

United States Senate
Committee on the Judiciary

Questionnaire for Non-Judicial Nominees

Appendix 12(a)

WILLIAM PELHAM BARR
Nominee to be United States Attorney General

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United States Senate
Committee on the Judiciary

Questionnaire for Non-Judicial Nominees
Attachments to Question 12(a)

WILLIAM PELHAM BARR
Nominee to be United States Attorney General

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11/8/18 Wash. Post (Wash., D.C.) A17
2018 WLNR 34609106

Washington Post, The (Washington, D.C.)
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November 8, 2018

Issue DAILY
Section: Editorial

Thank you for your work, Mr. Sessions

William P. Barr;Edwin Meese III;Michael B. Mukasey

William P. Barr was attorney general from 1991 to 1993. Edwin Meese III was attorney general from 1985 to 1988. Michael B. Mukasey was U.S. attorney general from 2007 to 2009.

Serving as U.S. attorney general is the honor and the challenge of a lifetime.

We are three former attorneys general who served in Republican administrations - from different backgrounds, with different perspectives and who took different actions while in office.

But we share the view that Jeff Sessions, who resigned at President Trump's request on Wednesday, has been an outstanding attorney general.

Each of us has known Sessions over many years. All of us thought his record - as a U.S. attorney for 12 years, as a state attorney general, as a respected U.S. senator for 20 years - made him a nominee of unexcelled experience. As important, his deep commitment to the Justice Department and its mission made him a nominee of unexcelled temperament.

By any measure, he has fulfilled the promise of those qualifications.

Sessions took office after the previous administration's policies had undermined police morale, with the spreading "Ferguson effect" causing officers to shy away from proactive policing out of fear of prosecution. Steep declines in the rate of violent crime from 1992 to 2014 were reversed in the last administration's final two years, with violent crime generally up 7 percent, assault 10 percent, rape nearly 11 percent and murder 21 percent. Opioid abuse skyrocketed. Many people were concerned that the hard-won progress of earlier years would be lost.

Sessions made sure that didn't happen. He reinstituted the charging practices that had been used against drug dealers before 2008. He leveraged the power of big data to locate those who were stealing taxpayer dollars and flooding the streets with opioids and other painkillers.

During his tenure, the Justice Department broke several long-standing law enforcement records. In 2017, the department prosecuted the highest number of violent offenders since 1991, when it started to track that category of prosecutions

during the time that one of us (William P. Barr) was attorney general. Then, in 2018, the department broke the record again, prosecuting more violent crime defendants than ever by a 15 percent margin.

In 2017, the department prosecuted the most firearm defendants in 10 years, since another of us (Michael B. Mukasey) was attorney general, and in 2018 prosecuted the most firearm defendants ever, surpassing the prior mark by 17 percent.

Sessions set four goals for his tenure: to reduce the rates of murder, violent crime generally, opioid prescription fraud and drug overdose deaths. He achieved all four.

He attacked the rampant illegality that riddled our immigration system, breaking the record for prosecution of illegal-entry cases and increasing by 38 percent the prosecution of deported immigrants who reentered the country illegally.

Such numbers are impressive, but just as impressive has been the refocusing of the department's efforts under Sessions's leadership to protect the liberties of Americans.

In statements of interest in four cases, the Justice Department served notice that it would act to fulfill Sessions's commitment to promote and defend "Americans' first freedom" - the freedom of speech - at public universities, by opposing efforts to impose unconstitutional limitations on speech and speakers who allegedly offended the sensibilities of some on campus.

In October 2017, he issued a memorandum to all executive departments containing guidance for protecting religious expression, and oversaw the department's participation in cases protecting the right of a religious institution to advertise on public transportation facilities, the rights of vendors not to participate in activities that would violate their religious beliefs and the right not to have the religious beliefs of business owners burdened by a mandate to provide funding for contraceptives.

To help restore the rule of law, Sessions has opposed sweeping nationwide injunctions by federal district courts; forbidden settlements in which the Justice Department has directed payments from settling defendants to third parties so as to circumvent the appropriation authority of Congress; withdrawn policies that expanded statutory protections based on gender identity that Congress had not provided for in law; and rescinded guidance documents previously issued by the Justice Department that were outdated, inconsistent with existing law or otherwise improper.

He has acted to protect our national security through such diverse steps as cracking down on leaks through the National Insider Threat Task Force; establishing the Hezbollah Financing and Narcoterrorism Team to combat the threat from Hezbollah narcoterrorism; and supporting reauthorization of the Foreign Intelligence Surveillance Act to permit the intelligence community, under robust oversight by all three branches of government, to collect vital information about international terrorists and other foreign intelligence targets.

Throughout, Jeff Sessions has set an example of personal grace and dignity under enormous pressure. He has remained humble and of good cheer, on good days and bad, and focused on fulfilling the mandate of the administration in which he has served. He has acted always out of concern not for his personal legacy but rather for the legacy of the Justice Department and the rule of law. We salute him for a job well done.

William P. Barr was attorney general from 1991 to 1993. Edwin Meese III was attorney general from 1985 to 1988. Michael B. Mukasey was U.S. attorney general from 2007 to 2009.

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News Subject: (Crime (1CR87); Criminal Law (1CR79); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Social Issues (1SO05))

Language: EN

Other Indexing: (Trump; Michael Mukasey; Edwin Meese III; William Barr)

Edition: RE

Word Count: 849

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5/14/17 Wash. Post (Wash., D.C.) A25
2017 WLNR 15031178

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May 14, 2017

Issue DAILY
Section: Editorial

Comey is gone, the Russia probe isn't

William Barr

William Barr was U.S. attorney general from 1991 to 1993.

Having served as both attorney general and deputy attorney general in the Justice Department, I had responsibility for supervising the FBI, working on virtually a daily basis with its senior leadership. From that experience I came to understand how fortunate we are as a nation to have in the FBI the finest law-enforcement organization in the world - one that is thoroughly professional and free of partisanship. I offer this perspective on President Trump's removal of FBI Director James B. Comey.

Comey is an extraordinarily gifted man who has contributed much during his many years of public service. Unfortunately, beginning in July, when he announced the outcome of the FBI investigation into Hillary Clinton's use of a private email server while secretary of state, he crossed a line that is fundamental to the allocation of authority in the Justice Department.

While the FBI carries out investigative work, the responsibility for supervising, directing and ultimately determining the resolution of investigations is solely the province of the Justice Department's prosecutors. With an investigation as sensitive as the one involving Clinton, the ultimate decision-making is reserved to the attorney general or, when the attorney general is recused, the deputy attorney general. By unilaterally announcing his conclusions regarding how the matter should be resolved, Comey arrogated the attorney general's authority to himself.

It is true, as I pointed out in a Post op-ed in October, that Attorney General Loretta E. Lynch, after her tarmac meeting with Bill Clinton, had left a vacuum by neither formally recusing herself nor exercising supervision over the case. But the remedy for that was for Comey to present his factual findings to the deputy attorney general, not to exercise the prosecutorial power himself on a matter of such grave importance.

Until Comey's testimony last week, I had assumed that Lynch had authorized Comey to act unilaterally. It is now clear that the department's leadership was sandbagged. I know of no former senior Justice Department official - Democrat or Republican - who does not view Comey's conduct in July to have been a grave usurpation of authority.

Comey's basic misjudgment boxed him in, compelling him to take increasingly controversial actions giving the impression that the FBI was enmeshed in politics. Once Comey staked out a position in July, he had no choice on the near-eve of the

election but to reopen the investigation when new evidence materialized. Regrettably, however, this performance made Comey himself the issue, placing him on center stage in public political discourse and causing him to lose credibility on both sides of the aisle. It was widely recognized that Comey's job was in jeopardy regardless of who won the election.

It is not surprising that Trump would be inclined to make a fresh start at the bureau and would consult with the leadership of the Justice Department about whether Comey should remain. Those deliberations could not begin in earnest until the new deputy attorney general, Rod J. Rosenstein, to whom Comey would report, was confirmed and in a position to assess Comey and his performance. No matter how far along the president was in his own thinking, Rosenstein's assessment is cogent and vindicates the president's decision.

Rosenstein made clear in his memorandum that he was concerned not so much with Comey's past arrogation of power, as astonishing as it was, but rather with his ongoing refusal to acknowledge his errors. I do not dispute that Comey sincerely believes he acted properly in the best interests of the country. But at the same time, I think it is quite understandable that the administration would not want an FBI director who did not recognize established limits on his powers.

It is telling that none of the president's critics are challenging the decision on the merits. None argue that Comey's performance warranted keeping him on as director. Instead, they are attacking the president's motives, claiming the president acted to neuter the investigation into Russia's role in the election.

The notion that the integrity of this investigation depends on Comey's presence just does not hold water. Contrary to the critics' talking points, Comey was not "in charge" of the investigation.

In the Justice Department, responsibility for overseeing and directing investigations is lodged in the department's prosecutors. Because Attorney General Jeff Sessions has recused himself, the investigation into Russian interference is being supervised by Rosenstein and Dana Boente, acting head of the department's National Security Division. Both men have long and exemplary service as career prosecutors in the department and were selected to hold political office as U.S. attorneys by President Barack Obama.

In short, responsibility for the integrity of the Russia investigation is vested in the hands of two highly regarded Obama veterans. Senate Democrats were well aware that Rosenstein would be overseeing the Russia investigation when they overwhelmingly joined with Republican senators in confirming him by a 94-to-6 vote.

Furthermore, the day-to-day work in that investigation was being done not by Comey but by career prosecutors and FBI agents, whose professionalism and integrity do not depend on the identity of the FBI director. Indeed, as the acting director, Andrew McCabe, just testified, FBI agents working on the investigation will do a thorough and professional job regardless of who is serving as the bureau's director.

According to news reports, the investigation is in full swing, with the Justice Department using a grand jury to subpoena relevant information, indicating a degree of thoroughness not evident in the investigation into Clinton's email server. Comey's removal simply has no relevance to the integrity of the Russian investigation as it moves ahead.

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Industry: (Security (1SE29); Security Agencies (1SE35))

Region: (Asia (1AS61); CIS Countries (1CI64); Eastern Europe (1EA48); Europe (1EU83); Russia (1RU33))

Language: EN

Other Indexing: (Trump; Loretta Lynch; Dana Boente; Andrew McCabe; Hillary Clinton; Rod Rosenstein; Bill Clinton; James Comey; William Barr; Barack Obama)

Edition: RE

Word Count: 940

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2/1/17 WashingtonPost.com (Pg. Unavail. Online)
2017 WLNR 3270212

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February 1, 2017

Section: /opinions

Former attorney general: Trump was right to fire Sally Yates
Her action must go down as a serious abuse of office.

William Barr

On Friday, President Trump issued an executive order temporarily suspending for 90 days the entry of nationals from seven countries into the United States pending the implementation of heightened vetting procedures to identify and exclude any radical Islamist terrorists attempting to infiltrate the country. Like many others, I thought part of that order — the manner in which it was applied to permanent residents — though not illegal, was unwise, but that aspect has been remedied. I see no plausible grounds for disputing the order's lawfulness. It falls squarely within both the president's constitutional authority and his explicit statutory immigration powers. Nonetheless, over the past several days, the left, aided by an onslaught of tendentious media reporting, has engaged in a campaign of histrionics unjustified by the measured steps taken.

On Monday, things reached their nadir when acting attorney general Sally Yates, an Obama holdover with a few days left in office, issued a directive that the Justice Department should not defend the president's order in court. While an official is always free to resign if she does not agree with, or has doubts about, the legality of a presidential order, Yates had no authority and no conceivable justification for directing the department's lawyers not to advocate the president's position in court. Her action was unprecedented and must go down as a serious abuse of office.

In our system of government, the Supreme Court ultimately decides on the constitutionality of laws passed by Congress or of presidential actions. When their actions are challenged, both Congress and the president are entitled to have their positions forcefully advocated in court. It is the responsibility of the Justice Department to be that advocate. That is why the department has long recognized that, even if it doubts the legality of a statute, it is obliged to defend that law by advancing all colorable arguments that can mustered in support. And when the president determines an action is within his authority — even if that conclusion is debatable (which I don't think it is here) — the president is entitled to have his position presented to the courts. It is the duty of the department to present them.

Yates's attempt to justify her action is incoherent and untenable. The crux of her position was not that the order was illegal but that its legality is open to dispute and she had yet to be convinced it was legal. Indeed, she acknowledged that the department's own Office of Legal Counsel had concluded that the order was legal. Instead, she vaguely suggested that the president could have hidden motives for the order that somehow affect its legality. She never explained what these are or how they could invalidate the order. She summarily justified her obstruction on the grounds that she was not

yet "convinced that the Executive Order is lawful" and that she did not think it wise policy. While she was free to resign if she disagreed, neither her policy objection nor her legal skepticism can justify her attempt at overruling the president.

Presidential powers are not exercised by a body or group. The Constitution vests "all executive power" in one and only one person — the president. An attorney general's duty is to render her opinion and honest advice; she cannot set herself up as a judge overruling the president's decision. The president need not "convince" his subordinate that his decision reflects the best view of the law.

The absurdity of Yates's position is self-evident. If it is permissible for her, based on her own opinion, to direct the president's subordinates not to carry out or defend a presidential directive, then it would be permissible for her own subordinates to do the same to her. If she, as acting attorney general, decided that a particular case should be brought, would it be permissible for any official down the chain to flout and sabotage her decision by directing their own subordinates to defy her? No government could function in that way.

By her vague reference to the president's possible hidden motivations, Yates was attempting to advance the narrative that the vetting order, though cast as a national security measure, is really a discriminatory Muslim ban. The very terms of the order expose this claim as baseless. First, of the 49 majority-Muslim countries in the world, the 90-day suspension applies only to seven, comprising about 12 percent of the world's Muslim population. Second, it is clear that the criterion for selecting those seven countries was not that they were Muslim but that the risk of terrorist infiltration from these countries is especially high. Third, the order merely suspends entry while a vetting process is implemented. By definition, a vetting process means that exclusion will not be based on attributes such as religion, but on the attributes detected through vetting — namely, the violent, hostile ideology that Islamist militants possess. Nor does the indefinite suspension of refugees from Syria suggest anti-Muslim animus. That measure makes perfect sense given the president's plan to establish "safe zones" that will protect innocent civilians inside Syria.

Trump could not allow Yates's obstruction to stand. To have allowed it would have set a dangerous precedent.

---- Index References ----

News Subject: (Government (1GO80); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Public Affairs (1PU31))

Language: EN

Other Indexing: (Trump; Sally Yates)

Word Count: 862

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11/1/16 Wash. Post (Wash., D.C.) A17
2016 WLNR 33384555

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November 1, 2016

Issue DAILY
Section: Editorial

The FBI director merely corrected the record

William Barr

William Barr was U.S. attorney general from 1991 to 1993.

The continuing refrain from Hillary Clinton supporters and other observers that FBI Director James B. Comey's action was "contrary" to Justice Department policy is flatly wrong. Given the particular circumstances facing Comey, it is absurd. While I do not agree with everything done and said over the summer in connection with the email investigation, I think that, last week, Comey had no choice but to issue the statement he did. Indeed, it would have violated policy had he not done so.

Earlier this year, everyone was calling for a responsible investigation and rapid resolution of the email matter. The FBI pushed ahead, and in July, Comey announced that the matter had been thoroughly investigated and that he would not recommend prosecution. That announcement was a great boon to Clinton's campaign - she touted it as a vindication, and, in the wake of Comey's announcement, her poll numbers appreciably improved.

The FBI then discovered that the investigation had not, in fact, been a complete one. It appears that thousands of emails exist on a computer belonging to former congressman Anthony Weiner and Clinton aide Huma Abedin that had not been turned over during the investigation. The failure of the Clinton camp to provide all pertinent evidence rendered Comey's July announcement misleading. The FBI's investigation was not comprehensive and not complete, and the conclusions announced by Comey three months ago were therefore premature.

If the FBI remained silent about the newly discovered incompleteness of its earlier investigation, it would be deliberately leaving uncorrected a misleading statement being used by the Clinton campaign to its political advantage. Thus, failure to correct the record would have been deceitful and would have represented a political decision to influence the election by leaving in place a misleading statement. At this point, the right choice was honesty - explaining that new emails had been found and would have to be reviewed. To the extent this step might affect the election, its effect arises from correcting a previous erroneous statement - in other words, from truthfulness.

Much is being made of the point that Comey does not know whether the new trove of emails is significant. That misses the point. The two critical facts conveyed to the public in July were that the investigation was completed and that, based on that completed investigation, no prosecution was warranted. Disclosing these facts did not run afoul of the policy against commenting on investigations while they are underway. There is nothing wrong with conveying such facts; in

cases of overriding public interest, it is done all the time, as for example in the House banking scandal and the so-called Iraq-gate matter during the 1992 election. But once the new emails were discovered, these statements could not stand. They were invalidated precisely because more investigation of the emails was necessary to complete the investigation and make a final determination of Clinton's culpability. That is all that Comey's letter says - that the FBI now has to review more emails before it can say it has completed the investigation. In other words, Comey simply said the FBI had more work to do.

Another complaint made is that, in July, a Justice Department prosecutor, rather than the FBI, should have made the ultimate call on whether the facts justified prosecution. That is true, but in this case it does not appear that Comey was usurping power so much as receiving a punt from the Justice Department. The department was all too happy to let Comey take the lead because his judgment would stand up as nonpartisan. In any event, this criticism is irrelevant to whether he was right to inform Congress that his earlier statement that the investigation was complete was not true.

The claim that Comey's actions violated a Justice Department policy is just wrong. There is no policy - and never has been - that the department avoid any action that could affect an election. Rather, the policy has been twofold. First, prosecutors should not take any action for partisan reasons, i.e., for the purpose of affecting an election. Second, where the timing of an otherwise bona fide investigative or prosecutive step could affect the outcome of an election, those actions should be deferred absent a strong public interest that justifies taking the action before the election. Sometimes this requires difficult judgments. Here, it did not. Indeed, if anything would have "violated" Justice Department policy, it would have been to remain mute and fail to correct the record.

Finally, it must be remembered that this whole situation could have been avoided if those in the Clinton camp had provided all pertinent information to the FBI to begin with. They were looking for early resolution of the matter, and it was in their interest to be as thorough as possible in supplying information to the government. Whether through an innocent oversight or not, they failed to do this. To the extent the timing of Comey's correction of the record is difficult for Clinton, it is a self-inflicted wound.

---- Index References ----

News Subject: (Campaigns & Elections (1CA25); Global Politics (1GL73); Government (1GO80); Government Litigation (1GO18); Legal (1LE33); Public Affairs (1PU31); World Elections (1WO93))

Industry: (Security (1SE29); Security Agencies (1SE35))

Language: EN

Other Indexing: (Anthony Weiner; Hillary Clinton; James Comey; Huma Abedin; William Barr)

Edition: RE

Word Count: 841

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Stop the Leaks

The New York Times

May 21, 2013 Tuesday, Late Edition - Final

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Section: Section A; Column 0; Editorial Desk; Pg. 25; OP-ED CONTRIBUTORS

Length: 780 words

Byline: By WILLIAM P. BARR, JAMIE S. GORELICK and KENNETH L. WAINSTEIN

William P. Barr was the United States attorney general from 1991 to 1993. Jamie S. Gorelick was deputy attorney general from 1994 to 1997. Kenneth L. Wainstein was assistant attorney general for national security from 2006 to 2008.

Body

WASHINGTON -- FOLLOWING the disclosure that the Justice Department obtained the telephone records of Associated Press journalists, The A.P. and other news organizations have sharply criticized the action as investigative overreaching and unwarranted interference with the ability of journalists to report on government operations.

As former Justice Department officials who served in the three administrations preceding President Obama's, we are worried that the criticism of the decision to subpoena telephone toll records of A.P. journalists in an important leak investigation sends the wrong message to the government officials who are responsible for our national security.

While neither we nor the critics know the circumstances behind the prosecutors' decision to issue this subpoena, we do know from the government's public disclosures that the prosecutors were right to investigate this leak vigorously. The leak -- which resulted in a May 2012 article by The A.P. about the disruption of a Yemen-based terrorist plot to bomb an airliner -- significantly damaged our national security.

The United States and its allies were trying to locate a master bomb builder affiliated with Al Qaeda in the Arabian Peninsula, a group that was extremely difficult to penetrate. After considerable effort and danger, an agent was inserted inside the group. Although that agent succeeded in foiling one serious bombing plot against the United States, he was rendered ineffective once his existence was disclosed.

The leak of such sensitive source information not only denies us an invaluable insight into our adversaries' plans and operations. It is also devastating to our overall ability to thwart terrorist threats, because it discourages our allies from working and sharing intelligence with us and deters would-be sources from providing intelligence about our adversaries. Unless we can demonstrate the willingness and ability to stop this kind of leak, those critical intelligence resources may be lost to us.

At the time the article was published, there were strong bipartisan calls for the Justice Department to find the leaker. Attorney General Eric H. Holder Jr. gave that assignment to Ronald C. Machen Jr., the United States attorney for the District of Columbia, who is known for his meticulous and dedicated work. Importantly, his assignment was to identify and prosecute the government official who leaked the sensitive information; it was not to conduct an inquiry into the news organization that published it.

His office, which has an experienced national security team, undertook a methodical and measured investigation. Did prosecutors immediately seek the reporters' toll records? No. Did they subpoena the reporters to testify or

Stop the Leaks

compel them to turn over their notes? No. Rather, according to the Justice Department's May 14 letter to The A.P., they first interviewed 550 people, presumably those who knew or might have known about the agent, and scoured the documentary record. But after eight months of intensive effort, it appears that they still could not identify the leaker.

