of an executive conflict of interest. \footnote{145}

An analogy to the corporate law "business judgment rule" is apt here. Under the business judgment rule, courts ordinarily defer to the judgment of a corporation's board of directors in determining what corporate action would be in the corporation's best interest. An exception occurs, however, when directors are defendants in a shareholder derivative action. The Delaware Supreme Court has ruled that when directors are sued derivatively by a corporation through its shareholders, a court applying Delaware law has the discretion to apply "its own business judgment" in deciding whether it would be in the corporation's interest for its shareholders to continue the suit in the corporation's behalf. \footnote{146}


144. \textbf{SPECIAL PROSECUTOR ACT OF 1978}, H.R. REP. No. 1307, 95th Cong., 2d Sess. 1 (1978) ("The purpose of the legislation is to . . . eliminate the conflict of interest inherent when the Department of Justice must investigate and prosecute high-level executive branch officials.").

145. \textbf{JIMMY CARTER, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO PRESERVE AND PROMOTE ETHICAL STANDARDS THROUGHOUT THE EXECUTIVE BRANCH AND FOR OTHER PURPOSES}, H.R. DOC. No. 139, 95th Cong., 1st Sess. 3 (1977) ("This [special prosecutor legislation] . . . will eliminate all appearance of high-level interference in sensitive investigations and prosecutions.").

146. Zapata Corp. v. Maldonado, 430 A.2d 779, 789 (Del. 1981). The Delaware Supreme Court's approach has been followed and amplified in a noteworthy federal court opinion as}
Both the business judgment rule and the state secrets privilege are based in part on the fact that the decision-maker whose decision is subject to judicial review acts within a sphere of constitutionally and/or legislatively assigned authority, and in part on the assumption that the decision-maker possesses a special, non-judicial expertise. All else being equal (and this discounts, among other things, the difference between constitutionally and legislatively assigned spheres of authority), the business judgment rule's notion that judicial intervention is appropriate when the decision-maker is subject to a conflict of interest suggests that federal courts should have similar discretion to apply their own "national security judgment" in the independent counsel context. This analysis dovetails with that of the *Nixon* court when it adduced the benefits of candor in the decision-making process as a rationale for creating a constitutional confidentiality privilege for the President and his advisors. As much as "[h]uman experience" teaches that a group will make better decisions if its members feel they are able to speak openly with one another, human experience teaches that people are less likely to make good decisions when they are judging their own cause.

**e. Having vs. Seeking Information**

Another aspect of the independent counsel scenario distinguishes it from *Reynolds* and most of *Reynolds's* progeny: the litigant seeking disclosure possesses the disputed information. This has two ramifications.

First, it increases the likelihood that the information is actually important for the trial. If the defendant is the party who wants to use the information, it means the court probably has decided that the information is relevant evidence without which the trial cannot proceed. If the independent counsel is the one who wants to use the information, it means the independent counsel thinks it will enable him or her to prove criminal well. *See Joy v. North*, 692 F.2d 880 (2d Cir. 1982) (applying Connecticut law), *cert. denied*, 460 U.S. 1051 (1983).

147. *See Nixon*, 418 U.S. at 705.

148. Under CIPA, *supra* note 4, a criminal defendant seeking to use classified evidence must first notify the government. The government then has the opportunity to argue that the evidence is irrelevant or inadmissible, or to offer non-classified substitutions to be used in its place. The time would not be ripe for an independent counsel to contest an executive classification decision until the trial judge has decided that all non-classified alternatives are inadequate and that the defendant must be able to present classified evidence in order to receive a fair trial. At that point, the independent counsel would either have to drop the case, or challenge the Executive's classification decision.
wrongdoing. In a Reynolds case, the party seeking disclosure often does not have the information nor even knows whether it exists. Second, the practical balance of power between the Judicial and the Executive branches shifts subtly. If the parties did not have the information, the court would have to order the Executive to provide it to them, raising the real possibility that the Executive would refuse. Executive non-compliance would leave the court with no recourse of its own, and in the potentially embarrassing and delegitimizing posture of issuing an ineffectual decree. When the parties have the information, however, the court can simply allow them to introduce it at trial, without worrying that the ruling might be ineffectual. If this happened, and the President still wanted to prevent disclosure, he or she would have to pardon the defendant. Thus, in the independent counsel context, the question is not whether the court has the power to compel executive disclosure of national security information, but whether the Executive has the power to prevent judicial disclosure without pardoning the defendant.

149. As Congress considers reviving the independent counsel provisions of the Ethics Act, it might want to contemplate requiring independent counsel to obtain the same sort of relevance, admissibility and inadequacy of substitution rulings that defendants must obtain under CIPA before independent counsel may challenge the propriety of executive security classifications pertaining to prosecution evidence. Such a requirement would give content to the "if necessary" limitation on independent counsel's contestation power in section 594(a)(6) of the Ethics Act, and might provide an extra safeguard against unripe or unnecessary challenges by independent counsel.

150. Indeed, the Supreme Court characterized the Reynolds plaintiff's showing that the information at issue was necessary as "dubious." Reynolds, 345 U.S. at 11. But cf. Halpern, 258 F.2d at 36 (Reynolds' case in which litigant seeking disclosure possessed the information at issue).

151. At oral arguments in United States v. Nixon, President Nixon's attorney suggested to the Supreme Court that Nixon might decide not to produce his tapes if they were subpoenaed. Schmitt, supra note 9, at 193 n.81.

152. The Attorney General also could try firing the independent counsel, but this probably would just delay matters. Under the Ethics Act the Attorney General was able to dismiss an independent counsel for "good cause"—the existence of which the Judiciary presumably was the final arbiter. 28 U.S.C. § 596(a) (expired).

153. While power and authority are not the same, their conflation may at times be unavoidable. At least since Justice Marshall ruled that he lacked the authority to command that the Secretary of State deliver to the justices of the peace their commissions in Marbury v. Madison, 5 U.S. 137 (1803), power on occasion has been an important, if unspoken, factor in the Judiciary's calculation of its own authority. Whether the Judiciary's increased power in the independent counsel context is a legitimate reason for exercising it might depend on whether the Judiciary's diminished power in the Reynolds context has been a factor in discretionary decisions by judges to exercise greater restraint than judicial authority requires in calibrating...
f. Frequency

Occasions requiring the use of interim special prosecutors to investigate high executive officials have been exceptional. If the past is a reliable predictor, they will continue to be exceptional. Even more rare would be the subset of those occasions which required the Judiciary to adjudicate disputes between independent counsel and the Executive over the evidentiary use of security information. To date, in fact, that subset is an empty set. In the aggregate then, judicial review of executive classification decisions arising from independent counsel cases would be a much lower order intrusion upon the executive sphere than judicial review arising from the sum of day-to-day Reynolds cases.

In the past, the Supreme Court and the Executive branch have each exhibited concern for frequency in constitutional inquiries of this nature. In both New York Times Co. and Nixon, the Supreme Court excused its limitation of executive power by noting that the particular circumstances involved were not likely to happen very often.154 Similarly, when President Ford asserted that the 1974 amendments to the Freedom of Information Act were unconstitutional, he vetoed them in part because of the drain on Executive resources which the mass of FOIA requests would work.155

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154. New York Times Co., 403 U.S. at 733 (per curiam) (White, J., concurring) ("[D]iscom-fiture [at denying relief to the United States on its good-faith claims that publication will work serious damage to the country] is considerably dispelled by the infrequency of prior-restraint cases."); Nixon, 418 U.S. at 712 ("[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.").

155. President Ford gave the following reason for his veto:

[M]any millions of pages of . . . files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court—separately for each paragraph of each document—that disclosure "would" cause . . . harm . . . . Our . . . agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests . . . .

GERALD R. FORD, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES VETOING H.R. 12471, AN ACT TO AMEND THE FREEDOM OF INFORMATION ACT, H.R. DOC. NO. 383, 93rd Cong., 2d Sess. III (1974). Resource drain continued to be one of the defense and intelligence agencies' primary complaints about FOIA after Congress passed the amendments over Ford's veto. See Wald, supra note 31, at 672-73.

While *Reynolds*, as it generally has been construed, sets an exceedingly deferential standard for judicial review of executive representations that security information must not be disclosed, *New York Times Co.* sets an exceedingly difficult standard for the Executive to meet. In *New York Times Co.*, the Court of Appeals for the Second Circuit had held, and the Nixon Administration itself suggested on appeal, that for the Administration to convince the courts to enjoin the publication of the Pentagon Papers, the Administration should have to show that disclosure would cause “grave and irreparable injury” or “grave and immediate danger” to the public interest. Justice White rejected these formulations, however, as too *deferential* to the Executive.\(^{156}\) Mirroring White, Justice Brennan opined that a pre-publication restraint could never be predicated upon mere conjecture that harm might result, and could only be legal if the nation were at war or, maybe, if the world situation were tantamount to time of war.\(^{157}\) Justice Stewart, on the other hand, indicated that he preferred a standard closer to those the Administration and the court of appeals had formulated.\(^{158}\) Interestingly, neither the *Reynolds* nor the *New York Times Co.* standard looks to the need of the non-government litigant who is seeking disclosure, only to the harm the government alleges would result from disclosure. Under *Reynolds*, the government need only show that any harm to slight harm might occur, while under *New York Times Co.*, it must show that enormous harm to catastrophic harm would occur.

The argument that the Executive should bear a heavier burden in justifying prior restraints of the press than prior restraints of independent counsel does not need extensive elaboration here. A dispute between the Executive and an independent counsel over the control of state secrets pits the President’s general and implied constitutional powers against congressional and judicial powers of a similar magnitude. In a prior restraint case, however, general and implied presidential powers compete against “specific and emphatic [constitutional] guarantees” that the freedom of the press shall

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157. *Id.* at 725-26 (Brennan, J., concurring).
158. *Id.* at 730 (Stewart, J., concurring) (“I cannot say that disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people.”).
not be abridged. 159

To the extent an independent counsel’s First Amendment rights might be implicated, they are attenuated or waived by the independent counsel’s prior acceptance of the obligations which accompany his or her position. Newspapers, unlike government officials, are not employees of the state or servants of the people. They do not receive security information in the course of performing official functions. They owe no fiduciary-like duty to closely hold the people’s or the government’s confidences and to disseminate them only in accordance with proper legal forms. 160 Indeed, they are sometimes portrayed as belonging to a quasi-formal “fourth estate” which the founders intended to play a supplemental role as gadfly in our system of checks and balances. 161

C. Separation of Powers

1. Introduction

The preceding “sliding scale” analysis in subpart B is largely comparative, and rests on two assumptions: first, that if the state secrets privilege were constitutionalized, it would continue to be applied as it has been, and, second, that such an application would be constitutional. Either assumption could be wrong. For this reason, subpart C will attempt independently to justify this article’s conception of the role of independent counsel in terms of the constitutional separation of powers.

The term “separation of powers” encompasses a cluster of interrelated concerns regarding the proper allocation of government authority and power among government institutions. Initially, it is useful to distinguish two separate inquiries prone to conflation under the separation of powers rubric: “what allocation of power does the Constitution actually prescribe?” and

159. Id. at 716-17 (Black, J., concurring) (citing U.S. CONST. amend. I: “Congress shall make no law . . . abridging the freedom . . . of the press . . . .”); see also id. at 730-31 (White, J., concurring) (judgment due to “extraordinary protection against prior restraints enjoyed by the press under our constitutional system.”).

160. Cf. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (“[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”).

161. New York Times Co., 403 U.S. at 717 (Black, J., concurring) (“The press was protected so that it could bare the secrets of government and inform the people.”); id. at 728 (Stewart, J., concurring) (press supplements governmental checks and balances); see also Potter Stewart, Or of the Press, 26 HASTINGS L.J. 631, 633-34 (1975) (“The relevant metaphor . . . is [that] of the Fourth Estate.”).
“what allocation is ‘best’?” The former inquiry is reflected in the first criterion the Supreme Court uses to identify nonjusticiable “political questions”—whether the Constitution “textually commits” a decision to one of the political branches of government, thereby precluding judicial resolution or interference by the other political branch. Section 2, below, argues that the constitutional text does not preclude congressionally authorized judicial review of executive security privilege claims in the independent counsel context.

Where the search for a clear textual prescription is inconclusive, normative rationales may inform allocation choices. This latter inquiry, the search for the “best” allocation of power, may be guided by at least two different separation of powers rationales—one positive and one negative. The positive rationale for separation of powers is functional. For efficiency’s sake, it posits, each branch of government should perform only those functions at which it is most proficient. Sometimes incompatible with this positive rationale, the negative separation of powers rationale seeks to guard against tyranny by preventing the centralization of government power. Government power is so dangerous, the negative rationale posits, that it must be diffused among separate institutions, each capable of preserving itself against the others.

The positive, or functional, rationale for separation of powers can cut two ways regarding judicial review of executive invocations of the state secrets privilege in the independent counsel context. If it requires that the President always be able to execute covert military or foreign policy with the utmost expedition, then it argues for a quite limited judicial role. If, however, it means that United States policy should reflect the most accurate possible assessment of the nation’s security interests, then, I will argue, it suggests that a substantial judicial role is desirable.

This functional argument, contained in sections three through six below, addresses a series of separation of powers concerns articulated by the Supreme Court and by commentators which derive mainly from the


164. E.g., THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty . . . ”); Morrison v. Olson, 487 U.S. 564, 710, 727 (1988) (Scalia, J., dissenting) (“The purpose of the separation and equilibration of powers . . . was . . . to preserve individual freedom.”).
functional rationale. These concerns include: the relative competencies and expertise of the Judiciary and the Executive; the relative merits of the judicial forum versus normal political processes; the availability of judicially discoverable and manageable standards for assessing claims of privilege; and the judicial ability to fashion appropriate and final relief.\(^{165}\) These concerns have been advanced as reasons why courts should avoid decisions involving military and foreign affairs,\(^{166}\) the Executive's withholding of information from Congress,\(^{167}\) and challenges by independent counsel of executive state secrets privilege claims.\(^{168}\)

For historical reasons, the negative rationale most obviously cuts in the direction of a greater judicial role. Abuses of secrecy in the name of national security, and in particular executive abuses, have plagued our nation in this century. However, in an essay favoring a constitutional executive privilege, Gary Schmitt has suggested that executive privilege is a desirable safeguard against an overweening or oppressive Congress. The last section below argues that Schmitt's concerns are less apposite in the independent counsel context than in the context he addresses—congressional demands to be supplied information by the Executive.

2. Textual Commitment

As is often the case in hard political question cases, the search for clear, exclusive textual commitments is inconclusive in this separation of powers inquiry.\(^{169}\) Consequently, this subsection argues, the constitutional text does not preclude a judicial role in evaluating executive invocations of


It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . .

\(^{167}\) Schmitt, supra note 9, at 178-82.

\(^{168}\) Noble, supra note 8, at 577-80.

\(^{169}\) Walter L. Nixon, 113 S. Ct. at 741 (White, J., concurring) ("[T]here are few, if any, explicit and unequivocal instances in the constitution of this sort of textual commitment.").
the state secrets privilege at the request of independent counsel.

I discussed earlier how the Constitution does not explicitly grant to the President any responsibility for regulating government secrecy. The *Nixon* rationale for a constitutional executive communications privilege is that the Constitution *impliedly* grants to the President all powers that are appropriate and relevant for carrying out the powers it explicitly grants him or her. By the same rationale, *Nixon* suggested, a constitutional state secrets privilege might accompany the military and foreign affairs functions which the Constitution explicitly vests in the President.

The Constitution explicitly grants military and foreign affairs powers to Congress as well. Is it not just as appropriate then, that Congress too receive implied powers to regulate governmental secrecy in these areas?

In sheer number, word count, and page space, the Constitution's textual commitments of military and foreign affairs powers to the Congress overwhelm its like commitments to the President. The Constitution contains four textual commitments of military or foreign affairs powers to the President. Half of these grant powers which may be exercised only with the advice and consent of the Senate. The Constitution contains at least sixteen textual commitments of military or foreign affairs powers to Congress.

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171. Cf. United States v. AT&T, 567 F.2d 121, 128 (D.C. Cir. 1977) ("The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. . . . [T]he Constitution . . . confers upon Congress other powers equally inseparable from the national security."); *cf. also* Haig v. Agee, 453 U.S. 280, 289 n.17 (1981) (President's foreign relations power must be exercised in subordination to applicable constitutional provisions).

172. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ."); id. § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ."); id. § 3 ("[H]e shall receive Ambassadors and other public Ministers . . . .").

173. In addition to the Senate's Article II advice and consent duties, these include: U.S. CONST., art. I, § 8, cl. 1 ("The Congress shall have Power To . . . . provide for the common Defence . . . of the United States . . . ."); id. § 8, cl. 3 ("To regulate Commerce with foreign Nations"); id. § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"); id. § 8, cl. 11 ("To declare War" and "grant Letters of Marque and Reprisal"); id. § 8, cl. 12 ("To raise and support Armies"); U.S. CONST. art. I, § 8, cl. 13 ("To provide and maintain a Navy"); id. § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval Forces"); id. § 8, cl. 15 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); id. § 8, cl. 16 ("To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States,
Article I, Section 8, Clause 18 is the most expansive of these, empowering Congress to make laws relating to all powers which the Constitution vests in the United States Government. Presumably, "all" powers includes the military and foreign affairs powers more directly vested in the President.174

The argument for joint executive and congressional proprietorship of state secrets is particularly compelling when the secrets are not purely executive in nature. The Nixon privilege, covering communications among the President and his advisors, applies to information solely of executive origin. State secrets tend to involve covert government activities which Congress has authorized, appropriated money for, and (in theory at least) monitors. For such secrets, both branches share a kind of generative proprietorship.

If the foregoing proposition that the Constitution impliedly grants Congress a degree of authority to regulate government secrecy is correct, could not Congress create corresponding judicial functions in adjudicating disputes arising out of such regulation? Moreover, the Constitution explicitly charges the federal courts with adjudicating various cases that

174. Gary Schmitt turns the preceding argument on its head, pointing out that "meagerness of text does not necessarily imply a paucity of power." He suggests that the lesser enumeration of war powers in Article II might "indicate an intent on the part of the framers to grant a substantial amount of discretion" to the President, to avoid burdening him or her with details. Schmitt, supra note 9, at 172-73. Schmitt's is a valid, if creative, textual interpretation, but hardly conclusive. Nor does it negate the substantial congressional role in military and foreign affairs enumerated in Article II, even as it views that enumeration restrictively.
touch on military and foreign affairs matters. By implication and extension, could not such a congressional bestowal of subject matter jurisdiction be appropriate in light of the Article III text?

A special executive privilege for state secrets would also compete with explicit or implied constitutional grants of authority to the other branches which are not directly related to military and foreign affairs. The Judiciary’s constitutionally assigned responsibility for the “fair administration of criminal justice” is an example discussed earlier. Another example might be Congress’s implied authority to create legal mechanisms for ensuring that its laws are obeyed and enforced. Such an authority would be especially relevant when the laws needing enforcement are laws that prohibit lying to Congress—as occurred in the Iran-Contra Affair. Surely it is a relevant and appropriate accompaniment to the sum of Congress’s explicit constitutional responsibilities that Congress have the implied power to ensure information provided to it is truthful and accurate.

3. Expertise

a. The Judiciary Has Sufficient Expertise

That courts lack the expertise to evaluate state secrets has often been stated, but rarely explained. One possible explanation is that state secrets are too complex for judges to appreciate or grasp. But courts routinely deal with the most important and complex issues of our society. What makes national security matters recherché? Are military and intelligence

175. U.S. CONST. art. III, § 2, cl. 1 (“The Judicial Power shall extend to all . . . Treaties . . . ; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”); id. § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies. . . . No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”). 176. The quote is from Nixon, 418 U.S. 683, 711-13 (1974); see also supra text accompanying notes 139-40. 177. Cf. United States v. United States Dist. Ct. for the E. Dist. of Mich., 407 U.S. 297, 320 (1972) [hereinafter Keith] (“We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.”). Judge Bazelon extrapolated this Keith argument to national security matters in Halkin v. Helms (Halkin I), 598 F.2d 1, 15 n.17 (D.C. Cir. 1978) (Bazelon, J.) (objecting to denial of petition for en banc rehearing).
methodology more arcane than the usual medical malpractice or patent litigation? If knowledge of background information is necessary to appreciate certain national security threats (the possibility of which has concerned judges and executive officials in the past), the information may be presented to a court in camera. If a security threat still is too subtle for the Executive to convey its significance to a court, there is reason to doubt that it exists. Doomsayers making patently implausible predictions—the English folktale of Chicken Little comes to mind—should not be heeded just because they show up in court with impressive charts and solemn affidavits. Chicken Little is an extreme and fanciful example, of course, but to concede that a judge should not defer to a Deputy CIA Director Little just because he or she wears the Article II mantle would seem to be a concession that the propriety of constitutional claims of state secrets privilege would be justiciable, at least in some circumstances. Admitting this exception, moreover, it is unclear where and by what principle the exception could be limited.

Another possible explanation for judicial incapacity is that secrecy decisions often are prophylactic judgment calls made on the basis of limited information of unknown reliability, particularly in the area of foreign affairs. But, assessing foreign affairs pitfalls—for example, predicting the effect that exposure of a joint covert effort with a foreign government would have on other governments’ or on intelligence operatives’ willingness to cooperate secretly with the United States in the future—is no more prophesy than a host of typical judicial decisions: for example, predicting the degree to which exposure of a citizen informant will impede domestic law enforcement; or awarding a broadcasting license on the basis of sex will promote certain forms of speech; or calculating the lost future wages of

178. See supra notes 65-66 and accompanying text; Reynolds v. United States, 192 F.2d 987, 997-98 (3d Cir. 1951) (opinion adopted by Black, Frankfurter, and Jackson, JJ., dissenting in United States v. Reynolds, 345 U.S. at 12). (“[I]f, as the Government asserts is sometimes the case, a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge in camera.”).

179. In the folktale, Chicken Little (a.k.a. Henny Penny or Chicken Licken) comes to believe that the sky is falling after an acorn drops on her head. She and several compatriots set out to warn the King. All are eaten en route by Foxy Woxy, however, so that “to this day the King has never been told that the sky was falling.” See, e.g., V.S. HUTCHINSON with illustrations by LOIS LENSKI, CHIMNEY CORNER STORIES 3 (1925); THE OXFORD COMPANION TO CHILDREN’S LITERATURE 110 (1984).


181. Lamprecht v. Federal Communications Comm’n, 958 F.2d 382, 393 (D.C. Cir. 1992) (Future Supreme Court Justice Clarence Thomas found that “[a]ny ‘predictive judgments’
a tort victim; or deciding whether probable cause exists for a search warrant. The existence of relative degrees of uncertainty among a category of factual judgments would be a poor reason for the judiciary to shun the entire category—even if many of the decisions in the category involve a high degree of uncertainty. First, such an approach would be unnecessarily overexclusive, excluding decisions that could be based on more certain and complete information. Second, our judicial fact-finding system generally approaches risk of error not by avoiding judgment, but with burdens of proof. It would be a sufficient and appropriate corrective for uncertainty in the state secrets area if a judge, in setting burdens of proof, factored in the magnitude of harm the Executive alleged would result from disclosure, just as the Supreme Court has calibrated burdens of proof by the relative importance of interests at stake in other contexts.¹⁸²

In fact, the Reynolds court appears to have signaled its own use of this approach when it emphasized that the historical context of its decision was the midst of the Korean War. "In the instant case," the court wrote, "we cannot escape judicial notice that this is a time of vigorous preparation for national defense."¹⁸³ This reference would seem to be a tacit bow to the notion that courts must weigh the magnitude and the plausibility of alleged dangers in deciding whether to defer to the Executive’s nondisclosure decision. Historical context, i.e. "time of war," was a rough-and-ready proxy for satisfying these criteria with regard to the Air Force test data at issue in the case. Presumably, the nation was sufficiently aware that it was at war when the Supreme Court decided Reynolds that it did not need to be reminded of the fact. The statement’s most plausible significance would have been for future courts, deciding future cases, at times of relative peace.

As for legislative estimations of judicial competence, Congress specifically addressed the question when the Nixon and Ford Administrations urged Congress to relax the Freedom of Information Act’s general de novo review standard for cases involving FOIA’s national security exemption. Both administrations argued that judges lack the knowledge and


expertise necessary to make disclosure decisions regarding state secrets.\textsuperscript{184} “Congress soundly rejected this contention, however,” and refused to create the special exception the Executive wanted.\textsuperscript{185}

Closely related to the issue of judicial expertise is the question of judicial responsibility. However, there is little reason to fear that judges will be insensitive or careless where security issues are concerned.\textsuperscript{186} Throughout our history the Judiciary has approached security matters with solicitude and caution. It has never been accused of dropping the ball.\textsuperscript{187} To the extent a judge’s self-interest enters the equation, a natural bias probably exists for the judge to err on the side of nondisclosure. To err on the side of secrecy is to err in private; to err on the side of disclosure is to err publicly. By choosing secrecy, a judge greatly reduces his or her risk of public embarrassment.


\textsuperscript{185} Ray, 587 F.2d at 1210; \textit{see} 120 \textsc{Cong. Rec.} 17,028 (1974) (Sen. Chiles) (“We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake, and the Federal judge sits there without a bias one way or another. I want him to be able to decide without blinders or having to go in one direction.”).


Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. . . . [J]udges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged.

\textit{See also} 120 \textsc{Cong. Rec.} 36,870 (1974) (Sen. Muskie):

I cannot imagine that any Federal judge would throw open the gates of the Nation’s classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides. On the contrary, if we constrict the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.

\textsuperscript{187} \textit{See} \textit{Wald, supra} note 31, at 672-73, 675, 676-77 and testimony of intelligence officials cited therein (“Neither the FBI nor the CIA [as of 1984] has yet identified a court-ordered [FOIA] disclosure that has been carried through to endanger lives or operations.”); \textit{James Zagel, The State Secrets Privilege, 50 Minn. L. Rev.} 875, 900 (1966) (“The courts have clearly shown they are not about to run wild in declaring information unprivileged.”).
b. The Executive Is Overrated

In contrast, the Executive's spotty track record at intelligence and security analysis invites consideration of whether the Judiciary might actually be a superior decision-maker than the Executive. This hypothesis has both procedural and substantive elements.

Procedurally, intelligence is collected, analyzed, and reconciled with policy within a closed system. The people who make policy head that system. If intelligence does not support policy, executive policymakers have two options. They can change policy, or they can change intelligence—most easily by changing the intelligence collectors and analysts. Consequently, intelligence workers face institutional pressures to tell policy-making superiors what they want to hear.

The CIA, for example, recently has been criticized for the quality and integrity of its intelligence product during the 1980s. A few senior CIA officials and analysts have testified to Congress that an atmosphere of politicization and intimidation existed at the CIA throughout the decade, corrupting intelligence analysis. Similarly, according to an internal CIA survey, a widespread impression exists among CIA managers and analysts that agency reports currently are tailored to please superiors. Furthermore, career secret-keepers no doubt possess the natural human tendency of overestimating the importance of one's own bailiwick—a prevalent phenomenon, apparently, in executive agencies (a phenomenon Judge

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188. According to George Reedy: "[Y]ou can be ... certain that none of the people close to [the President] ... are going to apply sceptical judgment [to the information on which the President is acting]. At least they aren't going to apply sceptical judgments and remain close to him very long." BERGER, supra note 111, at 344 n.11.

189. Cf. DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST 456-57 (1972) ("[N]o one tells the President he is wrong."); In Awe of the President, WALL ST. J., Aug. 10, 1973, at 6 ("The 10 weeks of [Watergate] hearings brought forth witness after witness who by his own account was afraid to speak his mind to Mr. Nixon. ... The quintessence of this attitude was exemplified in [the behavior of L. Patrick Gray, acting director of the FBI, and General Walters, of the CIA.]").

190. E.g., Elaine Sciolino, Gates Almost a Side Issue in Hearings, N.Y. TIMES, Oct. 1, 1991, at A19; see also Excerpts from Gates's Testimony on His Record at the C.I.A., N.Y. TIMES, Oct. 4, 1991, at A12 (transcript of then-nominee CIA Director Robert M. Gates' testimony at confirmation hearings) ("Again and again, Inspector General Reports and studies by the directorate's product evaluation staff found pockets of perceptions of politicization ... .").

Stephen Breyer has dubbed "tunnel vision". Former CIA Director Stansfield Turner has written that the quality of United States intelligence analysis is disappointing in general, attributing this in part to bureaucratic stifling of incentives for analytic initiative and rigor, and in part to pressure to reconcile intelligence with established executive policy.

The judicial decision-making process is less prone to "slanted" security assessments. In a disclosure dispute between an independent counsel and the Executive, our adversarial system and the rules of evidence would ensure a robust dialogue within a highly structured analytic framework. Each side would have to marshal facts and submit its interpretation of the facts to scrutiny and challenge. If necessary, the independent counsel could obtain expert witnesses among former intelligence, military, or foreign affairs officials. If necessary, the court could appoint a similar expert to aid the court as a special master. Most important, the judicial decision-maker would possess neither an institutional nor a personal interest in the outcome of the dispute.

192. "Tunnel vision, a classic administrative disease, arises when an agency so organizes or subdivides its tasks that each employee's individual conscientious performance effectively carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good." STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (1993). Regarding "tunnel vision" in the intelligence community, see also, e.g., John Hart Ely, The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About, 42 STAN. L. REV. 1093, 1115 (1990) ("bureaucracies generally like to operate without scrutiny whenever they can get away with it, and ... the CIA in particular displays this preference with a vengeance"); John C. Jeffries, Jr., Rethinking Prior Restraint, 92 YALE L.J. 409, 435 (1983); Elaine Sciolino, A Panel from C.I.A. Urges Curtailing of Agency Secrecy, N.Y. TIMES, Jan. 12, 1992, at A1, A14 (quoting Steven Aftergood, director of the Project on Secrecy and Government at the Federation of American Scientists: "The intelligence community reflexively classifies information and refuses to release it .... It pushes the limits of absurdity. But it's built into their mindset.").

193. Stansfield Turner, Intelligence for a New World Order, FOREIGN AFFAIRS, Vol. 70, issue 4, Fall 1991, at 150, 161-64.

194. On the executive decision-making process, compare Derek Bok, BOSTON SUNDAY GLOBE, July 22, 1973, at 44, ("The central staff may not be ... open enough to debate and discussion with those holding contrary points of view.").

Substantively, administration bureaucracies are notorious for overclassifying security information. William G. Florence, formerly the Air Force’s Deputy Assistant for Security and Trade Affairs, once testified that disclosure of 99.5 percent of classified documents would not prejudice the nation’s defense interests. Specific examples of questionable security classifications include the withholding from a member of Congress of a report that water flows downhill and a confidential file on troop movements in Europe dated April 15, 1917, which remains under lock and key today. Regular United States prosecutors, not just independent counsel, have clashed with the intelligence community over protecting security information to the detriment of law enforcement.

In addition, high executive officials frequently have exaggerated, or at

196. See, e.g., Tamanaha, supra note 91, at 312-13 & n.199, and authorities cited therein (“The classification system has a well-documented history of chronic abuse resulting in the unnecessary or overclassification of information.”); cf. also Shedding the C.I.A.’s Cloak, N.Y. Times, Jan. 29, 1992, at A20 (“The C.I.A. is notoriously unresponsive to requests for information.”).


198. Zagel, supra note 187, at 898-99. See id. for similar examples. See also, e.g., David Margolick, Seeing F.B.I. Files on Lennon: A Hard Day’s Night, N.Y. TIMES, Sept. 6, 1991, at B5 (John Lennon lyrics classified “confidential” for 10 years though 15,000 people attended same concert as FBI informer who transcribed lyrics and lyrics were later printed on cover of Beatles’ record album).

199. Elaine Sciolino, Panel from C.I.A. Urges Curtailing of Agency Secrecy, N.Y. TIMES, Jan. 12, 1992, at A1, A14 (attributing Steven Aftergood, director of the Project on Secrecy and Government at the Federation of American Scientists: “Government documents are routinely classified, often with little regard to whether their disclosure would damage national security.”); see also, e.g., Graymail, Legislation: Hearings on H. 4736 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence, 96th Cong., 1st Sess. 106 (1979) (statement of Philip Lacovara: most classified information is overclassified); Security Classification Reform: Hearings Before a Subcomm. on Government Operations on H.R. 12004, 93rd Cong., 2d Sess. (Jul. 11, 25 and Aug. 1, 1974) (statement of Representative Dante Fascell: “[I]n the field of foreign affairs . . . a lot . . . doesn’t need to be classified.”); id. (statement of Representative Alan Steelman, quoting Senator William D. Hathaway: “[w]idespread overclassification”).

least egregiously misread, national security risks even in the face of strong public attention. In 1952, President Truman sought to take control of most of the nation's steel mills because of impending strikes by steelworkers. The Truman Administration asserted that its action was "necessary to avert a national catastrophe which would inevitably result" from a stoppage of steel production during the Korean War.\footnote{201} Scholars have concluded, however, that "[i]t is . . . clear in hindsight that the Truman Administration greatly exaggerated the seriousness of the problem."\footnote{202} After the Supreme Court ruled that the President lacked the power to nationalize the steel industry,\footnote{203} the steelworkers struck for fifty-three days. "[N]o steel shortage materialized, and the strike had no discernible impact on the war effort."\footnote{204}

Similarly, the U.S. military now is widely regarded to have greatly overstated the danger of subversion by Japanese-Americans during World War II. "[J]ournalists and researchers have stocked library shelves with studies . . . [which] demonstrate that there could have been no reasonable military assessment of an emergency at the time . . . "\footnote{205} In a detailed and chilling account, Peter Irons has written that Justice Department lawyers representing the government in Korematsu v. United States\footnote{206} learned that the military's evidence that Japanese-Americans posed a security threat was extremely weak, but that the lawyers did not reveal this to the Supreme Court when they argued in favor of interning Japanese-Americans.\footnote{207}

Other instances of executive exaggeration relate specifically to the consequences of disclosing national security information. In 1969, Senator Stuart Symington headed an investigatory committee which discovered that

\footnotesize{\begin{itemize}
\item \footnote{201} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) (emphasis added).
\item \footnote{203} Youngstown, 343 U.S. at 588.
\item \footnote{204} See STONE, supra note 202.
\item \footnote{205} Hirabayashi v. United States, 828 F.2d 591, 593 (9th Cir. 1987) (citing, for example, PETER IRONS, JUSTICE AT WAR (1983); R. DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS (1975); M. GRODZINS, AMERICANS BETRAYED (1949); Eric K. Yamamoto, Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties, 26 SANTA CLARA L. REV. 1 (1966)).
\item \footnote{206} 323 U.S. 214 (1944).
\item \footnote{207} PETER IRONS, JUSTICE AT WAR ix-x, 278-310 (1983).
\end{itemize}}
the United States had been waging a secret war against the Pathet Lao in northern Laos. After the Symington Committee forced the administration to admit in closed session that the Committee's findings were accurate, the Committee tried to publicize the information over the Executive's objections. The Executive predicted that dire consequences would result, but the Committee prevailed and the information was publicized. As a Committee counsel later observed: "None of the parade of horrors which the State Department imagined did in fact occur."

In *New York Times Co.*, the Executive represented that unless publication of the Pentagon Papers was prevented, "the nation's security will suffer immediate and irreparable harm," including one or all of the following: "a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans or intelligence operations, or scientific or technological developments vital to the national defense."

Today, there appears to be a consensus that the Executive's evidence was "woefully weak" and that no dire consequences have occurred. Leslie Gelb, who authored the Pentagon Papers, has written recently that he "did not think then or now that the publication would compromise U.S. national security." Erwin Griswold, solicitor general during the Nixon Administration, was the lawyer who asked the Supreme Court to suppress the Pentagon Papers. He has since written, in reference to the suppression of evidence needed for the North trial, that although he "thought there was a substantial risk" at the time, he has "never seen any trace of a threat to national security" since the papers were published. According to Griswold, "the lesson of the Pentagon Papers experience" is that there is "massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment.

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209. SCHLESINGER, supra note 208, at 345-46.


of one sort or another."^{214}

Excluding instances of politically motivated or hysteria-induced exaggeration, due to the imprecise nature of much intelligence and foreign affairs analysis, the Executive often is plain wrong.\textsuperscript{215} According to Senator Daniel Moynihan, "[f]or a quarter century the CIA has been repeatedly wrong about the major political and economic questions entrusted to its analysis."\textsuperscript{216} Some of the intelligence community's blunders have been embarrassingly glaring. Relatively recent examples which have been widely cited include the Executive's failure to predict or assess the Iranian revolution,\textsuperscript{217} the extent of Iraqi President Saddam Hussein's bellicosity,\textsuperscript{218} and the Soviet Union's economic decline and subsequent disintegration.\textsuperscript{219} It is unlikely that an educated layperson, much less a judge who had perused relevant intelligence information, would have done a worse job of prognostication.


Obviously, C.I.A.'s analysts are capable of and do turn out high-quality work. But we also turn out work that is irrelevant, uninteresting, too late to be of value, too narrow, too unimaginative, and too often just flat wrong.

\ldots

C.I.A.'s analysts missed the likelihood and significance in 1975 of the massive Soviet supply of military hardware to Angola, \ldots missed similar developments in Ethiopia in 1977 and failed to foresee the invasion of Afghanistan in 1979.

\textsuperscript{216.} Turner, supra note 193, at 161.
\textsuperscript{217.} See, e.g., \textit{id.} at 151, 152-53, 155, 157-58, 161, 163.
\textsuperscript{219.} See, e.g., Turner, supra note 193, at 162 ("We should not gloss over the enormity of this failure to forecast the magnitude of the Soviet crisis, \ldots [T]here were many Soviet academics, economists, and political thinkers \ldots who understood long before 1980 that the Soviet economic system was broken. \ldots Yet I never heard a suggestion from the CIA or the intelligence arms of the Departments of Defense or State that numerous Soviets recognized a growing, systematic economic problem."); Elaine Sciolino, \textit{Director Admits C.I.A. Fell Short in Predicting the Soviet Collapse}, N.Y. TIMES, May 21, 1992, at A6; Pozner & Donahue, \textit{Unmonitored, Unchecked, Unelected: Is the CIA Necessary?} (Multi-media Entertainment television broadcast, March 20, 1992) (statement of former CIA Director William Colby) (in 1989 CIA overstated the Soviet Union's rate of economic growth for 1980-85).
4. The Judicial Forum vs. The Political Process

At least since McCulloch v. Maryland, a theory has existed that the relative ability of the political process itself to ensure against improper government conduct is a reason for greater or lesser judicial involvement in various cases. In Baker v. Carr, the Supreme Court articulated an associated, if somewhat tautological, concern that courts should avoid decisions involving "an initial policy determination of a kind clearly for nonjudicial discretion." While Baker's vague statement may encompass McCulloch's view of judges as referees of the representation process, it may also be interpreted to express a separate intuition about the role of courts which distinguishes policy making from fact finding and policy application. Judges are supposed to find facts and apply law, according to this intuition. They are not supposed to make pure value judgments, which, in the main, our society prefers to leave to majoritarian democratic processes. Of course, the contours of these three activities—policy making, fact finding, and policy application—are difficult to discern. Equally, if not more, difficult to discern must be the contours of the distinction Baker draws between two kinds of policy making, that which is appropriate and that which is inappropriate for judicial discretion.

I suggest that Baker's identification, but vague definition, of a non-justiciable variety of policy determination clearly does not encompass two types of dispute which might arise out of an independent counsel's challenge of a President's invocation of the state secrets privilege. Each type involves judicial activity which is more properly characterized as "policy application" or "fact finding" than as "policy making." I also submit that a third type of dispute exists in which an independent counsel asks a judge to make an initial policy determination of the kind which Baker indicates is appropriate for judicial discretion. If I am correct that even one of these three types of dispute is appropriate for judicial resolution, a blanket refusal by the courts to evaluate executive invocations of the state secrets privilege at the request of independent counsel would be a mistake. As Baker cautions: "Much confusion results from the capacity of the 'political question' label to

220. See McCulloch v. Maryland, 17 U.S. 316, 428 (1819) ("The only security against the abuse of [this tax] power, is found in the structure of the government itself. . . . The people . . . prescribe no limits to the exercise of this right, resting confidently on . . . the influence of the constituents over their representatives . . . to guard them against its abuse."). See generally JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980).

obscure the need for case-by-case inquiry.”

The first type is a dispute about whether the material the President claims is privileged is sufficiently related to military and foreign affairs even to be considered a “state secret,” much less a privileged state secret. Suppose, for example, that in 1993 the Office of Thrift Supervision (“OTS”) does not want to reveal publicly that it is contemplating closing a Savings and Loan institution (“S&L”) because it fears that disclosure would precipitate a depositors’ run on the S&L. While a strong reason would exist for the OTS’s deliberations to be kept secret, absent other circumstances, it probably would not be protected by the heavy-duty executive privilege for military and foreign affairs matters which Nixon contemplated. Any judicial decision to this effect could aptly be characterized as an application of law rather than policy formation. The Constitution expresses the President’s military and foreign affairs duties (“policy formation”), and the Judiciary must interpret their scope (“policy application”).

The second type is a dispute in which the President’s concerns clearly fall within the scope of his or her military and foreign affairs authority, but where the independent counsel only challenges the President’s factual assessment of the dangers involved, not whether avoidance of the contemplated dangers would be desirable. Here, judicial evaluation of the President’s claims is much more in the nature of “fact-finding” than “policy determination.” This is a distinction between ends and means, of course, and every means can be redefined as an end. That is why choice of means is a kind of policy determination too. However, is the proposed judicial inquiry the kind of initial, or primary, policy determination with which Baker was concerned? To take an easy hypothetical, suppose that the President’s concerns are patently irrational: for example, the President alleges that a foreign country will invade the United States if it learns that our military has prepared a report on the tendency of water to flow downhill. Would not the “initial” policy determination here be the judgment whether the independent counsel’s prosecution or the avoidance

222. “[C]ourts possess power to review either legislative or executive action that transgresses identifiable textual limits. . . . ‘[W]hether the . . . action exceeds whatever authority has been committed . . . is a responsibility of [the Supreme Court] as ultimate interpreter of the Constitution.’” Walter L. Nixon, 113 S. Ct. at 740 (quoting Baker, 369 U.S. at 211).

223. Cf. Zagel supra note 187; cf. also Walter L. Nixon, 113 S.Ct. at 748 (Souter, J., concurring) (“If the Senate were to [impeach and convict an officer of the United States] . . . upon a coin-toss, or upon a summary determination that [an] officer . . . was simply ‘a bad guy,’ . . . judicial interference might well be appropriate.”).
of an invasion is more important? The independent counsel and the President do not disagree on the undesirability of being invaded, or that prevention of an invasion is more important than the independent counsel's prosecution; they disagree on whether invasion will result from disclosure of our military's report that water flows downhill.

The third type is a dispute in which the independent counsel asks the Judiciary to make the initial policy determination whether the independent counsel's prosecution or the avoidance of certain security risks is more important. Might some or all of the disputes of this kind involve the kind of initial policy determination which Baker identifies as appropriate for judicial discretion? Here, a McCulloch-style inquiry into the adequacy of the alternative political process can profitably be brought to bear.

Catch-22 of the "leave it to politics" refrain in the independent-counsel/state-secrets-privilege context is that the political process cannot operate when the issues at stake are secret. As far as the electorate is concerned, it cannot evaluate the pros and cons of disclosing information of which it is ignorant. An independent counsel is uniquely situated to seek congressional assistance, thus obtaining an advantage over most parties who have litigated disclosure issues with the Executive. But even a purely republican approach to the dilemma is deficient.

If Congress sides with the independent counsel, it can try to extract Executive concessions by publicly browbeating the Executive or by offering it political horsetrades. Public browbeating is of limited value, however, when the browbeaters cannot publicize their arguments, and horsetrading's effectiveness is diminished by security constraints which restrict informational access to small subsets of the Legislature (often the House and Senate intelligence committees). Horsetrading and public browbeating share certain drawbacks as well. Both increase the danger that legislators will leak security information to the press. And both are clumsy and time-consuming in the context of a criminal trial. An independent counsel cannot fairly ask a judge to put a trial on hold for an indefinite period while Congress and the Executive hash out an evidentiary issue. And what if Congress fails to convince the Executive? Without an arbiter of some kind, the Executive "wins" by default. Procedurally, this seems unsatisfying, perhaps because Congress's negotiating weapons—not counting impeachment—are so weak.

224. Cf. Environmental Protection Agency v. Mink, 410 U.S. 73, 95 (1973) (Stewart, J., concurring) ("[W]ith the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.").
to begin with. 225  
As for impeachment, it is either an inapplicable or an inappropriately blunt instrument. What would be the impeachable offense? It is unlikely that the refusal to declassify evidence necessary for a criminal trial amounts to an impeachable “high crime” or “misdemeanor.” 226  But even if the Senate were willing to construe the Impeachment Clause so that it covered a policy disagreement with the Executive, 227 whom would the Senate impeach? Impeaching the Attorney General or intelligence agency officials might intimidate the President into appointing replacements who would declassify evidence at Congress’s bidding. But if it did not, the Senate ultimately would have to impeach the President. Such a scorched-earth tactic would be incommensurate with congressional objectives. Congress should not have to paralyze the government to ferret out and deter criminal wrongdoing which might be limited to former second-tier executive officials, or because it disagrees with classification experts whose judgment, but not integrity, it questions. Such an approach would sacrifice the patient to cure the disease.

Moreover, even a credible threat of impeachment might be insufficient to persuade an administration nearing the end of its second term. Such a circumstance is unlikely to arise, but the concern cannot be disregarded. The central North charges, for example, were dismissed on January 13, 1989 with less than a month remaining in Ronald Reagan’s presidency. 228

Lastly, those who would still argue that impeachment is a reasonable alternative to legislatively mandated judicial review of executive security classifications must respond to an obverse argument. If the President feels that protecting certain security information is more important than an independent counsel’s prosecution, the President already is able to protect the information by exercising his or her pardon power. Why then does the President need a judicially created state secrets privilege when the Constitu-

225. Professor Ely argues that Congress has demonstrated in the latter half of the twentieth century that it actually lacks appropriate incentives to oversee secret executive actions in the national security context. “In this area . . . there exists a tacit understanding between the two political branches—the President acts, Congress looks the other way and avoids the heat.” Ely, supra note 192, at 1135.

226. U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

227. Id. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

tion explicitly grants him or her a satisfactory alternative recourse? One response is that a pardon, like impeachment, is an overly blunt, one-sided device for resolving evidentiary issues in a criminal trial. But that is precisely the point.

The pardon power also is a far more flexible and user-friendly instrument than the impeachment power. A pardon can be narrowly tailored to protect only the security information at issue, leaving the defendant accountable for any crimes that can be tried without using the information as evidence.229 Impeachment, on the other hand, must entirely remove an executive officeholder, and cannot direct the office-holder (or the office-holder’s successor) to permit the disclosure of the security information. In exercising his or her pardon power, the President also does not have the enormous collective action problem that Congress faces in mounting an impeachment. What the President can do alone, with the stroke of a pen, the Congress must do by actuating hundreds of people—a majority of representatives and a two-thirds majority of senators230—over a sustained period of time.

5. Judicially Discoverable and Manageable Criteria

If a statute is passed which assigns to the judiciary the task of reviewing executive invocations of the state secrets privilege at the request of independent counsel, how should a judge approach such an evaluation? If the statute is silent on the question—as was Section 594(a)(6) of the Ethics Act—the judiciary will have to develop its own guidelines. It would seem best for a judge to begin by considering the nature of the inquiry. What he or she has to determine is the optimal use for the particular information at issue. Should the information be kept secret in order to pursue certain foreign policy or national defense objectives? Or, should it be made public in order to pursue certain law enforcement objectives?

The judge certainly has the option of borrowing from the dominant line of Reynolds jurisprudence and from New York Times Co. The dominant Reynolds line purports to consider only whether disclosure might cause recognizable harm to security interests and to ignore any countervailing need

229. See supra text accompanying notes 141-42.

230. U.S. CONST. art. I, § 3, cl. 6, supra note 227; id. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).
Similarly, *New York Times Co.* does not weigh the need of the individual litigant seeking disclosure, although it requires that the government demonstrate an extraordinarily high likelihood and magnitude of harm. In the independent counsel context, too, the judge could ignore the need for disclosure and subject the Executive position to some intermediate standard of review, requiring for example that the Executive demonstrate a “significant chance of significant harm” in order to prevent disclosure. Such a one-dimensional, “prejudicial impact” test, however, results in a distorted evaluation of United States interests. As the Supreme Court noted in *CIA v. Sims*, for example: “The national interest sometimes makes it advisable, or even imperative, to disclose information that may [reveal] intelligence sources.”

Instead, the judge should be concerned with the totality of societal costs and benefits which would result from either disclosure or nondisclosure. “National Security” is an expansive and malleable term. It encompasses abundant and diverse possibilities, vesting each with equally ponderous evocations. Yet vast gradations of harm exist. Does the Executive allege that disclosure will almost certainly push the nations of the world to the brink of Armageddon—a not implausible claim during the Cold War; or, merely that it might arouse the pique of an aged, terminally-ill despot in a small, poor, and distant foreign country of dubious strategic value to the United States?

A judge should be sensitive to such gradations. What is the nature and magnitude of the damage to national security which allegedly would result from disclosure? What is the probability that it will occur? Can it be mitigated by other governmental action? As for nondisclosure, what impact is it likely to have upon the independent counsel’s prosecution and investigation? How serious a crime is the defendant accused of, and how important is it that the public learn more about his or her activities? What deterrence objectives would be served by prosecuting the defendant?

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231. I write “purports” because *Reynolds* allows a judge to consider the need of the disclosure-seeking litigant in deciding how far to probe in ascertaining whether the occasion for the privilege is appropriate. *See supra* note 134 and accompanying text. Theoretically, cases could exist where the need of the litigant is great enough so that no amount of probing could satisfy the judge that the occasion for the privilege is appropriate.

232. 471 U.S. 159, 180 (1985). The Court goes on to decide that under the specific statute involved in the case, Congress had determined that it was “the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information [is warranted].”

233. Accord *New York Times Co.*, 403 U.S. at 719 (per curiam) (Black, J., concurring) ("The word 'security' is a broad, vague generality . . . ").
Since the Executive will emphasize those costs and benefits indicating the wisdom of nondisclosure, and the independent counsel will emphasize those costs and benefits indicating the wisdom of disclosure, the judge should apply a balancing test in deciding between the parties. A balancing standard fits comfortably between the existing standards of the Reynolds tort claimant and the New York Times Co. prior restraint contexts. "[Nor is it] unusual for Congress to instruct a . . . judge conscientiously to weigh several different factors without specifying precise weights for each." 234

An ad hoc consideration of the totality of the circumstances and a balancing-test review standard need not leave a judge unacceptably afloat in a sea of personal discretion. Regarding judicial evaluation of the "informant's privilege"—an evidentiary privilege which enables the government to keep secret the identity of persons who furnish information to domestic law enforcement officers—the Supreme Court has long held that "[t]he problem . . . calls for balancing the public interest in protecting the flow of information [to the government] against the . . . [criminal defendant's] right to prepare his defense," and "[w]hether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case. . . ." 235 In criminal trials governed by the Classified Information Procedures Act, some courts of appeals seem satisfactorily to have been applying a similar approach in adjudicating questions of discovery, relevance, admissibility, and adequacy of proffered evidentiary substitutions. 236 In doing so, judges have evaluated the defendant's need for


236. See United States v. Smith, 780 F.2d 1102 (4th Cir. 1985) (balancing public interest in nondisclosure of classified information against defendant's need for disclosure in ruling on relevance and admissibility of evidence under CIPA); United States v. Zettl, 835 F.2d 1059, 1064-67 (4th Cir. 1987) (following Smith); United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988) (on issues of discovery, court can engage in balancing national security concerns against defendant's need for documents); United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985)"(in appraising materiality [under CIPA], the court is not to consider the classified nature of the evidence. However, in passing upon [adequacy of proposed evidentiary substitutions] the trial judge should bear in mind that the proffered defense evidence does involve national security."); United States v. Pringle, 751 F.2d 419, 426-28 (1st Cir. 1984) (classified information properly excluded from discovery because defendant did not need it and because disclosure to defendant would damage national security). In United States v. Yunis, 681 F.
disclosure and the national interest in keeping security information secret, and balanced the two quantities against each other.

In a CIPA dispute between the Justice Department and an independent counsel, these same courts of appeals should not hesitate to engage in the same analysis they perform in CIPA disputes between the Justice Department and criminal defendants. Functionally, the intellectual exercises are virtually identical. Nor are the stakes appreciably higher in the independent counsel context. In a discovery, relevancy, admissibility, or substitution dispute between the Justice Department and a criminal defendant under CIPA, deciding against the Justice Department forces the United States to "disclose or dismiss." In a state secrets privilege dispute between the Justice Department and an independent counsel, deciding against the Justice Department forces the President to "disclose or pardon." 237

In the independent counsel context, judges can derive criteria from ordinary CIPA opinions of the kind mentioned above, and from a few other sources as well. 238 First, judges can look to the Justice Department's own criteria for deciding whether to prosecute criminal defendants when there is a possibility that classified information will have to be revealed. CIPA required the Attorney General to issue such guidelines and transmit them to Congress in 1981. 239 Judges should expect the Executive to apply its own guidelines equally in Justice Department and independent counsel prosecutions.

Second, judges can look to the Justice Department's own prosecution practices. Since 1981, every time the Justice Department decided not to prosecute a criminal defendant for fear of disclosing security information, CIPA has required that the Department prepare written findings detailing the reasons for its decision not to prosecute and that the Department report on

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Supp. 909 (D.D.C. 1988), the District Court for the District of Columbia balanced the defendant's interest in disclosure against the government's need to keep security information secret in ordering the discovery of security information. The court of appeals reversed on other grounds, and neither accepted nor rejected the trial court's adoption of a balancing test for discovery. United States v. Yunis, 867 F.2d 617, 625 (D.C. Cir. 1989). See also Salgado, supra note 93 at 428 & n.15.

237. A pardon, narrowly tailored and conditionally applied, can achieve the same discriminating objectives available under CIPA for properly classified information. These include alternative methods of disclosure (CIPA, § 6(c)) and measured sanctions against the prosecution which are less stringent than outright dismissal (CIPA § 6(e)(2)). See supra text accompanying note 142.

238. CIPA has only existed thirteen years. With the passage of time, a more substantial body of case law is likely to develop.

its decision to Congress. Thus a source exists of detailed reports on prosecutions which were forgone in order to protect security information. Cases in which security information was disclosed in favor of prosecution are matters of public record.

Finally, the Executive frequently discloses security information to advance interests unrelated to prosecuting criminals. For instance, to the consternation of intelligence community officials in 1986, the Reagan Administration sought to justify United States air strikes against Libya by publicly revealing information it had obtained from interceptions of Libyan diplomatic communications. As a result, intelligence about Libya became much more difficult to obtain. Another example is the Administration’s official disclosure of detailed intelligence on North Vietnamese forces operating in South Vietnam to gain domestic support for the United States military effort there. A catalogue of such executive disclosures, while not directly analogous to criminal prosecutions, could aid a judge in ranking the relative weights the Executive accords to various categories of security information, and in gauging the magnitude of countervailing interest for which the Executive is willing to disclose a particular category of security information. Such a catalogue might also support or contradict executive assertions about the consequences it believes will result from the publication of certain types of security information.

6. Finality and the Judicial Capacity to Fashion Relief

In the political question area, the Supreme Court has made clear that lack of finality to a judicial resolution and the difficulty of fashioning

240. Id. §§ 12(b), 13.


242. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir. 1975); see also id. (noting official disclosure of United States development of Multiple Independently Targeted Reentry Vehicles to counter public and congressional pressure to construct more missiles). During the Cuban missile crisis, President Kennedy released a “great deal” of security information concerning Soviet missile installations in Cuba in an attempt to justify administration policy. Sims, 471 U.S. at 180 n.24 (quoting statement of CIA Director, Admiral Stansfield Turner). In 1978, Admiral Turner decided to disclose the identities of certain academic institutions affiliated with the CIA’s MKULTRA project because “the benefits of . . . disclosure . . . outweighed the costs . . .” Id. at 180-81.
judicial relief "counsel against justiciability." Gary Schmitt has raised
finality and fashionability-of-relief concerns specifically in regard to review of executive privilege claims. As review of privilege claims would arise in the independent counsel posture, however, the concerns are not serious.