It was only then -- after pursuing "all reasonable alternative investigative steps," as required by the department's regulations -- that investigators proposed obtaining telephone toll records (logs of calls made and received) for about 20 phone lines that the leaker might have used in conversations with A.P. journalists. They limited the request to the two months when the leak most likely occurred, and did not propose more intrusive investigative steps.

The decision was made at the highest levels of the Justice Department, under longstanding regulations that are well within the boundaries of the Constitution. Having participated in similar decisions, we know that they are made after careful deliberation, because the government does not lightly seek information about a reporter's work. Along with the obligation to investigate and prosecute government employees who violate their duty to protect operational secrets, Justice Department officials recognize the need to minimize any intrusion into the operations of the free press.

While we cannot know all of the facts and considerations that went into the department's decision, we do know that prosecutors were right to try to find out who gave this damaging information to The A.P. They were right to pursue the investigation with "alternative investigative steps" for eight months first. And ultimately, they were right to take it to the next stage when they still needed more to make a case against the leaker. If the Justice Department had not done so, it would have defaulted on its obligation to protect the American people.

<http://www.nytimes.com/2013/05/21/opinion/stop-the-leaks.html>

Graphic

DRAWING (DRAWING BY OTTO DETTMER)

Load-Date: May 21, 2013

‘Unseemly’ and ‘Dodgy’ Maneuvers Would Invite Legal Challenges

By EDWIN MEESE III & WILLIAM P. BARR | March 19, 2010 2:51 PM



The convoluted and questionable method under discussion by both Houses of Congress for final passage of the long-debated health care legislation raises serious constitutional concerns, which, at best, will lead to protracted and wholly avoidable litigation and continued doubt about the bill’s validity. Members of Congress from both parties have criticized the use of such sleights of hand, and the *Washington Post* has rightly editorialized against such “unseemly” and “dodgy” maneuvers for the health-care bill. Beyond the obvious practical concerns shared by all citizens, the use of such obscure “rules” for final passage is even harder to justify in light of the real constitutional doubt and the erosion of public confidence in government that it will cause.

Contrary to what President Obama and some congressional leaders have been repeating of late, the American people do care passionately that the process for consideration of health-care reform be both constitutional and fair. At a bare minimum, article I, sec. 7, cl. 2 of the U.S. Constitution requires that the following conditions be met before a bill becomes law: “(1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President.” *Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

The “deem and pass” and similar options under consideration in the House of Representatives plainly violate at least the spirit of the Constitution’s bicameralism and presentment requirements. Those constitutional requirements were intended to ensure democratic transparency with a straightforward up-or-

down vote in each House on all bills that become law. More importantly, these requirements were designed to ensure that the new national government actually followed “the consent of the governed,” which the Declaration of Independence had declared before the world to be the only basis of legitimate government.

The “deem and pass” options under consideration in the House and the subsequent use of a “reconciliation” process that is reserved for budget issues in acts already signed into law further erode confidence in the rule of law. Some past uses of the “deem and pass” or “self executing” rules raise similar concerns, but none was as convoluted as the proposed use, and significantly, there may have been no one with legal standing to challenge prior uses in court. Many individuals will have standing to challenge any health-reform legislation that restructures one sixth of the American economy, and the contemplated use of the “deem and pass” maneuver in this instance may be combined with questionable procedural steps in the Senate that render it much more subject to challenge.

There is no need to engage in such procedural machinations, and no asserted reason for doing so exists other than to avoid the traditional legislative safeguards in the Senate and to obscure the appearance that members of the House actually voted for the Senate bill, which is a prerequisite for genuine reconciliation. The constitutional requirement of bicameralism should not be jettisoned under any circumstances — and certainly not for such trivial and partisan reasons.

Members of Congress take an oath to uphold the Constitution. Members should violate *neither* the letter *nor* spirit of the Constitution, especially when there is so much at stake, not only as a policy matter, but with the very legitimacy of the legislative process in question. Given that many parts of the underlying legislation itself raise substantial constitutional concerns, these “unseemly” and “dodgy” procedures underscore the justified concern the American people have that their elected representatives are blatantly disregarding the Constitution, and as a result, undermining the rule of law.

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73 Geo. Wash. L. Rev. 429

George Washington Law Review

April, 2005

Article

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THE GILD THAT IS KILLING THE LILY: HOW CONFUSION OVER REGULATORY TAKINGS DOCTRINE IS UNDERMINING THE CORE PROTECTIONS OF THE TAKINGS CLAUSE

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*430 Introduction

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.

James Madison clearly understood that the protection of private property from the acquisitive impulse of the majority is difficult but essential in democratic government, both to ensure political stability and to safeguard individual rights. The “most common and durable source of factions,” he rightly tells us, is “the various and unequal distribution of property.”² The “regulation” of the “various and interfering interests” of “[t]hose who hold and those who are without property” is “the principal task of modern legislation.”³ The great solution to this problem proposed in *The Federalist* No. 10 is the establishment of a representative democracy in which power is divided and dispersed, so that faction is set against faction.⁴ A key part of that solution became the Bill of Rights, an extrinsic check on the will of the majority, to be enforced by a judiciary that is at some remove from political faction. The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation forms an essential part of the government's protection of the unequal faculties of acquiring property, which is both the object of government and critical to the preservation of its stability.

Despite the centrality of the protection of private property to the design of the Constitution, the Supreme Court's jurisprudence in recent years has all but destroyed the essential protections of the Takings Clause. The Court evaluates takings claims according to a balance-all-the-incommensurate-factors test that even it admits is “ad hoc”⁵ and in the process usually ends up denying the property owner's claim for compensation. Everyone recognizes that this area of the law is a mess,⁶ and many commentators have proposed new approaches to conceptualized pieces of takings law.⁷ But few have perceived the root cause.

***431** At its core, the Takings Clause applies to the government's appropriation of an economic opportunity inhering in private property. When the government transfers the right to use property from the owner to a third party or to the government itself, the rule is simple and unqualified: a taking has occurred. The confusion has arisen when the Takings Clause is extended to the distinct situation of regulation of the owner's use of its own property. Such regulations are an essential and ordinarily legitimate exercise of government power, and they are considered takings only in extreme and unusual cases. The Court has not been able to articulate any coherent standard by which those cases are to be identified--hence its ad hoc-ism. But the real problem develops when we forget that regulation is at the periphery of takings law and we export the ad hoc approach back into the core situation of government appropriation.

This doctrinal confusion is nowhere more apparent or more important than in the treatment of takings principles applicable to public utilities. A utility regime goes to the heart of the Takings Clause--the appropriation of private property for public use. A classic utility regime is a formal arrangement by which a private firm is required to expend capital to produce output that is consumed by the public. This arrangement inherently involves a taking of the productive capacity of private capital for the use and enjoyment of the public. It is a taking in the same way that the government's transfer of cash from a private party's account to the government's account to be spent by the government to produce public utility services would be a taking of the owner's money. No less than a direct seizure of private capital, the requirement that a private party expend its capital to produce output for the public is a taking that requires the government to ensure that the owner receives just compensation.

The defining characteristic of a utility regime is compulsion--the government affirmatively directs a private firm to engage in the continuing production of goods or services. At bottom, it is simply a requirement that a private party devote its capital to produce goods or services for use by the public. If government by means of a contrivance is able to pay the

private party less than the amount necessarily incurred to produce the required output, the government has managed to transfer the use of private property to the public without paying just compensation.

This concept is illustrated by a simple example to which we return throughout this Article. Imagine a city in need of a waterworks to supply potable water to its inhabitants. Assume that the minimum cost of constructing the facilities needed to collect, purify, and distribute the water is \$1 billion and that the ongoing operating cost is \$100 million annually. These are *432 the minimum costs that anyone who goes into the business of supplying water--the city itself or any private firm--will have to incur. Let us assume further that our city chooses not to go into the water business itself, but instead wishes to have a private firm undertake the construction and operation of the waterworks. Obviously, no private firm would volunteer to do so unless it could recover its \$1 billion investment, its \$100 million in annual operating costs, and a return on its investment reflecting the opportunity the firm had to deploy its capital in another venture. Now let us say that the city imposes on a private firm the duty to provide water to all city residents. It is equally obvious that the city cannot compel the company to provide water service on less favorable terms.

The risk of an uncompensated taking in this arrangement is manifest. After the firm invests \$1 billion, the city will be tempted to prevent the firm from recovering its investment. Once it has sunk costs, the firm is vulnerable to such confiscation. As long as the rates set by the city cover the firm's operating costs and provide for recovery of at least some portion of sunk costs, the firm will be better off continuing to operate rather than writing off all of its investment. Thus, suppose that immediately after the private firm invests the \$1 billion needed for construction the city conjures up a new ratemaking methodology that is designed to permit the recovery of only \$750 million from city residents. There can be no doubt that the city has taken \$250 million without compensation. The private firm has been required to surrender \$1 billion; the public has received a \$1 billion benefit; and the public only compensates the firm for \$750 million. The same confiscatory result would occur if, after the company built the waterworks, the city states that the company is entitled to collect only \$75 million in annual operating costs. Whatever the city's justification for its new ratemaking methodology--and rest assured that there is no limit to a regulator's ingenuity--the bottom line is that the government must pay for the full amount it has required the firm to spend.

In the past, two checks prevented the government from getting away with such uncompensated takings of a utility's capital. The first was legal. The clear understanding was crystallized in Justice Brandeis's 1923 concurrence in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*⁸ and in Justice Douglas's 1944 opinion for the Court in *Federal Power Commission v. Hope Natural Gas Co.*⁹ Those opinions recognized that the property that the government takes is the capital the utility devotes to provide service, and the constitutional standard of compensation to which a utility is entitled is the opportunity to recover the amounts prudently expended to meet its service obligation.⁰ "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock." The firm is also entitled a return *433 on investment "commensurate with returns on investments in other enterprises having corresponding risks" and "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."² The firm's right to a return on investment, of course, presupposes that it also has the right to a return of the principal amount of the investment. So too, the rates that are sufficient to attract capital are those that will return the capital. The clear teaching of *Hope* was that the utility is entitled to recover the amount of capital prudently devoted to public service.

The second, and probably more important check on the government's ability to appropriate the benefits of private capital in a utility regime without sufficient compensation, was practical. Utilities generally were small, not diversified, and not subject to competition. Often they operated a single line of business in a closed market in a single jurisdiction. The regulator had plenary control over the firm's operations. If the regulator failed to respect the investors' right to recover the money they put into the enterprise, the market rapidly reacted by refusing to invest additional capital. The regulator was directly accountable in the market for the consequences of depredation. And as much as the regulator might have wanted

to help the propertyless faction by requiring the utility to provide service below cost, the regulator was more concerned about starving the utility of cash needed to fund continued operations and ending up with no utility service at all.

This practical check has been all but eviscerated. Utilities have expanded their operations into many geographical areas under the jurisdiction of various states and countries. Utilities also have branched out into various lines of business, many wholly unregulated and others highly competitive. These developments have removed the practical check on regulatory excess. If the regulator in a single jurisdiction sets rates below cost, the large, diversified utility will probably not go under. Profits from operations that are outside the regulator's control--such as competitive ventures and businesses conducted in other jurisdictions--will enable the firm to continue to raise money. The regulator pays no price for setting rates below cost. It has an engraved invitation to commit larceny on a grand scale--to impose public mandates on private parties without paying for them. And the temptation will become harder to resist as the government pushes up against the limit of tax revenues and increasingly searches for off-budget ways of achieving public desiderata. If the government cannot afford to provide a service itself, it will naturally seek to compel a private party to do so--especially if it can impose such a private mandate without paying for it in full. The undermining of the practical check and the increasing attraction of shifting public functions to private parties make the legal check against failure to provide adequate compensation all the more critical.

Unfortunately, the courts' failure to distinguish between the *per se* rule governing appropriations (including appropriations of utility capital) and the *ad hoc* test applied to regulatory takings has placed the legal check in peril. To determine whether a regulation restricting an owner's use of its own property is a taking, the courts consider three factors: (1) the character of the ⁴³⁴ government action; (2) the severity of the economic impact of the regulation on the owner; and (3) the interference with the owner's investment-backed expectations. ³ The drift of the cases is toward the application of these three factors to the evaluation of government "regulation" of utilities, such that a utility's claim that rates do not provide adequate compensation would not be considered unless the government's ratemaking is so extreme as to constitute a regulatory taking under the three-part test. ⁴ Once that mistake occurs, the game is over. Consider each of the three factors. The first factor favors the government because ratesetting is typical government action. The second factor also favors the government because the severity of the impact is judged by reference to the property as a whole. Large and diversified utilities own a lot of property, so at least a loose formulation of this factor would allow the regulator to take plenty of property on the theory that the utility can afford it. Finally, the third factor tends to favor the government over time as those expectations are shaped by ever more aggressive regulatory predation. In short, treating mandated production as the same as any other kind of business "regulation" would destroy the bedrock protection against appropriation, which entitles the owner to compensation regardless of the amount taken. To analyze utility regulation under the test for regulatory takings, rather than as a *per se* taking of utility capital, is a basic category error. ⁵

Utility regulation is regarded by most judges and commentators as something of a dark science whose mysteries are impenetrable to the uninitiated. They immediately recognize that a condemnation of land is a taking, but they only dimly perceive (if at all) that the government's directive that a private party expend capital for the benefit of the public stands on the same constitutional footing. When the government requires a private party to expend capital in order to produce output to be consumed by the public, the government is taking that capital just as it would if it directly seized the money and spent it for the same purpose. But the taking inherent in a regime of compelled output is of far greater practical importance than the explicit condemnation of private property. The federal and state governments have commandeered trillions of dollars of private capital devoted to the provision of various utility services. These sums dwarf the amount of property taken by the government through formal condemnation proceedings. The danger, moreover, is not limited to public utilities. The greatest threat to private property is not the formal condemnation of property, which is relatively rare and for which the owner has secure protections. The more insidious threat arises from the subtle artifices to deprive private parties of full compensation when the government compels them to expend private capital to satisfy a public need. "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." ⁶ There is no reason to assume that undercompensation of private

parties compelled to perform public duties will ^{*435} be limited to those firms traditionally regarded as public utilities. As the government's ability to raise taxes to pay for government programs reaches its limit, the temptation will grow to achieve these same public objectives by expanding private mandates--requiring private parties to spend their own money to provide services to the public. Clear-sighted judicial protection of private property commandeered into public service is essential to protect everyone who is vulnerable to the imposition of a mandate to expend money for the benefit of the public. Judicial protection is quite simple once the courts grasp the fundamental constitutional principles--that the object of ratemaking is to provide compensation for prudent expenditure taken in a regime of compelled service, including compensation through a rate of return for the risk of nonrecovery of investments.

Do not fall into the trap of believing that utility issues are narrow and belong to administrative law specialists. This is the mindset that has led constitutional lawyers to write countless articles spinning out grand theories of takings without once mentioning the largest and most important taking in which the government engages every day--compelled production by utilities. ⁷ It is the mindset that causes jurists to devote immense energy to adjudicating the claims of particular landowners who assert that they are entitled to a few thousand dollars in compensation for the devaluation of their property resulting from regulation, ⁸ while turning a blind eye to the adequacy of compensation provided by the government for the trillions of dollars in private capital dedicated to public service in utility regimes. ⁹

The danger posed by the recent confusion regarding takings principles applicable to the compelled use of capital in a utility regime is not merely theoretical. It is starkly exemplified by the methodology adopted by the Federal Communications Commission ("FCC") to establish rates to be paid to incumbent local telephone companies for the compelled use of elements of their networks by competitive entrants. The FCC has determined that rates will be based upon a hypothetical construct that ignores the investment and operating costs that incumbents in the real world have necessarily and prudently incurred. Before the FCC's action, the incumbent local telephone companies had expended about \$350 billion to construct facilities necessary to meet their obligations to provide service and were recovering those amounts in rates charged to retail customers. ²⁰ The FCC, however, has decreed that incumbents have no right to recover these amounts, and it has required the use of a methodology that values the network at less than \$200 billion. ² Whatever bureaucratic legerdemain is employed to justify this shift in methodologies, incumbents remain entitled to full recovery of their prudent ^{*436} investment. Yet by exploiting the growing confusion about the principles governing review of the sufficiency of compensation provided by a ratemaking methodology, the FCC has so far successfully avoided any judicial review of the confiscatory effect of its approach.

The balance of this Article proceeds as follows. Part I sets forth the constitutional framework for utility compensation. It describes the salient characteristics of a utility regime and explains why such a regime involves a taking of private property. It further elaborates upon prudent expenditure as the constitutional benchmark for sufficient compensation, how ratemaking serves as the method of providing compensation (and special problems created by regulation in competitive markets), and the role of judicial review in overseeing the sufficiency of compensation. Part II addresses the principal source of confusion regarding utility takings law--the failure to distinguish between government action that transfers the use of property to another (such as a utility regime) and government regulation of the owner's use of property. Part III applies these principles in the context of the wholesale obligations imposed on local telephone companies under the Telecommunications Act of 1996.

I. The Constitutional Framework for Utility Compensation

In this Part, we examine the nature of the classic utility regime and its relationship to takings principles.

A. A Brief Introduction to Takings Law

To understand the Takings Clause, it is critical to recognize the fundamental distinction between two very different kinds of government action. On the one hand, there is government action that is “regulatory” --that is, it defines or limits how far certain property may be used and enjoyed by its owner. On the other hand, there is government action that is “appropriative” --that is, it mandates that some person other than the owner gets some or all of the use and enjoyment of the owner's property. When the government is doing no more than restricting the owner's own permissible use of his property, then it is simply engaged in regulation. But when the government goes further and transfers to someone other than the owner (either to third parties or to the public generally) all or some of the economic opportunity inhering in a permissible use of the property, it is engaged in appropriation of private property.

At its very core, the Takings Clause of the Fifth Amendment is meant to protect property owners, not from regulation of their property, but from the appropriation of it to others. As we elaborate in Part II below, this focus is confirmed by the express text of the Constitution, the original understanding of the clause, and the case law, as well as the basic political philosophy upon which our constitutional system of individual liberty and limited government rests.

Government actions that are appropriative are always a taking, even when the intrusion on the owner's own use is minimal. The feature that makes government action a “taking” is not the extent of imposition to the ^{*437} owner, but the fact that the government is making available to someone other than the owner an economic opportunity that inheres in the property. When the government thus transfers the use of property from the owner to others, it is a per se taking.

The classic example of appropriative takings involves the compelled transfer of interests in real property, ranging from transfers to the government in fee to appropriations of small slivers of large parcels for the benefit of private parties. These appropriations involve physical invasions of real property. Such cases are paradigmatic not because of any sui generis characteristics of real property, but simply because physical presence on the property is the way in which third parties realize the economic opportunity that can be derived from real property. But the same per se rule applies to appropriations of all types of property, including chattels, intellectual property, and capital. Although a physical invasion of these forms of property involves an appropriation, the government can appropriate property in other ways as well. Intellectual property, for example, may be appropriated by mandated publication, and capital may be appropriated by mandated expenditure on a public purpose. However accomplished, when the government mandates that the economic opportunities inhering in any of these forms of property are to be made available to others, such actions are appropriations and are “takings” regardless of whether they produce a generalized public benefit or have only a minimal impact on the owner. In cases of appropriation, the extent of the government's intrusion is relevant only in determining the amount of compensation due.

In contrast, government actions that are regulatory--that restrict an owner's own use of property without effectuating a transfer--are rarely considered takings even when the regulation causes a substantial reduction in property value.²² Courts apply a far different and more deferential test when evaluating regulations that do not result in a transfer of ownership but instead limit an owner's use of property. Such requirements are scrutinized under the rubric of “regulatory takings,” and whether a regulation effectuates a taking turns on the balance of several factors, including the nature of the government's action, the severity of the regulation's economic impact, and whether the regulation interferes with the owner's reasonable investment-backed expectations.²³ Unlike appropriations, restrictions on use may not qualify as takings even if they substantially diminish the value of affected property. Although a regulation can result in a per se taking if it eliminates all economically beneficial use of property,²⁴ regulatory takings remain the exception, not the rule. The central distinction of takings law therefore turns not on the impact that a government action has on the owner but on whether the government's action is appropriative or regulatory.

This is not to say that regulatory restrictions on an owner's use of property may not in some way benefit the public. They frequently do and are ^{*438} indeed usually justified on that basis. For example, the public is benefited when the government prohibits a potentially harmful use of an owner's property. Or the public may gain aesthetic benefits when

the government places limits on how an owner may use his property. Or general property values may be increased by such limitations. But the critical fact in such cases is that the benefit to the public flows from the owner's nonuse of his own property not from the public's use of the owner's property. In other words, these cases involve no appropriation because, although the owner may be prevented from realizing opportunities that might otherwise inhere in his property, such opportunities are not being shifted to the public.

As is frequently said, the Takings Clause does not outright prohibit the appropriation of property; rather, it requires that a property owner be justly compensated for any appropriation. Thus, once a court determines that a government action involves a taking, the next step is to ascertain the amount of compensation due.²⁵ Because the essence of a taking involves the shifting of an economic opportunity from the owner to third parties, the measure of compensation is the extent of economic opportunity surrendered by the owner. The purpose of compensation is to restore to the owner the same opportunity he would have had but for the government's appropriation of opportunity to others. In short, the standard of compensation is always the opportunity cost to the owner. This measure turns on the pecuniary loss suffered by the owner and not the gain secured by the government. The obligation to compensate therefore arises at the time the taking occurs and not when the benefit of the property flows to the public.²⁶ To meet this obligation, the government is not required to make payment in full at the time of the taking. Instead, the government has the option of making reasonable, certain, and adequate provision for payment in the future so long as it does so at the time the property is taken.²⁷ When the government follows this course, it must compensate the owner for the delay in providing recompense—an obligation typically met through the payment of interest.

B. A Classic Utility Regime Inherently Involves a Per Se Taking

1. A Classic Utility Regime Is an Arrangement Under Which the Government Mandates Continued Production

A classic utility regime involves a distinctive form of government action that requires a private firm to engage in the continuous production of output for the benefit of the public. Such an arrangement is categorically different from the government's regulation of other businesses through the imposition of other conditions or obligations on firms that choose to produce output.

There is an increasing tendency to use the word “utility” loosely in referring to many different kinds of regulation covering a wide range of businesses. But the fact that the government subjects a business to price regulation or other restrictions does not, by itself, make the business a “utility.” *439 The classic public utility is a business engaged in providing goods or services so essential to communal and economic life that securing their adequate supply is ultimately a government responsibility. The supply of water, power, communications, and transport has typically been viewed as falling within this category as has the provision of war material during wartime. Such goods and services are just “as truly public services as the traditional governmental functions of police and justice.”²⁸

The essential nature of utility services justifies broad government control to ensure their continued provision on reasonable terms. First, it has always been recognized that the government has expansive authority over the production and distribution of essential services, including price controls and common carrier obligations. One of the great debates of the late nineteenth and early twentieth centuries was whether the police power was limited to a judicially defined category of “essential” services. But there was never any doubt that the government could exercise pervasive regulatory power over whatever services were “truly” essential.²⁹ Second, the government's power with respect to such services included the adoption of such measures as may be necessary to provide absolute assurance that the services would continue to be produced at the required levels.

In theory, there are a number of ways a government might achieve the objective of ensuring that essential services are continually made available to the public on reasonable terms. For example, governments might choose, and sometimes

do choose, to provide these services directly by building and operating the necessary infrastructure themselves. In such cases, the government must obtain the necessary capital; the entity providing service is an agency of the government; and the personnel involved in providing service are typically public employees. An alternative approach, which has generally been preferred, is for the government to involve private corporations in the task of providing these critical services. This arrangement not only harnesses private capital (rather than public monies) in the enterprise, but also offers efficiencies that may come with private management. But relying on private parties to supply essential functions raises a basic challenge: how does the government, on the one hand, gain the benefits of private capital and management and yet, on the other hand, retain largely the same degree of control it would have had if it did the job itself through a public agency--a degree of control that may be needed to provide, in the face of changing circumstances, the surety and quality of supply the public interest demands?

The solution that is usually adopted is to establish a system by which the government exercises the police power to require a private firm--a utility--to engage in continuous production of the required service. The classic utility regime is the distinctive device by which the government uses its police powers to conscript a private firm into the production of public services. The government assures a secure flow of essential services by imposing on a private ^{*440} firm a duty to engage in the continuous production of output at whatever level and for however long the government demands. Once designated a "public utility," the firm is subject to the compulsory power of the state and placed under an affirmative obligation to produce. Further, the government enforces the firm's duty to maintain service, not as a litigant in a contract action, but through direct use of its police power.

Compulsion thus lies at the heart of the classic utility regime. Specifically, these regimes include three elements of formal compulsion.

First, the firm is explicitly required by statute, regulation, or other binding directive to produce a certain output. This requirement is frequently referred to as the utility's "service obligation." Typically, the firm is required to produce sufficient output to serve all customers in a defined geographical area. This mandate goes beyond a requirement that, if a firm chooses to engage in production, it must conform to certain requirements. It goes beyond imposition of mere common carrier duties, which require that, if a firm chooses to engage in production, it must deliver its services to customers on a nondiscriminatory basis up to the capacity it has chosen to produce. A utility is not free to choose whether or not to produce the output specified by the government. The essence of the government's command is that the firm must engage in production, and further, that it must produce the level of output mandated by the government.

The second compulsory feature of a utility regime is that the government formally prohibits or limits the firm's right to exit all or any part of the business. This restriction essentially enforces the government's command to produce. By combining these two elements--the command to produce and the prohibition on exit--the government locks the utility into a regime that assures continuous production. This prohibition on exit is imposed in a variety of ways, including: (1) explicit orders in one form or another to "continue service" as required; and (2) express prohibitions on withdrawing from any service without the prior approval of the governing regulator--an approval that is discretionary and usually turns on whether the commission deems withdrawal "in the public interest."³⁰

^{*441} The third compulsory feature of a utility regime is that the government, by retaining pervasive control over both the costs and revenues of providing service, has ultimate control over the economic opportunity associated with the enterprise. The government largely determines the utility's costs by fixing the level of mandated output. The government directs the utility to make whatever investments are necessary to provide the required service, including investments that would otherwise be uneconomic, such as infrastructure to serve areas that could not possibly support the cost. The government further determines cost by setting "quality of service" requirements that detail what the service must include and how it must be delivered. For example, telephone companies are typically subject to such requirements as maintaining excess capacity, handling repairs within stated time frames, and answering calls within specified time intervals. The government likewise controls revenue by dictating how much a utility can charge for its service, its overall

“revenue requirement,” and the pace at which it can seek to recover its investments. Moreover, the government either directly controls the business risk faced by the utility (e.g., the extent to which competitors will be allowed in the market), or where it does not control the risk (e.g., the threat of technological obsolescence and substitution), it controls the firm's ability to respond to the risk--by, for example, curbing rights to accelerate cost recovery, eliminate unprofitable lines of business, and reduce costs by cutting back on quality of service.

Beyond these formal *de jure* elements of compulsion, there exists in utility regimes a powerful *de facto* aspect of compulsion--the extraordinary sunk costs inherent in utility investments.³² Building a water works, a railroad, an electricity grid, or a telephone network that serves every customer in a large territory requires massive capital investments.³² Once this money is spent, the resulting assets are typically immobile and suitable only to a single purpose--delivering the services the utility is obligated to provide.³³ This *442 means that the utility cannot easily exit the business without losing these massive sunk costs. As a practical matter, as long as it receives revenue even slightly in excess of its current operating expenses, the utility is effectively forced to continue its operations in order to recover at least some of its sunk investment. Of course, it is precisely these sunk costs that leave the utility vulnerable to predation.³⁴ Absent a constitutional limitation on ratesetting authority, the government could--without creating any real risk that service to the public will be disrupted--present a utility with a Hobson's choice: exit the market and lose everything, or produce in return for revenues that do not allow for full recovery of past investment.

The imposition of a compulsory duty to produce differentiates “utilities” from other regulated entities. While using a variety of metaphors to describe their distinctive status, courts have generally agreed that the characteristic that makes utilities partly “public” in nature is the servitude imposed upon them to produce as the public requires. As Justice Brandeis explained, a utility “is the substitute for the state in the performance of the public service; thus becoming a public servant.”³⁵ Chief Justice Taft analogized the status of a utility to that of an officer in the armed forces.³⁶ Explaining that requiring “continuity of business” goes far beyond normal regulation meant to protect the public from monopoly power or other harms arising from a business, Chief Justice Taft observed that such a mandate “can only arise when investment by the owner . . . create[s] a conventional relation to the public somewhat equivalent to the appointment . . . in military service.”³⁷

The relationship between the government and a utility is often referred to as a “regulatory compact.”³⁸ Properly understood, the “compact” is a shorthand reference to a legal relationship of mutual obligation, in which the utility is required to provide essential service to all customers on reasonable *443 terms and the government is required to enable the utility to recover the costs necessarily incurred to fulfill that duty. The use of the term “compact” to describe these reciprocal obligations, however, should not be misunderstood as signifying that the relationship between the government and the private firm is purely contractual.³⁹ The utility is obligated to engage in continuous production, not because it agreed to do so, but because the government has commanded it to do so through the police power. In fact, there is a heavy presumption against construing government action as a contract that relinquishes its police power,⁴⁰ and some sovereign powers, including the power to take property by eminent domain, can never be contracted away.⁴¹ Much of the early litigation involving utilities dealt with claims that the franchise granted by the government constituted a contract that was impaired by rate regulation. The Supreme Court rejected nearly all of these claims on the grounds that the franchise agreements did not clearly and unequivocally entitle the utility to charge a particular rate in perpetuity.⁴² The cases firmly establish that the relationship between the utility and the government is premised not in contract, but in the police power. By exercising such power and compelling a private firm to produce, the government obligates itself to provide the utility with at least the minimum compensation due under the Takings Clause. The duty to provide compensation arises by direct operation of the Constitution because the arrangement inherently involves compelling a private firm to make expenditures for a public purpose.

Although government compulsion to produce necessarily triggers a duty to provide just compensation, governments frequently formalize this duty in utility statutes that require “just and reasonable” rates.⁴³ In this way, governments seek to induce firms to enter by providing greater assurance of cost recovery. Indeed, governments sometimes went even further by, for example, offering a firm an exclusive franchise for a particular term of years or promising to use a particular formula in computing rates. Such specific government promises can create expectations that the government is bound to honor in the event it later seeks to alter these terms. This does not mean the government is forever locked in to a particular way of dealing with a utility.⁴⁴ The government always retains the right to exercise the police power in a different way. But if it does so in a manner that defeats the legitimate expectations *444 it has created through its unmistakable actions, it must indemnify the private party for the costs imposed by the change.⁴⁵ When the government's promise is general--as when government has induced entry by assuring that the utility will be paid just and reasonable rates--the utility has an expectation interest that coincides with the direct guarantee of the Takings Clause.

Some commentators have suggested that utility regimes are purely consensual because utilities willingly subjected themselves to public service obligations.⁴⁶ But even if a firm did volunteer to become a public utility, it still is entitled to recover the minimum amount guaranteed by the Constitution. A firm that agreed to become a utility did not thereby assume the risk that the government will establish rates that do not allow for the recovery of prudent investment or a reasonable rate of return. Even if the utility chose to subject itself to a utility regime, its actions within that regime are compelled. Chief Justice Taft's analogy to military service is particularly apt in this context.⁴⁷ A soldier is compelled to follow each and every order given by a superior officer. It does not matter whether the soldier enlisted or was drafted. An order is an order, and compliance is compulsory for the enlistee and draftee alike. The fact that some soldiers enlist does not mean that when they are ordered to do something they are acting “voluntarily.” Likewise, in the utility context a firm's willingness to operate under a regime of compelled production does not negate the compulsion. It means only that the firm may have willingly submitted to a regime under which it was subject to compulsion. In addition, the suggestion that utilities willingly subjected themselves to the risk of change in government regulation begs the question of the extent of that risk. Obviously, no rational actor volunteers to participate in a regime that does not ensure at least an opportunity to recover its prudent investment plus a reasonable rate of return. No investor sets out to lose money, and no one would agree to sink billions of dollars in a fixed and immovable asset if the government could capriciously set rates that deny an opportunity for recovery.

Some commentators nevertheless suggest that utilities are at risk for recovering their investments because firms retain a measure of discretion about how to meet the obligation to provide service.⁴⁸ These commentators would *445 concede that just compensation is required for investments that are compelled, recognizing that such investments “involve[] no calculated risk taking at all by the utility,” and as such are “equivalent to the forcible transfer of valuable property from a private party to the state.”⁴⁹ But they contend that most investments are “voluntary” in the sense that the utility chooses when to invest and what investments to make, including investments that may exceed those necessary to meet minimum service obligations.⁵⁰ As to such costs, these commentators claim that a utility is “entitled to what the government has explicitly and unambiguously committed itself to and no more.”⁵¹ But expenditures are not “voluntary” simply because the utility retains some measure of discretion, any more than a soldier who peels potatoes does so “voluntarily” because his sergeant only ordered him to hand over the peeled potatoes and left it to the soldier to decide whether to use a knife or a peeler. Whatever discretion a utility may retain as to particular investments, it is compelled to expend capital in order to meet the service obligation imposed by law. Ultimately, the claim that utilities retain discretion about how to meet service obligations devolves to a claim that certain utility investments were not necessary to meet those obligations--i.e., that they were imprudent. To be sure, if the government finds that a particular expenditure was imprudent, it can disallow the excess from the rate base because the government did not compel the firm to incur costs that were not necessary to fulfill the duty to serve.⁵² But in the absence of an imprudence finding, the utility's expenditures are presumed to be necessary to meet its service obligation⁵³ and are therefore compelled by the utility regime.

2. As a System of Compelled Production, a Utility Regime Inherently Involves a Per Se Appropriative Taking

When the government compels a firm to engage in continuous production, the government's action is appropriative in nature and effects a per se taking. It is no different than the government emptying out a private person's bank account and spending the money for a public purpose. A directive to produce entails a command to expend the capital necessary to generate that output and thus involves a transfer of the productive use of capital from the owner to the public.

Ownership of capital entails three economic opportunities. First, the owner has the right to consume the capital by purchasing something of value, ^{*446} or to preserve and enhance the capital by investing it. If the owner chooses the latter course, it would invest in an enterprise only if it believed it had a legitimate opportunity to recover its investment and earn a competitive return. A firm can select from among a variety of investments that carry greater or lesser risk. Investors have different levels of risk tolerance, but no one invests to lose money. Those who select riskier investments will demand a higher return, such that the net probability (the amount received if the investment is successful, discounted by the probability that it will fail) at least equals the amount invested. Second, the owner of capital has the freedom to manage its investments so as to maximize recovery of its sunk costs by responding to risks as they arise. The owner of a business, for example, can take several measures to reduce costs or increase revenues. The owner may impose short-term price increases to capitalize on a transitory advantage, allow service quality to decline in order to contain costs, shed certain product lines, or focus on high-margin customers. Third, the owner has the freedom to withdraw its investment in whole or in part and redeploy its capital for no other reason than to seek more profitable or less risky enterprises.

When the government commands a firm to engage in production, each of the opportunities, which the owner of capital would otherwise have, is taken at the time that the owner expends capital to meet the government's directive. The owner forgoes the opportunity to consume the capital or deploy it in another investment. The owner is required to dedicate its capital to a business over which the government exercises pervasive control, such that the return on investment is largely a matter of government dictate. Finally, the owner is not permitted to withdraw its investment in its unilateral discretion. In sum, a utility regime compels a private firm to surrender all of the essential opportunities that inhere in the ownership of capital--the ability to consume it for one's own purposes; to preserve and enhance it by selecting investments that offer a reward commensurate with their risk; to redeploy it to avoid loss or pursue more profitable opportunities; or to manage risk by altering business strategy. In a utility regime, the government fixes rates, specifies service quality, and restricts exit. A utility has ceded the lion's share of its ability to manage risk to the government. A regime of compelled production therefore entails the government's appropriation of the full economic opportunity associated with the utility's capital. What the public gets in return is the use of that capital along with all of its productive capacity. A utility regime thus transfers to the public the key incident of ownership over capital--the right to decide how, when, and for what purpose that capital will be deployed. Once that taking occurs by virtue of the firm's expenditure of capital to meet the service obligation, the government becomes obligated to compensate the business by providing it with an opportunity equivalent to the one it had before being required to spend the capital. The economic opportunity represented by a certain sum of capital is-- by its very nature--the face value of the capital. ⁵⁴

^{*447} Much of the early judicial confusion on this subject arose from the Supreme Court's failure to distinguish between two fundamentally different situations: (1) the case where the government simply requisitions the finished output of a business; and (2) the case where the government actually commands that a business engage in production. Although both cases involve a taking, they differ as to the identity of the property taken and the time the taking occurs.

In the former case, when the government simply requisitions a firm's finished output, it is not forcing the firm to make the goods; it is only commanding that the firm deliver up goods it has freely chosen to produce. The critical fact is that the business is left free to decide for itself whether to engage in production or not. Thus, for example, if the government commandeers all or part of a firm's existing inventory, the business freely made the decision to produce the goods in the first place, and nothing the government has done caused the company to incur the costs of production. In these cases, the

government only exercises power over the firm's postproduction property. The compulsory effect of the government's command arises only after production is complete.

In such cases, the property taken by the government is the firm's final output. What the business is being forced to surrender is the economic opportunity inherent in those finished goods, and what is being appropriated to the public is the use and enjoyment of those goods. The time of the taking is the point at which the firm hands the goods over to the government. It is at that point the company surrenders the economic opportunity it otherwise had in those products. Consequently, it is also at that point the government becomes obliged to compensate for that loss by providing the firm with the same opportunity it otherwise would have had with respect to those finished products. Where there is a real market for the finished products, then their "market value" objectively measures the property owner's opportunity cost.⁵⁵

The situation is fundamentally different, however, when the government orders a firm to produce certain output. In such cases, the business is not free to decide for itself whether to produce or not. Moreover, when the government orders a firm to make something, inherent in that order is the command that the firm expend whatever factors of production are necessary to generate the mandated output. The firm thus has no choice but to spend its capital on the inputs needed for production--the capital equipment, raw materials, labor, and land. In these cases, the government is wielding its power over the firm's preproduction property. The compulsory effect of the government's command arises prior to the commencement of productive activity. In such cases, the property taken by the government is not the final output but the necessary inputs. What the business is being required to surrender is the economic opportunity inherent in the productive inputs that must be expended to satisfy the government's mandate.

***448** The distinction between the appropriation of outputs and the compulsion to produce can be illustrated by imagining a shoemaker. If the government requisitions the shoemaker's stock on hand of boots (finished output), it would have to pay their fair market value. But if the government ordered the shoemaker to make boots for the next year, it would have to compensate for the value of the inputs that the shoemaker must expend to comply with that order. The inputs include the capital to purchase supplies and the shoemaker's labor, which otherwise could have been devoted to another venture. The value of those inputs is measured by the shoemaker's opportunity cost, i.e., the amount of value that the shoemaker could have generated by using the capital and labor for a private venture instead of compliance with the government's directive. Likewise, if the government directs a private firm to expend \$1 billion to construct a waterworks, it takes the economic opportunity of that capital theretofore owned by the firm.

C. The Standard of Sufficient Compensation for a Utility Taking Is Prudent Expenditure

Because a utility regime involves the taking of capital dedicated to the enterprise at the time it is expended, the measure of just compensation required by the Constitution is an opportunity to recover all funds prudently invested under the regime, plus a fair rate of return. Compensable expenditures include all upfront capital investments, ongoing capital investments needed to maintain and improve the property dedicated to delivering utility services, operating expenses, and the utility's cost of capital.

The key compensation principle enforced by the Takings Clause is a requirement that the government return to the owner the economic equivalent of the property taken, measured at the time the property is tendered to the public. This obligation is rooted in the text of the clause, which provides that the government must pay "just compensation" for all "private property . . . taken for public use."⁵⁶ The mandate is to pay for what is taken; not the value of what is taken at some later date on which the government, or the public, accrues a benefit from the property's use.⁵⁷ Thus, the Supreme Court has held in a "consistent and unambiguous" line of cases "that the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain."⁵⁸ An owner "is entitled to ***449** be put in as good a position pecuniarily as if his property had not been taken."⁵⁹

In the case of a utility, the owner's loss is the expenditures prudently dedicated to the regime, including the opportunity to deploy that capital for other productive purposes and thereby earn a market return. A utility surrenders by dint of government mandate every dollar it prudently spends meeting its service obligations, and therefore it is entitled to recover those expenditures, whether classified as capital outlays or operating expenses. Further, because a utility regime involves the construction of long-lived capital assets and the payment of compensation over time, a utility also surrenders the opportunity it otherwise would have had to invest its capital in profitable alternative investments. Stated another way, a utility faces a cost of capital--the cost the utility would incur to borrow the funds dedicated to its regime--that is part of its compensable loss.

The Supreme Court eventually adopted the prudent investment rule, but only after a misguided detour. After initially suggesting that legislative ratesetting was not subject to judicial review under the Constitution,⁶⁰ the Court held in 1886 that the state's power to regulate rates was limited by the principle that rates could not be confiscatory.⁶¹ In the following decade, the Court struggled to articulate a standard for determining when rates were confiscatory. At first, the cases seem implicitly to assume that the standard would have reference to the utility's investment and operating cost.⁶² Thereafter, the Court never deviated from the principle that rates must at least cover operating costs. But the Court did stray from investment as the standard for determining the reasonableness of a utility's return.

The trend began in the 1894 decision in *Reagan v. Farmers' Loan & Trust Co.*⁶³ Although the Court held confiscatory a rate that did not permit the railroad to recover the remaining balance of its original investment, as reflected in its outstanding debt and stock, it also analogized the regulation of utilities to eminent domain and suggested that the public's use of utility property for a rate that was less than its market value would be unjust.⁶⁴ The Court noted that the replacement cost of the utility's property approximately equaled its remaining investment and did not delve further into the measure of market value.⁶⁵ Replacement cost seems to have been used as a rough check on the reasonableness of the utility's original investment,⁶⁶ made more *450 necessary in an era in which railroads and other utilities engaged in fictitious capitalization and engaged in wasteful or imprudent expenditures.⁶⁷

As these cases were decided in the 1890s, the nation experienced a severe economic recession. Consumer advocates seized on the general decline in prices to argue for a reduction in utility rates,⁶⁸ which they sought to justify based on a reduction in the reproduction cost of utility property. Indeed, William Jennings Bryan, counsel for the state in *Smyth v. Ames*,⁶⁹ asserted that judicial review of the reasonableness of profit earned by the railroad should be limited, at most, to the return on the "present value" of the railroad's facilities.⁷⁰ In *Smyth*, the Court did not entirely accept this suggestion, but did hold that the standard for determining confiscation is return on the "fair value" of utility property.⁷¹ Fair value was to be determined based on an amalgam of factors, including primarily original cost and replacement cost.⁷² There followed a number of cases in which the Court upheld orders that deprived utilities of a return on original investment by setting rates based on a "fair value" that was lower than original cost because of a general decline in prices as well as suspicions regarding imprudence or exaggerated claims of investments.⁷³ But even when fair value was in vogue, reproduction cost was never the sole criterion for determining value; original cost was always a significant, though not necessarily controlling, factor.⁷⁴

It soon became apparent that the determination of the "fair value" of utility property was a hopelessly subjective exercise. In a series of cases just after the turn of the twentieth century, the Court avoided adjudicating fair value claims, finding that the claims were inadequately proven or premature.⁷⁵ Meanwhile, the Court attempted in vain to make the "fair value" standard more concrete and definite.⁷⁶ Even in this period of confusion and uncertainty about the derivation of the "fair value" of utility property, however, the Court never wavered from the principle that rates were confiscatory if

they did not cover the utility's actual operating costs.⁷⁷ Although a utility *451 was not entitled to recover unnecessary or imprudent operating costs,⁷⁸ it could not be forced to continue in business at a loss based on the theory that the "value" of the service provided was lower than the costs it actually had to incur to provide service.⁷⁹ The debate centered on the return of and on capital invested in the utility enterprise.