Schmitt focuses exclusively on the executive refusal of congressional information requests where, if the Court were to order disclosure, it would ultimately depend upon the aid of the political branches for the efficacy of its judgment. What distinguishes the independent counsel context is that the parties seeking disclosure already possess the relevant information. For its judgment to be effective, the Court would only need the Executive to refrain from affirmatively halting the trial, an extremely unlikely event, especially where the President has the more politically palatable option of pardoning the defendants.

A different flavor of finality concern also is apposite in the independent counsel context. In Walter L. Nixon v. United States, six justices recently suggested that judicial relief is inappropriate where it would disrupt the political life of the country by reopening a previously settled issue the necessary resettlement of which would render aspects of government uncertain or ineffective for a significant period of time. If a court grants relief in the independent counsel context, however, the rest of the hand plays out simply. Either the information will be disclosed or the President will have issued pardons in due course.

7. Prevention of Tyranny

When our government has encroached upon civil liberties and property rights it often has done so secretly, or for secret reasons, in the name of military or foreign affairs necessity. Americans of Japanese ancestry, for example, were interned during World War II because the military alleged that it was necessary to avoid the "gravest imminent danger to the public

244. Schmitt, supra note 9, at 182.
245. See Walter L. Nixon, 113 S. Ct. at 739. But see id. at 745 n.3 (White, J., concurring) (expressing skepticism regarding the risks of disruption).
246. Regarding property rights, see for example, Clift v. United States, 597 F.2d 826 (2d Cir. 1979), and Halpern v. United States, 258 F.2d 36 (2d Cir. 1958), two cases involving United States invocation of the state secrets privilege to avoid compensating patent holders for the United States' appropriation and exploitation of inventions with national security applications.
Similarly, it appears that only beginning in late 1993, spurred by the efforts of Secretary of Energy Hazel O'Leary, are the nature and extent of secret, federally funded radiation experiments on unwitting human subjects from 1945 until the mid-1970s now being revealed. Numerous other civil liberties violations have figured directly in countless legal battles over the nondisclosure of national security information. The plaintiffs in *CIA v. Sims*, for example, sought information about a CIA program which involved, among other things, the conducting of mind control experiments on unwitting human subjects, at least two of whom died as a result. In *Patterson v. Federal Bureau of Investigation*, (a case involving less nefarious matters of more recent vintage), Todd Patterson, an otherwise not unusual elementary school student, sought access to his FBI file because he wanted to know why the Bureau had been opening his mail and tapping his phone. Concern that executive civil liberties violations could occur behind a curtain of secrecy privileges, and in the name of military and foreign affairs necessity, was evident in congressional deliberations on the

247. See *Korematsu v. United States*, 323 U.S. 214, 218 (1944) ("Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify . . . [exclusion of Japanese Americans from the West Coast war area or from their homes].").

248. In several federally sponsored experiments, scientists injected toxic plutonium into gravely injured hospital patients; exposed indigent cancer patients to whole-body radiation; placed prison inmates' testicles in irradiated water; and served poor pregnant women a drink containing radioactive iron filings. Melissa Healy, *Science of Power and Weakness*, L.A. TIMES, Jan. 8, 1994, at A1; see also, e.g., John H. Cushman, Jr., *Study Sought on All Testing on Humans*, N.Y. TIMES, Jan. 10, 1994, at A12 (secret military experiments exposed 4,000 unwitting sailors and soldiers to mustard gas and other poison gases); Keith Schneider, *A Spreading Light on Radiation Tests*, N.Y. TIMES, Jan. 14, 1994, at A14.

249. 471 U.S. at 162 n.2; see also, e.g., Wald, *supra* note 31, at 673-74. If it were not for the Freedom of Information Act, we would never have learned that "[i]n 1979, the CIA confined the head of a foreign political party to a mental hospital and considered disposing of him because he refused to stay put"; or, that "[i]n the late 1960s, the CIA infiltrated black civil rights groups even though the Agency's own research showed the groups posed no threat to national security;" or, that "[t]he CIA once conducted experiments on young boys to determine whether circumcision affected the boys' development." *Id.*

250. 705 F. Supp. 1033 (D.N.J. 1989). The reason: Todd had solicited information from foreign governments in furtherance of his elementary school project to compile an encyclopedia of the world. *See also*, e.g., Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991) (FOIA suit by historian seeking records of FBI's investigation of rock star John Lennon in the late 1960's and early 1970's); Margolick, *supra* note 198, at B5; Wald, *supra* note 31, at 675-76 (recounting more serious FBI excesses disclosed publicly through FOIA).
passage of the independent counsel legislation\(^{251}\) and is expressed in the Senate report on CIPA.\(^{252}\)

Consider also the two most prominent occasions when our country has resorted to the independent counsel or special prosecutor mechanisms. The Watergate scandal involved a President’s attempt to conceal a burglary which his reelection committee tried to commit at a rival political party’s presidential campaign headquarters; the Iran-Contra Affair involved the Executive branch’s attempt to conceal its secret support of a foreign war which the Legislature had voted to stop funding. Both are paradigmatic examples of the danger government secrecy poses to a democratic system and its processes.\(^{253}\)

Section 594(a)(6) of the Ethics Act, as part III above advocates that it be construed, vested the independent counsel and the Judiciary with an important democracy reinforcement function.\(^{254}\) The section made it less likely that a President would be able to use some subordinates to subvert democratic processes secretly and then shield the subordinates from investigation and prosecution by pointing to other, “expert” subordinates’ representations that the necessary evidence was just too sensitive to be investigated.

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\(^{251}\) See Special Prosecutor Legislation: Hearing on H.R. 2835 and Related Bills Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, 95th Cong., 1st Sess. 40 (1977) (testimony and statement of Jerry J. Berman, Legislative Associate, ACLU); id. at 59 (statement of Fred Wertheimer, Vice President for Operations, Common Cause).

\(^{252}\) Senate Judiciary Comm., Classified Information Procedures Act, S. Rep. No. 823, 96th Cong., 2d Sess. 3 (1980), reprinted in 1980 U.S.C.C.A.N. 4294, 4296 (“The purpose of this bill is to help ensure that the intelligence agencies are subject to the rule of law and to help strengthen the enforcement of laws designed to protect both national security and civil liberties.”); see also Graymail, S. 1482: Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 31 (1980) (statement of Morton Halperin of ACLU):

> For executive officials who perform or are even tangentially connected with the performance of intelligence functions, 'graymail' can mean a virtual immunity from Federal criminal investigation or prosecution 'in the interest of national security' . . . From a civil liberties point of view, the rights of individuals cannot be fully and effectively protected if . . . criminal conduct by Government officials cannot be investigated and prosecuted . . .

\(^{253}\) Cf. New York Times Co., 403 U.S. at 724 (per curiam) (Douglas, J., concurring) (“Secrecy in government is fundamentally anti-democratic.”); id. at 719 (Black, J., concurring) (“The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”).

\(^{254}\) Cf. McGee v. Casey, 718 F.2d 1137, 1150 (D.C. Cir. 1983) (separate statement of Judge Wald) (“By not weighing the value to the public of knowing about particularly relevant episodes in the intelligence agencies’ history, we may undermine the public’s ability to assess the government’s performance of its duty.”).
disclosed. Given the history which preceded the Act, and presuming that prevention of tyranny is a proper object of separation of powers, it was quite reasonable for Congress and at least one President to have concluded that the Executive branch needed to be checked in this manner.\(^{255}\)

Gary Schmitt, on the other hand, expresses a converse fear that "democracy's natural and largely salutary suspicion of secrecy will overwhelm the prudent constitutional design of a vigorous and independent executive." He suggests that democracy's natural distaste for secrecy, independent of judicial aid, is enough to prevent any prolonged or serious abuse of executive privilege.\(^{256}\)

Schmitt's argument is more sophisticated than a mere denial of the dangers inherent in executive privilege. Rather, he questions whether we can achieve an increase in safety that would be worth the concomitant diminution in the instrumental and protective benefits of the Executive. While Schmitt concedes it is possible that today "the main threat to liberty comes from the Presidency,"\(^{257}\) he maintains that "the solution to executive excess is not elimination of the power from which that excess may come but rather the vigorous use by Congress of those tools it has at its disposal."\(^{258}\) The quest is for symmetry. We do not want to "trad[e] one imperial crown for another."\(^{259}\)

Regarding the vulnerability of the Presidency's instrumental virtues, Schmitt's argument is most germane in the context he addresses: whether

\(^{255}\) Signing the Ethics Act, President Carter declared: "I am . . . announcing my support for legislation which would require the appointment of a Special Prosecutor . . . . The American people must be assured that no one, regardless of position, is above the law." MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO PRESERVE AND PROMOTE ETHICAL STANDARDS THROUGHOUT THE EXECUTIVE BRANCH AND FOR OTHER PURPOSES, H.R. DOC. NO. 139, 95th Cong., 1st Sess. 3 (1977). Six years before the passage of the Ethics Act, Justice Stewart noted that the "Executive[s]' . . . power in the two related areas of national defense and international relations . . . since the advent of the nuclear missile age" has experienced an "absence of the governmental checks and balances present in other areas of our national life . . . ." New York Times Co., 403 U.S. at 727-28 (per curiam) (Stewart, J., concurring); see also, e.g., United States v. Nixon, 418 U.S. 683, 707 (1974) ("[T]he separate powers were not intended to operate with absolute independence."); THE FEDERALIST NO. 48 (James Madison) ("[U]nless these [legislative, executive, and judicial] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never in practice be duly maintained.").

\(^{256}\) Schmitt, supra note 9, at 183-84.

\(^{257}\) Id. at 176.

\(^{258}\) Id. at 178.

\(^{259}\) Id. at 176.
the courts should allow Congress to enlist their aid in demanding that the President provide to Congress any information it wants whenever it wants it. Such demands are potentially limitless. They are an instrument with which Congress could hound the everyday executive function, or bludgeon particular, delicate Presidential initiatives into oblivion. In the independent counsel context, however, it is doubtful that the Presidency would be seriously enervated by the inherently more limited number of occasions when courts could or would allow independent counsel to use national security information as evidence in criminal trials. Moreover, on such occasions, the President can adequately protect any particular covert initiatives with the pardon power.

Regarding the Executive’s role as a check against congressional oppression, a general executive privilege of the Nixon variety may well be an important tool for the President’s fulfillment of that function. Schmitt’s example of President Eisenhower’s expansive use of executive privilege in reaction to the Army-McCarthy hearings is well taken.260 Similarly, as a prosecution mechanism, independent counsel undoubtedly add an increment to Congress’s oppressive potential (though not an unconstitutional increment the Supreme Court has ruled).261 However, the ability of an independent counsel to seek the disclosure of information kept secret for reasons of national security does not itself contribute to this increment.

While some disclosure mechanisms can be instruments of oppression, it is difficult to envision how a disclosure mechanism directed only at putative state secrets could be (unless, perhaps, through a long and attenuated chain of causation). The Ethics Act did not authorize independent counsel specifically to seek the disclosure of citizens’ marital confidences, voting histories, or other private matters. It authorized independent counsel specifically to contest claims of privilege on grounds of national security. The only extra danger posed by this disclosure mechanism was to military preparedness and diplomatic relations. Conversely, a special, extra-strength state secrets privilege is not a check on tyranny, and adds nothing in this regard to a generic executive privilege. It does not seek to protect citizens’ religious beliefs, political associations, or other privacy or liberty interests. It seeks to protect covert military and diplomatic initiatives.

In addition, several damping mechanisms in the Ethics Act prevented independent counsel from becoming tools as directly manipulable by

260. Id. at 192 n.70.
Congress as are its inquiry and contempt powers. First, an independent counsel was in charge of a separate office which Congress had no legal authority to direct. Second, the Executive and Judicial branches had legal authority to direct aspects of an independent counsel’s office. A special judicial panel appointed the counsel and defined the scope of his or her prosecutorial jurisdiction.262 The decision whether to allow the independent counsel to disclose national security information would also have belonged to the Judiciary. The judicial panel only could have appointed an independent counsel in the first place if the attorney general requested it to do so.263 And, the attorney general could have removed an independent counsel for “good cause,”264 which, presumably, would have been judicially defined if the attorney general’s action were contested.

That Congress could not have directly manipulated an independent counsel does not eliminate the model of an independent counsel as a Frankenstein’s monster or self-directed doomsday device designed and set loose by Congress. To reiterate, though, the state secrets privilege is not a safeguard against the independent counsel’s oppressive prosecutorial potential, and adds nothing to the safeguards which already exist in that area. There is no reason to think that grand juries, juries, the Judiciary, the Bill of Rights, and the Executive’s pardon power would not protect citizens from overreaching independent prosecutors equally well whether the prosecutors could challenge executive security classifications or not.

V. CONCLUSION

Widespread dissatisfaction with the course of the prosecutions arising out of the Iran-Contra Affair has spawned a number of curative proposals. These range from dispensing with the independent counsel mechanism entirely265 to Harold Koh’s call for a wholesale restructuring of our military and foreign affairs apparatus through omnibus legislation.266 In between are three other proposals which specifically address the conflict that arises when the President and an independent counsel disagree on the proper use of classified evidence. Ronald Noble proposes the creation of another

263. Id. § 592 (expired).
264. Id. § 596(a)(1) (expired).
266. KOH, supra note 8.
inferior executive office called the “Independent Special Arbiter” (“ISA”).

The ISA would review disputes between independent counsel and the President over whether sensitive evidence should be made public, but the ISA’s opinions would be advisory only. Sandra Jordan proposes the development of procedures for criminal trials to be held in secret. Independent Counsel Walsh’s final report states:

Independent Counsel suggests that the attorney general implement standards that would permit independent review of a decision to block a prosecution of an officer within the Executive Branch and legitimate congressional oversight.

I suggest that we stay the course on which we only recently embarked. Scrapping independent counsel would likely be a regression to Teapot Domes and Saturday Night Massacres. Koh’s plan for wholesale reorganization seems precipitous, and, as he himself admits, politically impractical. As for the wrinkles Noble and Jordan propose adding to the independent counsel mechanism, one seems superfluous and the other, I fear, is exactly the kind of pernicious encroachment on civil liberty which Schmitt warns can result from a congressional overreaction to executive excess. It is unclear from the public volumes of Independent Counsel Walsh’s final report (a classified volume still has not been made public) whether he proposes that the Attorney General promulgate disclosure guidelines or create an actual mechanism for delegating the disclosure decision to another official. The latter proposal would be the stronger prescription, but it appears to have only slightly more bite than Nobel’s ISA proposal. Any voluntary delegation of authority by the Attorney General presumably could be revoked by the Attorney General.

No legal form can eliminate the uneasy tension between our legitimate needs for secrecy, security, and expediency on the one hand and our pursuit of democracy, accountability, and justice on the other. A good procedural design, however, should remove such delicate balancing decisions from the hands of excessively interested parties. The independent counsel provisions of the Ethics Act did just that, and they seemed a viable means of restoring public confidence in the rule of law. Stymied by congressional grants of

267. Noble, supra note 8, at 590-97.
270. Koh, supra note 8, at 185.
271. See supra text accompanying notes 256-60.
immunity and executive claims of security privilege, a number of Iran–Contra prosecutions floundered, precipitating suggestions that new bells and whistles be added to the Ethics Act.

Whatever independent counsel may have lacked under the previous legislative scheme, it was not statutory authority. The independent counsel provisions of the Ethics Act plainly empowered independent counsel to contest in court Presidential assertions of security privilege, and the provisions were easily harmonized with CIPA. Whether that statutory authority was constitutional, of course, is a closer question.

As Congress considers the bills which would reenact the independent counsel provisions of the Ethics Act, it should consider enumerating criteria of decision for judicial review of executive claims of state secrets privilege. This could improve the constitutional viability of that portion of the statute by narrowing one possible barrier to justiciability, the absence of “judicially discoverable and manageable criteria.” But even if the statute provides no rules of decision, this article has suggested, the judiciary can adequately fashion its own criteria. Congress also might want to require independent counsel to obtain the kind of relevance, admissibility, and inadequacy of substitution rulings that defendants must obtain under CIPA before independent counsel may challenge the propriety of executive security classifications pertaining to prosecution evidence. Such a requirement would flesh out the “if necessary” limitation on independent counsel’s contestation powers, and might provide an added safeguard against unripe or unnecessary challenges by independent counsel.272 Whether or not Congress adopts these proposals, judicial review of executive invocations of the state secrets privilege in the independent counsel context readily comports with existing state secrets jurisprudence and separation of powers doctrine. Most important, our experience of executive secrecy abuses in the twentieth century indicates that it would conduce to safer government.

272. See supra text accompanying notes 83-86; note 95 and accompanying text; notes 148-49 and accompanying text. Congress also might want to indicate that it disagrees with the interpretation of the word “withhold” in section 594(a)(6) of the Ethics Act suggested by United States v. Fernandez, 887 F.2d 465, 471 n.6 (4th Cir. 1989). See supra notes 86-90 and accompanying text.
Winterset and the Recrudescence of Ressentiment

Steven M. Richman*

TABLE OF CONTENTS

I. INTRODUCTION

II. WINTERSET—THE PLAY ITSELF

III. WINTERSET AND THE ABUSE OF LEGAL AUTHORITY

IV. WINTERSET IN THE CONTEXT OF OTHER ANDERSON PLAYS

V. WINTERSET AND BILLY BUDD, SAILOR COMPARED

VI. CONCLUSION

I. INTRODUCTION

Art instructs.

In his collection of essays, Punishment and Responsibility, Hart asserts that "[n]o one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making, or unmaking, laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable to do these things." Hart devotes much time and effort to rationalizing principles of criminal punishment, responsibility and retribution, so perhaps we should expect the time to be made. For those with the time, these concerns are occasionally addressed through less pedantic and more vicarious ways, such as drama, fiction or poetry.

This challenge to rationalize the impact of political and moral decisions with the daily practice of law and adjudication makes the study of literature a fruitful area for illuminating the discussion of punishment and retribution.

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in a legal context. As one commentator in the now-established "law and literature" field has noted, "[t]he virtue of literary stories about law is that they force us to grapple with the unique elements that often come to the fore when law acts on people."² The use of a "fictional world" to provide "a dramatic enactment" of normative claims has been attempted elsewhere.³ In this regard, Maxwell Anderson's 1935 verse play Winterset, taking its theme from the Sacco-Vanzetti case,⁴ is one of the more prominent examples of law in literature, and to use a phrase of Judge Richard Posner, provides a cynosure here for a discussion of "the literary indictment of legal injustice."⁵ Such an enactment of claims has provided fodder for a debate between Professor Richard Weisberg and Judge Richard Posner with regard to Billy Budd, Sailor and the role of literature in illustrating injustice. Winterset as a contemporary play should be considered along with Billy Budd, Sailor in its development of themes of revenge and "ressentiment"⁶ that have framed a significant portion of the law and literature debate.² It is a debate as to whether authority or reason will predominate.⁸ This article explores Winterset in the context of that debate, and as an example of the ressentiment in the form of rancor identified by Weisberg as underlying

⁸. Weisberg, supra note 2, at 1606.
Richman

Billy Budd, Sailor and its recurrence, like a bad sore, in this century in the context of Winterset and the Sacco-Vanzetti case. Before proceeding to a more specific discussion of the debate, a few words are in order about the play itself.

II. WINTerset—THE PLAY ITSELF

It is difficult to understand the absence of attention paid in law and literature discussions to Maxwell Anderson. Although not an attorney, several of his plays have jurisprudential themes and build around them. Anderson’s principal literary efforts occurred in the 1930’s; Winterset among them. His more significant plays include judges and trials in a variety of settings, such as Joan of Lorraine, dealing with Joan of Arc, and Second Overture, set during the Russian Revolution. An historical playwright and realist, Anderson deliberately used poetic verse to make an often harsh social reality transcend its time and place into a more universal and lasting commentary. He is no Homer or Aeschylus in ability; nonetheless, like them he was working with history, myth, and legend as well as dramatic tragedy, although in a modern setting in the case of Sacco and Vanzetti. Aware of this, he wrote “the playwright will also try to make that fable coincide with something in himself that he wants to put into words” and those words must be written for the time and place in which the older fable is, in essence, re-created.

Winterset appeared in 1935, several years after the execution of Nicola Sacco and Bartolomeo Vanzetti, two anarchists and alleged murderers, and

9. The most recent and comprehensive, if biased, biography of Anderson appears to be ALFRED S. SHIVERS, THE LIFE OF MAXWELL ANDERSON (1983) (while not particularly critically oriented, and often assuming a sometimes distracting familiarity with its subject, it serves as an introduction to Anderson). See also DRAMATIST IN AMERICA: LETTERS OF MAXWELL ANDERSON 3-25 (Laurence G. Avery ed. 1977) [hereinafter LETTERS]; MABEL DRISCOlL BAILEY, MAXWELL ANDERSON, THE PLAYWRIGHT AS PROPHET (1957); BARRETT H. CLARK, MAXWELL ANDERSON: THE MAN AND HIS PLAYS (1933); ALFRED S. SHIVERS, MAXWELL ANDERSON (1976) (a predecessor work). For source material relating to Anderson, see A CATALOGUE OF THE MAXWELL ANDERSON COLLECTION AT THE UNIVERSITY OF TEXAS (1968); ALFRED S. SHIVERS, MAXWELL ANDERSON: AN ANNOTATED BIBLIOGRAPHY OF PRIMARY AND SECONDARY WORKS (1985) [hereinafter SHIVERS, BIBLIOGRAPHY].

earned Anderson a Pulitzer Prize.11 Anderson had previously utilized the Sacco-Vanzetti case as the subject of a co-authored play, Gods of the Lightning, which appeared in 1928.12

The historical facts of the Sacco-Vanzetti case involve the murder of a paymaster in Braintree, Massachusetts. It occurred during a time of intense nationalistic and xenophobic feeling that found some expression in the arrest of two Italian-American anarchists, Sacco and Vanzetti. Although convicted, the two defendants aroused intense sympathy among the intellectual and civil rights community.

Winterset revolves around its three protagonists seeking revenge or vindication, and each is mad in his own way. Judge Gaunt, the presiding judge at the Romagna trial in Winterset and putatively based upon Judge Webster Thayer, the actual trial judge in Sacco and Vanzetti’s trial,13 roams the streets of New York, dislocated and obsessed, like the Ancient Mariner, with his self-justifying tale. Trock Estrella, the “actual” gunman in the context of the play who committed the murder for which the wrongly accused man was executed, has six months to live and is seeking to silence those who may give away his guilt. He may be compared to one of the gang members who was actually involved in the real case. Mio Romagna, son of the Vanzetti-styled innocent Bartolomeo Romagna,14 is also

11. Others have found inspiration in the Sacco-Vanzetti affair. See, e.g., EDNA ST. VINCENT MILLAY, Justice Denied in Massachusetts, in COLLECTED POEMS 230, 231 (Norma Millay ed., 1956) (“We shall die in darkness, and be buried in the rain.”); JOHN DOS PASSOS, THE BIG MONEY 520-21 (1979) (“they have clubbed us off the streets they are stronger they are rich they hire and fire the politicians the news papereditors the old judges the small men with reputations... the immigrants haters of oppression lie quiet in black suits in the little undertaking parlor in the North End”) (spacing in original). A comprehensive review of the Sacco-Vanzetti trial in literature is found in G. LOUIS JOUGHIN & EDMUND M. MORGAN, THE LEGACY OF SACCO & VANZETTI 375-454 (1948).

12. JOUGHIN & MORGAN, supra note 11, at 402.

13. The inspiration for the play came from a lawyer friend and college classmate, attorney Robert H. Montgomery, who Anderson said told him that the trial judge, Webster Thayer, “really deserves your sympathy.” LETTERS, supra note 9, at 313 (quoted in an interview with Anderson conducted by Louis M. Starr and transcribed as “Anderson memoir”). Montgomery authored his own version of the case, which is found in ROBERT H. MONTGOMERY, SACCO-VANZETTI: THE MURDER AND THE MYTH (The Americanist Library ed., Western Islands 1965) (1960). Shivers disputes the notion that the idea came from KING LEAR, apparently suggested in some quarters. SHIVERS, BIBLIOGRAPHY, supra note 9, at 147-48. Anderson himself claims not to remember much about the writing of Winterset. LETTERS, supra note 9, at 313.

14. See JOUGHIN & MORGAN, supra note 11, at 418. In actuality, Sacco had a son but Vanzetti did not, although some have suggested that what is said about Romagna render him consistent with the persona of Vanzetti. See id.
obsessed with the case and seeks vengeance upon those who would continue to slander his father.

There was another part-time member of the gang, a driver named Garth Esdras, who knew the truth but was never called as a witness at trial. This is consistent with the actual case, as there was a witness whose testimony was never taken. In reality, the “new evidence” was a confession from a convict named Madeiros and was the subject of a motion before Judge Thayer; however, the motion was denied and the conviction upheld by the Supreme Court of Massachusetts.

Briefly summarized, in Act One, Trock Estrella, a small-time hoodlum, has been released from prison. Garth Esdras becomes the witness that was not called and the time frame is altered, since the execution of Romagna in the play occurred eleven years prior to the action. As in the framework for a revenge play, the actions precipitating the revenge have occurred elsewhere and previously, and only alluded to in the “present” of the play. Estrella is looking for Garth as a result of a Professor Hobhouse (presumably, based upon Felix Frankfurter’s work) stirring up new evidence. Estrella has been given no more than six months to live by his doctor and plans his revenge upon the world with impunity. He is accompanied by his subordinate, Shadow. With little imagination, we can add “of doubt.”

Nearby, Garth Esdras wrestles with his conscience. He has received a letter from a lawyer telling him “[d]on’t get me wrong, but stay in out of the rain the next few days, just for instance.” He knows Romagna was not guilty, but he never came forward with his evidence.

Estrella comes to Garth’s house to find out what he may have told others in light of the new investigation and the mention of Garth’s name in “the professor’s pamphlet.” Estrella claims that the trial judge, Judge Gaunt, has “gone off his nut. He’s got that damn trial on his mind, and been going

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16. See Weisberg, supra note 2.
17. See FRANKFURTER, supra note 15.
18. MAXWELL ANDERSON, WINTerset act 1, sc. 2.
19. One wonders who the lawyer was who wrote it. Was it Garth’s? Was it Romagna’s lawyer trying to warn Garth? If so, should he not have come forward with the information? Could it have been Estrella’s lawyer and, if so, had he breached a confidence? While the professional ethics issues are of more than a passing interest to the lawyer, it should be noted that “A Lawyer Should Preserve the Confidences and Secrets of a Client.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981).
round proving to everybody he was right all the time and the radicals were guilty . . . "20

In the final scene of the first act, Judge Gaunt makes his way to Garth's house, where Garth shelters him. By his own admission, he is a man on an errand. While the judge retreats to the shadows, Mio Romagna, son of the wrongly executed man, comes to the same place searching for evidence of his father's innocence. Eleven years have passed since that time, but the "same old business" consumes him. He meets Miriamne briefly. He is part of a lost generation, cut off:

When the State executes your father, and your mother dies of grief, and you know damn well he was innocent, and the authorities of your home town politely inform you they'd consider it a favor if you lived somewhere else—that cuts you off from the world—with a meat-ax.21

Mio Romagna, also aware of the professor's research, has come for his own vengeance. He tells Miriamne that "all roads are mine that might revenge" his father.22 In the hidden recesses of the surrealistic set (with detail, however, still vague and unsettling), Estrella and Shadow exchange threats as Shadow fears that Estrella's plans to kill witnesses and the judge may incriminate him. Almost immediately afterward, as they part, Estrella’s men ambush and shoot Shadow.