In probably the most important opinion on utility takings ever written, Justice Brandeis cut through this confusion in his famous concurrence in the *Southwestern Bell* case in 1923, which exposed both the theoretical and practical flaws in the fair value approach.⁸⁰ Brandeis began by refuting the eminent domain analogy that was begun in *Reagan* and continued in *Smyth*.⁸ That analogy, which was fundamental to the fair value theory, assumed that a utility regime involves the continuous "taking" of physical utility facilities at the time they are used by the public.⁸² Brandeis explained that the property taken in a utility regime "is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return."⁸³ Because the property taken in a utility regime is the capital dedicated to public service, the taking occurs when the capital is expended, and not when the public uses the services or when a regulator establishes the rates. Only this formulation affords utilities the right to recover what has been taken--the full economic opportunity associated with their capital at the time it is dedicated to the public.

Once subject to a utility obligation to provide service to the public, the firm is entitled to recover "the reasonable cost of conducting the business," i.e., operating expenses and capital charges.⁸⁴ The latter, Brandeis explained, "cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital."⁸⁵ This approach, which Brandeis denominated *452 the "prudent investment" rule, would ensure that "the rate base [would] be definite, stable, and readily ascertainable."⁸⁶

Brandeis contrasted the virtues of the prudent investment rule with the subjectivity and unpredictability of the fair value approach. The "value" of utility property cannot be determined by market transactions because utility property is not commonly bought and sold; nor can it be derived from capitalizing the utility's anticipated future earnings because those "are determined, in large measure, by the rate which the company will be permitted to charge; and, thus, the vicious circle would be encountered."⁸⁷ Fair value therefore was typically determined "by ascertaining what it actually cost to construct and instal [sic] it; or by estimating what it should have cost; or by estimating what it would cost to reproduce, or to replace, it."⁸⁸ Each of these elements involved a discretionary judgment, and the amalgamation of each of these incommensurate factors to derive "value" was inherently subjective: "[T]he rule not only fails to furnish any applicable standard of judgment, but directs consideration of so many elements, that almost any result may be justified."⁸⁹

Brandeis further argued that the practical considerations that largely motivated the fair value rule were no longer valid. Estimates of reproduction cost were formerly used to prove actual cost when direct evidence of investment was either missing or lacking in credibility.⁹⁰ Regulatory oversight of issuance of securities, accounting, and depreciation lent greater reliability to utilities' evidence of prudent investment.⁹ Brandeis also observed that reproduction cost, which was once favored by regulators in an era of declining prices, was now being used by utilities to justify recovery of substantially more than their actual investment.⁹² Brandeis argued that both investors and ratepayers would be better off with the prudent investment rule, which would result in stable rates not subject to rapid fluctuation based on general price trends.⁹³

Brandeis's vision was vindicated in a pair of cases decided in the 1940s. In *Federal Power Commission v. Natural Gas Pipeline Co.*,⁹⁴ the majority upheld a rate order of the Federal Power Commission that used reproduction cost

(in excess of actual investment) to set the rate base but excluded certain elements of “good will.”⁹⁵ Justice Black authored a concurrence, joined by *453 Justices Douglas and Murphy, that rejected the Smyth rule and the eminent domain analogy upon which it relied,⁹⁶ and explicitly embraced Brandeis's prudent investment rule.⁹⁷ The concurrence explained that “[t]he investor interest is adequately served if the utility is allowed the opportunity to earn the cost of the service,” with “cost” defined in Brandeis's terms as recovery of operating expenses and capital charges.⁹⁸ The concurrence emphasized that the agency had broad discretion in selecting a ratemaking methodology as long as the “end” of the approach selected was to permit the utility to recover its prudent investment.⁹⁹

The views of the concurrence in *Natural Gas Pipeline* became those of the Court in *Federal Power Commission v. Hope Natural Gas Co.*,⁰⁰ which was authored by Justice Douglas, who had joined Justice Black's concurrence in the prior case. *Hope* reiterates, nearly verbatim, the test suggested in the concurrence in *Natural Gas Pipeline*, which in turn reiterated the Brandeis formulation:

[T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.⁰

The investor is also entitled to a return “commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.”⁰² Again, the Court gave the agency wide latitude to adopt a ratemaking methodology as long as its “total effect” meets the criterion of recovery of prudent investment and operating costs.⁰³

Although recovery of prudent investment and operating costs is the constitutional minimum, the government has broad discretion to protect the interests of consumers by ensuring that the utility does not charge monopoly prices for essential services. Both the concurrence in *Natural Gas Pipeline* and the Court's opinion in *Hope* speak of ratemaking as involving a “balance” between consumer and utility interests.⁰⁴ But the consumer side of *454 the balance can never trump the utility's right to recover the costs it is compelled to spend in order to meet its service obligations. Rather, the consumer has a legitimate interest in not being exploited by monopoly pricing over and above costs. Utility services are generally indispensable and often provided by only one firm for either economic or legal reasons. In such circumstances, the monopolist could charge rates that are well in excess of its costs, thus depriving some consumers of services necessary for survival and also reducing overall social welfare.⁰⁵ But the consumer interest in preventing exploitation is legitimate only to the extent that rates permit the utility to recover its costs. Consumers always have an “interest” in getting service for free, but the government cannot avoid paying the constitutional minimum merely to gratify that desire. The utility is entitled to recover the costs necessarily incurred to provide service, i.e., the costs without which the service would not exist. Rates that are designed to recover such prudent investment can never be exploitative.⁰⁶ The concurrence in *Natural Gas Pipeline* therefore stated that the consumers' interest should be considered only to the extent of determining the amount of “return on historical cost or prudent investment” that should be allowed,⁰⁷ not in determining whether prudent investment and operating costs themselves should be recovered.

It is of course the case that a utility will not attract capital if the ratesetting regime does not afford investors an opportunity to recover their investments. Nonetheless, the standard articulated by the Court in *Hope* has been much misinterpreted--relied on to suggest that the Takings Clause is not implicated in ratemaking cases unless the utility has both feet in the grave.⁰⁸ As will be explained below, this is a serious error, and it is rendered more and more dangerous

as utilities become more diversified, both in the products they sell and the markets in which they operate.⁰⁹ Before discussing this point, however, it is necessary to address how the compensation obligation *455 imposed by the Takings Clause operates as a constraint on regulators seeking to craft a ratemaking methodology.

D. The Use of Ratemaking Methodologies as a Means of Compensation

To meet its obligations under the Takings Clause, the government must, at the time of taking, either make full payment to the property owner or make a firm promise to pay based on a formula that ensures just compensation. As the Court has explained, “the Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking. All that is required is the existence of a reasonable, certain and adequate provision for obtaining compensation at the time of taking.”⁰ In a utility regime, the government obviously does not make payment at the time of the taking--that is, at the time each expenditure is made. Rather, it makes “reasonable, certain, and adequate provision” for payment by establishing a ratemaking methodology. A ratemaking methodology is the government's promise to pay a utility for the ongoing takings that occur as the firm makes investments and incurs costs under a utility regime.

Ratemaking is a teleological exercise. It is an enterprise directed at an end--the government's compliance with its obligation to provide just compensation by ensuring a utility a fair opportunity to recover its prudent investment. For its part, the government achieves two objectives by relying on ratemaking rather than paying immediate compensation. First, the government shifts the responsibility for payment to users, thereby insulating the public fisc from liability stemming from the consumption of utility services. Second, the government stretches out the time over which utilities recover their capital, thereby insulating users from the obligation to make burdensome one-time payments as a condition for receiving essential services. This delay in payment is the source of the government's obligation to cover the utility's cost of capital by paying a reasonable return.

In developing a ratemaking methodology, the government need not provide an absolute guarantee that a utility will recover its prudent investment. Were the government to adopt such an approach--by, for example, promising a true-up at the end of every ratemaking period, such that any difference between the amount recovered through rates and a utility's prudent expenditure was covered by a check from the treasury--the utility would face no risk to its capital. Expenditures under such a regime would be akin to government bonds, a safe investment that generated only the low rate of return warranted by drawing out the utility's recovery over time. The Supreme Court has made clear that the Constitution does not require regulators to adopt this ultraconservative methodology.²

*456 Instead, the government retains the freedom to adopt a ratemaking methodology that exposes utilities to a risk of nonrecovery. But to take advantage of this freedom, the government must make an adjustment to the rate of return to compensate for the added risk. This is the definition of a risk-adjusted rate of return--a rate of return increased to offset the risk that a utility will not recover its prudent investment.

There are essentially three different types of risk that must be addressed by a rate methodology. Unless it is understood how these risks are allocated, it is impossible to set an adequate rate of return.

First, there is the risk flowing from general economic conditions outside the specific market in which the utility provides service. Thus, for example, a utility's ability to recover its investment may be adversely affected by such factors as an economic recession, a power shortage, a supplier's labor problems, the technological obsolescence of its service, or the development of a product in a different market that reduces demand. These are the kinds of general “background” risks that exist in any marketplace and are compensated for in the prevailing cost of capital. Under virtually all utility ratemaking methodologies, the utility must bear this kind of general market risk, and this risk explains why the rate of return for utilities is higher than the interest rate payable on government obligations, such as bonds.

This general economic risk materialized in *Market Street Railway Co. v. Railroad Commission*.³ There, the advent of the internal combustion engine and the consequent emergence of buses eroded the ability of the utility trolley car company to recover its investments.⁴ The government was not responsible for these losses, however, because the trolley company bore the risk of technological obsolescence and had been paid for bearing that risk through the rate of return.⁵ The government had only promised the trolley company that it would not face competition from other trolley companies.⁶

The second type of risk that must be addressed by a ratemaking methodology is the risk from competition within the market in which the utility provides service. Obviously, investments in a legal monopoly are less risky (and hence demand a lower rate of return) than those in a competitive market. For most of the last century, public authorities generally structured utility regimes as exclusive franchises or at least restricted entry to eliminate or limit the risk of direct competition. As will be discussed below, there were many strong public policy reasons for doing so, and the alternative--seeking to impose utility obligations on only one firm in a competitive market--was (and still is) fraught with practical and legal difficulties. But certainly one of the principal advantages of insulating a utility from the risk of actual competition was that it enabled public authorities to provide a lower rate of return and thus benefit the consuming public with lower and more stable rates. It is this protection from competition risk that explains why utility rates of return *457 have traditionally been lower than those prevailing in "nonregulated" industries.

The third kind of risk that can affect a utility's ability to recover its investments, and therefore must be accounted for in setting a rate of return, is so-called "methodological" risk. This risk flows from explicit restrictions on cost recovery that the government has set forth as part of its ratemaking methodology. Such risk is thus entirely government made, in that it arises from rules and not from the market. It is, as the Supreme Court has observed, the principal risk faced by utilities,⁷ but it is also the risk over which commentators and courts have gotten most confused.

The starting point for understanding methodological risk is this question: why would the government artificially increase the risk to cost recovery, given the fact that it must pay for any higher risk through a higher rate of return? Obviously, it would make no sense to gratuitously introduce risk; doing so would only end up costing consumers more while achieving no offsetting social benefit. There may be circumstances, however, when artificially creating risk does make sense. When, for example, the government has insulated a utility from actual competition, it may want to create some of the benefits that would otherwise flow from competition, such as innovation and efficiency. Certain restrictions on cost recovery can promote these goals, and although the government must provide compensation for the increased risk, at least there is a corresponding social benefit.

The principal way the government can create this kind of purposeful methodological risk is by defining the costs includable in the rate base in terms that are different than actual prudent investment. For example, as in *Duquesne Light Co. v. Barasch*,⁸ the government can define the rate base as including only expenditures that prove "used and useful."⁹ By imposing on the utility the risk that certain investments, though prudent, will turn out to be nonproductive, such an approach may serve the goal of promoting greater discipline in investment decisions. Price caps are another example.²⁰ In effect, *458 these methodologies continuously reduce the rate base by the amount of productivity gains the utility can reasonably be expected to achieve. The utility runs the risk that if it cannot meet these productivity standards, it will be unable to recoup all of its investments. To the extent productivity standards are set at reasonably achievable levels, injecting this risk serves to promote managerial efficiency.

From the utility's standpoint the obvious "risk" in all these cases is that the amount allowed to be included in the rate base, as defined by the methodology, will turn out to be less than the amount of the utility's prudent investment. This is precisely the risk that must be addressed by making an upward adjustment in rate of return. In order to be sufficiently

compensatory, the rate of return must be set sufficiently high so that there is a net probability that the utility will recover its actual historical investments. In other words, no matter how the government chooses to define the “rate base” element of a methodology, the methodology as a whole must always afford the utility a “fair opportunity” to recover its prudent expenditures and a return on those expenditures commensurate with the risk to which the utility is exposed.

To illustrate this point let us return to the example of the waterworks project and consider first a situation where the government, though in dire need of a facility, is relying on free market forces to provide one. A private firm would never voluntarily invest \$1 billion to build and operate the facilities unless it determined that it would be able to recoup the \$1 billion and also earn a return--a profit over and above the amount of the investment. Without such a probability it would pursue other investment opportunities. Suppose the firm forecast that if it went forward with the waterworks plant, it would in five years face competition from new sources of water that could produce the same supply at half the cost. It would not make the investment unless it determined that it could accelerate its recovery by pricing its water during the first five years at sufficiently high levels to assure ultimate recoupment of its investment and a profit. Moreover, the likely profit would have to be sufficiently high to justify exposing the capital to such a risk rather than pursuing less risky alternative investments. In other words, to make such an investment, the private firm would demand a higher return.

Suppose the government proposed to eliminate market risk by offering an exclusive franchise but then introduced “methodological risk” by providing that pricing would be based on periodically determined “replacement value” of the facilities. Essentially, the government would preclude actual competition but would seek to mimic some of the effects of competition through cost recovery rules. Obviously, a private firm would not willingly invest in such a regime unless it projected a probability that it could still ⁴⁵⁹ recover its investment and make a profit. The only way it could accomplish this is by charging high enough rates at the outset to offset the likely decrease in the value of its facilities in the future. Thus, if the government offered a high enough rate of return and fast enough depreciation, it would be offering the private firm a net probability of recovery, and such a firm might voluntarily invest. If, however, the government refused to allow the necessary adjustment to the rate of return, no private firm would willingly make the investment.

The same calculus must apply when the government seeks to compel investments. When the government requires a utility to provide service, it must give that utility the same opportunity it would have in the absence of a mandate to spend capital. ²

Once the government establishes a methodology--with a defined set of puts and takes in its risks and rate of return--it retains the freedom to make changes and shift to new methodologies that involve allocating additional risks to the utility. But this freedom is not unconstrained. When adopting a new methodology, the government cannot foreclose a utility from recovering investments made under the old regime by invoking a risk that was not paid for under the old regime. In other words, if the new methodology exposes the utility to a risk that did not exist under the prior methodology--if, for example, the new methodology opens the market to competition while the old regime guaranteed the utility an exclusive franchise--the government must adjust the new rate of return to compensate for the new risk. The Takings Clause bars the government from pointing to a new and uncompensated risk as a reason for shortchanging the utility on investments made under the prior regime. If the risk was not addressed by the rate of return set under the old regime, the utility did not assume it, and the government cannot point to that risk as a basis for denying recovery.

The reason is simple. After a utility has made significant investments that generate valuable property under one set of regulatory rules, there will often be a strong temptation to use government power to appropriate some or all of that value to the benefit of the public at a reduced cost. Changing ratemaking methodologies midstream can accomplish just such an appropriation of value by foreclosing a utility's recovery of a constitutional return on investments made under the original methodology. No less than in other instances of appropriation of private property, the Takings Clause precludes the government from securing investment under one set of rules and then capturing the rewards of that investment by unilaterally altering the rules of the game. A shift in methodologies must be accompanied by some mechanism to compensate for investment stranded by the shift in methodologies itself.

The Supreme Court applied this principle in *Duquesne* to evaluate a shift that created a new methodological risk.²² Under the original ratemaking *460 regime described in *Duquesne*, all prudent investment was included in the utility's rate base.²³ This regime was modified, however, to exclude from the rate base investments that, although prudent when made, turned out not to be used or useful.²⁴ The Court evaluated the constitutionality of this new methodology by determining whether the shift adversely affected the utility's opportunity to recover the whole of its prudent investment.²⁵ Ultimately, the Court approved the new methodology because it was projected to permit a recovery of prudent investment "within the constitutional range of reasonableness" as measured under the old regime.²⁶ In reaching its decision, the Court recognized that "a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions."²⁷ The switch at issue in *Duquesne* did not present this problem because the new regime afforded the utility "a reasonable rate of return . . . given the risks."²⁸

*United States v. Winstar*²⁹ reached a similar result. There, the government entered into contracts with financial institutions that held out the promise of preferred accounting treatment for certain assets in return for the institutions' agreement to acquire failed thrifts.³⁰ Although the government retained authority to alter the banking law and nullify this promised advantage—a step the Congress ultimately did take—the contracts allocated the risk of this change to the government.³¹ Because the financial institutions were not compensated for bearing this risk as part of the contract, the government, once it breached its obligation to deliver the beneficial accounting treatment, was liable for damages.³² In other words, the government was free to change the regulatory regime but not to foist the cost of that change on a private party that had never been paid for bearing the risk.

E. The Role of Exclusive Franchises, Cross-Subsidies, and Competitive Revenues in Utility Ratemaking

Courts and regulators have become accustomed to brushing aside takings claims by utilities on the ground that the claim is not cognizable unless and until the utility's overall financial integrity is compromised. According to this view, the central teaching of *Hope* is not that prudent investment is the constitutional standard of compensation but that there is no constitutional question as long as the "total effect"³³ of the rate order is that the utility is still able "to operate successfully, to maintain its financial integrity, *461 to attract capital, and to compensate its investors for the risks assumed."³⁴ The inadequacy of a particular rate is irrelevant as long as the rates as a whole provide sufficient compensation. But this principle has been misconstrued as immunizing from constitutional scrutiny rates that provide insufficient revenue as long as the firm is managing to stay afloat. That error is especially important to correct now, as utilities branch out into different jurisdictions and services.

The analysis of this issue begins with the premise that the government must provide full compensation for whatever property it takes. If the government takes a sliver of real property for an easement, it must compensate the owner for the value of that property right. It makes no difference how much property is left to the owner or how much money the owner can make from the portion of the property not taken. In the utility context, as we have seen, the property taken is the private capital that the utility must expend in order to fulfill its public service mandate.³⁵ The government must pay in full for the capital so taken.

But it does not necessarily follow that the regulator must set each rate to cover the costs incurred to provide that particular service. From the earliest days of its utility takings jurisprudence, the Supreme Court held that a utility cannot challenge a rate on one particular service as confiscatory if the regulator establishes rates that it reasonably projects would produce

sufficient revenue in the aggregate to cover all of the utility's costs.³⁶ In other words, the regulator could set one rate below cost and make up for the loss by setting another rate above cost.

Such cross-subsidies are a permissible form of compensation only if the government is responsible for generating the offsetting revenue. Otherwise, the revenue is not compensation provided by the government but instead is revenue already due to the firm as recompense for the provision of other services. Such revenues are already spoken for. They are the reward due to the firm for its provision of those other services. The government cannot claim that money, which already belongs to the firm, as compensation for the obligation imposed by the government to provide other services below cost. In simpler terms, the government could not compel General Motors to sell *462 Chevrolets to the poor below cost because, due to earnings on Cadillacs and Buicks, the company as a whole remained profitable. Such a result, to borrow a phrase from Justice Scalia, would mark the triumph of “the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored . . . that the normal rules of the Constitution protecting private property are suspended.”³⁷

The regulator is “responsible” for generating revenue from a supporting service only if the regulator sets the rate for that service above cost and prevents competitive entry. If the market for the provision of the supporting service is open to competition, the revenues received by the firm are due to its own efforts and not those of the government. Revenues earned in a market open to competition are compensation for the risks the firm undertook when participating in the market. The extent of those returns, moreover, is a function of the competitive dynamic, not of regulatory action. The regulator cannot calibrate the revenues earned in an open market to produce an overall stream of revenues that it projects will provide sufficient compensation for the capital taken for public use. Revenues earned in a market open to competition cannot count as constitutionally required compensation because they are not a “reasonable, certain and adequate” assurance of payment at the time the government effectuates a taking.³⁸

The Supreme Court has long recognized that the government cannot point to returns earned on the sale of competitive services to satisfy its compensation obligation. The seminal case applying this principle is *Brooks-Scanlon Co. v. Railroad Commission*,³⁹ in which the Court held that regulators could not justify below-cost railway rates by claiming that the railroad was still profitable due to healthy returns in its competitive lumber business.⁴⁰ As Justice Holmes explained, earnings from competitive operations are the firm's private property, and a firm “no more can be compelled to spend that [money] than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.”⁴¹ Competitive revenues are irrelevant to the analysis of whether rates are compensatory because the government is not responsible for generating those revenues.

For the same reason, the Supreme Court recognized early on that a regulator may not justify deficient rates by pointing to revenues generated under a different sovereign's jurisdiction. A state cannot, for example, excuse constitutionally inadequate rates for intrastate services by pointing to positive returns for interstate services. “The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control.”⁴² The revenues for those *463 nonjurisdictional services are already spoken for: the other sovereign has already determined that they are necessary to satisfy its just compensation obligation to the utility for the risks associated with the business conducted under its jurisdiction.⁴³

A cross-subsidy is a permissible form of compensation only in a closed market within the plenary control of a single regulator. That was the traditional model of utility regulation in effect for most of the twentieth century. The government typically granted a monopoly to a single provider through an exclusive franchise. In addition to the other advantages of such arrangements,⁴⁴ they enabled the regulator to shift costs between services and over time. To advance social policy objectives, such as the advancement of universal service, regulators often reduced rates below the cost of service for

some customers (e.g., residential users and rural customers) and compensated the utility by establishing above-cost rates for other categories of customers (e.g., business customers and city dwellers). Likewise, regulators deliberately slowed depreciation schedules to keep current rates low and to defer recovery of investments to future periods.

It was in this context that the Court in *Hope* articulated the “total effect” test.⁴⁵ In *Hope* and the other cases that permitted cross-subsidies, the utilities at issue were regulated monopolies in all of their operations. In those cases, therefore, it was proper to consider the company's overall revenues from all operations in determining the sufficiency of a rate. But those cases clearly do not stand for the proposition that where the government's control is limited to part of a utility's business, it can justify a noncompensatory rate by claiming that revenues from sources outside of its control can make up the difference. Instead, *Hope*'s “financial integrity” test⁴⁶ must be applied only to the utility operations that the regulator controls to such an extent that it can be deemed responsible for generating the revenues from those services. It does not include revenues earned from all operations under the regulator's jurisdiction to constrain. Revenues from a competitive service do not suddenly become “compensation” from the government once the government makes it more difficult for the firm to earn those revenues by imposing an additional burden on its ability to compete.

***464** The total effect test must therefore be used with greater caution today as utilities are branching out beyond their regulated operations into competitive markets and as once closed utility markets are opened to competition. Increasingly, utilities do not raise capital for a single regulated purpose. More commonly, utilities are subsidiaries of holding companies, which in turn operate in many jurisdictions (often outside the United States) and in many lines of business that are either unregulated entirely or at least open to competition. The ability of such a holding company to raise capital is not probative of whether a rate order by a regulator of one of its many subsidiaries is compensatory. Unless the total effect test is limited to consideration of the revenues from services that the regulator is responsible for generating, the regulator can justify noncompensatory rates simply by adverting to the financial health of the corporate family as a whole. That would enable the regulator improperly to take credit for revenues over which it has no control and which are due to the firm as recompense for the services it provides in a market open to competition or under another sovereign's jurisdiction. The regulator cannot use those revenues, which already belong to the firm, to compensate it for the obligations imposed by that regulator to provide other services below cost.

A related excuse invoked by regulators is that the government has conferred various “benefits” on utilities that either partially offset or fully relieve the government from the obligation to provide full compensation. Usually, the “benefit” claimed is the utility's right to be a monopoly provider. Of course, that benefit is joined with the obligation to provide service, which is the source of the obligation to provide compensation. The protection from competition was part of the mechanism for providing compensation and does not relieve the government from that obligation. Other so-called “benefits” simply reduced the utilities' cost of providing service--and thus reduced the amounts that consumers would otherwise have paid. The government's provision of rights of way, material, and the power of eminent domain fall into this category. If the government had not granted these privileges, the utilities would have had to expend additional capital on their own to construct the infrastructure necessary to provide service. As customers would have been required to pay rates that enabled the utilities to recover these additional costs (along with a return), those customers, and not the utilities, were the ultimate beneficiaries of the government's largesse.

A more subtle form of the argument is that assets dedicated to the provision of utility service can also be used to provide competitive services. The regulator may seek to allocate a portion of the costs of facilities used jointly for monopoly and competitive services to the latter (and thus reduce the obligation to provide compensation for the former). Usually, however, the regulator attempts to reallocate the costs of services retroactively--i.e., after the firm has been successful in a competitive line of business and has generated profits, which the regulator can use to offset the costs previously allocated to the regulated service. The retroactive reallocation of costs to competitive businesses is opportunistic: the regulator will reallocate costs to the competitive business when the business is successful, but it will not reallocate costs back to the regulated business if the competitive venture fails. The retroactive ***465** reallocation of costs to the competitive business thus systematically alters the risk profile of the competitive business by truncating the opportunity for gain without

limiting the risk of loss. In addition, this post hoc cost reallocation is no different from the more direct application of profits from the competitive business to fulfill the obligation to provide compensatory rates. Both are equally unlawful. Because the allocation of costs of facilities that jointly support regulated and competitive services is necessarily arbitrary, the regulator can retroactively reallocate joint cost to the competitive service in direct proportion to the competitive profits. If the government cannot use a utility's past profits as a basis for limiting future returns,⁴⁷ it certainly cannot use the profits of a competitive business to accomplish the same result.⁴⁸

F. Judicial Review of Utility Ratemaking

Because ratemaking is the method by which the government provides compensation for the taking inherent in a utility regime, judicial review of ratemaking is essential to the protection of constitutional rights. As the Court explained in one of its earliest cases involving the taking of utility property:

It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.⁴⁹

The Court has therefore declared repeatedly that the judiciary has the final word on whether rates are compensatory.⁵⁰

A utility can challenge ratemaking as confiscatory in either of two ways. First, the utility can claim that the ratemaking methodology is not designed to produce sufficient compensation. As noted, the objective or end of ratemaking is the generation of compensation that is sufficient under the Constitution. If the methodology selected by the regulator is not geared toward ensuring constitutionally adequate recovery, the utility can immediately challenge it on this basis. The utility can claim that the methodology is arbitrary and capricious because it is not rationally directed at the establishment of “just and reasonable” rates as required by the agency's governing statute. Likewise, the utility can assert that the methodology does not meet the constitutional requirement because it does not provide a reasonable, certain, and adequate promise to pay the constitutional minimum level of compensation. This species of challenge does not depend on the outcome of the rate order *466 but goes to the systemic flaw in the methodology itself. The rates that are the product of the regulator's chosen methodology, and the revenues that result from such rates, can be evidence of the inadequacy of the methodology as a means of providing compensation. But neither rates nor revenues are necessary to this kind of methodological challenge. Consider again the waterworks example, and suppose that the government decided that it would establish rates based on the spin of a roulette wheel, allowing the utility a one-in-forty chance of adequate recovery on its \$1 billion investment each year and no increase in the rate of return to account for the methodological risk. Would the rate be compensatory if the utility hit its lucky number in year one? Would the rate be confiscatory merely because the utility missed in year two? The answer is obviously no. The deficiency in the methodology stems not from its results, but from the fact that it is not reasonably calculated to achieve the end specified by the Constitution.

Again, Justice Brandeis correctly articulated the rule. His opinion for the Court in *Northern Pacific Railway Co. v. Department of Public Works*,⁵¹ which he authored two years after his concurrence in *Southwestern Bell*, invalidated a rate order set by a state commission. The commission determined that railroads were entitled to rates for carrying logs that covered only the average operating costs for all categories of freight by all railroads.⁵² The Court held that the ratemaking methodology was invalid because it only considered average costs and did not account for differences in costs among the railroads or the categories of freight.⁵³ “[W]here rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may enquire into the method by which its conclusion was reached.”⁵⁴

A challenge to the end at which a ratemaking methodology is directed is different from a challenge to the means used by the regulator to achieve that end. Regulators generally enjoy broad discretion in formulating a ratemaking methodology that is designed to produce sufficient revenue to meet the constitutional target.⁵⁵ The regulator can select from a variety of ratemaking methodologies: prudent investment, used and useful, price caps, replacement cost, etc. Setting aside problems that may arise if the regulator shifts from one methodology to another,⁵⁶ any of these methods (and others) is permissible as long as the regulator calibrates them so that the utility retains ^{*467} a net probability of recovering its prudent expenditures. In addition, the regulator has considerable discretion to decide how particular rates should be set (e.g., the proportion of charges based on volume as compared to fixed charges), provided that these subsidiary determinations are made within the context of a ratemaking methodology that is designed to generate sufficient revenue to enable the utility to recover its prudent expenditures. The regulator must select a proper end--the generation of sufficient revenue to permit the utility to recover prudent investment--and the judiciary must step in if it fails to do so. But as long as the regulator is setting rates that are directed at the proper end, the means selected by the regulator are largely within its discretion.⁵⁷

A second and distinct type of takings challenge is that the rate methodology, although designed to be compensatory, did not in fact result in compensatory rates. The courts generally postpone such claims until after the effect of the rate methodology is proven through actual experience with the rates. If the regulator is aiming at the proper target, the courts tend to defer to its expert judgment that the rate will fulfill the regulator's objective of producing sufficient revenue to cover the utility's prudent expenditure. The variables affecting the revenues the rate produces and the costs that the utility necessarily incurs to provide service are too many and too complex for a court to have confidence second-guessing the regulator's prospective judgment. If the regulator's prediction turns out to be incorrect, a utility can challenge the rate at that point.⁵⁸ But such a challenge depends on actual experience.

Whereas the first type of challenge, which addresses the regulator's adoption of the wrong standard of compensation, can be brought at the time the regulator adopts a methodology that reflects that error, the second type of challenge is often dismissed as premature (or "unripe") if brought before the rates have been put into place.⁵⁹ The Supreme Court seems to have had the latter type of challenge in mind when it said in *Verizon Communications, Inc. v. FCC*⁶⁰ that the "usual" kind of takings challenge in a utility ratemaking case is based on the actual impact of specific rates.⁶ In those cases, the "general rule" is that "any question about the constitutionality of ratesetting is raised by rates, not methods."⁶² But that does not mean that the utility is foreclosed from prospectively challenging a ratemaking methodology that is directed at the wrong end. The Supreme Court in *Verizon Communications* did not address the utilities' claim that the FCC's methodology was not directed at the proper target because the Court concluded that the methodology was not yet completely formulated.⁶³ But if the Court had confronted a ^{*468} methodology that was clearly not directed at allowing recovery of prudent expenditure, the utilities' challenge would have been properly considered.

Deferring adjudication of a challenge claiming that the methodology is not directed at the standard of compensation required by the Constitution has four significant problems.

First, it eliminates any check on irrational agency decisionmaking--i.e., decisions that are not directed to achieving the objective of establishing "just and reasonable" (compensatory) rates.

Second, the failure to engage in prospective review of the agency's determination of the end of ratemaking creates a risk that the liability for utility takings will fall on the Treasury, rather than on the users of utility services. By withholding review until the methodology runs its course--and potentially generates uncompensated losses for utilities--the courts create a risk that users will escape their obligation to make full payment for the services consumed and that the burden of a true-up will fall on the public fisc.

Third, deferring review of utility ratemaking thrusts the judiciary into a briar patch, eliminating from consideration claims that are relatively easy to adjudicate, and replacing them with claims that raise extremely complex questions of fact and causation. When reviewing a methodology, a court's task is limited to determining whether the ratemaker has made adjustments to the rate of return appropriate to compensate for the risks created by the methodology. When reviewing the results of a rate, however, a court is required to determine whether a shortfall suffered by a utility is the result of a risk covered by the rate of return, or a risk for which the utility has received no compensation. Deferring review of ratemaking methodology forces the judiciary to determine, for example, whether a utility's losses stem from a downdraft in the economy, the force of competition, or a methodological risk imposed by the ratemaking regime. Such questions are impossible to answer with precision. Deferring judicial involvement in cases where the method is aimed at the constitutional standard therefore defeats the very purpose served by the doctrines of ripeness and deference, forcing the courts to tackle questions that are far beyond their institutional competence.

Finally, a key purpose of ratemaking is to ensure that the utility is able to attract capital in the marketplace--a purpose that is defeated by deferring review until the utility's losses come to fruition. Delay and uncertainty increase the risk facing utility investors and therefore increase the cost of capital. The result is higher costs for the utility and higher prices for ratepayers. Justice Brandeis understood this point, recognizing that the public "can get cheap service from private companies, only through cheap capital," and "ample service through private companies, only if investors may be assured of receiving continuously a fair return upon the[ir] investment." ⁶⁴

***469 II. Judicial Confusion of Regulatory Takings and Utility Takings**

Given the high costs of judicial inattention, the central need of modern utility jurisprudence is a reinvigoration of the courts as a bulwark against the confiscation of utility property. The dilution of the judiciary's supervisory role over ratemaking reflects judicial confusion about the constitutional principles applicable to takings in general and to government regulation of utility rates in particular. The greatest source of confusion in takings law arises from the failure to distinguish between two fundamentally different forms of government action. The first is a taking by means of an appropriation of private property, whereby the government transfers the use and enjoyment of property from the owner to the public. The second form is government regulation that restricts the owner's use of property. Regulation limits the usefulness of the property to the owner, but it does not shift that use to a third party. As the Supreme Court recently stated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*:

[The] plain language [of the Fifth Amendment] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. ⁶⁵

This Part explains how these two kinds of action are distinct, why the Constitution establishes different rules to evaluate each, and why utility cases, like physical occupation cases, involve appropriations.

A. Appropriation Versus Restriction of Use

At the outset, the distinction between appropriative and regulatory action must be clearly understood. As discussed below, appropriation is the core situation addressed by the Takings Clause. When the government shifts the use and enjoyment of property from the owner to the public--when it appropriates to itself or to its designee all or part of the economic opportunity that inheres in property--the government has taken the property. The paradigmatic case is the condemnation of land or the granting of a permanent right of physical occupation to a third party. ⁶⁶ Other examples

are discussed *470 in detail below.⁶⁷ At this stage, the main point is that government appropriation is a taking per se, without regard to the government's need or the owner's loss. When use is appropriated, a taking has occurred no matter how compelling the government's justification for its action. Even in cases of direst emergency--for example, the need for supplies to conduct a war-- government appropriation of the use of property is a taking.⁶⁸ Likewise, the extent of the impact of the appropriation on the owner is irrelevant. The appropriation of even a tiny fraction of the owner's interest in property is a taking.⁶⁹ If the government condemns a five-inch strip of land to build a highway that crosses a corner of the property, it has effectuated a taking by appropriating the owner's use of that property. It does not matter that the owner did not plan to use that strip, that the remaining 500 acres of the lot are untouched, or that the owner retains 99.99% of the value of the property. As the Court stated in *Tahoe-Sierra*: "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."⁷⁰

The second situation is government action that restricts the owner's use of property. Regulating owners' use of their own property is the sine qua non of the police power. Government has an essential role in defining how far an owner may go in using its own property in relation to the rights and interests of other members of the community. Such limitations are permissible and necessary. Requiring compensation in every case in which the government restricts an owner's use of property would destroy the government's ability to regulate. Accordingly, such regulations are not regarded as takings in most cases.

Beginning in *Pennsylvania Coal Co. v. Mahon*,⁷¹ however, the Supreme Court recognized that nonappropriative government action that restricts an owner's use of property can go "too far."⁷² In this context, the Court has struggled to articulate a coherent standard for determining when regulation crosses the line. It has generally eschewed categorical approaches in favor of context-specific consideration of the impact of regulation⁷³--what the Court *471 calls "ad hoc, factual inquiries."⁷⁴ Although it can hardly be called a "standard," the Court has considered three factors in attempting to identify particular situations in which government regulation of property amounts to a taking: (1) the nature of the governmental action; (2) the severity of the economic impact of the regulation; and (3) interference with the owner's reasonable investment-backed expectations.⁷⁵ Thus, a regulation may be regarded as a taking only in an extreme case based on a consideration of factors that are irrelevant to the classification of an appropriation as a taking per se. In particular, the test for regulation is largely owner-centric. The harm caused to the owner, measured in terms of the destruction of reasonable expectations and the value remaining, is critical in identifying the cases in which regulation has such drastic effects on the owner that it crosses the line to a taking. Even so, fairly drastic effects are usually not regarded as takings, as long as the government leaves the owner with some economically valuable use of the property.⁷⁶

The confusion between these distinct categories has arisen because the courts have been so absorbed in attempting to divine the limits of regulation that they have lost sight of the rule applicable to appropriations, which has nothing to do with the impact of the government's action on the owner. The free-floating inquiry into the fairness of a regulation from the owner's point of view is relevant only to identify those exceptional cases in which regulation goes too far. Unless the distinction between appropriation and regulation is maintained, the factors considered in determining whether regulation amounts to a taking may be improperly transferred to cases involving government appropriation, thus undermining the core protection of the Takings Clause. The three-factor test to evaluate regulations, which is owner-centric, was never intended to be used--and should not be used--as a limitation or qualification on the categorical rule applicable to appropriations, which focuses on the transfer of the right to use and enjoy to the public. The government's power to destroy does not entail a power to steal, and the government's power to devalue property by regulation is not equivalent to its power to appropriate value from an owner and give it to the government or to a third party. The determinative consideration is the appropriation of the productive use of the property to the public, not the extent of the impact of the government's action on the owner.

*472 The distinction between appropriation and regulation is inherent in the Constitution and generally explains the results of the cases.⁷⁷ The distinction is sometimes recognized in the case law (although it is usually wheeled out in order to shoot down a claim for compensation).⁷⁸ Unfortunately, however, the distinction is not always maintained, and the courts seem to be moving unthinkingly in the direction of applying the ad hoc, totality-of-the-circumstances test to direct appropriations of the use and enjoyment of property. This tendency is reflected in the suggestions of some commentators that every government action should be evaluated under the three-factor test.⁷⁹ If that were the rule, the government would have a license to steal. As long as it does not totally destroy the value of the property, it can appropriate almost the entire use.

Nowhere is this confusion more evident than in the context of the analysis of the constitutional principles applicable to utility regulation. The Supreme Court has not clearly articulated, at least in recent years,⁸⁰ whether the regulation of rates charged by public utilities falls into the per se takings category or is instead to be evaluated under the three-part test reserved for regulatory takings. In fact, the advent of a fuzzy jurisprudence for regulatory takings has begun to infect the analysis of utility ratesetting. This unfortunate trend is evident in Chief Justice Rehnquist's opinion for the Court in *Duquesne*,⁸ which, despite its perspicuity in laying down the rule to evaluate shifts in ratemaking methodologies,⁸² nevertheless evidences befuddlement about the basic constitutional categories applicable to review of utility ratemaking. The closest the opinion comes to recognizing that a different *473 standard might apply in ratemaking situations as compared to regulatory takings is its impenetrable comment that the "partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment."⁸³ The opinion never makes clear what those questions are or how they are to be answered. Instead, it refers to the amount of capital that the utility is entitled to recover and the rate of return it is entitled to earn as issues which "[a]t the margins . . . have constitutional overtones."⁸⁴ These questions do not have "overtones"; they are the melody itself. While purporting to reaffirm the "teachings of *Hope*,"⁸⁵ *Duquesne* clouds the constitutional principles so clearly set forth in *Hope* and its progenitors.

It is not surprising, then, that courts and regulators have become confused about those principles and have erroneously infused the analysis of utility takings with principles that apply to the analysis of whether government regulation constitutes a taking. This trend is reflected in the explicit or implicit assumption that the test for evaluating whether a rate order is confiscatory is equivalent to the test for determining whether a regulation amounts to a taking--that the "total effect" of a rate order is to deprive the utility of the opportunity to earn a fair return only when the rate order⁸⁶ "goes too far."⁸⁷ This has led to the mistaken conception that an order regulating a utility's rates will not be regarded as a taking unless the government's action constitutes a "taking" under the three-factor test used to evaluate the impact of government regulation.⁸⁸ Government compulsion to invest the capital necessary to provide service would not, under this view, be a compensable taking as long as the total effect of the government's action leaves the firm with some residual value. So the government could, under this construct, order our water utility to build a plant that costs \$1 billion and then, after it is built, limit the company to recovering \$500 million in rates. Because the value of the utility's property was not totally destroyed, because the utility had to expect that regulation would change, and because the government had *474 a compelling interest in lower rates, the government could appropriate \$500 million scot-free. Something must be wrong here.

The problem lies in the superficial view that such regulation is akin to the government's regulation of any other business--regulation that may impair the value of the business, but does not thereby necessarily constitute a taking under the three-factor test. As noted, however, this view fails to appreciate the central characteristic of a utility regime: government compulsion to provide service to the public. The government does not merely limit the manner in which a utility may operate, but affirmatively mandates that a utility do business--and, as a necessary consequence, affirmatively mandates that the utility dedicate its capital to public use. Such compulsory service entails an appropriation of the use of capital

from the owner to the public. It is a taking per se, without regard to the government's interest, the effect of the government's action on the owner, or any other "factor" that is used to determine if a regulation goes too far.

B. Constitutional Language and Structure

The Fifth Amendment reflects the basic principle that government appropriation of the right to use and enjoy private property is a taking per se, whereas government action that only restricts the owner's use of property is generally not a taking but can become one in extreme cases.