In Act Two, Judge Gaunt comes to the Garth house, introduces himself, and feels compelled to recite his version of the case and justify his actions in light of Professor Hobhouse’s recent published account. Mio returns and asks Garth about the crime. He recognizes Judge Gaunt and they debate the fairness of the trial. Trock finds the house. He wants to "remove" the judge and ascertain what Garth has said. Shadow, who still lives, comes in and threatens Trock at gunpoint, but then collapses. Mio takes the gun and keeps Trock at bay as Gaunt attempts to call the "court" to order. As in the paradigm of revenge tragedy, Winterset has its own play within a play; in this case the play being the mock trial at gunpoint in the Esdras house. Mio accuses Trock of the murder; Trock claims it was Shadow. Again, Judge Gaunt recites the justifications for the result and the manner in which the legal system operated. They are interrupted by the police, who have been looking for the judge. They take Gaunt away, after failing to find Shadow’s body at Mio’s urging. Trock simply walks out, leaving Miriamne, Esdras

20. MAXWELL ANDERSON, WINTerset act 1, sc. 2.
21. Id. act 1, sc. 3.
22. Id.
and Garth behind. Mio pursues Trock Estrella into the rainy night.

In Act Three, the star-crossed lovers Mio and Miriamne are ambushed and killed by Trock and his men. Mio's own indecision, or change of heart, lead to his own end. The play ends with Esdras lamenting the "masterless night."

III. **Winterset and the Abuse of Legal Authority**

We can now frame the parameters of the discussion by placing *Winterset* within the viewpoints generally set forth by both Posner and Weisberg by beginning with the former. *Winterset* is a striking example of Posner's "revenge literature," because the revenge at issue occurs against a backdrop of a fairly well-developed and sophisticated criminal justice system. Anderson, as a student, was familiar with Elizabethan drama and therefore the vehicle of revenge as exemplified in that period's works. Anderson hypothesizes the legal system itself as a form of legitimized societal revenge, as opposed to law itself being a replacement by a more rational means of dispute resolution and criminal retribution, and his sympathies appear mixed. Even if mistakes are made, they must be legitimized because the political ramifications of such mistakes would be worse than the legal miscarriage itself. Despite the existence of that order, tragedy still results; an innocent man has been executed. It was not the result of a lone judge exercising discretion. In the play as well as in the real case, reference is made to the imprimatur the Supreme Court of Massachusetts gives to the judge's rulings. Therefore, *Winterset* stands for the proposition that a developed legal system may be seriously flawed and does not necessarily replace revenge as an appropriate mechanism in all cases. In other words, a legal system—its configuration and viability—is

25. Anderson was no stranger to direct involvement in the court system. An individual named Francis Hackett sued Anderson for plagiarism in Anderson's play *Anne of the Thousand Days*. Anderson, represented by John Wharton of Paul Weiss Wharton & Garrison, counterclaimed for libel. *Letters, supra* note 9, at 238. The suit was settled approximately a year after it began. *Id.* at 240. Anderson was also sued by a typist секретary named Orrie Lashin, who claimed Anderson plagiarized her work; that case settled as well. *Id.* at 239.
26. At least one source has called Thayer inconsequential, and attempted to focus more blame and attention upon the appellate judges who upheld his evidentiary and motions rulings. *Joughin & Morgan, supra* note 11, at 509.
only a function of public tolerance, a type of "rule of recognition" that might find favor with some positivist thinkers as discussed below.

In his discussion on revenge literature, Posner suggests that vengeance is an inefficient means of legal control that evolved from private to public enforcement of law. 27 He notes, however, that instead of eliminating revenge, law "channels" it and "replaces it as system but not as feeling." 28 It is that persistence of feeling which causes law, in Posner's view, to create the conditions so that the revenge "will not endanger social order." 29 To the extent that Posner considers law a foolproof replacement for revenge, that is disputed. In his own contribution to the law and literature field, Gewirtz has argued, for example, that Oresteia, by Aeschylus, is an early example of revenge literature demonstrating that law and legal process cannot be made, nor should be made, wholly rational. 30 This tension between primal instincts towards revenge and the attempt of a legal system to harness and redirect such instincts in an acceptable fashion is at the core of Winterset. Stated differently, if Posner is correct that a legal system is the natural evolution to a more controlled method of channelling revenge, then such a position will have to accommodate the observable phenomenon of misuse of that legal system or, more accurately, a specific use of the legal system to exact a political purpose, such as revenge, upon certain segments of society.

We therefore return to the question initially posed, what Winterset can demonstrate with regard to Posner's argument on the one hand that a legal system replaces revenge, and Weisberg's on the other that a legal system can provide the opportunity for misuse of authority in the guise of judicial correctness, otherwise denominated ressentiment. It is the play's combined plotline of three separate characters set on three separate courses of revenge, critical to Posner's themes, 31 that gives the play part of its interest from a jurisprudential perspective in terms of Posner's parameters and those challenged by his anti-authoritarian critics, and must be considered part and parcel of the discussion of ressentiment and authority.

The current focus of those utilizing literature for legal purposes is, at its core, the abuse of law and its language by those professing to uphold the law. At its most basic, this appears to be the focal point for the debate

27. POSNER, supra note 5, at 32.
28. Id. at 33.
29. Id.
31. POSNER, supra note 5, at 25-70. Judge Posner argues for a category of literature entitled "revenge literature," with more focus on revenge as a legal theme. Id. at 69.
between Weisberg and Posner. Weisberg may be generally read as suggesting that literature involving legal themes sheds light upon ethical questions or, more particularly, as arguing that literature demonstrates the dangers of legal formalism and the destructive ramifications of that. Posner, on the other hand, argues extensively through *Law and Literature* that such a use of literature is itself a destructive type of formalism because it becomes too literal, and that literary use of law is no more than a metaphoric use of law as symbolic of fate, or adversity.

For example, although Posner insists on considering *Hamlet* a revenge play, Weisberg finds Hamlet himself a prototype of ressentiment. Weisberg, discussing ressentiment as a persistent rancor, argues that through narrative, through a "legalistic proclivity," protagonists in fiction have acted in legal capacities to legitimize otherwise unjust results within the framework of a legal system. He posits, through a variety of literary texts, the notion that ressentiment is antithetical to the concept of justice, and that an authoritarian figure can utilize the language, or mock language, of law to achieve political ends. This concept is approached from a different angle by Professor James Boyd White, who argues that law is in reality an exercise in rhetoric, in community, and should be seen as having social, as opposed to purely positivist, implications.

The scheme of ressentiment is "a series of creative verbalizers [who] organize criminal proceedings against a nonverbal defendant whose moral systems differs from their own." The effort is deemed "considerate" communication, since the communicator seems at heart to believe in the necessity of politeness and of giving due deference to form and process.

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34. *Posner*, supra note 5, at 54-70.

35. Richard H. Weisberg, *More Words on The Failure of the Word: A Response to Heinzelman and Levinson*, 7 Cardozo L. Rev. 473, 480-81 (1986); see generally *Posner*, supra note 5, at 64 n.34.


38. *Weisberg*, supra note 6, at 133-34.

39. *Id.* at 139.
Weisberg states his theme as culminating in Herman Melville's *Billy Budd, Sailor* as finding ressentiment prevailing, that such "verbal formalism and reactive hatred are the principal legacy of the old value system."\(^{40}\) One could also view this embodiment of ressentiment as the prevailing authority to justify status quo, regardless of the actual law or a sense of justice. Given Weisberg's approach to certain literary works from the standpoint of whether they exemplify the workings of a ressentiment as he has argued, this approach finds fertile terrain in *Winterset*, where the analogy to *Billy Budd* and Captain Vere are present in the verbalization and fictionalization of the judge in the *Sacco-Vanzetti* case.

Posner is dismissive of these types of arguments to the extent that he suggests they read too much into the literary works they discuss, although applauding the thoughtfulness about legal issues they engender.\(^{41}\) In direct counterpoint to Weisberg's discussion of *Billy Budd, Sailor*, for example, Posner finds a sympathetic figure in the form of the officer who tries Budd, Captain Vere, performing in a fully consonant manner with the spirit and letter of the law.\(^{42}\) In *Billy Budd*, a young sailor, Billy Budd, was framed for mutiny by the ship's petty officer, Claggart. In the presence of Captain Vere, Budd was unable to respond to the allegation because of his speech impediment. Vere interpreted this as Budd needed more time. Vere put his arm around Budd, at which point Budd's arm shot out and hit Claggart, killing him. Vere convened a drumhead court and after hearing the case, convicted Budd and sentenced him to be hanged. Whereas Weisberg has devoted considerable effort to questioning the legal premises underlying Vere's action and presenting him as a prototype of ressentiment,\(^{43}\) Posner has objected to this reading in a defense of Vere and authority.\(^{44}\)

Posner would argue that *Winterset* and its legalistic themes are merely metaphors for something else, that is, it is not a play about procedure or due process, but uses those features to build a classic story dealing with classic themes of envy, revenge and love. He would emphasize mitigating factors in support of Judge Gaunt's actions as he did in his defense of Captain Vere.

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\(^{40}\) *Id.* at xiv.

\(^{41}\) *Posner,* *supra* note 5, at 174-75.

\(^{42}\) *Id.* at 164.


\(^{44}\) *Posner,* *supra* note 5, at 155-65; see also Richard A. Posner, *From Billy Budd to Buchenwald—The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*, 96 *Yale L.J.* 1173 (1987)
and find numerous examples within the play of Gaunt's own statements. In
the case of Sacco and Vanzetti, for example, there was a jury.45 Although
there is evidence that one juror was tainted and malicious, the remaining
eleven jurymen were considered impartial.46 Posner would presumably
find Judge Gaunt vindicated to a large extent by the fact that he was not the
ultimate fact-finder and, equally significant, he was sustained on appeal.

Weisberg's textual approach would serve well, however, in bringing
Winterset back within the fold of a work about ressentiment. Gaunt uses
poetic language, highly formalistic language, which is the essence of the
authority figures who are embodiments of ressentiment. Such language is
used to rationalize the acts that are causing the defensiveness in the first
place. It is most arresting to note the dramatic and fictional, if hauntingly
accurate, commentary of Winterset's Judge Gaunt in attempting to justify his
conduct at the trial:

Suppose it known,
but there are things a judge must not believe
though they should head and fester underneath
and press in on his brain. Justice once rendered
in a clear burst of anger, righteously,
upon a very common laborer,
confessed an anarchist, the verdict found
and in the precise machinery of law
invoked to know him guilty—think what furor
would rock the state if the court then flatly said;
all this was lies—must be reversed? It's better,
as any judge can tell you, in such cases,
holding the common good to be worth more
than small injustice, to let the record stand,
let one man die. For justice, in the main,
is governed by opinion...47

This is an expression of an analogous type of rationale that Weisberg
argues is employed by Captain Vere in his judgment and sentencing of Billy
Budd in terms of its reference to social and political expediency of the day.

45. See JOUHIN & MORGAN, supra note 11, at 201-20 for a general discussion of the
jury.
46. Id. at 203. Notwithstanding this, Joughin and Morgan still consider the verdict
tainted and the result of an overriding fear of anarchy; as they note, "[a] sick society makes
sick decisions." Id. at 205.
47. MAXWELL ANDERSON, WINTERSET act 2.
It is precisely the situation described by Weisberg when he notes that in *The Brothers Karamazov* and *Billy Budd, Sailor* "the now fully developed verbal character uses the language of the law to control a less articulate, more popular, and basically well-adjusted criminal defendant."\(^{48}\)

That this is so is supported by the comments of the non-lawyers in the play. For example, these views are consistent with those held by Garth Esdras himself. As Garth explains to his sister, "everybody knew Romagna wasn’t guilty! But they weren’t listening to evidence in his favor. They didn’t want it. They don’t want it now."\(^{49}\) Presumably, "they" refers to the jury that convicted Romagna. As to why he wasn’t called, he says "[s]o far as I know they never’d heard of me—and I can assure you I knew nothing about it." Early in the play there is the notion planted of law as the avenger; the paymaster was murdered, an Italian scapegoat was available, and justice would be done in accordance with what is convenient for the State as opposed to the individual. For example, Romagna’s friend, Carr, tells him "[t]he State can’t afford to admit it was wrong, you see. Not when there’s been that much of a row kicked up over it. So for all practical purposes the State was right and your father robbed the pay roll."\(^{50}\) To which Mio Romagna replies, "[t]here’s still such a thing as evidence."\(^{51}\)

Part of the backdrop of this discussion of Judge Gaunt’s literary exposition and its comparison with the actual Judge Thayer, as well as Captain Vere in *Billy Budd*, are the basic tenets of positivism. Although not discussed by either Posner or Weisberg in their argument over the interpretation of Vere’s actions in *Billy Budd*, the literary argument over ressentiment, authority and use of language and theme can also be viewed against a

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48. *Weisberg*, *supra* note 6, at xii.
49. *Maxwell Anderson*, *Winterset* act 1, sc. 2.
50. One recent commentator on American legal history sees the case as nothing more than this. See *Charles Rembar*, *The Law of the Land: The Evolution of Our Legal System* 368 (1980).
51. *Maxwell Anderson*, *Winterset* act 1, sc. 3.
52. *Id.* To which Carr states:

It’s something you can buy. In fact, at the moment I don’t think of anything you can’t buy, including life, honor, virtue, glory, public office, conjugal affection and all kinds of justice, from the traffic court to the immortal nine. Go out and make yourself a pot of money and you can buy all the justice you want. Convictions obtained, convictions averted. Lowest rates in years.

*Id.*

Mio Romagna’s reply sets the tone for the play; he is out for vengeance, to “go back, and hang the carrion around their necks that made it!” He will “find out who did it and make them see it till it scalds their eyes and make them admit it till their tongues are blistered with saying how black they lied!” *Id.*
jurisprudential setting. In other words, it is not only a question of whether
Judge Gaunt in Winterset is operating with rancor and misusing language,
but even conceding that, the issue is also whether he is operating within the
bounds of acceptable behavior as an example of a type of jurisprudential
philosophy. In this regard, having begun this essay with a quote from Hart,
it is possible to shift the focus of the discussion slightly to view Judge
Gaunt as a literary exposition of a judge acting in accordance with positivist
principles.

Hart noted, for example, in Punishment and Responsibility, that
obedience to law exists "because it offers a guarantee that the antisocial
minority who would not otherwise obey will be coerced into obedience by
fear." Therefore, in order to have a legitimate legal system, the only
"minimum conditions" are

rules of behavior which are valid according to the system's ultimate
criteria of validity must be generally obeyed, and, on the other hand, its
rules of recognition specifying the criteria of legal validity and its rules
of change and adjudication must be effectively accepted as common
public standards of official behavior by its officials. 54

Indeed, Hart has argued that a legal system may claim authority even though
its citizens may challenge its moral legitimacy, provided that there is
continued acceptance of the law based upon the actions of officials and their
criticisms of officials who deviate from the accepted law. 55 Morality is
irrelevant provided that acceptance of a rule of recognition, which itself
defines how other rules are determined, exists.

In this regard, then, a positivist would find the legal system discussed
in Winterset an effective one, particularly since there is acceptance of moral
aberrations by those subject to the particular legal system who are, in
essence, all of those who are not judges. 56 Deviations from the rule are
met by coercion; the fictional Judge Gaunt as well as the actual Judge
Thayer both find support in the affirmance by the Supreme Court of
Massachusetts. This is significant because the real judge, like the fictional
judge, was upheld in his exercise of discretion in rulings on various points,
particularly regarding the scope of cross-examination. 57 This is also

53. HART, supra note 1, at 50.
55. For a recent criticism of Hart's positivism as ultimately self-serving, see David
56. HART, supra note 1, at 50.
57. See Weisberg, supra note 2.
meaningful in analyzing this work of literature and its portrayal of a judge seemingly steeped in positivism and using that positivism as a basis for acting, as Weisberg would have it, with rancor. In other words, this was not the work of a single judge, but of a system that sustained that judge’s rulings on appeal. Winterset, then, through its portrayal of a real judge through a fictitious judge that nonetheless speaks against a legitimate jurisprudential background, demonstrates the arguments for and against that jurisprudence by vivid example in a way that the more academically oriented essay could not. Language becomes critical, whether in the hands of a playwright or judge. In Winterset, poetic language emphasizes the philosophy being set forth. 58

Judge Gaunt espouses a primitively worded rule of recognition concept, which Garth Esdras seems to confirm, that finds its source in the historical record of the real trial. In reality, during much of 1924, Arthur D. Hill, a Boston attorney then representing Sacco and Vanzetti, had a variety of conversations with Judge Thayer in which he later recalled that Judge Thayer expressed himself “about the danger of our institutions from foreigners and radicals, and the importance of respect for the law and of a firm hand in the administration of justice.” 59 It is the use of literature in its mirror of reality that renders such works directly relevant in viewing the “real world” impact of legal decisions. To the extent that Posner argues that literature is really not useful in this regard, such a view ignores the use to which other critics put legal themes in literature. For example, the words of Judge Gaunt in Winterset provide justifications that the reader will assume are similar to those in the “real life” practice of law. These are precisely the types of justifications that West attacks, through her use of

58. Poet and dramatist T.S. Eliot has noted that language “will only be ‘poetry’ when the dramatic situation has reached such a point of intensity that poetry becomes the natural utterance, because then it is the only language in which the emotions can be expressed at all.” T.S. ELIOT, Poetry and Drama, in ON POETRY AND POETS 75, 78 (1957). The critical view of the poetry utilized by Anderson, however, is far from unanimous. For example, see POETIC DRAMA 40 (Alfred Kreymborg ed. 1941) (calling Anderson’s plays “devoid of real poetry and the prose more poetic than the verse. . . . The public swallowed the verse because of the exciting action and not because they were listening to the march of poetic drama.”). Kreymborg called Winterset “a melodrama dressed up in picturesque verse.” Id; see also Walter J. Meserve, The Dramatist and their Plays, in 8 THE REVELS HISTORY OF DRAMA IN ENGLISH 147, 260 (1977) (Anderson “approached the probing concern for modern man that distinguishes the best dramatists, but he was usually hampered by an inability to achieve the kind of poetry and the well-structured play that would show the theatre to be that cathedral of the spirit in which he believed.”).

59. MONTGOMERY, supra note 13, at 272 (quoting Arthur Hill) (emphasis added).
Kafka, as prevalent in Posner. West argues, for example, that Posner’s central claim that the state of affairs resulting from an expressly commercial transaction is a moral one, is belied by the representation of such market transactions in Kafka’s works. Similarly, then, Winterset can be discussed critically and used to criticize jurisprudential viewpoints.

The statements from Judge Thayer are reality, and provides proof of the dangers of the type of legal ressentiment discussed by Weisberg, and a contemporary snapshot of the awful dangers of wrongful persuasion identified by White in his discussion of Philoctetes, in which Odysseus manipulates Neoptolemus to persuade Philoctetes to give up his bow. It is the veneer of authority that colors law and its proper function; it is literature that provides the focus through its use of heightened language to make the point. Having said this, we can return to the original question posed, namely, whether Winterset is a contemporary Billy Budd and, in that regard, whether it represents a form of legal ressentiment, or rancor, such as described by Weisberg and objected to by Posner.

IV. WINTerset IN THE CONTEXT OF OTHER ANDERSON PLAYS

It is a theme of this essay that Winterset, in exemplifying Hart’s legal positivism, helps focus the Weisberg-Posner debate over whether literature can really provide such a forum in the first place. Even if one were to find the Sacco-Vanzetti rulings aberrational, as did the contemporaneous academic community, Judge Gaunt’s justification, such as it is, finds a comfortable place within Hart’s discussion of finality and infallibility in judicial decisions. These legal and procedural errors find analog in the discussions of Billy Budd, Sailor, particularly in terms of Captain Vere’s effort to legitimize his result within the veneer of process. Despite the outcry of the intellectual and artistic community, Sacco and Vanzetti were executed, and the Massachusetts judiciary was not ousted. Morality does not enter into the discussion. Judge Gaunt appears more introspective by what


61. Id. at 391.

62. WHITE, supra note 37, at 3-27.

63. Comment, Cross-Examination to Impeach, 36 YALE L.J. 384 (1927).

64. HART, supra note 1, at 138-44.

65. See WEISBERG, supra note 6, at 147-59; see also Weisberg Judges, supra note 43, at 1.
he has done than Judge Thayer in the "mock" trial of the play.\textsuperscript{66} In this regard as well, he is like the fictional Captain Vere who chooses his "duty" over his own humanistic feelings, having already pre-defined that duty in accordance with prevailing political standards.\textsuperscript{67} In further support for a reading of \textit{Winterset} as a play about legal authority, similar themes may be found in other verse plays by Anderson. Again, this "rule of recognition" that Hart has defined is utilized by "resentful" authority figures—in these cases, judges—who utilize their position to justify otherwise legally indefensible positions. It is the literary exposition of these protagonists, and their abbreviated, poetic dialogue, that drives home the point.

Anderson develops this theme of legal authority relying, in essence, upon policy arguments to justify the results, in two other poetic works, \textit{Joan of Lorraine} and \textit{Second Overture}. In \textit{Joan of Lorraine}, Peter Cauchon, Bishop of Beauvais, was the chief judge in the inquiry of Joan of Arc by the faculty of the University of Paris.\textsuperscript{68} Joan had been captured by troops loyal to the Duke of Burgundy, who with the English opposed Charles VII's ascension to the throne of France. The English, under the Duke of Bedford, bargained for her custody and placed her on trial to undo political damage. Putting her to death would ensure her martyrdom, and it therefore was necessary to the English to defuse the situation and establish an independent ground for finding Joan guilty. Here, as in \textit{Winterset}, extrinsic political considerations are part of a legal order, accepted by the judges. Cauchon explains and gives insight into the role of a trial not as fact-finding exercise, but as a political expedient:

First, I believe that many who have sat with us misunderstood the character of this trial... We sit as an ecclesiastical court to examine in a case of alleged heresy, blasphemy and sorcery. But if that were our only business we should have concluded the matter long ago. It is obvious that Joan the Maid is guilty on all three counts. She has freely admitted enough heretical beliefs and actions to burn all the virgins in

\textsuperscript{66} Judge Thayer, apart from the illness, was not a perfect match, temperament-wise, for Judge Gaunt. \textit{Joughin & Morgan, supra} note 11, at 418.

\textsuperscript{67} One might make a comparison with the so-called Rodney King trials, where the reverse situation occurred: The prevailing political climate disapproved of the jury acquittal after full process, whereas in the \textit{Sacco-Vanzetti} case, there was a conviction but only intellectual outcry.

Europe. In my mind she is condemned and the trial is over. And yet we must go on with it. And we must be more skillful and resourceful than we have been so far or we shall be beaten.69

In Joan of Lorraine, one of the inquisitors expresses his doubt as to the guilt itself, prior to the trial, stating “I shall not allow any temporal influence, whether French, English or Burgundian, to touch my judgment.”70 Cauchon responds in language that recalls Judge Gaunt’s own philosophical underpinnings:

Why, sir, I would not myself judge a case in opposition to my belief. But when it happens, as it happens now, that the just thing is the politic thing—when it happens that the laws of the church require of us the same verdict which is demanded of us by the heads of the state—is there any reason why we should not render that verdict?71

As in Winterset, Anderson here portrays a judge who looks to politics and the politics that the general populace will accept as legitimate in determining the lengths to which he may go in deciding a legal issue.

Similarly, in Second Overture, a verse play in one act, set in January, 1918 in a small town near Moscow, the same “rule of recognition” operates to justify analogous results.72 A group of refugee-prisoners are awaiting a decision on their future. The commissar who speaks for the new government advises that “[w]e have neither time nor use for legalistic forms.”73 In his exchange with his former colleague Gregor, the same conflict raised with Judge Gaunt and Bishop Cauchon arises. Commissar Charash declares all the prisoners guilty of crimes of counter-revolutionary activities and sympathy, except his former colleague and now prisoner Gregor. Charash, convinced of his moral basis, states:

I shall not lose my faith. 
But we shall win, and after we have won
There will be time for justice. The task now
Is a cleansing of the empire of the filth
Of a thousand years. I have no more time
And this is a fruitless argument. Come with me.

69. MAXWELL ANDERSON, JOAN OF LORRAINE act 2, sc. 5.
70. Id.
71. Id.
72. See MAXWELL ANDERSON, SECOND OVERTURE act 1.
73. Id.
I have my orders and my own convictions.
You will not change them.\footnote{Id.}

Anderson has taken ressentiment to its outermost extreme. Charash has his "orders" and they are legitimized, much as Vere's and Gaunt's "orders" have come from somewhere else, namely, the world of the political. It is the poetic language that also reinforces the veneer of authority.

\section*{V. \textit{Winterset} and \textit{Billy Budd, Sailor} Compared}

This essay began with the proposition that literature does have something to say about law, and that \textit{Winterset} and some of Anderson's other plays have been too long ignored in these discussions. It cannot be assumed that Anderson would have intended these plays as celebrations of authority, as discussed. That is likely how Posner would read them consistent with his themes in \textit{Law and Literature} and his critic's interpretations of those themes.\footnote{See \textit{POSNER}, supra note 5.} Indeed, Posner criticizes Weisberg for presenting "prosecutors as villains and criminals as heroes."\footnote{Id. at 137.} Posner specifically notes the textual absence in \textit{Billy Budd, Sailor} of any suggestion of illegality in the court-martial and execution of Billy Budd.\footnote{Id. at 157.} Posner finds legitimation of Captain Vere within the system; there is a parallel to Judge Gaunt's real-life model, Judge Thayer, in that his rulings were sustained on appeal.\footnote{See \textit{Weisberg}, supra note 2.}

One of the critical features of the Posner-Weisberg debate over \textit{Billy Budd} in particular is the exposition of authority figures in literature in general. In this regard, Posner has attempted to categorize two distinct theories of law that flow roughly along positivist and natural law lines. The analysis, which Posner used to discuss issues in \textit{The Merchant of Venice} that are not dissimilar to those raised in both \textit{Billy Budd} and \textit{Winterset}, contrasts a vision of law as a more objective, dispassionate, rule-oriented system, with a vision of law as a more personal, subjective, flexible and equitable notion.\footnote{POSNER, supra note 5, at 107-08.} Utilizing this framework that he finds applicable to various works of literature relating legal themes, Posner argues against the one-sided portrayal of Vere that he finds in Weisberg's analysis, and puts forwards

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See \textit{POSNER}, supra note 5.
\item Id. at 137.
\item Id. at 157.
\item See \textit{Weisberg}, supra note 2.
\item POSNER, supra note 5, at 107-08.
\end{enumerate}
\end{footnotesize}
Vere as embodying a duality of both columns. He does this by finding justification for Vere's actions in the legal system in which he operates, and renders him sympathetic because of the arguable emotion and regret Posner finds in the text. One could also argue, in such a vein, that there is a similar duality in Judge Gaunt in *Winterset* as a result of his rationalization. In many respects, Judge Gaunt seems the literary apologist for positivist jurisprudence, a judge insistent on removing morality from his consideration. He views his role as piercing through the cunning of defense attorneys, to make sure the "proofs" he held "in his hands" were found by the jury. Of interest in this regard are Gaunt's comments describing his function as the ideal judge:

\[
\begin{align*}
\text{Certain laws} \\
\text{seem cruel in their operation; it's necessary} \\
\text{that we be cruel to uphold them. This cruelty} \\
\text{is kindness to those I serve.}
\end{align*}
\]

One might recall Captain Vere's remark upon the fatal blow struck by Billy Budd which killed the ship's officer Claggart, a blow that was clearly an accident: "Struck dead by an angel of God! *Yet the angel must hang!*" The cruelty of the result is a kindness; angels who kill must hang. Gaunt like Vere is therefore a judge who rules out moral and historical considerations, and even this extreme view of his retributive function might still find a place within Hart. Similarly apt comparison could be made to the speech of Captain Vere in which he defends loyalty to the king even at the expense of loyalty to natural law or one's feelings; "let not warm hearts betray heads that should be cool." Gaunt does not say whom it is that he services because Gaunt the man is only Gaunt the judge. The question is raised as to whether he can function as a human being, or if as judge he must be guided by different standards. Ironically, when he is not deciding a case but rather advising the police officer in the play how to deal with hobos, Gaunt cites the First Amendment and urges gentleness. On the other hand, when functioning as judge, he will not question the intent behind the laws.

80. *Id.* at 165.
81. MAXWELL ANDERSON, *WINTERTSET* act 2.
82. *Id.* (emphasis added).
83. HART, *supra* note 1, at 235-37.
85. *See* MAXWELL ANDERSON, *WINTERTSET* act 1, sc. 2.
The manner in which Anderson portrays Gaunt and his other authority figures allows for sympathetic interpretation. As noted, Anderson was moved by his friend's sympathy towards Judge Thayer, even though most observers of the play would be offended by the result in light of the truth that was revealed in *Winterset* as to the innocence of Romagna. In viewing Gaunt's pronouncements, Posner would be struck by their sincerity, as he was by those of Captain Vere. They are the statements of a conscience-driven man, justifying his actions in law, not from a sense of justice or politics. The fictional Gaunt has "scanned and verified and compared the transcripts of the trial," and yet came to a result that not only in the light of his fictional history, but even of the contemporary analysis of the Hobhouse equivalent of Frankfurter, was wrong. The real Judge Thayer, after listening to the lengthy final speech of Vanzetti prior to pronouncing the death sentence, took refuge in the jury verdict, claiming the judge had no role whatsoever, and that he had been vindicated by the Supreme Court of Massachusetts in that court's review of the numerous exceptions taken. Gaunt is convinced of the rightness of his decision, yet states "even I am not free of regret—even I." He lacks "the homing instinct." Interestingly, these remarks may be contrasted with the persona displayed by the actual Judge Thayer because, according to Montgomery, as noted above, it was the depression or madness of Judge Thayer that led to the inspiration of the play.

Posner finds sympathy with similar comments made by Captain Vere in *Billy Budd*. As with Vere, much of Gaunt's justification for his actions results from a sense of "Rule of Law," that is, of the necessity to have enforcement and toleration of authority, despite harsh results, for the public good and for the maintenance of order. One imagines that Gaunt, like Vere, was acting against a backdrop of mutiny: Sacco and Vanzetti were self-avowed anarchists at a time in American history when tolerance for such viewpoints was at a lower ebb than usual. Anderson, long a champion of individual liberties and clearly offended by the result in the Sacco-Vanzetti matter, nonetheless has taken Montgomery's comments to

86. Posner, supra note 5, at 164.
88. Speeches to the Court, in *The Letters of Sacco and Vanzetti* 377-78 (Marion Denman Frankfurter & Gardner Jackson eds., 1928) [hereinafter Sacco and Vanzetti].
89. Maxwell Anderson, *Winterset* act 1, sc. 3.
90. Id. act 2.
91. See Posner, supra note 5, at 162.
92. Id.
heart. Gaunt admits that he has been "ill," and accuses the academic troublemaker Hobhouse of writing with bias and "malicious intent to undermine the public confidence in justice and the courts." Since the "case was clear," and "Romagna was known guilty," Gaunt did not call Esdras as a witness. (Anderson takes a liberty here; the prosecution or defense would have called such a witness, not the judge.) Gaunt refuses to see the bias and accuses Mio of having his own bias. Mio accuses the judge of pandering to mob hysteria in order to convict.

Having considered a Posnerian reading of the play, then, viewing it from the other end of the spectrum provides ample grounds for considering Winterset as a play presenting the perspective of ressentiment. There is some biographical support for this reading as well. For example, Anderson was a rabid anti-Communist in the 1950's, lending an ambiguity to his persona and attitudes towards tolerance and authority. Some of this ambivalence is recognizable in Winterset; at least one Anderson critic reads Winterset to find an ambivalent justice, not being the whole truth or at least not a one-sided polemic. This shade of gray would be visible to Posner, but probably decriable critics such as West, who views his argument as one that renders order, not justice, as its goal; law is good solely because it is authoritative. On the other hand, Anderson himself was a pacifist in World War I, which cost him his teaching position in North Dakota early in his career. He taught at Whittier College in California, where he left after one year, precipitated by his controversial defense of a conscientious objector. This history of opposition to intolerance, which Shivers suggests makes Anderson a "champion of liberty and justice, particularly as these applied to the individual citizen in conflict with overly zealous minions of the law." There is an ambiguity to the playwright that textures the play with sarcasm and sympathy—readings available in Billy Budd, Sailor as well. Nonetheless, Anderson's portrayal of Gaunt is that of one using the language of the law and of authority to oppress the innocent.

Gaunt will not question the intent behind the laws. In some ways, he is an extreme positivist:

93. MAXWELL ANDERSON, WINTerset act 2.
94. Id. act 2.
95. BAILEY, supra note 9, at 139.
97. SHIVERS, BIBLIOGRAPHY, supra note 9, at 6-7.
98. Id. at 55.
99. Id. at 111.
For always, night and day,
there lies on my brain like a weight, the admonition:
see truly, let nothing sway you; among all functions
there's but one godlike, to judge. Then see to it
you judge as a god would judge, with clarity,
with truth, with what mercy is found consonant
with order and law. Without law men are beasts,
and it's a judge's task to lift and hold them
above themselves. Let a judge be once mistaken
or step aside for a friend, and a gap is made
in the dykes that hold back anarchy and chaos,
and leave men bound but free.100

Posner suggests that legalism is, if anything, “the pariah’s protection.”101 Yet, there are suspicions of madness in Captain Vere expressed
by the ship’s surgeon in Billy Budd, much as there are clearer statements of
Judge Gaunt’s madness in Winterset. These are irrelevant to Posner’s
reading of Billy Budd and would be, we presume, in a reading of Winterset.
He would point to the almost fatherly way that Gaunt speaks to Mio,
attempting to make Mio see that Mio himself is as biased the other way and
therefore incapable of perceiving not only the truth, but what the evidence
showed.

It is difficult to rationalize the protestations of “mercy” consonant with
law, in light of the remainder of the statement. Clearly, in Gaunt’s mind,
mercy is not a separate factor, but a presumed and inherently inchoate
ingredient in the ordained norms embodied in society’s laws. Despite his
own human regrets, as judge he defends the system; injustice occurs only
“by regrettable chance.”102 Such is the statement of abusive authority.

It is not only Judge Gaunt whose actions and statements bear upon the
analysis of the play in terms of its portrayal of authority and ressentiment.
Mio Romagna’s sarcastic and knowing accusation as to whom the judge
serves elicits further refuge by Judge Gaunt in strict obedience to the letter
of the law:

Would I have chosen
to rack myself with other men’s despairs,
stop my ears, harden my heart, and listen only
to the voice of law and light, if I had hoped

100. MAXWELL ANDERSON, WINTerset act 2.
101. POSNER, supra note 5, at 136.
102. MAXWELL ANDERSON, WINTerset act 2.
for some private gain for serving? . . .

For hope of heaven or place on earth, or power or gold, no man has had my voice, nor will while I still keep the trust that’s laid on me to sentence and define. 103

Gaunt calls Romagna guilty, and while admitting some injustices in court from time to time, assures Mio Romagna that that did not happen here. In a vein reminiscent of Captain Vere, Gaunt says “Romagna was found guilty by all due process of law, and given his chance to prove his innocence.” 104 In actuality, a contemporaneous criticism of the Massachusetts Supreme Court’s rulings in the Sacco-Vanzetti case on critical points of cross-examination suggests otherwise. 105

Mio Romagna raises the jury charge as a refutation to the judge’s effort to hide behind process and the jury, calling the judge the “fountain-head of the lies that slew” his father. 106 As Mio states, “[e]very word you spoke was balanced carefully to keep the letter of the law and still convict.” 107 The argument between Gaunt and Mio is about evidence sought and not found; Mio claims Gaunt led the jury astray and Gaunt replied “[a]nd if the jury were led astray, remember it’s the jury, by our Anglo-Saxon system, that finds for guilt or innocence. The judge is powerless in that matter.” 108

What Judge Thayer stated in full is worth repeating. Like Captain Vere pronouncing sentence, he shows no more remorse in real life than his fictional counterpart in Winterset. Posner justifies Vere’s reaction as due to shock and extreme emotion; there is a convenience to that and perhaps Posner would apply the same to Judge Thayer, whose response is close to the poetic version created by Anderson:

103. Id.
104. Id.
105. Comment, Cross-Examination to Impeach, 36 YALE L.J. 384, 386 (1927). The commentators argue that the Massachusetts rule, holding “that as long as the evidence admitted has a degrading tendency, there can be no abuse of discretion,” interpreted literally, “is an interpretation which in the present state of American jurisprudence, at least, may lead to the conviction of defendants for crimes which they never committed,” Id. at 385-86. See also FRAKSFURTER, supra note 15, at 25.
106. MAXWELL ANDERSON, WINTERSSET act 2.
107. Id.
108. Id.
Under the law of Massachusetts the jury says whether a defendant is guilty or innocent. The Court has absolutely nothing to do with that question. The law of Massachusetts provides that a Judge cannot deal in any way with the facts. As far as he can go under our law is to state the evidence.\textsuperscript{109}

And yet Frankfurter, like Judge Gaunt reviewing the "many thousand pages" of the record, concluded "that the trustworthiness of the testimony which placed Sacco and Vanzetti in Braintree on April 15 is the foundation of the case."\textsuperscript{110} There were fifty-nine witnesses for the prosecution and ninety-nine witnesses for the defendants on the issue of the identity of the murders, which Frankfurter indicates raises by sheer numbers the implication that identification was far from clear-cut.\textsuperscript{111} It is that very trustworthiness that Judge Gaunt refuses to question. Posner is able to find affection between Captain Vere and Billy Budd, and cites the final words of Vere ("Billy Budd") and Budd ("God Bless Captain Vere") as evidence of the relationship between the two of them. Interestingly, the last words of Vanzetti were that he forgives some of those who were his enemies.\textsuperscript{112}

\textit{Winterset} fully develops and stands within the range of discussion of Weisberg's theme of ressentiment, and bears strong comparison with the literary and legal analyses of \textit{Billy Budd}. It has not been my intention to embark upon yet another analysis of the actual trial of Sacco and Vanzetti. It is within the context of the literary work \textit{Winterset} that implications for lawyers, and particularly judges, are found. As such, \textit{Winterset} can be read as an attack upon injustice but, at the same time, find textual threads that fit within the fabric of the Weisberg-Posner debate.

\section*{VI. CONCLUSION}

I have attempted to bring to the table a significant play that has been all but ignored in the recent discussions of law and literature. That this should happen to \textit{Winterset} is surprising in light of the significant twentieth-century parallels to a work such as \textit{Billy Budd, Sailor}. I agree with those who, in growing number, are looking to literature to gain (if not regain) a perspective on law—what it is and what it is meant to achieve. We are

\begin{footnotesize}
\begin{enumerate}
\item[109.] \textit{Sacco and Vanzetti}, supra note 88, at 377-78.
\item[110.] \textit{Frankfurter}, supra note 15, at 11 (emphasis added).
\item[111.] \textit{Id}.
\item[112.] Vanzetti's Last Statement, in \textit{The Letters of Sacco and Vanzetti} 404 n.1 (Marion Denman Frankfurter & Gardner Jackson eds., 1928).
\end{enumerate}
\end{footnotesize}
creatures of metaphor and analogy, often incapable of grasping the complexities of life except by vicarious vision. *Winterset* provides that vision. While the play may have its critical faults, it nonetheless encapsulates a modern legend no less powerful than those employed by ancient writers.
Sexual Harassment After *Harris v. Forklift Systems, Inc.*—Is it Really Easier to Prove?

TABLE OF CONTENTS

I. INTRODUCTION ........................................ 1889
II. STATE OF THE LAW BEFORE *HARRIS* ............... 1892
   A. *Title VII of the Civil Rights Act of 1964* .......... 1892
   B. *The Supreme Court Steps In: Meritor Savings Bank v. Vinson* .......... 1894
   C. *Split in the Circuit Courts* .................... 1896
III. *HARRIS V. FORKLIFT SYSTEMS, INC.* ........... 1900
    A. Lower Court Decision .......................... 1900
    B. Facts ...................................... 1901
    C. Supreme Court Holding ..................... 1902
IV. IMPACT ............................................ 1904
V. FUTURE CONCERNS .................................. 1908
    A. Psychological Harm Element .................... 1908
    B. *The Reasonable Person Standard* ............. 1910
    C. *The First Amendment* ....................... 1913
VI. CONCLUSION ....................................... 1916

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against an employee on the basis of sex.1 The language of Title VII does not specifically address the issue of whether sexual harassment constitutes sexual discrimination under the Title. As a result, courts initially dismissed sexual harassment claims for failure to state a claim for relief under Title VII.2

In 1980, the lack of uniformity and confusion in construing Title VII prompted the Equal Employment Opportunity Commission ("EEOC") to develop guidelines for analyzing sexual harassment claims.3 The guidelines

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affirmed the position that sexual harassment in the workplace is a violation of Title VII. According to the guidelines, hostile environment sexual harassment need not result in denial of employment opportunities. It is harassment that creates an "intimidating, hostile or offensive work environment." Although the EEOC Guidelines articulated the concept of "hostile environment" sexual harassment, because the commission is only an administrative agency and its promulgations do not carry the weight of binding law, some courts were unwilling to recognize hostile environment claims. In 1986, the Supreme Court for the first time attempted to put an end to the confusion when it decided *Meritor Savings Bank v. Vinson.*

One of the ways the Supreme Court helped ease the debate was by recognizing that claims of hostile environment sexual harassment were actionable as sex discrimination under Title VII. The Court further held that although the EEOC Guidelines are not binding on the courts, they are a body of experience and informed judgment that courts and litigants should look to. The Supreme Court set a standard for when hostile environment sexual harassment is actionable: the conduct must be sufficiently "severe or pervasive" so as to alter the conditions of employment and create an abusive work environment.

The Supreme Court thought it was ending the controversy in this area; however, the decision failed to address the disagreement between the circuit courts in defining hostile environment sexual harassment. The biggest problem the circuit courts have faced since *Meritor* has been in defining precisely what conduct would create a sexually hostile environment. The Court did not define "severe" or "pervasive." This left lower courts without a guideline which, in turn, has led to inconsistent results. Some courts have

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4. See id. § 1604.11(a). There are two forms of sexual harassment under the guidelines: (1) quid pro quo, which is when sexual conduct is made a term or condition of employment; and (2) hostile environment, which is when the conduct unreasonably interferes with the work performance or the conduct creates an intimidating, hostile or offensive working environment. *Id.*

5. Denial of employment opportunities may result in "quid pro quo" sexual harassment. See *id.* at § 1604.11(a)(2).

6. *Id.* § 1604.11(a)(3).


9. *Id.* at 65.

10. *Id.*

11. *Id.* at 67.

decided that in light of Meritor, the plaintiff must show that the alleged conduct caused psychological harm. At the same time, other courts have held that psychological harm is not a necessary element of the claim.

On November 9, 1993, the Supreme Court decided Harris v. Forklift Systems, Inc., ("Harris II"). By deciding this case, the Supreme Court was hoping to resolve the issues it left unresolved in 1986. The Court did not overrule Meritor; rather, it broadly interpreted its prior holding and decided that the conduct need not cause a tangible psychological injury to be considered sexual harassment. The Court took the middle ground between making a mere offensive utterance a valid cause of action and requiring that victims suffer a nervous breakdown as a requirement for a cause of action. The petitioner argued in her brief, and the Supreme Court agreed, that requiring psychological injury is inconsistent with the prophylactic objectives of Title VII. The Supreme Court stated that to question whether the conduct "seriously affected plaintiff's psychological well-being" or "led her to suffer injury" is a needless inquiry that focuses the factfinder's attention on concrete psychological harm, an element Title VII does not require. The Court was trying to set a standard for lower courts to follow, but it remains to be seen how this decision will be interpreted by the lower courts.

This comment will analyze the state of the law before the Supreme Court's decision and whether Harris II has changed the meaning of hostile environment sexual harassment. There is concern that the elimination of the psychological harm element makes it too easy for plaintiffs to prove their cases. The goal of this comment is to determine whether Harris II in fact, does make hostile environment sexual harassment easier to prove. The Harris II decision by no means resolved all the questions dealing with sexual harassment. This comment will analyze the ambiguities left by

14. See Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), vacated on other grounds, 900 F.2d 27 (4th Cir. 1990).
16. Id. at 370.
17. Id.
Harris II and how one appellate court has dealt with the Supreme Court's holding. Many issues are unresolved in this area, one being the fairness or unfairness of the reasonable person standard in evaluating sexual harassment cases. Although this comment focuses on Harris II, the pros and cons of the reasonable person standard and the viability of the reasonable woman standard will also be discussed. This comment will also address the issue of whether the Federal government's restriction of speech in the workplace through Title VII is offensive to the First Amendment. The Supreme Court should be visiting these two issues in the very near future.

II. STATE OF THE LAW BEFORE HARRIS

A. Title VII of the Civil Rights Act of 1964

Congress passed Title VII as part of the Civil Rights Act of 1964. Its primary goal was to eliminate employment discrimination. Title VII makes it an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's sex. As part of Title VII, the Federal Equal Employment Opportunity Commission was created to help carry out the law. By 1972, although the federal law was in place, Congress realized that the EEOC was not meeting desired expectations.

21. See Saxton v. AT&T, 10 F.3d 526 (7th Cir. 1993).
22. The Supreme Court framed the issue as whether a plaintiff needs to show she was psychologically injured in order to recover for hostile environment sexual harassment. The Court did not evaluate the reasonable person standard. It reversed the district court's decision and remanded the case to a factfinder who will apply the rule that it set forth. Harris II, 114 S. Ct. at 371.
23. The First Amendment to the U.S. Constitution provides: "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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
25. Id.
Due to the ineffectiveness of the EEOC, Congress amended Title VII by passing the Equal Employment Opportunity Act. Congress realized that the EEOC had been established in 1964 but that its power was limited to conciliation. It became evident that the EEOC needed to have quasi-judicial power with the authority to obtain enforcement of its orders. The legislative history of the amendment demonstrates Congress' growing concern with discrimination against women based on gender and its desire to put a stop to the problem. Congress became concerned that discrimination against women was being regarded by many as either morally or physiologically justifiable. Trying to change society's view of discrimination based on gender, Congress announced that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."

By 1980, the EEOC had set up guidelines to help courts determine not only what conduct constitutes sexual discrimination but, more importantly, what conduct constitutes sexual harassment. The guidelines made harassment on the basis of sex a violation of Title VII. They went on to recognize two forms of sexual harassment: "quid pro quo" and "hostile environment." When evaluating a sexual harassment claim, the record is to be looked at as a whole and a decision is to be made based on the totality of the circumstances.

Despite the guidelines, some courts were unwilling to allow hostile environment claims because administrative agency guidelines do not carry

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29. Id. at 2138.
30. See id.
31. See id. at 2139. The persistence of discrimination and its detrimental effects require a reaffirmation of our national policy of equal opportunity in employment. Id.
32. See H.R. REP. No. 238 at 2141.
33. Id.
34. See 29 C.F.R. § 1604.11 (1993).
35. Id.
36. Id. Quid pro quo sexual harassment exists when submission to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature is made a term or condition of employment. Id. § 1604.11(a)(1). Hostile environment sexual harassment is defined by the guidelines as "conduct hav[ing] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Id. § 1604.11(a)(3). Hostile environment sexual harassment is the focus of this comment.
37. 29 C.F.R. § 1604.11(b) (1993).
the weight of binding law.\textsuperscript{38} By 1981, courts were still refusing to recognize sexual harassment that did not affect tangible job benefits.\textsuperscript{39} In \textit{Bundy v. Jackson},\textsuperscript{40} the Court of Appeals for the District of Columbia recognized hostile environment sexual harassment as actionable under Title VII.\textsuperscript{41} This was a boost for women because they could file their claims without having to prove the harassment detrimentally affected tangible job benefits.\textsuperscript{42} But women still had a long road ahead of them because the court in \textit{Bundy} stated that the psychological aspect of the work environment is a "condition of employment" under Title VII.\textsuperscript{43}

B. \textit{The Supreme Court Steps In: Meritor Savings Bank v. Vinson}\textsuperscript{44}

Another five years passed before the Supreme Court decided to step in and lay the foundation in this new area of the law.\textsuperscript{45} This was the first time the Supreme Court had taken a stand and held that hostile work environment is a form of sexual harassment that violates Title VII.\textsuperscript{46} The Court reaffirmed the position that Title VII is not limited to "economic" or "tangible" discrimination.\textsuperscript{47} This decision appeared to be the answer women were waiting for. However, it left many questions unanswered which, inevitably, have led to controversy.\textsuperscript{48} According to the Supreme Court, for lower courts to find that plaintiffs have stated a claim for sexual harassment, the harassing conduct must be sufficiently severe or pervasive to alter the conditions of employment and must create an abusive working environment.\textsuperscript{49}

The Supreme Court affirmed the court of appeals' remand to the

\textsuperscript{38} See Gettle, \textit{supra} note 7, at 845.
\textsuperscript{39} See Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), \textit{vacated on other grounds}, 587 F.2d 1240 (D.C. Cir. 1978).
\textsuperscript{40} 641 F.2d 934 (D.C. Cir. 1981).
\textsuperscript{41} See Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).
\textsuperscript{42} See \textit{id.} at 945.
\textsuperscript{43} \textit{Id.} at 944.
\textsuperscript{44} 477 U.S. 57 (1986).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 64.
\textsuperscript{47} \textit{Id.}
\textsuperscript{49} See \textit{Meritor}, 477 U.S. at 67.
The district court to dispose of Vinson's hostile environment claim. The district court, like many other courts, had previously decided that since there was no quid pro quo sexual harassment the claim should fail. The respondent, Mechelle Vinson, brought the action against Meritor Savings Bank, her employer, and Sidney Taylor, claiming that during the four years she was employed by the bank Taylor had constantly sexually harassed her. Vinson claimed that after her probationary period as a teller-trainee, Taylor invited her out to dinner, and during the meal suggested that they go to a motel to have sexual relations. She refused at first, but because she feared losing her job she eventually agreed. Taylor subsequently made repeated demands for sexual favors, both during and after business hours. Over the next several years, they had intercourse forty or fifty times. Taylor fondled Vinson in front of other employees, followed her into the women's restroom, exposed himself to her, and on several occasions forcibly raped her. These activities ceased when she started going with a steady boyfriend. On the stand, the testimony was the typical "he said/she said." Taylor contended that Vinson made the accusations because of a business-related dispute. The district court held that since Vinson's and Taylor's sexual relationship was voluntary and unrelated to her continued employment at the bank, there was no actionable sexual harassment.

In reviewing these facts, the Supreme Court decided that the EEOC Guidelines support the view that harassment leading to noneconomic injury can violate Title VII. The guidelines undercut the district court's holding because under Title VII the fact that sex-related conduct was voluntary, is not a valid defense to sexual harassment. The gravamen of any sexual

50. Id. at 73.
51. Id. at 57.
52. Id. at 60.
53. Id.
54. Meritor, 477 U.S. at 60.
55. Id.
56. Id.
57. Id.
58. Id.
60. Id. at 57. This language indicates the court did not find "quid pro quo" sexual harassment. But for hostile environment sexual harassment, sexual favors need not be made a condition of continued employment. See 29 C.F.R. § 1604.11(a)(3) (1993).
61. Meritor, 477 U.S. at 65.
harassment claim is that the alleged sexual advances were "unwelcome."\(^{63}\) The harassment need not be "quid pro quo;" it can be "hostile environment," because Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."\(^{64}\) In arriving at its decision, the Supreme Court relied on Rogers v. EEOC.\(^{65}\) Rogers recognized a cause of action for discriminatory work environment based on race under Title VII.\(^{66}\) The court held that a mere utterance which engendered offensive feelings in an employee is not enough for a claim under Title VII.\(^{67}\) On the other hand, a "working environment so heavily polluted with discrimination as to destroy completely the worker's emotional and psychological stability" is actionable.\(^{68}\) Although nowhere in Meritor does the Court say that plaintiffs must show they were psychologically damaged, quoting from Rogers created great confusion among the circuit courts and seemed to set a higher threshold for finding sexual harassment than under the EEOC Guidelines.\(^{69}\) One scholar has suggested that Meritor leaves room for much legal sexual harassment, which is what the Court set out to end.\(^{70}\) The Court failed to define how much conduct is lawful—from this stems the inconsistency that has pervaded this area.\(^{71}\)

C. Split in the Circuit Courts

In 1986, the Sixth Circuit Court of Appeals decided Rabidue v. Osceola Refining Co.,\(^{72}\) ("Rabidue II") based on the Meritor decision.\(^{73}\) Although this court purports to follow the Meritor reasoning, it denied relief to a plaintiff who was subjected to an "extremely vulgar and crude" supervisor who "customarily made obscene comments about women generally, and on occasion, directed such obscenities to plaintiff."\(^{74}\) In the course of the supervisor's (Douglas Henry) obscene comments about women, he used

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63. Meritor, 477 U.S. at 68; 29 C.F.R. § 1604.11(a).
64. Meritor, 477 U.S. at 65.
65. 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).
66. Id. at 236.
67. Id. at 238.
68. Id.
69. See Pollack, supra note 48, at 60.
70. See id. at 61.
71. See id.
73. Id.
74. Id. at 615.
words like "cunt," "pussy," and "tits." On at least one occasion, Mr. Henry called plaintiff a "fat ass." In addition to this, other male employees displayed, in their offices and work areas, pictures of nude or partially clad women, to which plaintiff and other female employees were exposed. The court of appeals decided that based on the EEOC Guidelines and legal precedent, for plaintiff to prevail in a Title VII offensive work environment sexual harassment action, she had to prove that the work environment seriously affected her psychological well-being. The court required psychological harm for a valid cause of action, although neither Meritor nor the EEOC Guidelines make psychological harm an element of the claim for relief.

The court, in Rabidue II, decided that based on the totality of the circumstances approach espoused by the guidelines, the lexicon of obscenity that pervaded the work environment before and after plaintiff's introduction to it must be considered together with the plaintiff's reasonable expectation when she voluntarily entered the environment. This language makes it seem as though plaintiff assumed the risk of being harassed based on her sex when she accepted employment at Osceola Refining Co. By affirming the status quo in this way, the court legitimized sexual harassment. What is good for society is good for the workplace; or more aptly, what is good for the gander is good for the goose. Even more disturbing is the district court's opinion, which was quoted by the appellate court in justification for its holding:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to - or can - change this. . . . Title VII was [not] designed to bring about a magical transformation in the social mores of American workers.

After reading this, it seems that Judge Newblatt totally misunderstood Title

76. Id.
77. Id.
78. Rabidue II, 805 F.2d at 619.
80. Rabidue II, 805 F.2d at 620.
81. See Pollack, supra note 48, at 65.
82. Rabidue I, 584 F. Supp. at 430; Rabidue II, 805 F.2d at 620-21.
VII and its goal. Congress enacted Title VII and the Equal Employment Opportunity Act to change conduct that had become acceptable in a pervasively male dominated workplace. Judge Keith, in his dissenting opinion, stated: "In my view, Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act." He further stated that women should not be subjected to environments where their sexual dignity and reasonable sensibilities are visually, verbally, or physically assaulted as a matter of prevailing male prerogative.

The kind of attitude espoused by the *Rabidue II* majority reaffirms the common belief that it is fine to joke sexually with a woman even if it is offensive to her because it has become socially acceptable behavior. It must be remembered that the Supreme Court said in *Meritor* that the gravamen of sexual harassment is that the advances were "unwelcome" not whether the harasser set out to cause harm. It is evident that the Sixth Circuit misinterpreted *Meritor* and makes it harder or virtually impossible for plaintiffs to make out a prima facie case for sexual harassment by requiring an element that is unnecessary. It has been proposed that courts want to see severe psychological harm because they simply do not believe in hostile environment sexual harassment claims, although they have been recognized by the EEOC and the Supreme Court.