The language, structure, and purpose of the Fifth Amendment require a focus on the mandated appropriation of the use of property. To begin, the word "taken" itself connotes the appropriation of property. "Take" derives from the Old English "tacen" or Norse word "taka," which meant to "grasp, grip, seize, lay hold of."⁸⁹ In essence, from the earliest usage, "take" meant

"to transfer to oneself by one's own action or volition (anything material or nonmaterial)." This becomes then the general or ordinary sense of the verb, which falls into two main divisions, take in the sense of "seize, grip", hence "appropriate", and take in the sense of "receive or accept what is handed to one."⁹⁰

At the time the Fifth Amendment was enacted, this was how "take" was defined.⁹¹ Property is thus "taken" when someone other than the owner ends up using it. By its nature, a taking involves a conversion of ownership from one to another, either de jure (when the government takes legal title) or de facto (when the government appropriates the use of the property theretofore belonging to the owner).⁹² Moreover, as Jed Rubenfeld has persuasively argued, *475⁹³ the text of the Fifth Amendment refers not simply to property that is "taken," but to property that is "taken for public use."⁹⁴ The latter phrase indicates a focus on situations-- like eminent domain or the requisition of supplies during wartime⁹⁵ -- that involve government appropriation of the use of private property.⁹⁶

In addition, the structure of the Fifth Amendment supports this interpretation. The clause immediately preceding the "taken for public use" provision ensures that "no person shall . . . be deprived of . . . property, without due process of law."⁹⁷ Both clauses refer to "property," but they use different terms to describe the government action at issue--"deprive" in the first case and "taken" in the second. The use of different terms and sentence structure in these adjacent clauses dealing with property suggests that the phrase "person . . . shall be deprived" should be interpreted differently from the phrase "property be taken."⁹⁸ One is "deprived" of property if the property is destroyed or the owner's ability to use it is otherwise curtailed, whether or not the property is subsequently used by the government or its nominee.⁹⁹ The Due Process Clause thus takes the owner's point of view, and it entitles the owner to process but not necessarily to compensation when his property right is diminished. This focus on the owner is reinforced by the sentence structure, which refers to a "person" whose property is deprived. By contrast, the next clause refers to "property" that is "taken for public use." The focus in the latter situation is not on the owner but instead on the character of the government's action. When the property is "taken for public use," the government uses the property for its own purposes. In these circumstances *476 both process and compensation are required, regardless of the impact of the government's action on the owner.

C. The Nature of Property

Deeper philosophical and jurisprudential considerations likewise support the per se rule that government action that transfers the right to use property from the owner to the public is a taking, whereas regulation of the owner's use of

property is a taking only in an extreme case. “Property,” as a concept that describes an individual's relationship to an object, carries two different significations. The first is the idea that the object can be owned, which necessarily means that one person's claim to use that object is superior to others' claims. The second concept bound up with property is the extent of use of the object permitted to the owner. The first idea has to do with who has the right to use; the second has to do with how property can be used. The first idea describes a prepolitical relationship that sets a limit on government action; the second is defined by positive law.

The very idea of property as a thing that can be owned necessarily connotes that one person's claim to use the object is superior to others'. If everyone's claim to use the object is equal, then the object is communal. Private property stands in contradistinction to communal property in that the owner can prevent others from using it. Property is not “owned” if the putative owner cannot exclude others. As Blackstone explained, the right of property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”²⁰⁰ When the government prevents the owner from excluding others--that is, when it transfers the right to use the property--it destroys the essence of the property right. The Supreme Court has thus instinctively recognized that the right to exclude is a central, indeed defining, characteristic of property.²⁰ The right to exclude is what defines property as “mine,” as opposed to “yours.” When the government destroys the right to exclude, it strikes at the core of property.

Positive law cannot alter this fundamental characteristic of private property. The irreducible core meaning of “property” is the right to exclude. If the identity of the person with a superior right to use an item of property is subject to the majority's vote, then there can be no private property; no one will ever have the exclusive right to use property as long as that use can be shifted at will to another. When the government eliminates the right to exclude, it takes property by definition. The Fifth Amendment presupposes that the individual's “property” right already exists and cannot be taken by *477 the government without just compensation. Indeed, the Framers believed that the right to property, in this sense, was a natural right logically existing prior to government.²⁰² If the government could avoid the obligation to pay by redefining property at will, the protection would be rendered nugatory.²⁰³

The constitutional command that government respect the owner's superior claim to the use of property is necessary to address the danger of theft of property that is inherent in the political process. Unless there is a core “right” of property that is a check against (and not defined by) positive law, the idea of private property is meaningless. In any political regime, there will be a strong temptation for the rulers to steal property for their own benefit. In a democracy, the majority has a natural inclination to redistribute--to take property from the (wealthy) minority and transfer it to the (poorer) majority. Indeed, there will always be a minority of one who faces an appetitive majority that desires to use that person's property.²⁰⁴ As the Founders recognized, this redistributionist temptation threatens the security of property and ultimately the stability of the political regime itself.²⁰⁵ Without a fixed line of demarcation between what is “mine” and what is “yours,” the political process would devolve into class and ultimately individual warfare over whose claim to particular property is superior. This sounds a lot like the state of nature, in which individuals' competing claims to own an object are ultimately resolved by force. Of course, a government in which ownership of property is not a matter of right but instead is determined by force would fail *478 its essential purpose. Indeed, some people might be better off in a state of nature, in which they would have at least some means to protect property they claimed as their own, than in a regime in which individuals must relinquish their natural right to protect their property by force and in which the government has the complete prerogative to determine ownership.

These risks of redistribution, which are inherent in any situation in which the government appropriates the use of property for the benefit of the public,²⁰⁶ can be addressed by an organic law that limits the scope of permissible government power. This can be done in two ways. First, the organic law could absolutely prohibit the government from appropriating property, even when the appropriation is justified by a compelling public need that is not based on a desire to

redistribute as such.²⁰⁷ The Constitution, however, takes a second approach, permitting the government to appropriate property--that is, to take private property "for public use" --but only if it pays "just compensation."²⁰⁸ Obviously, the compensation requirement protects the security of property ownership by restoring the economic opportunity inherent in the owner's superior claim to use the object that is taken. But it also serves a critical role in defusing the danger of redistribution that is inherent in a democratic regime. The absolute requirement to pay compensation neutralizes the redistributionist impulse by ensuring that government appropriation of property occurs only when it serves the public good as measured by an objective that is separate from redistribution.²⁰⁹ The democratic redistributionist *479 impulse is to appropriate property without paying for it; the government (that is, the public at large who finances the government) will be willing to pay for a taking of private property only when the public is benefited. By requiring compensation, the Takings Clause tends to direct appropriations of private property toward a public interest beyond satisfying simple redistributionist impulses.²¹⁰ The compensation requirement protects against the misuse of government power in those situations in which its exercise is inherently most dangerous--when the government seeks to provide a benefit to the public by appropriating the economic opportunity of property ownership.

When the government does not appropriate the use of property, but instead regulates the owner's use of property, different issues arise. Whereas the government is constrained to recognize the owner's right to exclude others from using the owner's property, the government's determination of the extent of the owner's permissible use is not inherently incompatible with the idea of property. Ownership of a thing does not connote the unlimited right to use it in any way the owner sees fit. Indeed, an owner's right to use property is inherently limited. Any person's exercise of rights, whether of liberty or of property, has the potential to impinge upon another person's enjoyment of their rights. Government, at least in domestic affairs, is all about regulating how individuals interact with one another--determining when one person's rights end and another's begin. We call such regulation the "police power": limits imposed by positive law on individuals' liberty and their ability to use their property based upon its relationship to others.

Thus, it is entirely unobjectionable for the government to prohibit an owner from using his or her property in a way that harms others.²¹¹ The government can severely limit the use of property, and thus destroy most of its value, in order to prevent such harm. The police power has been extended even further, as the government imposes restrictions on the use of property that are designed to benefit others.²¹² Although the propriety of the latter *480 extension of the police power has been challenged,²¹³ the fact remains that positive law, at least within broad limits, can define the extent of the owner's permissible use of property.²¹⁴ This is the sense in which the Supreme Court has said that property is defined by state law.²¹⁵ The power of the state to define the extent of the owner's permissible use of property, however, does not encompass the fundamentally different power to define away the owner's right to exclude others from using the property. The latter right is not subject to modification by positive law.

The political process establishes the positive law that demarcates the extent of the owner's permissible use of property, and it is designed to serve as a way of determining what uses of property are consistent with the public interest. Some kind of process is necessary to sort out the extent of permissible use of property. The determination of how far the owner may go in using property without adversely affecting others requires a contextual balancing of competing interests, which is usually accomplished through a process that looks to the specific facts, as opposed to a categorical or constitutional limitation. As long as the government's action involves only determining the extent of the owner's permissible use of property, and not appropriating an economic opportunity inhering in the property, the political process is more likely to produce a reasonable outcome. The majority has a self-interest in imposing only reasonable restraints on the use of property because the majority would subject itself to such restraints to the extent it has or aspires to obtain property, at least if the restriction on the use of property is generally applicable and does not single out particular property owners.²¹⁶ There are, in addition, certain characteristics of regulation of the owner's use of property that render it more likely to be directed at promoting the public good than at transferring the right to use property from one person to another.

One such characteristic is “average reciprocity of advantage”^{2 7}--the idea *481 that all property owners benefit from restrictions imposed on each of them, even if not in exact proportion. Another and related justification is that restrictions on one owner's ability to use his property may prevent that owner from harming others--and thus the restricted owner benefits to the extent other owners are prevented from harming him.

We can therefore recapitulate the core meaning of property as the owner's exclusive right to use the property to whatever extent use is permitted.^{2 8} Although positive law may define the scope of the economic opportunities to which property may be devoted, any opportunities that positive law permits belong to the owner. When the government appropriates those opportunities from an owner and gives them to a third party, compensation is due.

D. The Limits of Regulation

Unlike the per se rule that government appropriation of the use of property is a taking, regulation of the owner's use of property is the ordinary grist of the government's mill. If the government had to compensate the owner for any reduction in value of property resulting from any regulation, the police power would be nullified. In Justice Holmes's famous words: “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”^{2 9} But while regulation of the owner's use of property is not subject to a categorical rule requiring compensation, it does not follow that the government's power to destroy the value of the owner's property is limitless.

At first, the restraint on regulatory destruction of value was the view that the police power was inherently limited. Regulations were held permissible only if they prevented an owner from using property to harm others.²²⁰ *482 The “very essence of government”²² was to enforce the maxim sic utere tuo ut alienum non loedas.²²² It was thought to be beyond the power of the government to “control rights which are purely and exclusively private.”²²³ As applied to business property, this meant that the government could not regulate the charges set by the owner, whose use of property to offer goods or services could not be regarded as “harming” consumers who chose to purchase them. But there was always an exception for the regulation of certain businesses that were affected with the public interest.²²⁴ Once the Supreme Court decided in *Munn v. Illinois*²²⁵ that this category could be expanded,²²⁶ the limits on the police power were doomed. The limits lasted for a while: the *Lochner* doctrine resulted in the invalidation under the Due Process Clause of laws that went beyond the police power by regulating private business transactions.²²⁷ But *Munn* planted the seeds of the destruction of this reasoning, which bore fruit in *Nebbia v. New York*,²²⁸ in which the Court held that the determination of what businesses were affected with the public interest was a legislative function.²²⁹ Meanwhile, the courts receded from the effort to use substantive due process as a way of limiting the permissible scope of the police power to harm-preventing regulations.²³⁰ Although it is debatable whether the courts could have maintained the distinction between permissible harm-preventing regulations and impermissible benefit-producing regulations,²³ the demise of judicial supervision of the scope of the police power effectively left the government free to engage in plenary regulation of the use of property.²³²

Without a judicial limit on the police power, property owners had to rely on the political process to prevent regulations that undermine the security of property ownership. As noted, the political process offers some meaningful protection, but it is far from perfect. There are still opportunities for the government to take actions that, although in the form of restriction, are tantamount to an appropriation of the productive use of property. But even if the government's objective is not simply redistribution, but promotion of the public welfare by means of the imposition of a negative restraint on the *483 owner's use of property, expansive government regulation can impose severe burdens on certain property owners.

It is no coincidence that the Takings Clause made its entrance into the analysis of government regulation just at the time that the battering ram of *Munn* had broken down the limits on the police power.²³³ With the demise of judicial supervision of the scope of the police power and the inadequacy of the political process to protect property values, some new source of protection was required. In *Mahon*,²³⁴ the Supreme Court found it in the Takings Clause. *Mahon* held that certain government actions that were not in form appropriations nevertheless could “go too far” --not in the sense of being beyond the police power, but in the sense of constituting a taking of private property justifying compensation.²³⁵ The government can regulate, but in an extreme case it must pay the owner for the loss thereby caused.

Defining what regulations go “too far” has proven to be impossible. It is tempting to say, by analogy to the archetypal case of appropriation, that regulations cross the line when they produce benefits for persons other than the owner. But that would improperly merge distinct types of public benefits. Appropriative action transfers the economic opportunities that inhere in the use of property from the owner to a third party. Regulation that restricts an owner's use of property may confer a benefit on others in a diffuse sense, but that benefit arises from the owner's nonuse of property.²³⁶ The latter form of public benefit is categorically different from the transfer of the right to use the property to the public. As Justice Brandeis explained: “The restriction upon the use of this property can not, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits.”²³⁷

Instead, the regulatory takings cases tend to focus less on the benefit created and more on the impact of the regulation on the owner. The judicial impulse to examine the impact of the regulation from the owner's point of view was evident from the very start of regulatory takings jurisprudence. In *Mahon*, Justice Holmes began by considering “the extent of the diminution” in determining whether the police power went too far.²³⁸ When the diminution “reaches a certain magnitude,” he said, “in most if not in all cases there must be an exercise of eminent domain and compensation to sustain [it].”²³⁹ So too in later cases, the courts have considered the extent of the harm caused by the government's regulation and its impact on investment-backed expectations.²⁴⁰ Of course, the fact that regulation diminishes the value of *484 the owner's property is not and could not be the test, for any regulation by definition prevents the owner from using property in a way the owner would prefer and to that extent diminishes its value. Thus, the “economic impact to the owner” became a factor, but not a determining factor. Inconsistency was inevitable. Regulations that cause massive economic harm to the owner are held not to go too far,²⁴¹ whereas others with only a slight impact are found to constitute regulatory takings.²⁴²

As a result, the regulatory takings cases have fallen back to a three-factor, ad hoc test that tries to get at the idea of fairness to the owner. As the Supreme Court often says, the compensation requirement “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁴³ Whenever the Supreme Court invokes “fairness and justice” as the rule of decision, you know you are in trouble. It is inherently vague and subjective. As it turns out, the Court has usually not considered it unfair or unjust to force owners to bear fairly heavy burdens, at least if the owner is rich.²⁴⁴

Whatever the merits of this ad hoc analysis of regulatory takings, it would be a serious mistake to export them to core cases of appropriation. To be sure, it is fair to require the government to compensate the owner for the appropriation of the use of property. But the congruence between the fairness of requiring compensation for appropriations and the fairness of requiring compensation in some cases of regulation does not mean that a free-floating conception of fairness is the rule of decision in both situations. The Constitution establishes a categorical rule requiring compensation in all cases of appropriation based on the character of the government's action that transfers the right to use property to another. As noted, the rule does not take the owner's point of view, and compensation is due without regard to whether a particular judge would consider compensation as “fair” to the owner in a particular case.

Take the case of a simple condemnation of property through eminent domain--a core situation addressed by the "taken for public use" clause.²⁴⁵ These facts alone establish that the government has taken the property and must pay just compensation. The determination would not depend on any *485 separate judicial determination of whether it would be "fair" to require the owner to bear that loss depending on when it bought the property, how much other property the owner holds, etc. The Constitution determines that it is fair to pay compensation in this situation. So too, when the government appropriates the use of property from the owner and gives it to the public, the Constitution requires payment.

E. Examples

The distinction between the government's appropriation of the use of property and its regulation of the owner's use helps explain the results, if not the reasoning, of many of the cases and sets in context the analysis of utility takings. To begin, consider the cases involving physical occupation of real property. About the only rule that the Court has applied consistently in this area is that the government must pay just compensation when it requires the physical occupation of real property.²⁴⁶ The operative fact in such cases is that the government is appropriating the use of the property for the benefit of the public.²⁴⁷ In *Loretto*, a cable TV company acquired the right to use a portion of the owner's building.²⁴⁸ In *Pumpelly v. Green Bay Co.*,²⁴⁹ the government appropriated the use of land by permanently occupying it with water.²⁵⁰ In *United States v. Causby*,²⁵¹ the government appropriated the use *486 of property by allowing airplanes to fly over it: "[T]he land is appropriated as directly and completely as if it were used for the runways themselves."²⁵² In *Kaiser Aetna v. United States*,²⁵³ the government imposed a navigational servitude that allowed the public to enter upon and use the owner's marina.²⁵⁴ In each of these cases, compensation must be paid because the government has appropriated the use of property from the owner--regardless of the extent of the diminution in the value of the land, the owner's ability to use the property concurrently with others, or any other consideration bearing on the amount of harm suffered by the owner. These cases are, therefore, categorically different from those that merely restrict the owner's use of his own real property.²⁵⁵ A direct appropriation of use is a taking per se; a regulation of the owner's use of real property is presumptively not a taking unless, perhaps, it is an indirect means of accomplishing the same end, or unless its burden is so extreme that it would be unfair to require the owner to bear the cost itself.

Government action affecting tangible personal property can be analyzed in similar terms. The government can surely regulate and even prohibit coal exports, but it cannot seize coal that would have been exported without payment of just compensation as measured by the owner's opportunity to sell the *487 coal elsewhere (including selling it abroad, if permitted).²⁵⁶ The government can regulate and perhaps even outlaw tobacco sales, but if it appropriates cigarettes, it must pay for them.²⁵⁷ The government could impose a regulation prohibiting car owners from using their vehicles one day a month. Such a restriction could be justified by the public interest in conserving fuel or reducing traffic jams (average reciprocity of benefits) or reducing emissions (prevention of harm). It probably would not be regarded as a regulatory taking because the burden it imposes on car owners is not so severe that it would be unfair to require them to bear it. But if the government required the owner to allow an indigent person to use the owner's car on the one day a year when the owner is prohibited from using it, compensation would be required even though the impact on the owner might be far less severe than the restrictions on the owner's use.²⁵⁸

Regulation of intellectual property can be viewed in the same terms. Intellectual and other intangible forms of property are entitled to the protection of the Takings Clause.²⁵⁹ A government regulation that reduces the value of intellectual property by limiting the owner's use would not amount to a taking, except perhaps in an extreme case. Thus, the government can limit the owner's right to sell a copyright;²⁶⁰ it can require public disclosure of trade secrets in order to

protect public health;²⁶ and perhaps it can condition the grant of a license to conduct a regulated business on the waiver of intellectual property rights,²⁶² at least if those rights are related to the government's regulation of the business.²⁶³ In each case, the regulation might be deemed a taking if it "goes too far" in its destruction of intellectual property, especially in the presence of reasonable, investment-backed expectations.²⁶⁴ But when the government seeks to use, or to allow a third party to use, the owner's intellectual property rights, a per se taking occurs.

Monsanto presents an example of both per se and regulatory takings of intellectual property. In order to obtain a license to sell pesticides, Monsanto submitted data to the EPA under a 1972 statute that prohibited the EPA from disclosing or using information designated a trade secret.²⁶⁵ In 1978, Congress passed a new statute that permitted the EPA to disclose or use all information, including trade secret information previously submitted in connection with the evaluation of follow-on applications by other firms for licenses to sell similar pesticides.²⁶⁶ The Court held that the disclosure and use of trade secret information submitted prior to the enactment of the 1972 statute *488 prohibiting its disclosure, or subsequent to the 1978 statute requiring its disclosure, did not constitute a taking.²⁶⁷ The Court emphasized that Monsanto had no reasonable, investment-backed expectation that the trade secret information it filed during these periods would not be disclosed by the government.²⁶⁸ On the other hand, the Court found that Monsanto reasonably relied on the protection of trade secrets provided in the 1972 statute.²⁶⁹ The Court also observed that the public disclosure of the information would destroy its competitive value, which depended on the trade secrets remaining secret.²⁷⁰ Accordingly, the Court held that the government's disclosure and use of trade secrets filed by Monsanto between 1972 and 1978 was a compensable taking under the three-part test for regulatory takings.²⁷

A better way to analyze the facts of Monsanto would be to view it as a case of government-mandated use of the owner's trade secrets. Prior to the adoption of the 1978 statute, Monsanto had the exclusive right to use its trade secrets. Thereafter, the government required Monsanto to disclose the information to its competitors, who could use it to obtain their own valuable licenses. The appropriation of the use of Monsanto's trade secrets rendered the government's action a taking per se. There are hints of this analysis in the Court's opinion. The Court refers to the government's use of Monsanto's information in connection with the "evaluation" of competing license applications, and it observes that competitors "are allowed to use" the trade secret data.²⁷² The Court emphasized that "it is the fact that operation of the data-consideration or data-disclosure provisions will allow a competitor to register more easily its product or to use the disclosed data to improve its own technology that may constitute a taking."²⁷³ At the same time, the Court was focused on the destruction of Monsanto's property right in the trade secret by virtue of its public disclosure--an owner-centric analysis that inevitably introduces the difficulties of the regulatory takings doctrine.