The Third and Eleventh Circuits also require plaintiffs to show that they were psychologically injured by the offensive conduct. In *Andrews v. City of Philadelphia*, the plaintiffs were two female police officers who claimed they were harassed by their fellow workers and supervisors. In their working division, women were regularly referred to in an offensive and obscene manner and plaintiffs were personally addressed in such manner. There was evidence of pornographic pictures of women in the locker room, which plaintiffs contend embarrassed, humiliated, and harassed them. The behavior by the male police officers included the showing of a

84. *Rabidue II*, 805 F.2d at 626-27 (Keith, J., dissenting).
85. Id.
86. *See Meritor*, 477 U.S. at 68.
87. *See Rabidue II*, 805 F.2d at 619.
89. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990); Henson *v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982).
90. *Andrews*, 895 F.2d at 1471.
91. *Id.* at 1472.
pornographic movie in a squad room which was also used by the plaintiffs. Although plaintiffs were emotionally affected, scared, and nervous, the court held that plaintiffs had to establish that the conduct was severe enough to affect their psychological stability.

Likewise, the Eleventh Circuit in *Henson v. City of Dundee*, made psychological harm a question to be considered when deciding whether the harassment complained of affected a "term, condition, or privilege" of employment. The court did not find a Title VII violation, although Henson's supervisor, Sellgren, subjected her and her female co-worker to crude and vulgar language, and almost daily inquired into their sexual habits and proclivities.

The court in *Henson* enunciated the elements a plaintiff must prove in order to successfully claim hostile environment sexual harassment: (1) plaintiff must belong to a protected group; (2) plaintiff was subjected to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment affected a "term, condition, or privilege" of employment; and (5) employer knew or should have known of the harassment and failed to take action. The confusion comes into play when courts analyze the
fourth element—the harassment affected a “term, condition, or privilege” of employment. The Eleventh Circuit, like others, claims that for the harassment to be sufficiently severe or pervasive so as to affect a term, condition, or privilege of employment, it must affect plaintiff psychologically.101 Some courts have departed from this line of reasoning and only require that plaintiffs show either the harassment interfered with their ability to perform or significantly affected their psychological well-being or, even bolder, that the conduct need not affect plaintiffs psychologically.102

The standard of not requiring proof of tangible psychological harm is fair because someone’s job performance may be impaired without their suffering a nervous breakdown. This shows the confusion that has led to many inconsistent results. What plaintiffs must plead and prove depends on what circuit they are in and not on any set standard. This creates uncertainty and may even deter plaintiffs from filing their claims, which is a great departure from what Title VII set out to accomplish.103 It was evident that somewhere along the line the Supreme Court would have to step in again and try to set a standard for lower courts to follow in hostile environment sexual harassment claims.

III. HARRIS v. FORKLIFT SYSTEMS, INC.

A. Lower Court Decision

The District Court for the Middle District of Tennessee was following circuit precedent in 1991 when it decided that Teresa Harris had to show she had been psychologically damaged in order to show she had been sexually

existence of a grievance procedure and a policy against discrimination, coupled with employee’s failure to invoke the procedure, will not always insulate the employer from liability. Id. Courts since Meritor are split on whether notice is required. Compare Vance v. Southern Bel. Tel. & Tel. Co., 863 F.2d 1503, 1515 (11th Cir. 1989) (holding employer liable for supervisor’s conduct even without notice) with Lipsett v. University of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988) (holding employer liable if he or she had actual or constructive notice and failed to take appropriate action).

101. Henson, 682 F.2d at 904.

102. See Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). The harasser’s conduct is what must be pervasive or severe, not the alteration in the condition of employment. Id. at 876. Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989), vacated on other grounds, 900 F.2d 27 (4th Cir. 1990).

The test is whether the harassment is conduct which would interfere with a hypothetical reasonable individual's work performance and seriously affect the psychological well-being of that reasonable person under like circumstances. The court cited Rabidue II to justify its holding. By requiring that plaintiffs be psychologically harmed, the courts are denying relief when work performance has been affected but plaintiffs have not suffered a nervous breakdown. This is contrary to Title VII. The EEOC Guidelines were designed to punish people whose conduct unreasonably interferes with another's work performance. The district court found that Forklift's president often insulted Ms. Harris because of her gender and made her the target of unwanted sexual innuendos and that his inappropriate sexual comments offended her as they would a reasonable woman. Nevertheless, the court concluded that the behavior was not so severe as to be expected to seriously affect her psychological well-being. In like manner, the Sixth Circuit Court of Appeals affirmed.

B. Facts

Plaintiff, Teresa Harris, was employed by Forklift Systems as a rental manager from April 22, 1985 until October 1, 1987. Charles Hardy was at all material times president of Forklift. Mr. Hardy made plaintiff the object of a continuing pattern of sex-based derogatory conduct. In the presence of other employees he would make comments like "you're a woman, what do you know," "you're a dumb ass woman," "we need a man as the rental manager," and once in front of employees and a Nissan representative he said, "let's go to the Holiday Inn to negotiate your raise." Mr. Hardy would ask plaintiff and other female employees, but not male employees, to retrieve coins from his front pants pocket.

106. Id.
109. Id.
112. Id.
113. Id. at *2-3.
114. Id.
would throw objects on the ground in front of plaintiff and other female employees and ask them to pick them up, and then make comments about the female employees' attire. As a result of Mr. Hardy's behavior, plaintiff experienced anxiety and emotional upset. She did not want to go to work, cried frequently, began drinking heavily, and her relationship with her children became strained. On August 18, 1987, plaintiff met with Mr. Hardy to complain about his treatment towards her. He admitted making the comments but said they were jokes. He apologized, and on his promise that the behavior would cease, plaintiff continued working for Forklift. Shortly thereafter, Mr. Hardy continued to humiliate her by suggesting that plaintiff secured an account for the company by promising to do sexual favors for a customer. He said to her in front of other employees, “what did you do, promise the guy... some ‘bugger’ Saturday night?”

On Thursday, October 1, 1987, plaintiff collected her paycheck and left Forklift Systems. Considering all the facts and the way plaintiff felt, the court still refused to recognize she made a prima facie case for hostile environment sexual harassment. Although the court called this a close case and found that Mr. Hardy was a vulgar man who demeaned female employees at his workplace, the court chose to characterize his conduct as merely annoying and insensitive and dismissed plaintiff’s case.

C. Supreme Court Holding

The Supreme Court granted certiorari to resolve the conflict among the circuits on whether conduct, to be actionable as “abusive work environment” sexual harassment, must seriously affect an employee’s psychological well-being or lead the plaintiff to suffer injury. The Supreme Court reaffirmed its holding in Meritor and attempted to expand upon it by setting a standard. The Court, borrowing from Meritor, said that Title VII is

115. Id. at *3.
117. Id.
118. Id.
119. Id.
120. Id.
122. Id.
123. Id. at *5-6.
125. Id. at 370.
violated "[w]hen the workplace is permeated with discriminatory intimida-
tion, ridicule, and insult, that is sufficiently severe or pervasive to alter the
conditions of the victim's employment and create an abusive working
environment." The standard takes a middle path between making
merely offensive conduct actionable and requiring the conduct to cause
tangible psychological harm. The conduct is measured both objectively
and subjectively. The conduct must objectively create a hostile or offensive
environment that a reasonable person would find hostile and the victim must
subjectively perceive the conditions as such. The petitioner argued in
her brief, and the Court seemed by its holding to have agreed, that neither
the language of Title VII nor its legislative history requires proof of serious
psychological injury. The decision undercut the Sixth Circuit and
others that require tangible psychological harm because the Court announced
that "Title VII comes into play before the harassing conduct leads to a
nervous breakdown." Justice O'Connor, who rendered the unanimous
opinion, reasoned that psychological harm should not be an element of the
claim for relief because a discriminatorily abusive work environment, even
one that does not seriously affect employees' psychological well-being, can
and often will detract from employees' job performance, discourage
employees from remaining on the job, or keep them from advancing in their
careers. Such behavior is offensive to the goals of Title VII.

The Court further tried to ease the confusion by stating that the fact
that Meritor made reference to environments so heavily polluted with
discrimination as to completely destroy the emotional and psychological
stability of employees, merely showed an especially egregious example of
harassment. This language was not meant to mark the boundary for
what is actionable. This seems to be the language circuits were relying
upon to require tangible psychological damage as part of the claim for relief.
As correctly stated by petitioner in her brief, the Sixth Circuit test is based
on a misinterpretation of Meritor. Lower courts must now follow the

126. Id.
127. Id.
128. Id. The appropriateness of the reasonable person standard was not an issue before
this Court.
129. Petitioner's Brief, supra note 18, at 15.
130. Harris II, 114 S. Ct. at 370.
131. Id. at 371.
132. Id.
133. Id.
134. Id.
135. Petitioner's Brief, supra note 18, at 20.
rule that as long as the environment would reasonably be perceived and is perceived as hostile or abusive, there is no need for it also to be psychologically injurious. 136 This decision seems to be a major coup for women who were kept from showing they were sexually harassed because they had not endured a nervous breakdown. Nevertheless, the Court cautioned that this is a difficult area of the law and that there cannot be a mathematically precise test to determine when there has been a hostile environment sexual harassment violation under Title VII. 137 This language shows that hostile environment sexual harassment is far from being a defined area of the law. The decisions will still vary because juries must look at the totality of the circumstances and make decisions on a case-by-case basis. 138 Lower courts should look at the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether the conduct unreasonably interferes with an employee’s work performance. Whether or not the plaintiff suffered psychological harm may be relevant when determining if in fact plaintiff found the environment to be abusive, but no single factor is determinative. 139 In light of its holding, the Supreme Court reversed the judgment and remanded the case because the district court’s application of the incorrect standard may have influenced its ultimate conclusion. 140 The Court was further inclined to render this decision because the district judge himself found this to be a close case. 141 This does not mean that Ms. Harris won, but at least her case should now be evaluated under the correct legal standard, giving her a fair chance to prove she was sexually harassed.

IV. IMPACT

The impact the Supreme Court decision will have on Teresa Harris depends on how the district court weighs all the evidence. This could very well mean that the district court again finds she was not sexually harassed. What the court cannot do is ask that she show psychological harm as a result of Mr. Hardy’s abusive behavior. The Supreme Court was not sure if, or to what extent, the district court relied on the psychological harm

136. See Harris II, 114 S. Ct. at 371.
137. Id.
138. See id.
139. Id.
140. Id.
141. Harris II, 114 S. Ct. at 371.
element when it decided that Ms. Harris did not state a claim for hostile environment sexual harassment.\textsuperscript{142} Therefore, the decision the district court will make will depend on whether or not it gave too much weight to this element.

It seems from reading the district court opinion that the court accorded great weight to the fact she could not show a tangible injury.\textsuperscript{143} The court did find that Hardy was vulgar and treated female employees in a demeaning fashion.\textsuperscript{144} Further, the court even said that she was offended as would any reasonable woman.\textsuperscript{145} This shows the court did not find Ms. Harris to be an especially fragile or sensitive person who was merely overreacting. In light of all the evidence and the fact that the court cannot exclusively rely on psychological harm, there is a good chance the court will change its prior judgment dismissing plaintiff’s claim.

Of course, there exists the possibility, as respondent argued to the Supreme Court in his brief, that the district court did not give any particular emphasis to the psychological harm element.\textsuperscript{146} If this is so, then Teresa Harris stands to lose again. The Supreme Court was not attempting to cure all the evils that pervade sexual harassment when it decided \textit{Harris II}, but it was a move in the right direction.

The Supreme Court’s decision is strong legal precedent for new plaintiffs who can now successfully argue that they need not show they were psychologically injured to state a claim for hostile environment sexual harassment. On December 3, 1993, less than a month after the Supreme Court had decided the sexual harassment issue, the Court of Appeals for the Seventh Circuit decided a case based on \textit{Harris II}.\textsuperscript{147} The U.S. District Court for the Northern District of Illinois granted summary judgment in favor of AT&T because it found insufficient evidence to establish hostile environment sexual harassment.\textsuperscript{148} The Seventh Circuit Court of Appeals affirmed.\textsuperscript{149}

Although the plaintiff in that case did not make out a claim for hostile environment sexual harassment, it is important to note that the court

\begin{enumerate}
\item[142.] Id.
\item[143.] \textit{See Harris I}, 1991 WL 487444.
\item[144.] \textit{Harris I}, 1991 WL 487444 at *5.
\item[145.] Id. at *7.
\item[147.] \textit{See Saxton v. AT&T}, 10 F.3d 526 (7th Cir. 1993).
\item[148.] Id. at 531.
\item[149.] Id. at 537.
\end{enumerate}
followed the Supreme Court’s decision and stated that psychological injury is not a necessary element.\textsuperscript{150} The court further stated that, even without regard to the tangible effects, the very fact that there was discriminatory conduct, which was so severe or pervasive that it created a work environment abusive to employees because of gender, offends Title VII’s broad rule of workplace equality.\textsuperscript{151} The effect \textit{Harris II} had on this case was that the court had to take notice and realize that it could no longer require plaintiffs to show they suffered anxiety and debilitation as it had in the past.\textsuperscript{152} Furthermore, this decision shows that \textit{Meritor} is still alive and well in this field, as the court relies on it for the basic elements that must be proven to show hostile environment sexual harassment.\textsuperscript{153}

As was evident with \textit{Meritor}, lower courts do not always interpret cases correctly and sometimes the Supreme Court does not convey the message clearly. It still remains to be seen if lower courts are going to interpret \textit{Harris II} properly or are going to read something into it that is not there. The \textit{Saxton} decision is only one, and may not be the best, example to measure how other lower courts will apply the hostile environment sexual harassment test enunciated by \textit{Harris II} because the facts are not the ones commonly found in these types of cases.

The conduct by the supervisor in \textit{Saxton} was inappropriate but not severe or pervasive enough as to create a hostile work environment because the behavior was limited to two instances and he stopped after she made her lack of interest clear.\textsuperscript{154} Saxton and her supervisor, Richardson, met for drinks after work at Richardson’s suggestion.\textsuperscript{155} She had been trying to meet with him in order to discuss her dissatisfaction with her lab assignment.\textsuperscript{156} After spending two hours at a nightclub, they drove to a jazz club, again at Richardson’s request.\textsuperscript{157} While they were at the jazz club, Richardson placed his hand on Saxton’s leg above the knee several times and once he rubbed his hand along her upper thigh.\textsuperscript{158} Saxton removed his hand each time and told him to stop.\textsuperscript{159} When they left the jazz club, Richardson pulled Saxton into a doorway and kissed her for two or three

\begin{itemize}
\item \textsuperscript{150} \textit{Id.} at 533.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{See Saxton,} 10 F.3d at 533.
\item \textsuperscript{153} \textit{See id.}
\item \textsuperscript{154} \textit{Id.} at 534-35.
\item \textsuperscript{155} \textit{Id.} at 528.
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Saxton,} 10 F.3d at 528.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.}
\end{itemize}
seconds until she pushed him away.\textsuperscript{160} Saxton repeated her admonition at work the following morning, and he apologized and assured her that it would not happen again.\textsuperscript{161}

About three weeks later, Richardson invited Saxton to lunch to discuss work related matters.\textsuperscript{162} As Richardson was driving her back to her car after lunch, he took a detour, stopped the car and got out for a walk.\textsuperscript{163} Saxton decided to do the same and walked off on her own, when he suddenly lurched at her from behind some bushes, as if to grab her.\textsuperscript{164} She dashed several feet away to avoid him and again told him his behavior was inappropriate.\textsuperscript{165} This was the last time he made any advances toward Saxton.\textsuperscript{166} These facts make the case easier to decide than \textit{Meritor} or \textit{Harris II}, in which the conduct was obviously persistent and abusive. The ultimate result of \textit{Harris II} is that plaintiffs who find themselves in courts that follow the Sixth Circuit test can now cite \textit{Harris II} to overrule the need for psychological harm and remove the burden of proving any unnecessary elements.

As an interesting alternative, professor Kathryn Abrams has proposed two ways to prevent sexual harassment without the need to resort to litigation.\textsuperscript{167} The first is for the EEOC to enforce the guidelines which provide an avenue for reform that is less adversarial than a full-blown private action.\textsuperscript{168} The second is for employers to voluntarily implement programs to train employees on sexual harassment.\textsuperscript{169} This alternative is more desirable because neither the decree nor the litigation will help employers or employees understand what conduct caused the injury, nor do they learn more acceptable forms of conduct.\textsuperscript{170} When courts decide

\begin{footnotes}
\item[160.] Id.
\item[161.] Id.
\item[162.] Saxton, 10 F.3d at 528.
\item[163.] Id.
\item[164.] Id.
\item[165.] Id.
\item[166.] Id. at 529.
\item[168.] Id. at 1216-17.
\item[169.] Id. at 1217. Under this model, the employers would create guidelines indicating what conduct is proper and which is not proper for the workplace. \textit{Id.} at 1218. Upon imposing the guidelines, the employer must impress upon the employees that sexual harassment in the workplace will not be tolerated and corrective measures will be taken. \textit{See id.}
\item[170.] Abrams, \textit{supra} note 167, at 1219.
\end{footnotes}
sexual harassment they confine themselves to rendering the decision, not to advising the employer or employees on how they should reform their conduct. It seems that even if plaintiffs make it to court, the judicial decrees will do little in improving that particular workplace and preventing the event from recurring, unless employers get actively involved.

V. FUTURE CONCERNS

A. Psychological Harm Element

The Supreme Court in *Harris II* was attempting to set a standard that would erase the confusion that was troubling lower courts. The Court said that plaintiffs need not show they were psychologically injured in order to state a claim for hostile environment sexual harassment.\(^{171}\) This was the standard enunciated by the Court, but there is no set definition. There still exists no precise test to determine when someone has been the victim of hostile environment sexual harassment. *Harris II* leaves us with no set number of times the harasser must act; all that is evident is that it must be more than once. Even after the Supreme Court attempted to clear the air, there is no definition for how "severe" or "pervasive" the behavior must be.\(^{172}\) These are important items because they are vital to a correct judicial decision. It is likely that lower courts are still going to encounter problems when trying to apply *Harris II*. This will be especially true in cases where the conduct was borderline. When the conduct is clear-cut one way or the other, the court's decision is simplified. Unfortunately, in most cases, the decision is not so simple because the conduct was neither extremely blatant nor was it a mere one time occurrence. It then becomes important what definition is applied and how much weight the elements are given. It seems that these types of questions are always going to pervade this area because of the Court's reluctance to set a test and its desire to leave it up to lower courts to handle on a case-by-case basis.\(^{173}\)

In his concurring opinion, Justice Scalia points out that the *Harris II* holding leaves lower courts unguided because there is no mention of how much of each factor is necessary nor is a single factor identified as determinative.\(^{174}\) This does not help ease the uncertainty that already

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172. *Id*.
173. *See id*.
174. *Id*. at 372 (Scalia, J., concurring).
riddles this area of the law. Justice Scalia concurred because he did not foresee at the time an alternative course other than the one taken by the Court.175 It seems the Court took the better approach, not the best possible solution. He said that in an attempt to set a definite test, the Court could rely on the factor of unreasonable interference with the employee’s work performance as the absolute test.176 This would lend some guidance to lower courts, but by the same token he pointed out that Title VII’s language does not give any indication that such limitation is appropriate.177 Therefore, it seems the answer to what constitutes hostile environment sexual harassment is far from being fully answered.

A major concern after Harris II is that removing the psychological harm element will make hostile environment sexual harassment claims easier to prove. In other words, it will make it too easy for plaintiffs to show they were harassed.178 However, the author submits that Harris II does not make sexual harassment easier to prove. The Court simply removed an unnecessary obstacle. Lower courts were requiring this element based on a misinterpretation of precedent and aggrieved plaintiffs were the ones paying the price. Under the new standard, the insurmountable obstacles have been removed which makes it more fair to plaintiffs.179 Under the old standard, women who showed appalling behavior by co-workers and superiors had their cases dismissed nonetheless, for failure to show tangible psychological harm.180 Plaintiffs can now prove the essential elements of the claim without the need for unnecessary obstacles. Plaintiffs must show that the conduct was severe or pervasive enough that it created a hostile work environment in which an objective reasonable person would be offended.181 This is already a difficult task in and of itself without adding to it unnecessary elements.

The elements of the claim will eliminate any frivolous claims. Plaintiffs still have to make out a prima facie case. This diminishes the chance that removing the requirement of showing psychological harm will open the floodgates of litigation in this area. The judicial system cannot
create unreasonable obstacles for legitimate claims in an effort to keep out illegitimate ones. The positive aspect is that now plaintiffs with legitimate claims will not be discouraged from filing their cases; this is exactly what must occur if Title VII is to have any effect on preventing hostile environment sexual harassment.

B. The Reasonable Person Standard

The objective reasonable person standard is the standard that has been used by most courts, and was the one applied by the district court to determine if in fact Teresa Harris was offended by the conduct of Mr. Hardy.\(^{182}\) The conduct must be severe or pervasive enough to create an objective hostile or abusive work environment—one in which a reasonable person would be offended.\(^{183}\) This is the so-called "sex blind" reasonable person standard. The standard does not take into account the gender of the person who was offended. This standard is the one most widely used by judges and juries to determine if parties to a case acted reasonably.\(^{184}\)

The problem in this area of the law is that consistently women are the plaintiffs and their perspective is not taken into account.\(^{185}\) Men have reported experiences with sexual harassment from women, but historically it has been more common for women to face this behavior in the workplace.\(^{186}\) "[M]uch of the behavior that women find offensive is behavior that is accepted as normal heterosexual behavior by men."\(^{187}\) If courts are not willing to take into account that a plaintiff was offended because she is a woman, then sexually harassing environments will remain unchanged because men in male-dominated workplaces find such behavior normal and acceptable.\(^{188}\) It has been proposed that "the reasonable person standard may even work against Title VII’s goal of placing women on an equal footing with men in the workplace."\(^{189}\) Some courts have been willing to reexamine the reasonable person standard and consequently have decided

\(^{182}\) Id. at 369-70.
\(^{183}\) Id. at 370.
\(^{185}\) See generally Pollack, supra note 48.
\(^{186}\) Lillian Glass, Ph.D., He Says, She Says 208 (1992).
\(^{187}\) See Pollack, supra note 48, at 52.
\(^{188}\) See Glidden, supra note 184, at 1849.
\(^{189}\) See id. at 1839.
that it was time for a change.\textsuperscript{190} 

In \textit{Ellison v. Brady},\textsuperscript{191} the Ninth Circuit decided it would evaluate the severity and pervasiveness of sexual harassment from the perspective of the victim.\textsuperscript{192} The court chose to take this innovative route because “[h]arassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.”\textsuperscript{193} Men, who are rarely victims of sexual assault, tend to view sexual conduct without understanding the social setting or underlying threat of violence perceived by women.\textsuperscript{194} The court stated that taking into account the reasonable woman’s view does not establish a higher level of protection for women than men.\textsuperscript{195} A gender-conscious examination enables women to be equal to men in the workplace by acknowledging the effects of sexual harassment on a reasonable woman.\textsuperscript{196} This standard will protect employers from the hypersensitive female employee because it considers only the view of a reasonable woman.\textsuperscript{197}

The district and appellate courts judged Teresa Harris based on the perspective of a reasonable sexless person.\textsuperscript{198} This was the same standard used by the Sixth Circuit in \textit{Rabidue II}, which was the precedent the \textit{Harris I} court used.\textsuperscript{199} Interestingly, in \textit{Rabidue II}, Judge Keith espoused in his dissent the reasonable woman standard\textsuperscript{200} five years before \textit{Ellison} was decided.\textsuperscript{201} He dissented from the majority because he felt that unless a woman’s view was taken, sexual harassment would continue.\textsuperscript{202} Hopefully

\textsuperscript{190}. See \textit{Ellison v. Brady}, 924 F.2d 872, 879 (9th Cir. 1991); \textit{Andrews v. City of Philadelphia}, 895 F.2d 1469, 1482-83 (3rd Cir. 1990). The discrimination must “detrimentally affect a reasonable person of the same sex” in the position of the plaintiff. \textit{Id.} at 1482. \textit{Lipsett v. University of Puerto Rico}, 864 F.2d 881 (1st Cir. 1988); \textit{Rabidue II}, 805 F.2d at 626 (Keith, J., dissenting) (indicating that women and men are different and the standard should account for this), \textit{cert. denied}, 481 U.S. 1041 (1987).

\textsuperscript{191}. 924 F.2d 872 (9th Cir. 1991).

\textsuperscript{192}. \textit{Id.} at 878.

\textsuperscript{193}. \textit{Id.}

\textsuperscript{194}. \textit{Id.} at 879.

\textsuperscript{195}. \textit{Id.}

\textsuperscript{196}. \textit{Ellison}, 924 F.2d at 879.

\textsuperscript{197}. \textit{Id.}

\textsuperscript{198}. \textit{Harris I}, 1991 WL 487444.

\textsuperscript{199}. \textit{Rabidue II}, 805 F.2d at 611.

\textsuperscript{200}. \textit{Id.} at 626 (Keith, J., dissenting). “[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.” \textit{Id.}

\textsuperscript{201}. \textit{Id.}

\textsuperscript{202}. \textit{Id.}
someday soon, the voice of the minority will become that of the majority. At the moment, the reasonable woman/reasonable victim standard remains a minority view. As this area of the law has evolved, it has become evident that men’s and women’s perspectives must be considered separately.\(^{203}\)

The First Circuit, also taking the minority position, made the common illustration that a male supervisor may believe it is perfectly correct for him to tell a female subordinate that she has a great figure or nice legs.\(^{204}\) The female may find the comments are not a compliment but offensive behavior.\(^{205}\) The problem is that most men are not aware of how seemingly innocent words, “labels,” and terms of endearment may be perceived as sexist; they simply deem them as a way of interacting.\(^{206}\) That is why if the woman’s perspective is not taken into consideration, the comments will be dismissed as nothing more than a man complimenting a pretty woman.\(^{207}\) This is so regardless of the fact that the female was truly offended and these types of sexual comments made her feel inferior and uncomfortable. More and more women have grown to resent this sort of behavior as disrespectful and sexist.\(^{208}\) This is the sort of behavior Title VII\(^{209}\) was designed to prevent and it will continue to surface under the current reasonable person standard.\(^{210}\)

The Supreme Court in *Harris II* did not consider whether or not it should change the standard to account for the victim’s views.\(^{211}\) The Court only dealt with the issue at hand.\(^{212}\) Perhaps if Teresa Harris would have had the benefit of being judged based on a reasonable woman’s

204. Id.
205. *Id*; see also Glass, *supra* note 186, at 210. Many may fail to see the reason women get upset by being called “honey” or “sweetheart” in the workplace. This stems from the socially acceptable view that the man is just being friendly. Dr. Glass suggests that terms of endearment have no place in the workplace because they can easily be misinterpreted as a sexist comment. *Id*.
207. *Id*.
208. In a 1984 study conducted by *Newsweek*, women were asked if it bothered them when men referred to them as “girls.” Only 34% of the women surveyed reported that they were annoyed, while 51% said it did not bother them at all. This changed six years later when in 1990, another survey conducted for Virginia Slims American Women’s Poll revealed that 53% of the women were annoyed (a 19% increase), while 44% were not. *Id*.
210. *Id*.
211. *Harris II*, 114 S. Ct. at 368.
212. *Id* at 371.
perspective, she would have prevailed.\footnote{213} Even the district judge had to admit that a reasonable woman would have been offended by the behavior to which Ms. Harris was exposed.\footnote{214}

The viability of the reasonable woman standard has become a burning issue, one the Supreme Court will not be able to ignore much longer. As illustrated above, some lower courts have applied \textit{Harris II} and have shown the importance of the change. Realistically, it does not matter how severe or pervasive the conduct was or whether plaintiffs must show tangible psychological injury if their viewpoint and feelings are not going to be accorded the weight they deserve by the court.