The government's treatment of trade secret information submitted before 1972 and after 1978 also involved an appropriation of the use of Monsanto's information, but not necessarily a compelled use. Monsanto was certainly aware that the government could transfer to competitors any information Monsanto submitted after 1978. When Monsanto chose to submit trade secrets after that date, it arguably agreed voluntarily to permit disclosure. The same might be said of information Monsanto submitted prior to 1972, although those facts are more debatable. The Court viewed the government's action in these circumstances as akin to a condition on the grant of the government privilege of a license to sell pesticides.²⁷⁴ The government's power to prohibit pesticide sale altogether carries with it the lesser power to *489 condition the sale on the provision of information necessary to evaluate its safety. Assuming a nexus between the requirement that license applicants provide information and the regulation of pesticide sale, the information disclosure requirement puts the applicant to the choice of participating in the market at the price of disclosing trade secrets or choosing not to participate at all.²⁷⁵ A condition on the entry into a business may not reflect the kind of compulsion that is essential to make out a per se takings claim.²⁷⁶

A fourth example is government regulation of private capital. The government can restrict the owner's use of capital by limiting investment opportunities, prescribing conditions for transfers of capital, and even reducing the value of capital itself.²⁷⁷ Such actions would be analyzed under the regulatory takings doctrine and likely would be found not to constitute a taking. But when the government appropriates the use of private capital, there is a taking per se. *Brown v. Legal Foundation*,²⁷⁸ the Supreme Court's recent decision on interest on lawyers' trust accounts ("IOLTA"), illustrates this principle. The government required attorneys who received funds on behalf of clients to deposit them in IOLTA accounts in those circumstances in which it would not be economic to open a separate interest-earning account to hold those funds. The capital so deposited was the property of the client, and the Court had previously held that the interest earned on those amounts also belonged to the client.²⁷⁹ In *Brown*, the Court agreed that the transfer of such interest to the Legal Foundation of Washington ("Foundation") was a taking per se without regard to the three-factor regulatory takings standard.²⁸⁰ The Court properly applied the per se rule because the requirement to deposit funds in IOLTA accounts transferred the use of the capital from the client to the Foundation. The Court passed over this point, noting that the deposit requirement involves merely:

a transfer of principal and therefore does not effect a confiscation of any interest. Conceivably it could be viewed as the first step in a *490 "regulatory taking" which should be analyzed under the factors set forth in our opinion in *Penn Central*. Under such an analysis, however, it is clear that there would be no taking because the transaction had no adverse economic impact on petitioners and did not interfere with any investment-backed expectation.²⁸

The Court's focus on the impact of the deposit requirement on the owner ignores the controlling fact that the reason for and effect of the requirement is to transfer to the Foundation the use of the capital.²⁸² This error led the Court to the tenuous conclusion that no compensation was due for the per se taking of interest because the client could not have earned interest on the funds, and therefore the transfer did not cause the owner to sustain any loss.²⁸³ As the dissent points out, the client's loss included the interest, which was part of the owner's property at the time of the transfer.²⁸⁴ On the other hand, if the taking was the transfer of the use of the capital resulting from the requirement to deposit funds in IOLTA accounts, the Court's conclusion was correct. Compensation is due as of the date of the taking.²⁸⁵ When the government required the capital to be deposited in an IOLTA account, the client had no alternative use for it--the client could neither obtain the principal nor invest it in another interest-bearing account. Viewing the taking as occurring at the time the government took the capital for public use, rather than when the interest was transferred, the measure of the owner's loss was zero.²⁸⁶

Utility regulation, like other appropriations of the productive use of capital, involves a mandated appropriation of the use of private property. A classic utility regime involves government-mandated production for the public. The defining characteristic of this regime is the appropriation of the use of capital for the benefit of the public, which constitutes a taking per se.²⁸⁷ *491 When the government directs a utility to provide service, it has compelled the firm to invest the capital necessary in order to produce the output to be consumed by the public. The firm's required output represents the productive use of the capital invested in the enterprise. In other words, the capital is converted into output that is consumed. In this sense, by requiring output, the government is appropriating the use of the capital for the benefit of the public.²⁸⁸

F. Compulsion and Sunk Costs

The preceding discussion relies not only on the concept of appropriation of the use of capital but also on the element of government compulsion. A taking occurs only if the government imposes a mandate on the private party; if the owner's participation in a government-regulated program is purely voluntary, the transfer of use is caused by the owner's free choice and not the government's mandate.

The antipodes of compulsion are easy to discern. If the government by formal legal mandate obligates a private party to produce output, compulsion obviously exists because the government has removed the owner's ability to choose not to make the expenditures necessary to comply with the mandate. For example, if the government commands a particular firm to build a fighter jet, the Takings Clause requires just compensation. On the other hand, if a private party can accept or reject without constraint the terms of a transaction offered by the government--for example, to pay \$100 million to anyone who chooses to build a fighter jet according to the government's specifications-- there is no taking. In the first case, the government commands the firm to make the expenditures necessary to build the fighter jet; in the second case, those expenditures result from the firm's voluntary decision to avail itself of the opportunity created by the government.

As we have seen, a utility system entails formal government compulsion. A legal duty to serve and a restriction on the right to exit are hallmarks of utility systems.²⁸⁹ A utility is required to produce output to serve all customers *492 on pain of sanction. In the utility situation there can be no doubt that both the elements of appropriation of use of capital and of compulsion are present and, thus, that the government's action constitutes a taking of private capital per se.

The more difficult cases are those in which the government does not formally compel the business to operate. The courts have struggled, for example, to determine whether price regulation should be reviewed under the takings cases involving utility ratemaking or instead under the three-factor test used for regulatory takings. The utility rubric, the courts have said, applies when the firm is compelled to operate, whereas the regulatory takings framework applies when participation in the market is voluntary.²⁹⁰ But in the absence of a formal legal mandate to produce, the courts have not been clear on what circumstances justify a finding that the government has compelled the firm to operate. Some courts have simplistically suggested that the utility cases are inapplicable if the government does not formally require continued operation.²⁹¹ But an owner may be effectively compelled to operate even without formal legal compulsion. Once the owner has sunk costs that cannot be redeployed to another line of business, continued operation may be practically unavoidable.²⁹² An owner of an apartment building, for example, may have little choice but to rent at whatever prices the government allows, at least if the government prohibits the conversion of the building to condominiums or other uses.²⁹³ Thus, it cannot be assumed that an owner acts voluntarily simply because it submits to a condition on its continued participation *493 in the market. On the other hand, the presence of sunk cost alone should not be sufficient to establish compulsion. If it could be said that any business that has any sunk costs (and almost every business does) is compelled to produce and that a compulsion to produce involves an appropriation of the use of capital invested to produce output, then the police power would be in serious danger. Clearly, a more refined treatment of sunk costs is required.

In three distinct situations government regulation of the operation of the business with sunk costs involves appropriation of the use of private property that is effectively compelled even if the government leaves the owner free to withdraw from the market in each situation. The first two situations involve nonprice regulations on the operation of the business. The third situation involves price controls.

First, the government exercises effective compulsion over a business that has sunk costs when the government conditions the right to conduct the business on compliance with an obligation that is unrelated to the operation of the business. The form of the conditional obligation, at least in the typical case, would be an expansion or extension of the firm's output. In this situation, the government is using its power to prohibit the business entirely as an opportunity to appropriate the use of property for the benefit of the public. The government knows that the owner will feel compelled to submit to the costs

of the condition rather than write off its larger sunk costs. As a result, the government essentially extorts an appropriation of the use of private property to the public by threatening to deny the firm the ability to recover its sunk costs.

A classic example is *Great Northern Railway Co. v. Minnesota ex rel. State Railroad & Warehouse Commission*,²⁹⁴ in which a railway was directed to erect a six-ton scale in its stockyard. The scales “were not used in transactions between carrier and shippers” but were to be installed for the convenience of dealers.²⁹⁵ The Court held that the directive to install scales was invalid. “The business of a railroad is transportation and to supply the public with conveniences not connected therewith is no part of its ordinary duty.”²⁹⁶ Although the government could regulate the operation of the railroad business, *494 it could not require an expansion of that business in the name of regulation. “The demands upon a carrier which lawfully may be made are limited by its duty, and the present record conclusively shows the required structure had no direct relation thereto.”²⁹⁷ Although *Great Northern Railway* involved an express directive to construct scales, the same result would follow if the government conditioned the right to operate the railroad on the construction of scales.

If the evil addressed by the government's condition would exist in the same degree regardless of the operation of the business, the condition is not related to the operation of the business.²⁹⁸ When the business has sunk costs, the imposition of an unrelated condition is a disguised form of compelled appropriation--an attempt effectively to compel the business to transfer the use of property by threatening to prevent the recovery of sunk costs. That would occur if, for example, the government conditioned a firm's ability to sell a pharmaceutical product, in which the firm had invested a large amount, on the firm's agreement to supply some of it for free to indigents. The evil--indigents' inability to pay for medication--would exist in the same degree if the firm had never produced the product. The condition cannot be justified as related to the operation of the business because the business did not cause the problem.²⁹⁹

On the other hand, a regulation addressing a problem created or exacerbated by the operation of the business is not a per se taking, even in the presence of sunk costs, as long as the firm has the right to exit the market. Minimum standards of quality for a firm's output; restrictions on the emissions created by a factory; requirements to inform consumers of the hazards of the product offered; and myriad other regulations are directed at promoting *495 the public welfare by responding to conditions created by the business itself. Even though they increase the cost of doing business, these requirements should not be regarded as per se takings absent unusual circumstances. In a competitive market, these costs will be passed on to consumers in the form of higher prices. The result might be that consumers stop purchasing the products and the industry ceases to operate. But that is no different than a government decree prohibiting the operation of the business entirely--which might be a regulatory taking, but is not a per se taking.³⁰⁰

A second category of cases involves government regulations related to the operation of the business that effectively compel it to continue operating to recover its sunk costs. In such cases, when the regulation conditions the operation of the business on allowing a third party to use the owner's property, even where that condition is related to the operation of the business, the government has taken the property for public use. The government's power to regulate the owner's use of its property (even to prohibit such use altogether) does not imply a power to condition such use on the appropriation of a portion of the property for the benefit of a third party. A regulation that entitles a third party to use the owner's property goes beyond regulating the owner's use and transfers the productive use of the property to a third party. As noted, a transfer of use involves the appropriation power and is a taking per se; regulation of the owner's use is categorically different. When the government seeks to accomplish the transfer of use by imposition of a condition, rather than by express mandate, the required element of compulsion nevertheless exists if the owner would have to forgo recovery of sunk costs if it chooses not to comply with the condition.

Thus, in *Loretto*, the Court held that a requirement that rental property owners permit cable companies to occupy a portion of the building was a per se taking; whereas, a requirement that owners provide cable TV service would be analyzed as a regulatory taking.³⁰ The Court assumed that the government would have a legitimate interest in requiring

landlords to provide cable TV service--i.e., that such a regulation would be related to the operation of the landlord's business. But this legitimate interest did not justify appropriating the economic opportunity inherent in the landlord's property and giving it to the cable TV company. The Court had no trouble concluding that the physical occupation regulation was a per se taking even though it was framed conditionally--the regulation applied only to those owners who chose to rent their property, and the owner in theory could have chosen to exit the rental business.³⁰² Although the owner's notional choice *496 has given some commentators problems,³⁰³ the Court's conclusion recognizes the simple reality that the owner of an apartment building in Manhattan had no economically realistic choice but to continue to operate it as a rental property. The government effectively compelled the owner to submit to physical occupation by exposing it to the choice of forgoing recovery of substantial sunk costs.

*Dolan v. City of Tigard*³⁰⁴ is another example. There, the city's zoning ordinance required property owners in the central business district to leave fifteen percent of their property as undeveloped open space.³⁰⁵ In addition, as a condition of approving a construction project, the city required the owner to dedicate a strip of property lying within a floodplain to the city.³⁰⁶ The Court found that the city had reasonably concluded that the construction project would result in increased storm water flow by increasing the amount of impervious surface.³⁰⁷ But this relation justified a restriction on the owner's ability to develop the portion of its land lying in the floodplain; it did not justify a requirement that the owner dedicate the property to the city. The Court emphasized the distinction between a restriction on the owner's ability to use the property and the destruction of the owner's "ability to exclude others."³⁰⁸

By the same reasoning, a per se taking would likewise exist if the government prohibited supermarkets from operating unless they gave a particular vendor the right to establish a kiosk in the stores to sell its products; if the government required companies that sell software to give their source code to certain competitors; or if the government stipulated that any bank that wished to take deposits was required to place a specified portion of such funds in government accounts. In each case, the condition arguably attempts to cure a problem created by the operation of the business. The government's action is nevertheless a taking. Indeed, the basic principle of the Takings Clause is that compensation is due when the government has appropriated the productive use of property, and this principle holds when the government effectively compels this outcome by threatening to deny the owner's ability to recover sunk costs.

*497 A regulation that conditions the owner's operation of its business on compliance with requirements that cause the owner to expend more on inputs to the business is distinguishable and would not be a per se taking, provided that the firm has a legal right to exit the business. A legitimate exercise of the police power to regulate the owner's use of its own property to operate a business will usually require the owner to spend money. But the owner's need to transfer money to comply with a regulation that is cognate to the operation of the business does not render the regulation a taking per se even if the expenditure is practically compelled by the owner's sunk costs. When the owner decides to devote property to the operation of a business, the owner has committed to expending money to acquire inputs necessary to the output of the business. Regulations that affect the cost of those inputs do not impose an obligation that is different in kind from the one that the owner has chosen to assume, at least if the regulation is related to a problem caused or exacerbated by the operation of the business. The regulation of input costs may affect the value of the business, which is to say that regulation of the owner's use of property may diminish the benefits that the owner may derive. But such restriction does not necessarily involve a transfer of property to a third party. As long as the owner has the right to exit, a regulation that increases the cost of inputs cannot be said necessarily to constitute government compulsion to operate the business even in the presence of sunk costs.³⁰⁹ As noted, regulations of the quality of output or restrictions on externalities are proper exercises of the police power that limit the owner's use of property. There is no real distinction between a regulation that raises the cost of operating a business by restricting certain uses to which the owner may put the property and a regulation that conditions the owner's ability to use the property for a particular business on compliance with a condition that is designed to mitigate a problem that is related to the business.

But a condition on the operation of the business that requires output is different than a condition that affects the cost of the output that the owner has chosen to produce. A formal legal requirement to produce involves the appropriation of the productive use of the capital needed to produce and its transfer to the public who consumes the output of the business. A conditional regulation can have the same effect. For example, a regulation conditioning an owner's ability to rent apartments in an existing building on the owner's agreement to construct a second rental property would be a per se taking. The owner did not choose to produce that new output when it decided to go into the business of renting apartments in its building. To appreciate the distinctive character of a condition that requires the production of additional output, it must be contrasted with a condition that increases the input cost of producing output that the owner has already chosen to produce. A condition requiring additional expenditures on inputs is not directed at promoting the production of output for consumption by the public. The regulation may or may not have that effect, depending on whether the business ^{*498} feels compelled to comply with the condition and to continue operating in order to recover sunk costs. But the production of output results from the owner's voluntary decision to enter the business, not from the regulation that increases the cost of inputs. By contrast, a requirement that the owner devote its capital to generating a new kind of output in order to sell the services that it has chosen to supply involves an appropriation that is practically compelled when there are sunk costs. This is the distinction between a condition that compels output and a condition on production with respect to inputs, even though from the owner's point of view the choice to exit may be illusory in both contexts.

A third situation where compulsion may exist involves price controls.^{3 0} Unlike a regulation related to the operation or output of the business, which creates a diffuse public benefit, a regulation of the price of output directly transfers benefits from the firm to consumers. Price regulation is directly related to the output of the business and, in the nonutility situation, the firm can choose not to produce. But there remains a significant risk that the government is appropriating the use of property (capital used to generate output) from the owner and giving it to the public by effectively compelling the owner to produce instead of writing off its sunk costs. As noted in the discussion of the first situation, the required nexus would be absent if the evil addressed by the government regulation would exist in the same degree regardless of the operation of the business. The evil addressed by price regulation is charging a price that exploits consumers. A price that recovers the costs prudently and necessarily incurred by the firm to produce the output consumed cannot be regarded as exploitative.³ By definition, the costs are necessary inputs to the creation of the output. If these costs had never been incurred, the output would not have been produced. The whole point of regulating prices, however, is to ensure that consumers can purchase the goods and services so regulated. Although the government theoretically could destroy the business entirely, the objective of price regulation is to promote consumption, not to destroy it. The danger is that the government will go as far as it can in reducing the price of the output without destroying the business. Again, sunk costs create such an opportunity--the government can set the maximum price below cost but slightly above the amount that the firm would recover if it were to exit the business entirely. As a result, prices set below the costs reasonably and necessarily incurred to produce the regulated output are takings per se, even if the firm has the legal right to exit the market.

Pennell v. City of San Jose^{3 2} frames this issue. The San Jose rent control ordinance permitted a rent increase over eight percent per year if found "reasonable" based on seven factors.^{3 3} The first six factors were based on the owner's cost and the value of the property.^{3 4} The seventh factor considered ^{*499} the hardship to the tenant.^{3 5} The Court did not reach the takings issue in that case, finding it premature.^{3 6} In dissent, Justice Scalia observed that regulation of exorbitant prices could be said to address an economic hardship for which the producer was responsible, but he concluded that the San Jose ordinance went further and singled out landlords to address a problem that they did not cause:

Once the other six factors of the Ordinance have been applied to a landlord's property, so that he is receiving only a reasonable return, he can no longer be regarded as a "cause" of exorbitantly priced housing; nor is he any longer reaping distinctively high profits from the housing shortage. The seventh factor, the "hardship" provision, is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But that problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their

clothes, or the employers who pay them their wages, or the citizens of San Jose holding the higher paying jobs from which they are excluded.^{3 7}

Justice Scalia's analysis ties the price control case back to the first situation addressed above--a condition that is unrelated to the operation of the business. Because the landlord did not cause poverty, the requirement to provide apartments at a rate that would produce less than a reasonable return was not legitimately related to the operation of the rental business. As long as the rent is tied to the owner's cost, it is reasonable and cannot be linked to a problem created or exacerbated by the operation of the business.^{3 8}

III. Confiscatory Tactics Manifested: The FCC's Ratemaking Methodology Under the Telecommunications Act of 1996

The FCC's adoption of a methodology for setting the rates that incumbent local phone companies are allowed to charge entrants for the compelled use of the incumbents' networks is a case study of the confusion that has infected the law of utility takings. In developing and defending its ratemaking methodology to compensate for the required use of the incumbents' network, the FCC has exploited every confiscatory tactic and propagated every *500 confusion in the law described in the previous sections. This Part explains how the principles described above apply in this concrete setting.

A. The Taking Effectuated by the 1996 Act and the FCC's Pricing Methodology

For most of the twentieth century, local telephone service was treated as a natural monopoly, and the regulation of this utility service tracked the classic approach described in Part I. Typically, a state granted a single company an exclusive franchise to provide service within a designated area. With this franchise came mandates to serve all customers in a given area, and an obligation, enforced on pain of civil and sometimes criminal sanctions, to make the massive capital and operating expenditures necessary to satisfy this and other service obligations. For their part, regulators set rates designed to ensure that the incumbent had an opportunity to recover its prudent investment, as required by the Constitution.^{3 9}

The Telecommunications Act of 1996 ("1996 Act")³²⁰ was based on the premise that local phone service is no longer a natural monopoly and thus that the service can be efficiently provided by more than one firm. To open the market to competition, the 1996 Act terminated the incumbents' exclusive franchises and prohibited all other state-imposed barriers to entry.³² To facilitate the transition to a competitive market, the Act imposed new duties on incumbents designed to aid entrants. Of particular relevance here, the Act required incumbents to provide competitors access to pieces of their networks, dubbed in the Act's parlance "unbundled network elements" or "UNEs."³²² In a series of orders, the FCC has repeatedly directed that incumbents *501 provide entrants, in combined form, all of the facilities necessary to provide finished telephone service.³²³ As a result, competitors are able to serve retail customers using nothing more than a platform of elements leased from incumbents. In other words, the UNE obligation, as implemented by the FCC, requires incumbents to make available their entire system to entrants at deeply discounted wholesale prices and thus transfers the economic opportunity of the network from the incumbents to the entrants.