\textbf{C. The First Amendment}

Another major concern which the Supreme Court has not addressed is whether the federal government is unconstitutionally restricting speech in the workplace through Title VII. The question that begs to be answered is whether the Court’s recent interpretation of Title VII and the expansion of hostile environment sexual harassment claims is consistent with the First Amendment.\footnote{215} Professor Kingsley Browne suggests that the definition given to “hostile work environment” is too broad and for it to be consistent with the First Amendment it needs to be narrowed.\footnote{216} Some speech may be regulated on the basis of content if it falls within a recognized exception to the First Amendment such as defamation, obscenity, or fighting words.\footnote{217} Traditionally, if the category of speech does not fall under one of the recognized exceptions, it is protected. The First Amendment has been invoked successfully to protect expression even if it is offensive, harmful, or disagreeable to society.\footnote{218}

\begin{itemize}
\item \textit{Harris I}, 1991 WL 487444 at *7.
\item Id.
\item Id.
\item Texas v. Johnson, 491 U.S. 397 (1989). The expression of ideas may not be prohibited simply because society finds it offensive or disagreeable. An exception to this principle has not been recognized even when our flag is involved. \textit{Id.} at 414. “\textit{The mere presumed presence of unwitting listeners or viewers does not serve automatically to justify


The Supreme Court stated in *Pickering v. Board of Education*, 219 that the "core value" of the First Amendment is "having free and unhindered debate on matters of public importance." 220 This principle seems to be in direct collision with the cases that have made hostile environment sexual harassment actionable under Title VII because the person is held liable for what he says. 221 This conflict is also evident in racial discrimination claims under Title VII. 222 The Sixth Circuit said:

"[T]he law does require that an employer take prompt action to prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well." 223

This shows that courts are willing to restrict what people say in the workplace.

It can be inferred from the case law that the workplace is sufficiently different from the street or a social setting to merit a greater degree of regulation, but courts have never explained the reason for this. 224 *Harris curtailing all speech capable of giving offense."* Cohen v. California, 403 U.S. 15, 21 (1971). Free speech in our system of government best serves its purpose "when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). Public expression of ideas will not be prohibited merely because ideas are offensive to some listeners when they can simply "avert" their ears. Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

220. *Id.* at 573.
221. *E.g.*, *Harris II*, 114 S. Ct. at 367.
223. *Id.* at 350.
224. *See e.g.*, Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987). "[M]ost complaints of sexual harassment are based on actions which, although they may be permissible in some settings, are inappropriate in the workplace." *Id.* at 1561 n.13. *See Doe v. University of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (striking the university's policy prohibiting harassment of students on First Amendment grounds, but suggesting that "speech which creates a hostile or abusive working environment on the basis of race or sex" is unprotected); Snell v. Suffolk County, 611 F. Supp. 521 (E.D. N.Y. 1985), *aff'd*, 782 F.2d 1094 (2d Cir. 1986). Courts do not interfere with what people say or do in their homes or at social gatherings, but the workplace is different. *Id.* at 528. *See also Robert Post, Free Speech and Religious, Racial and Sexual Harassment: Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991). Speech in the workplace does not
II did not answer this question. The Court placed the case outside the parameters of the First Amendment by stating: "This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." This is the manner in which the First Amendment issue was disposed of by the Supreme Court. Since the Court refused to allow claims for sexual harassment based on a mere offensive utterance, the holding is not inconsistent with the First Amendment. This suggests that the conduct displayed by Mr. Hardy against Ms. Harris and other female employees was more than just an offensive utterance within the meaning of the First Amendment. It was behavior that created an abusive and hostile working environment, undeserving of First Amendment protection.

Professor Browne notes that the First Amendment is seldom invoked in these cases, although the defendant is held liable for expressing social and political ideas. Professor Browne suggests that if the First Amendment is going to be respected, hostile environment claims cannot be based even partly on protected speech. This would mean that a person who brings a claim based on employer's (or its agent's) inappropriate touching coupled with posting of pornographic pin-ups on the walls should not be permitted to introduce the latter into evidence. The problem with this proposition is that to force plaintiffs to base their claims solely on the physical act would go against the many judicial decisions on sexual harassment that do not require touching for a successful claim. The bulk of hostile environment sexual harassment claims are based on verbal abuse. This demonstrates the tension between hostile environment claims and the First Amendment.

generally constitute public discourse because that sort of dialogue would be patently out of place. Id. at 289.

225. Harris II, 114 S. Ct. at 370; see also Meritor, 477 U.S. at 57 (supporting the position that a mere utterance of an epithet which engenders offensive feelings in an employee is not sufficient to implicate Title VII).

226. See id.

227. See Harris II, 114 S. Ct. at 367.

228. See generally Browne, supra note 215.

229. Id. at 544.

230. Id.

231. E.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). Plaintiffs must show they were subjected to verbal or physical conduct of a sexual nature. Id. at 875. See also Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1490 (M.D. Fla. 1991) (plaintiff was subjected in the workplace to "pictures of women in various stages of undress and in sexually suggestive or submissive poses, as well as remarks by male employees and supervisors which demean women").
Amendment.

Due to the great public importance of the First Amendment issue, it is likely that the Supreme Court will be confronted with this issue in the near future. The Court will have to balance all the interests involved. Employees have the right to work in an environment free from discriminatory intimidation, ridicule, and insult\(^{232}\) and employers likewise have the right to have their workplaces free from this counterproductive behavior. On the other hand, citizens have the protection of the First Amendment to give their opinion on matters of public concern. Because the First Amendment is highly valued, this is not going to be an easy decision for the Court, but Congress has made clear its desire to stop discrimination in the workplace.\(^{233}\) The author submits that a solution would be for the Court to make expressions in the workplace which are targeted at a specific person and are perceived by that person as offensive an exception to First Amendment protection. If the Court does not resolve this conflict in favor of sexual harassment, then the legislative and judicial efforts to stop sexual harassment have been in vain. The harassment will continue and with more frequency because the harassers will be clothed by the First Amendment.

VI. CONCLUSION

*Harris II* seems to be the panacea victims of harassment were waiting for. Unfortunately, the questions have not been fully answered; if anything, more questions have been raised. Justice O'Connor said that the Court need not answer in its opinion all the questions raised by the hostile environment sexual harassment test.\(^{234}\) This shows that the decision is not going to solve all present inconsistencies and that sometime soon the Court will be revisiting the issue. Although the potential remains for a myriad of questions, the Court did take a positive stand in the struggle to give some definition to hostile environment sexual harassment claims. Now, plaintiffs like Teresa Harris will not have to endure a nervous breakdown before they can prove they were sexually harassed. The Court was not trying to make sexual harassment easier to prove. It was trying to determine the pertinent elements of the claim for relief. To do this it reaffirmed *Meritor* and said


\(^{233}\) See *supra* note 31 and accompanying text.

\(^{234}\) *Harris II*, 114 S. Ct. at 371.
psychological harm was never meant to be an element. The Court is merely giving sexual harassment victims what was theirs in the first place: the chance to show that abusive behavior created a hostile working environment.

Litigation is not the best means of preventing sexual harassment. The EEOC Guidelines seek prevention of sexual harassment as a means of elimination. When litigation ensues it is an after-the-fact event geared towards redress of the victim. The sexual harassment has already occurred and plaintiff is obligated to relive what happened by recounting the story in court. Professor Kathryn Abrams' suggestions on preventing sexual harassment without litigation are a viable solution to the current problem and merit consideration. The battle for preventing sexual harassment is not only in the hands of Congress and the judicial system, but more appropriately, at the root of the problem, the workplace.

These suggestions only illustrate ways sexual harassment can be prevented without resorting to the courts. When preventive measures are not in place or they do not function, plaintiffs must turn to the judicial system for redress. They can expect to find inconsistencies in the courts, because this is a highly uncertain area. There is no set test, even considering the Court's efforts in *Harris II*. The propositions set forth in Justices Scalia and Ginsburg's concurring opinions do not lend any help at the moment. Perhaps when the Court revisits the issue it will look to the concurring opinions as an aid to reaching a defined test for hostile environment sexual harassment claims. Until the Supreme Court takes up the issue again, let us hope lower courts have enough sense to evaluate all the factors fairly based on the totality of the circumstances, without adding any unnecessary burdens, from the perspective of the reasonable victim and not a sexless reasonable person.

*Mary C. Gomez*

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235. *Id.* at 370-71.

236. 29 C.F.R. § 1604.11(f) (1993).


Table of Contents

I. Introduction ...................................... 1919
II. Doctrine of Immunity ............................. 1925
III. Historical Development of Prosecutorial Immunity .......... 1927
IV. The Buckley Decision ............................ 1934
V. Critical Analysis of the Buckley Decision .................. 1935
VI. Conclusion ..................................... 1940

I. Introduction

On March 4, 1988, Stephen Buckley commenced a civil action seeking damages under Title 42, section 1983 of the United States Code from the State's Attorney for DuPage County, Illinois, J. Michael Fitzsimmons and other governmental officials, for allegedly fabricating evidence during the preliminary investigation of a crime in which Buckley had been implicated.

1. 42 U.S.C. § 1983 provides that:
   Every person who, under color of any ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2609 (1993). In his complaint, Buckley listed seventeen defendants. Id. Fitzsimmons, the State Attorney for DuPage County, Illinois at the time of Buckley's indictment, was the lead defendant. Id. The other defendants included the DuPage County Sheriff, members of the Sheriff's police department, several prosecutors of the State Attorney's office, two experts who analyzed evidence used against Buckley, the estate of another expert who analyzed evidence, and DuPage County itself. Id.

3. Buckley v. Fitzsimmons, 919 F.2d 1230, 1235-36 (7th Cir. 1990). In addition to seeking damages for the falsification of evidence claim, Buckley also contended that Fitzsimmons violated his liberty rights by making false statements at a press conference where it was announced that an indictment had been returned against Buckley. Id. at 1236. Buckley's complaint stated that everyone who participated in his prosecution was conspiring to execute him even though they all knew he was innocent. Id.
The action arose out of Buckley's arrest and subsequent prosecution for the murder of eleven year old Jeanine Nicarico. On February 25, 1983, Jeanine was kidnapped from her home in Naperville, Illinois, when someone kicked in the front door and carried her away in a blanket. The kidnapper drove Jeanine into the country where he raped and sodomized her. The assailant beat her to death and threw her body in the mud near a country path. Jeanine's body was found two days later, and an intensive investigation commenced under the direction and responsibility of the Illinois Sheriff's Department and the Illinois State Attorney's Office.

During the investigation, the authorities focused their attention on what they considered to be a key piece of evidence: a bootprint the killer left on the door of the Nicaricos' home when he kicked in the door. At approximately the same time in the investigation, a man named Alex Hernandez told Sheriff's detectives that Buckley had been present during a post-murder conversation in which Buckley discussed the murder of Nicarico.

Fitzsimmons wanted to strengthen his popularity for an upcoming election by quickly solving the Nicarico murder. Buckley also maintained that the press conference violated his rights because the community turned against him, and his chances of obtaining bail or receiving a fair trial were diminished. However, this comment will limit its focus to the falsification of evidence claim and subsequent decisions because the Supreme Court unanimously decided that Fitzsimmons was not entitled to absolute immunity for those statements he made at the press conference. Buckley, 113 S. Ct. at 2617-18.

4. Id. at 2609.
5. Buckley, 919 F.2d at 1234.
6. Id. The actual account of the crime is that after the kidnapper unsuccessfully attempted to penetrate Jeanine's vagina, he raped her in the anus. Id.
7. Id. Jeanine's skull was caved in by five blows from either a tire iron or a baseball bat. Id.
8. Buckley, 919 F.2d at 1234.
9. Id.
10. Id. Hernandez was believed to be a mentally disturbed petty thief who was subsequently arrested and convicted of Jeanine's murder along with Buckley and another man named Rolando Cruz. Id. Hernandez and Cruz had both admitted to taking part in Jeanine's abduction but neither confessed to the rape or murder, and both stated that Buckley drove the car. Id. All three men were arrested and put on trial. Buckley, 919 F.2d at 1235. A jury convicted Hernandez and Cruz of murder, among other charges, and they were sentenced to death. Id. In 1988, the Supreme Court of Illinois reversed the convictions of Cruz and Hernandez, but in reversing the convictions, the court did not forbid a retrial, concluding that the evidence was sufficient enough for a jury to find guilt. Id. As a result, Cruz and Hernandez were retried and Cruz was again found guilty and sentenced to death. Id. The jury could not reach a verdict regarding Hernandez's guilt or innocence, and his case was declared a mistrial. Id. However, it was announced that the prosecuting attorney would take
On the basis of the information supplied by Hernandez, detectives tracked down Buckley and questioned him about the murder.\(^{11}\) When detectives specifically asked Buckley if he owned any boots, he admitted to having boots with soles similar to the print that was left on the door.\(^{12}\) Buckley's boots were examined by three separate experts who gave three varying opinions.\(^{13}\) Confronted with these three differing opinions, prosecutors asked Louise Robbins, an anthropology professor at the University of North Carolina at Greensboro, to analyze the boots and the bootprint.\(^{14}\) Robbins affirmatively concluded that Buckley's boots made the marks on the Nicarico's door.\(^{15}\) Additional pieces of evidence linking Buckley to the crime were two eyewitnesses; one placed Buckley at the scene of the abduction and another placed him at the scene of the murder.\(^{16}\)

Prosecutors convened a special grand jury for the sole purpose of investigating the murder. Ten months later, Fitzsimmons announced Buckley's indictment at a news conference with the basis for the indictment being Louise Robbins' testimony.\(^{17}\) Buckley was eventually arrested, and

Hernandez to a third trial. *Buckley*, 919 F.2d at 1235.

11. *Id.* at 1234. Buckley steadfastly maintained his innocence as to any involvement in the murder throughout the entire proceedings. *Id.*

12. *Id.*

13. *Id.* The boots were first examined by John Gorayczyk who was the head of the identification section in the DuPage County crime laboratory. *Buckley*, 919 F.2d at 1234. He concluded that although the soles of the boots and the bootprint were the same, Buckley's boots did not match the bootprint because the heels were a "little" different. *Id.* The boots were next analyzed by Edward German, a forensic scientist in the Illinois Crime laboratory. *Id.* He determined that Buckley's boots "could have at best" made the bootprint. *Id.*

Prosecutors then asked Robert Olsen of the Kansas Bureau of Identification to examine the boots, and he concluded that Buckley's boot "probably" matched the marks on the door. *Id.*

14. *Buckley*, 919 F.2d at 1234. The use of Louise Robbins as an expert was considered to be controversial as she was thought to be an unreliable scientific evidence expert by other forensic scientists due to continuing accusations against her alleging that she was willing to fabricate her testimony. *Buckley*, 113 S. Ct. at 2610.

15. *Buckley*, 919 F.2d at 1234. During later testimony, Robbins stated that she could identify the wearer of a shoe with certainty even if she only had the prints made with different shoes. *Id.*

16. *Id.* Both eyewitnesses, one who was near the Nicarico's house and the other who was near the muddy path where Jeanine's body was found, stated that they were positive they saw Buckley driving a green Ford Granada leaving the neighborhood at the time of the abduction and arriving at the path near the time of the murder. *Id.*

17. *Buckley*, 113 S. Ct. at 2610-11. Buckley stated in his claim that Fitzsimmons convened this special grand jury to bolster his campaign and to specifically secure an indictment against him. *Buckley*, 919 F.2d at 1236.
his bond was set at three million dollars. Buckley, unable to meet the bond, remained incarcerated for three years.

At Buckley's first trial, Louise Robbins' testimony about the bootprint evidence provided the foundation of the prosecution's case against Buckley; however, the jury was unable to reach a verdict, and the judge declared a mistrial. The State decided to retry Buckley, but before the retrial began, Louise Robbins died. As a result, the charges against Buckley were dismissed, and he was released in March of 1987 after three years of incarceration.

In 1988, Buckley filed suit under 42 U.S.C. section 1983, claiming that virtually everyone involved with the arrest, investigation, and subsequent malicious prosecution should pay damages because his constitutional right to liberty was violated by their actions. The theory of Buckley's case was that to obtain the indictment against him, the prosecutors fabricated evidence when they obtained Robbins' opinion about the bootprint evidence. Fitzsimmons moved to dismiss Buckley's action based on a claim of absolute immunity.

In addition, Buckley maintains that the announcement of his indictment by Fitzsimmons to the press violated his right to liberty because the community turned against him, thereby diminishing his chances of obtaining bail or receiving a fair trial. Id. Buckley, 113 S. Ct. at 2611.

21. Buckley, 919 F.2d at 1235. During the two years between the first trial and the second trial, Buckley remained in prison. In addition, as preparations were being made for Buckley's retrial, a man named Brian Dugan who had recently been arrested for the kidnapping, molestation, and murder of a seven year old girl, confessed to Jeanine's murder; however, prosecutors in DuPage County determined that the confession was unreliable. Id.

22. Id. The prosecution found themselves in a bind because no other expert was willing to testify that the bootprint evidence positively confirmed Buckley's guilt. Id.

23. Id.

24. Buckley, 113 S. Ct. at 2610. Buckley's contention is that the prosecutors manufactured false evidence linking Buckley's boot to the bootprint by shopping around for experts until they found one who would provide them with the opinion they wanted. Id. at 2615.

25. Id. at 2611. Immunity is defined as the "freedom or exemption from a charge, duty, obligation . . . penalty . . . as granted by law to a person or class of persons," and as "a freedom granted to a special category of persons from the normal burdens and duties arising out of a legal relationship with other persons." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1130-31 (15th ed. 1971) (emphasis added).

The importance of the immunity concept in this scenario rests on its implications at the procedural level. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). Absolute immunity defeats a suit at the outset, provided the official's actions were within the scope of the
The District Court for the Northern District of Illinois, Eastern Division, held that the prosecutors were entitled to absolute immunity with respect to the claim based on the alleged fabrication of evidence. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, holding that the prosecutors had absolute immunity. The court concluded that the fabricated evidence could have only caused injury at the judicial phase, and therefore, the prosecutors were entitled to, and protected by, absolute prosecutorial immunity. The court reasoned that conversations between the prosecutors and the bootprint evidence expert may not be the foundation of liability because the out-of-court evaluation of evidence from an expert witness causes no injury independent from that which transpires in the courtroom. Thus, "[p]rosecutors whose out-of-court acts cause injury only to the extent a case proceeds will be brought to heel adequately by the court," and the defendant who has suffered the injury must rely on the pending court to protect his interests. Buckley appealed the decision to the United States Supreme Court and the Court granted his

immunity. See Wood v. Strickland, 420 U.S. 308, 320-22 (1975); Scheuer v. Rhodes, 416 U.S. 232, 238-39 (1974). However, an official with qualified immunity must depend upon the circumstances and motivations of his actions, as established at trial, to determine whether he is liable for the claims against him. Scheuer, 416 U.S. at 239. Under this form of immunity, government officials are not subject to damages liability for the performance of their duties when their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

26. Buckley, 113 S. Ct. at 2611. The district court stated that absolute immunity should be extended to the prosecutors effort to link the bootprint evidence to Buckley because that act was in the nature of evaluating evidence for the purpose of initiating a criminal proceeding. Id. The court further stated that the concept of absolute immunity covers the entire investigation of a case which includes meetings with witnesses, presentation of evidence to a grand jury, and the decision on whether or not to prosecute. Buckley, 919 F.2d at 1243.

27. Id. at 1244. However, the court of appeals reversed the district court, and ruled that the prosecutors were also entitled to the protection of absolute immunity with regard to the press statements. Id. at 1242.

28. Buckley, 113 S. Ct. at 2611.

29. Buckley, 919 F.2d at 1243-44.

30. Id. at 1242.

31. Id. at 1241. In addition to looking to the court to protect the defendant's interests, in this scenario, the defendant also has the opportunity to utilize his own expert witnesses at trial to rebut the expert testimony presented by the prosecution.
petition for certiorari, vacated the judgment, and remanded the case for further proceedings.\(^{32}\)

On remand, the Court of Appeals for the Seventh Circuit reaffirmed its decision.\(^{33}\) Buckley again appealed the court's decision, claiming that absolute prosecutorial immunity only applies to the act of initiating the prosecution and to acts that occur inside the courtroom during the presentation of the State's case.\(^{34}\) The Supreme Court once again granted certiorari and reversed the court of appeals decision, holding that the prosecutors were not entitled to absolute immunity,\(^{35}\) thereby allowing Buckley to seek damages from the prosecutor for the alleged falsification of evidence.

This comment will focus on the potential harmful ramifications this decision will have, as well as the contradictory nature of the decision itself. Part II will discuss the doctrine of immunity, from the immunity granted to those officials from common law liability, to the immunity afforded governmental officials under 42 U.S.C. section 1983. Part III will specifically examine the historical development of prosecutorial immunity, from the common law tradition of prosecutorial immunity, to a survey of the Federal Circuit Courts of Appeals' handling of the prosecutorial immunity issues, and finally to Supreme Court precedent dealing with the issue of prosecutorial immunity. Part IV will focus on the reasoning the Supreme Court proffered in its holding in \textit{Buckley}. Part V will criticize the majority's decision in light of previous Supreme Court decisions which clearly indicate that the prosecutors' actions in \textit{Buckley} should have been afforded the protection of absolute prosecutorial immunity. Furthermore, this part will discuss the possible effects and harmful ramifications \textit{Buckley} will have on prosecutors and the public. Part VI will conclude that absolute immunity should have been afforded to the prosecutors in \textit{Buckley} in light of the historical, common law, and case law support for extending absolute immunity to those acts undertaken by the prosecutors.

\(^{32}\) \textit{Buckley}, 113 S. Ct. at 2612. The Supreme Court remanded the case to the court of appeals in light of their recent decision in \textit{Burns} v. Reed, 111 S. Ct. 1934 (1991). \textit{Burns}, discussed more in depth later in this comment, dealt with absolute prosecutorial immunity and was decided after the Seventh Circuit Court of Appeals had already rendered its decision. \textit{See infra} pp. 1932-33 and note 95.

\(^{33}\) \textit{Buckley v. Fitzsimmons}, 952 F.2d 965 (7th Cir. 1992) (per curiam). The court held that \textit{Burns} did not undermine its initial decision that prosecutors are absolutely immune for "normal preparatory steps." \textit{Id.} at 966.

\(^{34}\) \textit{Buckley}, 113 S. Ct. at 2615, 2620.

\(^{35}\) \textit{Id.} at 2612. The Court limited its inquiry to the issue of prosecutorial immunity in regard to the bootprint evidence and the statements made to the press. \textit{See supra} note 3.
II. DOCTRINE OF IMMUNITY

Courts have granted immunity from liability to certain classes of federal and state officials based on their status as government officials. This immunity is based principally on the special status of the defendant as a government entity, and is grounded in the belief that even though the defendant may have committed a wrong, there exist greater social concerns that mandate the defendant escape liability.36

When a court grants immunity to an official, it does not deny that a tort exists. It deems that the defendant may not be subjected to a suit for the alleged wrong based solely on the defendant's function as a government official.37

The courts recognize two types of immunity: absolute and qualified.38 An official who has been granted absolute immunity is not subject to a tort action provided his actions are deemed to be within the scope of his duties as a government official, even if his actions are intentional or malicious.39 However, an official with qualified immunity is immune from liability if his actions are within the scope of his authority and are performed in good faith.40

The doctrine of immunity from common law liability is well settled and firmly establishes that judicial officers acting within the scope of their duties are immune from liability.41 The grant of absolute immunity to judges,42

38. See. e.g., Harlow v. Fitzgerald, 457 U.S. 800, 807-08 (1982). The Court noted that “our decisions have recognized immunity defenses of two kinds:” absolute and qualified. Id. at 807. The Court went on to state that absolute immunity applies to those officials whose status requires “complete protection from suit” and that qualified immunity is the normal standard for executive officials in general. Id.
40. Scheuer, 416 U.S. at 247-48 (however, in Harlow, the Court modifies this standard with regards to actions arising under 42 U.S.C. section 1983).
41. Imbler, 424 U.S. at 418, 424. The common law tradition of affording absolute immunity to prosecutors for acts committed within the scope of their duties was found to be preserved in claims brought under 42 U.S.C. section 1983. See Pierson v. Ray, 386 U.S. 547, 554-55 (1967).
42. Imbler, 424 U.S. at 423 n.20. The Supreme Court accepted the rule of judicial immunity in Bradley v. Fisher, 80 U.S. 335 (1871). The Court has since described the grant of judicial immunity as follows:

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley
grand jurors,\textsuperscript{43} and prosecutors,\textsuperscript{44} for acts within the scope of their official capacities has roots extending to the earliest days of the common law. Courts have recognized these types of immunities to protect the public interest by allowing those officials who were immune from liability to perform their duties without the fear of retaliatory lawsuits.\textsuperscript{45}

Under 42 U.S.C. section 1983, government officials acting under the color of state law may be held personally liable for acts that deprive any person of constitutionally protected rights.\textsuperscript{46} On its face, section 1983 grants no immunities.\textsuperscript{47} However, the United States Supreme Court has held that certain government officials performing certain functions should be afforded immunity from liability under section 1983 suits.\textsuperscript{48} The Court has further held that it is the function the government official performed, not his status, which determines whether an immunity defense is available to that official.\textsuperscript{49}

A government official may be granted the defense of absolute immunity and thereby be shielded from a section 1983 action if the official's function passes the standard set forth by the Supreme Court.\textsuperscript{50} The Court states that "where the immunity claimed by the defendant was well established at the common law at the time § 1983 was enacted, where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity."\textsuperscript{51} Therefore, if the official's function satisfies that standard, it will be "incorporated" into section 1983, and the official can successfully claim the defense of absolute immunity.\textsuperscript{52} Accordingly, the Court has recognized absolute immunity

\textsuperscript{43} Turpen v. Booth, 56 Cal. 65 (1880).
\textsuperscript{44} Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896).
\textsuperscript{45} Imbler, 424 U.S. at 418 n.12.
\textsuperscript{47} Id.
\textsuperscript{50} Owen v. City of Independence, 445 U.S. 622, 638 (1980).
\textsuperscript{51} Id.
\textsuperscript{52} Id.
from section 1983 suits for judges,\textsuperscript{53} witnesses,\textsuperscript{54} and prosecutors.\textsuperscript{55} The Court has reasoned that the same underlying justifications mandating absolute immunity from liability in common law tort suits also apply to section 1983 actions.\textsuperscript{56}

The majority of cases regarding government official's immunity from section 1983 liability have involved prosecutors and other officials with functions that the courts have designated as "quasi-judicial."\textsuperscript{57} The Court stated that it is the "functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers. . . ."\textsuperscript{58}

III. HISTORICAL DEVELOPMENT OF PROSECUTORIAL IMMUNITY

The common law immunity of a prosecutor is derived from the same considerations that form the common law grant of immunity to judicial officers acting within the scope of their duties.\textsuperscript{59} One reason is a prosecutor's concern about harassment from retaliatory lawsuits that would inhibit prosecutors from utilizing their lawyering skills to fully perform their duties.\textsuperscript{60} This recognition that the common law tradition of judicial immunity is extended to prosecutors ensures that prosecutors do not have to be intimidated by the threat of civil litigation. Furthermore, it guarantees that a prosecutor can retain and exercise the "independence of judgment required by his public trust."\textsuperscript{61} In addition, judicial immunity extends to prosecutors because prosecutors, like judges, are integrally involved in the

\textsuperscript{53} Pierson, 386 U.S. at 554. The Court determined that judicial immunity is essential to protect the judicial process and is therefore preserved under 42 U.S.C. section 1983. \textit{Id.}

\textsuperscript{54} Briscoe, 460 U.S. at 325. The Court reasoned there was nothing in the legislative history of section 1983 that indicated an intention to abrogate common law witness immunity. \textit{Id.}

\textsuperscript{55} See Pierson, 386 U.S. at 554-55. The Court determined the common law tradition of affording absolute immunity to prosecutors for acts committed within the scope of their duties was found to be preserved in claims brought under 42 U.S.C. section 1983. \textit{See id.}

\textsuperscript{56} Imbler, 424 U.S. at 418. The Court stated that "[section] 1983 is to be read in harmony with general principals of tort immunities and defenses rather that in derogation of them." \textit{Id.}

\textsuperscript{57} Id. at 423 n.20.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.} at 422-23.

\textsuperscript{60} Imbler, 424 U.S. at 423.

\textsuperscript{61} \textit{Id.}
judicial process and also exercise discretionary judgment on the basis of evidence presented to them.\(^\text{62}\)

In light of the immunity historically granted to prosecutors at common law, as well as the policy interests supporting prosecutorial immunity, state prosecutors have been deemed to be absolutely immune from liability under 42 U.S.C. section 1983 for their conduct in commencing prosecutorial proceedings and in presenting the State’s case,\(^\text{63}\) as long as that conduct is "intimately associated with the judicial phase of the criminal process."\(^\text{64}\)

Yet, before the Supreme Court rendered its decision in \textit{Buckley}, the question of whether absolute immunity protected certain preparatory actions undertaken by a prosecutor before an indictment had been filed had remained unanswered.\(^\text{65}\) The United States Courts of Appeal have declined to establish a "bright line" test based on the commencement of judicial proceedings, and have applied absolute immunity to several acts that prosecutors perform, including those that have occurred prior to an indictment.\(^\text{66}\)

The Court of Appeals for the Second Circuit has divided the pre-litigation actions of prosecutors into two categories.\(^\text{67}\) The first category involves those acts considered to be of a police nature and includes the supervision of and participation with law enforcement agencies in acquiring evidence that might be used during a prosecution.\(^\text{68}\) Therefore, those officials whose acts fall into this category would only be entitled to qualified immunity.\(^\text{69}\) The second category, categorized as prosecutorial in nature, involves the organization, evaluation, and supervision of evidence that will enable the prosecutor to decide whether or not to commence with judicial proceedings.\(^\text{70}\) Accordingly, these functions qualify for absolute immunity.\(^\text{71}\) The Second Circuit has also extended absolute immunity to a

\(^\text{62}\). \textit{Id.} at n.20. The Court notes it is this functional comparison of a prosecutor's discretionary judgment to that of judges that has resulted in prosecutors being labeled as "quasi-judicial" officers, and the immunity they are entitled to is also referred to in those terms. \textit{Id.}

\(^\text{63}\). \textit{Id.} at 431.

\(^\text{64}\). \textit{Imbler}, 424 U.S. at 430.

\(^\text{65}\). \textit{Id.} at 431 n.33.

\(^\text{66}\). \textit{See, e.g.}, Barbera v. Smith, 836 F.2d 96, 100 (2d Cir. 1987); Powers v. Coe, 728 F.2d 97, 104 (2d Cir. 1984).

\(^\text{67}\). \textit{Barbera}, 836 F.2d at 100.

\(^\text{68}\). \textit{Id.}

\(^\text{69}\). \textit{Id.}

\(^\text{70}\). \textit{Id.}

\(^\text{71}\). \textit{Id.}
prosecutor's actions during the plea bargaining stage of a proceeding despite misrepresentations by the prosecutor of certain facts. 72

The Court of Appeals for the Eighth Circuit has held that providing advice to law enforcement officials concerning the existence of probable cause and the legality of subsequent arrests is within the protected scope of prosecutorial immunity. 73 Furthermore, the Eighth Circuit has held that commencing proceedings to terminate parental rights without notice to the natural father is protected by absolute prosecutorial immunity. 74 Additionally, the Court of Appeals for the Fifth Circuit has established that the act of intimidating a plaintiff by continuing prosecutorial proceedings against him unless he agreed to dismiss a damage suit he had filed against a prosecutor was a protected prosecutorial function. 75

The United States Courts of Appeal have also established that the prosecution's pre-indictment securing of evidence, whether through the interrogation of witnesses or through other means, qualifies for absolute immunity because these acts are essential to the prosecutorial functions of pre-trial preparation. 76 Specifically, the Court of Appeals for the Second Circuit has held that a prosecutor is entitled to absolute immunity when the coercion of false testimony leads to an indictment. 77 The court reasoned that the same injurious result from the decision to prosecute must flow from the initiation of the criminal proceedings. 78 The Court of Appeals for the Fifth Circuit has stated that the interviewing of witnesses by prosecutors

72. Taylor v. Kavanaugh, 640 F.2d 450, 453 (2d Cir. 1981). In Taylor, the prosecutor lied to the defendant and to the court during the plea bargaining phase of the judicial proceedings, stating that an indictment had been returned by the grand jury when no such indictment had been handed down. Id. at 451. The state attorney during this plea bargaining stage also reneged on a promise he had made to the defendant that he would not make a recommendation relating to the sentence to be imposed. Id.
73. Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir. 1987).
74. Martin v. Aubuchon, 623 F.2d 1282, 1285 (8th Cir. 1980). In Martin, a man who had been arrested for the murder of his wife sought damages from a variety of governmental officials, including the District Attorney, claiming that he had not been given adequate notice of the termination proceedings and accordingly, had been deprived of due process. Id. The court stated that the claim against the District Attorney was barred by absolute immunity because the acts complained of occurred as part of the initiation and prosecution of the State's case. Id.
78. Id.
before presenting their testimony to a grand jury, is also protected by absolute immunity. 79

In addition, the Court of Appeals for the Ninth Circuit has similarly established that the act of conferring with a potential witness for the determination of whether or not to file charges is entitled to absolute immunity. 80 Finally, the Court of Appeals for the Tenth Circuit has determined that certain case preparation that is deemed "investigative" can be regarded as a necessary part of the prosecutorial function and thus qualifies for absolute immunity protection. 81

Supreme Court precedent has firmly established that the principles for determining whether certain actions of government officials are entitled to immunity have their basis in historical practice, and have resulted in a functional approach test being applied to determine whether or not immunity should be afforded to those actions. 82 The Court has stated that the "immunity analysis rests on functional categories, not on the status of the defendant." 83 The various functions that the prosecutor must perform in his role as advocate for the State are the essence of the functional approach. 84 Yet, prior to the Buckley decision, the Supreme Court has only

79. Cook v. Houston Post, 616 F.2d 791, 793 (5th Cir. 1980).
80. Demery v. Kupperman, 735 F.2d 1139, 1144 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985). The court reasoned that the act of conferring with witnesses for this purpose is necessary for the preparation for trial. Id.
83. Briscoe, 460 U.S. at 342.
84. Note, Delimiting the Scope of Prosecutorial Immunity From Section 1983 Damage Suits, 52 N.Y.U. L. Rev. 173, 187 (1977). The note goes on to state that a prosecutor's duties can be divided into seven general categories: 1) Quasi-judicial or prosecutorial duties, considered to be the most important duties, include decisions on whether or not to prosecute; 2) Executive or administrative duties that consist mostly of office duties; 3) Investigatory duties, similar to those undertaken by the police, may include the gathering of evidence and being involved in the investigation of criminal activities; 4) Ministerial duties include those matters in which a prosecutor cannot exercise his own discretionary judgment, such as complying with court orders; 5) Advisory acts include the giving of advice to other governmental officials and providing legal opinions; 6) Official public duties can comprise a vast scope of activities that can range from attending public activities, making speeches, and testifying at public hearings; and 7) Individual acts include job-related activities, like campaigning, as well as those acts that are strictly personal in nature. Id. at 187-88. The functional approach only extends absolute prosecutorial immunity to those acts falling under the quasi-judicial category. Id. at 188.
had two opportunities to utilize the functional approach test to specifically address the liability of prosecutors in a suit for damages under 42 U.S.C. section 1983.\textsuperscript{85}

In \textit{Imbler v. Pachtman},\textsuperscript{86} the Supreme Court first established that a prosecutor is absolutely immune from a civil suit for damages under 42 U.S.C. section 1983 for alleged deprivation of an accused’s constitutional rights.\textsuperscript{87} In \textit{Imbler}, the Court held that a state prosecuting attorney is absolutely immune from liability in “initiating a prosecution and in presenting the State’s case.”\textsuperscript{88} The Court focused upon the functional nature of a prosecutor’s activities rather than his status as a prosecutor, and stated that those activities which are “intimately associated with the judicial phase of the criminal process” are the type of functions that absolute immunity should apply to with full force.\textsuperscript{89} The Court reasoned that although this immunity would leave the “genuinely wronged” criminal
defendant without any type of civil action against the prosecutor whose improper actions deprived him of his liberty, the alternative of only affording a prosecutor the protection of qualified immunity would “prevent the vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice system.”

The Court, however, did not attempt to draw a line between those functions that a prosecutor undertakes in his preparation for the initiation of the criminal process and for trial and those functions that require a prosecutor to act as an administrator rather than as an officer of the court. The Court recognized that the duties of the prosecutor in his role as advocate for the State “involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.” As a result, the Court left the door open for further debate as to what prosecutorial acts would fall under the broad categorization of allowing absolute prosecutorial immunity for “initiating [and pursuing] a [criminal] prosecution” and “presenting the State’s case.”

In 1991, the Court revisited the issue of prosecutorial immunity in Burns v. Reed. The Burns Court applied the “functional” test analysis of

90. Id. at 427-28.
91. Imbler, 424 U.S. at 431 n.33.
92. Id. The court noted that preparation for both the initiation of the criminal process and for a trial may require the obtaining, reviewing, and evaluating of evidence. Id.
93. Id. at 431.
94. Id.
95. 111 S. Ct. 1934 (1991). In Burns, petitioner Cathy Burns had called the police to report that an assailant had entered her house, knocked her unconscious, and shot and wounded her two sons. Id. at 1937. Burns eventually became the prime suspect, even though she passed a lie-detector test and repeatedly denied any involvement in the attack. Id. It was then suspected that Burns had multiple personalities, one of whom had perpetrated the attack on her sons. Id.

The police sought the advice of state prosecutor Reed to see if it would be a permissible investigative technique to hypnotize Burns to determine if she did suffer from multiple personalities, and if so, to elicit if one of the personalities was the assailant. Id. While Burns was hypnotized she referred both to herself and to the assailant as “Katie.” Burns, 111 S. Ct. at 1937. The police regarded this as support for their multiple personality theory, and once again sought the advice of the state prosecutor for a probable cause determination, who told them that they “probably had probable cause” to arrest her. Id. On the basis of this assurance, Burns was arrested. Id.

During a subsequent probable cause hearing, one of the officers testified, in response to prosecutor’s Reed’s questions, that Burns had confessed to the attack; however, neither the officer, nor Reed, informed the judge that the confession was obtained while Burns was under hypnosis. Id. Burns was ultimately charged with attempted murder, but she successfully moved to suppress the statements elicited while she was under hypnosis, and the charges were
Imbler to further define the scope of absolute prosecutorial immunity.\textsuperscript{96} The Court held that a state prosecuting attorney is absolutely immune from liability for damages for his appearance as an advocate for the State during a probable cause hearing, where the prosecutor examined a witness and successfully supported the search warrant application.\textsuperscript{97}

The Court found support for this grant of absolute immunity both in the common law and in the policy concerns stated in Imbler.\textsuperscript{98} The Court reasoned that the prosecutor's appearance before the judge and the presentation of evidence in support of an application for a search warrant "clearly involves the prosecutor's role as advocate for the State."\textsuperscript{99}

However, the Court also held that absolute immunity from liability for damages under 42 U.S.C. section 1983 did not apply to the prosecutor's act of giving legal advice to the police.\textsuperscript{100} The Court noted that there was no historical or common law support for extending absolute immunity to such actions.\textsuperscript{101} The Court explained the risk of vexatious litigation was not present for this act because a defendant is not likely to be aware of the prosecutor's role in giving advice as compared to a prosecutor's role in initiating and conducting a prosecution.\textsuperscript{102} "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation."\textsuperscript{103} Therefore, only those actions that are related to the prosecutor's role in the judicial process justify the protection of absolute prosecutorial immunity.\textsuperscript{104}

\textsuperscript{96} 
Buckley, 113 S. Ct. at 2614.

\textsuperscript{97} 
Burns, 111 S. Ct. at 1940.

\textsuperscript{98} 
Id. at 1941. The Court noted that the "duties of the prosecutor in his functional role as advocate for the State involve actions preliminary to the initiation of a prosecution." \textit{Id.} (quoting \textit{Imbler}, 424 U.S. 431 n.33 (1976)).

\textsuperscript{99} 
Burns, 111 S. Ct. at 1942.

\textsuperscript{100} 
Id. at 1944-45. Prosecutor Reed advised the police that they could question Burns while under hypnosis to try to assess whether she possessed multiple personalities and to determine if one of those personalities was the assailant. \textit{Id.} at 1937.

\textsuperscript{101} 
Id. at 1942.

\textsuperscript{102} 
Id. at 1943.

\textsuperscript{103} 
Burns, 111 S. Ct. at 1943.

\textsuperscript{104} 
Id.
IV. THE BUCKLEY DECISION

In 1993, the Supreme Court had the opportunity to define and further specify what prosecutorial actions are protected under the umbrella of absolute immunity. In *Buckley v. Fitzsimmons*, the Court, in a five to four decision, narrowly held that prosecutors may be sued for damages under 42 U.S.C. section 1983 for their participation in the investigative stage of a criminal case. Justice John Paul Stevens, writing for the majority, stated that the prosecutors' actions in trying to determine whether the bootprint had been made by the petitioner's foot was investigative in character and therefore was not protected by absolute immunity. The Court noted that their decision in *Burns* clarified the principle that "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." However, the Court also reiterated the well established principle that those prosecutorial acts which are in preparation for trial or for the commencement of judicial proceedings and occur in the prosecutor's role as advocate for the State are entitled to absolute immunity. The Court further noted that those acts which are entitled to the protection of absolute immunity must include "the professional evaluation of the evidence assembled by the police" and any other preparations undertaken for presentation at trial or before a grand jury. Yet, instead of recognizing that the evaluation of the bootprint evidence fell under the protection of absolute immunity, the Court chose to compare the actions of the prosecutor to that of a detective searching for clues and corroboration that might give him probable cause to recommend an arrest. The Court, by classifying the prosecutor's actions of having the bootprint evidence examined by an expert witness as that of a detective "searching for clues," had no choice but

105. 113 S. Ct. 2606 (1993).
106. *Buckley*, 113 S. Ct. at 2617.
107. *Id.* at 2616-17.
108. *Id.* at 2615.
109. *Id.*
110. *Id.* (emphasis added). It is important to note that it was the police, not the prosecutors, who acquired the bootprint evidence. *Buckley*, 919 F.2d at 1234. Accordingly, the opinion rendered by Louise Robbins should have been regarded as evaluative, not investigative, because the steps undertaken by the prosecutors in eliciting the testimony of the forensic experts, and specifically Louise Robbins, was to evaluate and determine if Buckley had made the bootprint. *See discussion infra* pp. 1936-38.
111. *Buckley*, 113 S. Ct. at 2616.
to determine that the prosecutors were only entitled to qualified immunity.\textsuperscript{112} It was this classification where the Court made its error.

The \textit{Buckley} Court also drew the distinction between evaluating evidence and interviewing witnesses in preparation for trial, which are advocacy functions, and participating in an investigation for evidence that could provide probable cause for an arrest, which is an investigative function.\textsuperscript{113} The Court, in utilizing this distinction, determined that the alleged manufacture of evidence was part investigatory in nature because the prosecutors' actions involving the footprint evidence occurred before the prosecutors claimed to have probable cause to arrest Buckley or to initiate judicial proceedings against him.\textsuperscript{114} The Court went on to state that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."\textsuperscript{115}

However, the Court quickly retreated from what appeared to be a "bright line" test of distinguishing activities before and after the probable cause determination. The Court noted that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards."\textsuperscript{116}

\section*{V. CRITICAL ANALYSIS OF THE BUCKLEY DECISION}

As previously indicated, Supreme Court precedent has created a standard that allows prosecutors to remain absolutely immune from a suit seeking damages under 42 U.S.C. section 1983 for actions a prosecutor undertakes in initiating a prosecution and in presenting the State's case at trial.\textsuperscript{117} The Court has also acknowledged that because the "duties of the prosecutor in his role as advocate for the State involve actions \textit{preliminary} to the initiation of a prosecution" and involve actions that take place outside

\begin{thebibliography}{99}
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\item 112. \textit{Id.} Since a detective or a law enforcement agent would only be entitled to qualified immunity, a prosecutor whose actions are comparable to those that a detective would perform should only be afforded the same type of immunity because the focus is on the functional nature of the actions, not on the status of the defendant. \textit{Id.}
\item 113. \textit{Id.}
\item 114. \textit{Id.}
\item 115. \textit{Buckley}, 113 S. Ct. at 2616.
\item 116. \textit{Id.} at n.5.
\end{thebibliography}
of the courtroom, the protection of absolute immunity should also apply to those actions.\textsuperscript{118}

Accordingly, state prosecutors' attempts to link the bootprint evidence to Buckley should be described as actions undertaken in preparation for trial. In \textit{Buckley}, Justice Anthony Kennedy's dissent emphasizes that "the decision to use a witness" during any phase of the prosecution, "must be insulated from liability."\textsuperscript{119} He further explained that this decision should not be hampered by the damaging effects of a potential lawsuit.\textsuperscript{120}

Justice Kennedy notes how the bootprint evidence was a critical part of the prosecution's case and that the consultations with the various experts are "best viewed as a step to ensure the bootprint's admission into evidence and to bolster its probative value in the eyes of the jury."\textsuperscript{121} Therefore, the prosecutors' actions in obtaining, reviewing, and ultimately utilizing the expert witness testimony should have been regarded as a function of the prosecutor in his duties as an advocate for the State.\textsuperscript{122}

The majority's categorization of the prosecution's attempt to link the bootprint evidence to Buckley through the use of an expert witness as investigative in nature is incorrect when a careful look at the chronological order of events is taken. According to the allegations, Buckley was first implicated in the crime by Alex Hernandez.\textsuperscript{123} This initial connection to the crime was independent of the bootprint evidence.\textsuperscript{124} Therefore, it could be argued that the purpose of the development of the bootprint evidence was to corroborate the information supplied by Hernandez.\textsuperscript{125} The focus then becomes whether the prosecutors' attempt to obtain evidence linking Buckley to the bootprint was to acquire evidence or to evaluate the quality of the evidence already obtained. The bootprint evidence and the implication by Hernandez were both acquired before the State Attorney's office consulted with Louise Robbins to try to identify the evidence.

\textsuperscript{118} \textit{Imbler}, 424 U.S. at 431 n.33 (emphasis added).
\textsuperscript{119} \textit{Buckley}, 113 S. Ct. at 2621 (Kennedy, J., dissenting).
\textsuperscript{120} \textit{Id.} at 2621-22.
\textsuperscript{121} \textit{Id.} at 2621.
\textsuperscript{122} \textit{Id.} Justice Kennedy reiterates this point by quoting \textit{Imbler}. He writes, "actions in 'obtaining, reviewing, and evaluating' witness testimony . . . are a classic function of the prosecutor." \textit{Id.} (citations omitted).
\textsuperscript{123} \textit{Buckley}, 919 F.2d at 1234.
\textsuperscript{124} \textit{Id.} Hernandez stated that he, along with Buckley, was present at a conversation where the murder of Jeanine Nicarico was discussed. \textit{Id.} There was never any mention of the bootprint evidence. \textit{See id.}
\textsuperscript{125} This point is all the more realistic when it is noted that Hernandez was known to be mentally disturbed and to have a criminal history of committing petty crimes. \textit{Id.}
positively. As a result, this attempt to identify the bootprint evidence should have been classified as evaluative in nature and afforded the full protection of absolute immunity.

The majority opinion is additionally flawed due to the fact that the analysis proffered by the Court in its decision has the potential for diluting the standard set forth in *Imbler* and *Burns* into nothing more than a mere pleading rule. If preparatory actions, like the ones undertaken by the prosecutors in *Buckley*, are unprotected by absolute immunity, any criminal defendant can institute civil proceedings against the prosecutor by simply reframing a claim to attack the preparatory actions instead of those prosecutorial actions that are protected by absolute immunity. Allowing the protection of absolute immunity to be avoided simply through a pleading mechanism circumvents the protection that the Court found necessary to establish in *Imbler* and *Burns*.

This reasoning stems from the fact that almost every action which takes place inside the courtroom requires timely and intensive preparatory measures that have taken place outside of the courtroom. These out-of-court measures include “substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction [at trial].” Justice Kennedy referred to this reasoning as even more fundamental than that stated by the Court for rejecting Buckley’s argument that *Imbler* only applies to in-court conduct and to the commencement of a prosecution.

In addition, the Supreme Court has looked to historical and common law support as one of the factors needed for extending the protection of absolute immunity to certain prosecutorial actions. The common law

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126. *Buckley*, 919 F.2d at 1234.
127. This theory was not proffered by Justice Kennedy in his dissent, but it is indicative of his attempt to show that consultations with expert witnesses at every stage of a judicial proceeding should be viewed as evaluative in nature and ultimately as preparation for trial. See *Buckley*, 113 S. Ct. at 2620-25 (Kennedy, J., dissenting).
128. *Id.* at 2620-21.
129. *Id.* at 2621; *Imbler*, 424 U.S. at 431 n.34.
130. *Buckley*, 113 S. Ct. at 2621.
131. *Id.*
132. *Id.* The majority rejected Buckley’s claim that the protection of absolute immunity for a prosecutor’s conduct in initiating a prosecution and in presenting the State’s case “only extend[s] to the act of initiation itself and to conduct occurring in the courtroom.” *Id.* at 2615.
133. *Burns*, 111 S. Ct. at 1941-42. In *Burns*, the Court refused to grant absolute immunity to a prosecutor’s act of giving advice to the police because neither the prosecutor
immunized a prosecutor, like other lawyers, from civil liability for eliciting false or defamatory testimony from witnesses. Therefore, in light of this common law support, the prosecutors in Buckley, by eliciting the testimony from Louise Robbins, even if it was false, should have been afforded absolute immunity for their alleged acts of falsifying evidence through the use of false witness testimony.

Furthermore, the Court, in concluding that the actions of the prosecutors in regard to the bootprint evidence were not protected by absolute immunity, has superimposed “a bright-line standard onto the functional approach that has guided” the Court’s previous decisions. Imbler created the well established principle that prosecutors were not subject to suit for malicious prosecution. Yet, the Court has created the apparent notion that a claim for malicious prosecution is no longer subject to immediate dismissal on the grounds of absolute immunity where a civil plaintiff is “clever enough to include [in the claim for damages] some actions taken by the prosecutor prior to the initiation of prosecution.” As a result, this “classic case” scenario that has consistently been afforded the protection of absolute immunity may now fall on the unprotected side of the Court’s “new dividing line.”

The Court, in its decision, also criticized the Seventh Circuit Court of Appeals’ holding that when “courts can curtail the costs of prosecutorial blunders . . . by cutting short the prosecution or mitigating its effects,” “damages remedies are unnecessary.” Therefore, “if the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect nor the lower court identified any common law or historical support for extending absolute immunity to such actions. Id. at 1942.

134. See, e.g., Burns, 111 S. Ct. at 1941; Yaselli v. Goff, 12 F.2d 396, 401-02 (2d Cir. 1926); Youmans v. Smith, 47 N.E. 265 (N.Y. 1897); Griffith, 44 N.E. at 1002.

135. Buckley claimed that the prosecutors specifically chose Robbins because they knew she would testify, even if it meant testifying falsely, that Buckley made the bootprint on Nicarico’s door. Buckley, 113 S. Ct. at 2615.

136. Id. at 2622. (Kennedy, J., dissenting). Justice Kennedy explains that the Court, in its majority opinion, has created a true anomaly by stating that a prosecutor should not consider himself to be an advocate before he has probable cause to have anyone arrested. Id.

137. Id. at 2623.

138. Id.

139. Buckley, 113 S. Ct. at 2623 (Kennedy, J., dissenting).

140. Buckley, 919 F.2d at 1241.

141. Id. at 1240.
his interests.”142 Thus, “prosecutors whose out-of-court acts cause injury only to the extent a case proceeds” are entitled to absolute immunity.143 The Supreme Court called this theory “unprecedented” and contrary to the Court’s approach of focusing on the conduct for which immunity is extended.144 However, this “source of the injury” theory is consistent with, and supported by, Supreme Court precedent.145 This precedent was established to ensure that the full spectrum of prosecutorial actions that are intertwined and closely associated with the judicial phase of the criminal process are afforded the protection of absolute immunity.146

Finally, the decision was flawed because of the damaging effects and harmful ramifications the Buckley decision will have on a prosecutor’s ability to fully perform his duties. Prosecutorial immunity was created to ensure that prosecutors “will be guided solely by their sense of public responsibility” rather than by a sense of fear of civil liability.147 However, the Court’s decision in Buckley will have a chilling effect on those prosecutors who may have been otherwise willing to be somehow engaged in the full investigation of those cases that they will ultimately present at trial. A prosecutor’s concern about the potential liability arising from pretrial consultations with witnesses could hamper his judgment as to whether certain witnesses should be used.148 This fear of liability during the initial phase of a prosecutor’s work “could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability.”149

As a result, this lingering threat of liability may cause a prosecutor to act with an undue sense of caution that will impede upon his independent

142. Id. at 1241.
143. Id. at 1242.
144. Buckley, 113 S. Ct. at 2611.
146. Id. The respondent’s brief notes that the prosecutor in Imbler allegedly had a police sketch altered to more closely resemble Imbler after the investigation focused upon him. Id. Respondent argues that this out-of-court preparation is more investigatory in nature than the falsifying of evidence alleged in Buckley. Id. at 21. Yet, the prosecutor’s actions in Imbler were still afforded the protection of absolute immunity, presumably because the injury that Imbler attributed to the altered sketch occurred when it was used at trial in order to aid the prosecution in convicting him. Id. This line of reasoning should have been analogized to the use of Louise Robbins’ testimony.
149. Buckley, 113 S. Ct. at 2622 (quoting Malley, 475 U.S. at 343 (1986)).

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The ability of an attorney to vigorously and fearlessly perform his duties utilizing his own judgment is imperative to a state prosecutor, whose position requires that he serve the public's interest in the most competent way possible. This ability of a prosecutor to perform his or her duties fully and without reservation is "essential to the proper functioning of the criminal justice system."

VI. CONCLUSION

The notion and belief that "no bad deed should go unpunished" is one that has entrenched itself into societies throughout history. Yet, prosecutors have been afforded immunity protection in certain situations. Even if they do something wrong, the law has stated that they shall go unpunished. In performing their duties as public servants and in performing their duties as advocates for the State, prosecutors have been afforded the protection of absolute immunity for those functions in initiating and pursuing a criminal prosecution. However, since the dividing line between a prosecutor's acts in preparing for those functions, some of which would be absolutely immune, and his administrative or investigative acts, which would not, has yet to be clearly defined, the question of what acts are protected by absolute immunity is yet to be completely answered.

Nonetheless, the historical and common law tradition of prosecutorial immunity, combined with state, federal, and Supreme Court precedent, have established a standard by which the determination of what acts are to be afforded the protection of absolute immunity is to be decided. Accordingly, the standard that has been established is that those acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or in preparing for trial and that occur in the course of his role as a public servant as advocate for the State are entitled to the protection of absolute immunity. The attorneys in Buckley were functioning as prosecutors in eliciting the testimony from Louise Robbins. They were preparing for the initiation of criminal proceedings against Buckley. Even if the testimony they received from Louise Robbins was false and maliciously utilized, the prosecutors'
acts still should have been afforded absolute immunity because those acts were prosecutorial functions.

Although such immunity leaves the genuinely wronged criminal defendant without any civil redress against the prosecutor or prosecutors who intentionally and maliciously deprived him of his liberty, the alternative of qualifying a prosecutor's immunity would harm the public with which he has a duty to serve.155 "It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system . . . ."156

As a result of the Court's determination that the apparent preparatory steps undertaken by the prosecution were not protected by absolute immunity and because of the rationalization that they were more investigative in nature, a chilling effect on prosecutors will no doubt arise in their willingness to fully involve themselves in a case. As Judge Learned Hand emphatically stated in his frequently quoted passage regarding prosecutorial immunity:

As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave undressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.157

155. The immunity of a prosecutor from liability for damages in civil suits under 42 U.S.C. section 1983 does not leave the public without a course of criminal redress to assure the public that this type of immunity does not place certain governmental officials above the law. Title 18, section 242 of the United States Code is the criminal equivalent of 42 U.S.C. section 1983 and provides:

Whoever, under color of any law, statute or ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.


In addition, a prosecutor is also subject to disciplinary actions imposed by his peers. See Model Rules of Professional Conduct Rule 3.8 (1989).


The Supreme Court in *Buckley* should have realized that they have now subjected those prosecutors who are faithfully performing their prosecutorial functions to this constant fear of retaliation.

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