The imposition of these broad duties on incumbents to make their networks available to entrants was novel. As the Supreme Court recently explained, "[t]he sharing obligation imposed by the 1996 Act created something brand new--the wholesale market for leasing network elements."³²⁴ The Court also made clear that the incumbents were compelled by the 1996 Act to provide unbundled elements and did not assume that duty voluntarily.³²⁵

The obligation to provide UNEs imposed by the 1996 Act is a classic per se appropriative taking. It does not merely limit the use that incumbents make of their own property, but instead it transfers the use and enjoyment of that property

to entrants. The UNE obligation does not affect the use or economic opportunity associated with the facilities that the incumbent uses to serve its own retail customer. But when a competitor serves that same customer using UNEs, it gains the exclusive opportunity to deliver services over those facilities and to enjoy the economic returns generated by their use.³²⁶ In addition to being a clear appropriation of the economic opportunity associated with the facilities, the UNE regime also involves a physical occupation. When an incumbent is forced to lease its facilities to a competitor, the incumbent's own services are displaced, and the facilities become an exclusive conduit for the provision of the competitor's services. Competitors' *502 communications traffic (their electrons) occupies the incumbent's facilities to the exclusion of the incumbent's traffic (its electrons).³²⁷

The 1996 Act recognizes that the UNE regime effectuates a taking and therefore requires that incumbents be paid constitutionally sufficient compensation for the forced use of their property. Specifically, the Act provides that prices for UNEs shall be "just and reasonable"³²⁸--a term of art that refers to constitutionally sufficient compensation³²⁹--and that such rates "shall be based on the cost . . . of providing the interconnection or network element."³³⁰ Further, Congress specified that UNE rates "may include a reasonable profit."³³

In devising its ratemaking methodology for UNEs, the FCC categorically denied that UNE prices should be set to allow incumbents the opportunity to recover either their past prudent investments or their necessary future expenditures.³³² Instead, the FCC concluded that UNE rates should be set by projecting the forward-looking costs of a hypothetical carrier that always uses throughout its network only the most up-to-date technology and the most efficient network configuration.³³³ The FCC's methodology asks what each element would cost if the entire telephone network were rebuilt from scratch, as though writing on a blank slate. To answer this question, the FCC's methodology projects a hypothetical "least cost, most efficient" network that at all times deploys solely the latest technology and that always maintains an optimal network design. The FCC dubbed this novel methodology "Total Element Long Run Incremental Cost" or "TELRIC." The FCC's only concession to reality was that the hypothetical network imagined under TELRIC would have switching offices in the same locations as those occupied by the incumbent.³³⁴

TELRIC completely ignores incumbents' prudent expenditures, both past and future, and embraces a radical measure of replacement cost as the standard for compensation. The FCC's TELRIC rules expressly direct that the "costs that the incumbent . . . incurred in the past" "shall not be considered in a calculation of the forward-looking economic cost of an element."³³⁵ Further, the FCC's rules preclude consideration of the incumbent's actual going-forward operating and capital costs.³³⁶ Instead, TELRIC assumes that prices will always immediately reflect the costs of the most efficient new technology.³³⁷ TELRIC thus hypothesizes a world in which carriers repeatedly rip out and instantaneously rebuild their entire plant every time a new technology hits the market. Although such a carrier could never exist in reality--particularly given the large sunk costs and long asset lives in telecommunications--the *503 FCC nonetheless used this fiction to justify radical downward repricing of the existing network and to expose incumbents to the continuous risk of downward repricing for all future investments. The FCC based this decision on an assertion that incumbents' historical costs reflect "inefficient or obsolete network design and technology,"³³⁸ even though the FCC never found that any particular investment was imprudent when made.

The FCC did not make any provision in TELRIC to compensate for the massive new methodological risk created by its formula. Rather, the FCC's methodology provides that the "depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates,"³³⁹ as opposed to the much faster rates that would be necessary to match the assumptions of the model. Likewise, regulators setting TELRIC rates have not made any adjustment to the cost of capital to compensate for the model's methodological risks.³⁴⁰ This result is aggravated by the fact that TELRIC does not effect only a one-time downward revaluation of the network. Rather, the states, which are responsible under the 1996 Act for setting rates based on the FCC's methodology, have often conducted new ratesetting

proceedings every two to three years. As a result, incumbents' past and future expenditures are continuously subject to retroactive reclassification as "inefficient" and hence unrecoverable. Indeed, in recent proceedings, states have reduced switching rates as much as eighty-four percent from TELRIC-based rates set just a few years before.³⁴

***504** As a result of the extreme hypothetical assumptions incorporated into TELRIC and the inconsistent treatment of depreciation and cost of capital, the states have driven the rates for UNEs to extraordinarily low levels. The TELRIC rates produce wholesale revenue that is far below the amount necessary to recover incumbents' past prudent investment in the facilities used by entrants. For their part, entrants enjoy a huge windfall from TELRIC. Entrants using a complete platform of incumbent elements to serve retail customers have average gross margins ranging from fifty to sixty-six percent in most states.³⁴² Analysts have estimated that incumbents lose roughly sixty percent of their per-line revenues when a competitor serves a customer over the UNE-platform, but retain ninety-five percent of the costs.³⁴³

The UNE regime, as implemented with the FCC's ratemaking methodology, has thus divided incumbent facilities into two silos. In one silo are facilities used to deliver retail services, the compensation for which is paid by retail customers. In the other are facilities transferred to competitors, the compensation for which is delivered by competitors paying rates based on TELRIC. As implemented by the FCC, the UNE regime involves an ever-expanding removal of prudent capital investment in used and useful plant from a silo that allows its recovery to a silo that categorically denies its recovery. Each loop and switch taken results in the movement of a large percentage of the incumbent's investment from the recoverable to the unrecoverable side of the ledger. In New York alone--where competitors serve more than 2.1 million customers over a full platform of UNEs--the incumbent has suffered more than \$2.4 billion in stranded costs.³⁴⁴

As the next sections will explain, TELRIC is precisely the kind of grand contrivance that is the central concern of the Takings Clause. Incumbents have been compelled to invest hundreds of billions of dollars in private capital to develop a telecommunications infrastructure that provides enormous benefits to the public. The FCC has employed TELRIC as a means to enable the public to enjoy these benefits without paying for them. As demonstrated below, TELRIC does not allow for the recovery of past prudent expenditures--investments made by incumbents before the FCC adopted TELRIC--and therefore results in large stranded costs. In addition, TELRIC does not permit incumbents to recover their going-forward capital and operating expenditures--expenditures made by incumbents after the FCC adopted TELRIC--and therefore commands that incumbents make ongoing expenditures that will never be repaid.

To assess the constitutional adequacy of the compensation provided by TELRIC, the sufficiency of the rates to compensate for the use of UNEs must be distinguished from the propriety of considering revenues earned by incumbents from the provision of services other than UNEs. The first question ***505** is whether rates based on TELRIC are compensatory in themselves. In other words, do TELRIC rates meet the constitutional standard assuming that the incumbent is engaged solely in the business of providing UNEs? The FCC claims that they are because TELRIC represents the market value of UNEs at the time that rates are set. As we will explain, the FCC's rejection of prudent investment as the test for the constitutional adequacy of rates is just as mistaken as was the fair value rule rejected long ago. The FCC's argument: (1) confuses the time of the taking and misapprehends what is being taken; (2) founders on the fact that the constitutionally required measure of compensation is opportunity cost, which equates to the recovery of prudent investment; and (3) ignores the fact that there is no real market here and that the government cannot defeat its compensation obligation by conjuring up a market in which the target of a taking has no ability to recover its costs. We next address separately the FCC's claim that, even if prudent investment is the standard, incumbents cannot challenge TELRIC as confiscatory in view of incumbents' earnings from the provision of other services. As we will explain, both as a matter of fact and a matter of law, the FCC cannot make up for the insufficiency of the compensation provided by TELRIC by pointing to revenues earned by incumbents elsewhere. The FCC's argument devolves into the unsupportable claim that the government can satisfy its compensation obligation by paying incumbents with their own money.

B. TELRIC Necessarily Denies Recovery of Prudent Expenditures Made Prior to its Adoption

To understand why the FCC's methodology fails to provide constitutionally adequate compensation for expenditures made prior to its imposition, it is useful at the outset to set aside the fact that incumbents have faced two separate takings by two separate sovereigns. Assume for the moment that a single sovereign had tried to accomplish what was done here--that a state, which had already taken the prudent expenditures that incumbents used to provide retail services, attached a new servitude to the property used to deliver those services, with compensation for that servitude set at rates based on TELRIC.

From the principles described in Part I, it is absolutely clear that a single sovereign could not effectuate this change without running afoul of the Takings Clause. The imposition of a new sharing requirement, coupled with a new pricing methodology, is nothing more than a shift in ratemaking methodologies for that part of the incumbent's investment moved into the new silo. Such a shift in methodologies operates to confiscate part of the necessary and prudent expenditures made prior to the shift and thus strands a segment of the investment required to build the very facilities subject to the new servitude. This denial of compensation for compelled expenditures is impermissible because it arises directly from the government's shift in methodologies and not from the materialization of any risk for which the original methodology provided compensation. Indeed, up until the time of the switch, the government had specifically excluded the risk that the incumbent's rate base would be subject to devaluation by competitive entry--much less by the hypothesized *506 level of entry prevailing in TELRIC--and paid a lower rate of return commensurate with that diminished risk.

The impact of TELRIC on existing investment can be illustrated by reference to the waterworks example. The city in our example had directed a private firm to invest \$1 billion in a water distribution plant. Assume that the city established water rates designed to recover that amount along with a rate of return to compensate the utility for certain risks not including the risk of competition. The firm operated the plant for five years out of its fifty-year expected useful life and recovered \$100 million of its \$1 billion original investment. In year six, the city suddenly changes its methodology to set rates as if the utility were operating in a market that was "perfectly" competitive as defined by the city's hypothetical model, which assumes instant deployment of the latest technology. On this basis, the city deems the waterworks "worth" only \$450 million, and thus deprives the firm of the ability to recover half of its \$900 million remaining investment over the succeeding forty-five years. Worse still, after the introduction of an even cheaper new technology, the city in year seven reduces the "value" of the waterworks to \$350 million, stranding another \$90 million.

The harsh retroactivity of the adoption of the new ratemaking methodology is patent. The switch effectively reaches back and recharacterizes the legal effect of a utility's actions by recategorizing investments that were prudent (and therefore could be recovered) as now unrecoverable--long after the investments were made. It accomplishes that result by suddenly exposing the utility to a methodological risk--repricing based on the efficiencies of an imaginary, ideal carrier--that was never accounted for in the original method for determining compensation. The effect is to wipe out a significant portion of the recovery on past investments that had always been counted on as a necessary component for supplying a constitutional return under the old regime.

Such a switch violates the maxim, set out in *Duquesne*, that a regulator cannot deny a utility recovery of past prudent investment by invoking a risk in a new ratemaking methodology that was not paid for by the old regime.³⁴⁵ The new system must still provide for recovery of the investments made under the prior system and a return on investment that would have been constitutionally sufficient under the old system. The government is free to change the allocation of risk embedded in its ratemaking methodology, but, as in *Winstar*, it must compensate the utility for any new risk.³⁴⁶

To illustrate, consider an incumbent that five years ago purchased a switch for \$2 million, and has been recovering the cost of that switch based on straight-line depreciation over ten years at a rate of return of ten percent. Under this

methodology the incumbent would recover each year \$200,000 of its original investment, plus ten percent of the remaining undepreciated value of the switch. At year five the incumbent would have \$1 million in expenditures that remain to be recovered. Under TELRIC a regulator would determine in year five that a new switch could be purchased for \$500,000, but ^{*507} would leave the same ten-year useful life, straight-line depreciation, and ten-percent cost of capital in place. As a result, the incumbent's annual cost-recovery on the switch would drop--by seventy-five percent in this case, as monthly depreciation expenses are cut from \$16,667 to \$4167--as would payments toward the incumbent's cost of capital because the percentage returned would be computed on a smaller rate base. In five years at the end of the real switch's useful life, the incumbent would be forced to replace it, would face \$750,000 in stranded costs, and would have secured the return of only 62.5% of its original capital expenditure. ³⁴⁷

In this example, the ten-year depreciation schedule and ten-percent rate of return are legitimate only to the extent that the government is insulating the incumbent from the risk that its facilities would be devalued by competitive entry, real or hypothetical. Had the initial investment been subject to this risk, the original depreciation schedule would have had to be accelerated and the rate of return increased to ensure that the incumbent could recover the bulk of its outlay in the early years and thereby avoid a large stranded cost. What, then, does the Constitution require of a government that wants to make this methodological switch? It requires that any new methodology allow for recovery of the \$750,000 in potentially stranded investment, regardless of how the methodology treats new investments made after the switch takes place. To effectuate the shift, the new methodology would therefore have to incorporate a much more rapid rate of depreciation and a significantly increased cost of capital.

The analysis is the same when a second sovereign steps in, imposes a new servitude on the facilities that removes them from the original methodology, and imposes its own ratemaking regime. In that instance, what is being taken is the utility's constitutionally based opportunity to recover its original investment. On the occasion of the first taking by the first sovereign, the utility was given in compensation an opportunity, formalized in a ratemaking methodology, equal in value to the one it surrendered when it dedicated its capital to public use. When a second sovereign imposes a servitude on the ^{*508} same facilities and thereby removes them from the original methodology, the constitutionally mandated measure of compensation remains the utility's opportunity cost. Because the second sovereign is denying the utility the constitutionally guaranteed opportunity afforded by the first sovereign's methodology, its required measure of compensation is an amount equal to that lost opportunity. ³⁴⁸

When a second sovereign appropriates facilities that have already been taken, it is not just taking the bricks and mortar--it is taking the economic opportunity associated with those facilities. The Supreme Court established this principle long ago in *Monongahela Navigation Co. v. United States*. ³⁴⁹ There, a private firm had received a charter from the Commonwealth of Pennsylvania to construct a series of locks and dams on the Monongahela River. ³⁵⁰ In compliance with this mandate, the firm "expended large sums of money" to make the necessary improvements to the river--improvements that had been made, over and above the firm's relationship with the state, "at the instance and suggestion of the United States." ³⁵¹ These improvements dramatically enhanced the navigability of the river, and the firm was compensated for its expenditures through a franchise that authorized the collection of tolls. ³⁵² Some time later, Congress enacted legislation directing the Secretary of War to take the pivotal lock and dam on the river with compensation set at a sum that "did not take into account the franchise of the company to collect tolls." ³⁵³

The Court held that the compensation due the owner for the taking was measured by its opportunity under the state's original ratemaking methodology. ³⁵⁴ As a result, the compensation owed for the taking was to be determined by "the amount of compensation set" by "the state of Pennsylvania, the state which authorized the creation of the property." ³⁵⁵ As the Court explained, "when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, ^{*509} not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived." ³⁵⁶

The FCC cannot invoke the current market value of the incumbent's facilities as a justification for a new methodology that delivers less than prudent investment. The Court's decision in *Monongahela* reflects the basic principle that the measure of compensation required for a taking is the owner's opportunity, and when a second sovereign steps into an existing utility regime, it takes the utility's opportunity to recover its original investment.³⁵⁷ The value of the firm's facilities at the time the second sovereign establishes its ratemaking methodology is irrelevant to the constitutional calculus.³⁵⁸

Moreover, for two reasons, TELRIC does not reflect any real measure of market value. First, it ignores the primary objective indicia of market value--the revenues that incumbents are earning through the use of the appropriated facilities. The Court in *Monongahela* expressly cautioned that the government cannot set compensation based on such a sleight of hand, closing its eyes to an "element of value [that] exists before and after the taking, and disappears only during the very moment and process of taking."³⁵⁹ Indeed, it is nonsensical to talk about the market value of an object--"what a willing buyer would pay in cash to a willing seller"³⁶⁰--without some reference to "the revenues the property is capable of generating."³⁶ Thus, in *Kimball Laundry Co. v. United States*,³⁶² the Court held that the compensation due "when the Government has condemned business property with the intention of carrying on the business" must be based on the firm's "going-concern value"--the firm's "opportunity to profit from its trade routes" absent the taking.³⁶³ This rule is all the more central to the purpose of the Takings Clause here, where the business is not carried on by the government itself but is transferred to a class of private parties designated by the government.

Second, as will be discussed in the next section, because TELRIC only reflects the value of incumbent property in a hypothetical market, it imposes no objective check on the government's fulfillment of its compensation obligation. The results of TELRIC are dictated by the stylized assumptions of the model, and the methodology therefore implicates squarely the paradigm concern of the Takings Clause in utility cases--that the government, after mandating the expenditure of capital on the construction of facilities to serve the public, will employ a new methodological construct to devalue that investment once it is sunk and thereby avoid payment.

C. TELRIC Necessarily Denies Recovery of Prudent Expenditures Made After Its Adoption

TELRIC also deprives incumbents of the costs necessarily incurred in the future to provide UNEs. TELRIC not only strands past prudent investments made before the FCC adopted that methodology, but it also strands future expenditures made after its adoption. Any firm that builds and operates a network necessarily faces three types of costs: (1) the initial capital outlay to construct the original baseline facilities; (2) annual out-of-pocket operating expenses for labor, electricity, and other inputs necessary to make the network function; and (3) annual incremental capital expenditures required to expand the network's footprint, meet increasing demand, respond "to demographic shifts, offer new services, and incorporate improved technologies." Thus, returning to our primary example, we posit for purposes of this discussion a waterworks company that makes a \$1 billion initial investment to build its plant, faces \$100 million in annual operating expenses, and must make \$100 million in annual incremental capital investments. As we demonstrate below, TELRIC does not allow any firm, whether an incumbent or a new entrant, to recover these forward-looking costs.

Foremost, TELRIC precludes the complete recovery of upfront capital investments because the model assumes that long-lived assets will be replaced with every technological advance, which leads to a continuous devaluation of the utility's rate base. Whatever the amount of investment at the inception of the TELRIC regime, the FCC's methodology must permit the incumbent to recover that amount over time. Take an incumbent that has a switch that it originally bought for \$2 million and that has an undepreciated balance of \$1 million five years later. In the previous section we showed that the FCC must provide for recovery of the remaining \$1 million. But even if the FCC could revalue the switch at \$500,000 when it is transferred to the UNE regime, the FCC must still adopt a methodology that will recover \$500,000. But under

TELRIC, even if the switch begins with a value of \$500,000, the future applications of the methodology will reduce that value further and faster than the rate of depreciation. TELRIC assumes that the market for network elements is perfectly competitive; that there is, at any given time, a new entrant that has deployed a complete network using the most efficient technology available; and that each successive new blank-slate entrant, and all competitors that entered before, would instantaneously drop prices to the cost of this imaginary perfect network. The advance of technology is steady in telecommunications, and more efficient technology is frequently developed to deliver existing services. TELRIC would therefore only permit a utility to recover its upfront investments if its assumption of extreme competition were matched with accelerated rates of depreciation and high rates of return, such that the incumbent maintained a net probability of recovering the amount of capital it was required to devote at the inception of the UNE regime.

As explained above, however, regulators setting TELRIC rates have not made any such adjustments to compensate for this methodological risk. Instead, TELRIC rates have uniformly been characterized by a dichotomy between the real world, in which the introduction of competition and the incorporation of new technologies is gradual, and the model's hypothetical world, which purports to mimic a perfectly competitive market. Because regulators implementing TELRIC have set rates of depreciation and return based on the conditions prevailing in reality and defined recoverable capital costs based on the model's imaginary world, the methodology precludes any firm operating under its strictures from recovering the amount of capital at the inception of the regime, however it is valued.

***512** The FCC has defended this result by asserting that TELRIC merely mimics the results of a competitive market.³⁶⁴ This argument depends on the premise that the required measure of compensation is the market value of UNEs at the time they are used.³⁶⁵ But as with any regime of compelled service, the time of the taking is the time that expenditures are made. The FCC's error is the same error codified in *Smyth*, and corrected by the Court in *Hope*. It is the same error described in Part I, confusing the taking of inputs (capital), with the taking of outputs (facilities). To compensate for a utility taking, the government is obligated to establish a ratemaking methodology that provides an opportunity to recover the capital devoted to public service plus a fair rate of return. The government cannot continuously devalue expenditures after they are made by positing that, in the future, those expenditures will produce facilities that have declined in value, or that some other entrant could build for less. Thus, in our waterworks example the government cannot require the utility to spend \$1 billion of upfront capital and deny full recovery based on an assertion that the firm's assets are only worth \$900 million the next year, \$800 million the year after that, and so on when the rates of depreciation and return on capital do not reflect such risks. Such a seriatim revaluation creates a methodological risk, and the government must compensate the utility for this risk--just as it would if the risk stemmed from real competition--so that the net probability is the recovery of the amount devoted to public service at the inception of the regime.

Likewise, TELRIC does not permit any firm to recover its actual out-of-pocket operating costs. Once a utility builds a network, its operating costs are dictated by the network's technology and design. That network needs a certain quantum of electricity, employees, trucks, and the like for it to function. In regard to these operating expenses, any firm with a network in the ground is locked in, constrained by its network's achievable efficiencies. TELRIC, on the other hand, does not permit rates that cover any existing firm's operating costs--only the imagined efficiency of successive new entrants unconstrained by the limitations of extant networks. Thus, TELRIC posits a more automated network requiring fewer employees, less electricity, etc. What our waterworks must spend \$100 million to accomplish, TELRIC imagines a new perfectly efficient firm could do for \$50 million. A new entrant using more efficient technology will necessarily have lower costs than any existing firm, and under TELRIC these lower costs are all a firm using an older generation of technology is allowed to recover. Over time every entrant--even one that is perfectly efficient at the start--will suffer this fate. TELRIC has no means to compensate for this shortfall because an adjustment to rates of return or depreciation speaks only to the recovery of capital and not operating costs.

Finally, TELRIC precludes the complete recovery of each successive increment of ongoing capital investment. The reason is path dependency. ***513** Once a firm builds a network, that network's embedded features necessarily constrain how much additional output can be gained for a given sum. A hypothetical new entrant obviously does not share this

constraint because such an entrant has the freedom to build a network from scratch and can design it to address the total range of required output as it exists at that moment in time. As a result, a firm with an existing network must spend more to expand its output than the successive waves of perfectly efficient entrants conjured by TELRIC.

Returning to the waterworks example, if our utility in the second year of its operations needed to expand its plant to an adjacent town, the costs of that expansion would be dictated to a significant degree by the design of its existing network. If the nearest pumping station were some distance away, the firm would face higher expansion costs because, for example, it might need to add an additional pumping station or bear the expense of laying long conduits. In a world of constantly declining costs, a new entrant designing a network from scratch would invariably be able to cover this expanded footprint for less. Although the utility's incremental expenditures for the expansion would total \$100 million, a perfectly efficient new entrant might be able to generate the same additional output for \$50 million. The problem with TELRIC is that the real-world carrier is compelled to make \$100 million in prudent expenditures to meet its service obligations, but the methodology only allows it to recover a fraction of that amount. As with operating costs, TELRIC affords no mechanism to compensate for this differential. Adjustments to the rates of depreciation or return will not suffice because the problem relates to the amount of a firm's capital investment that is included in the underlying rate base. If capital expenditures are excluded from the rate base, they are not depreciated, and no return on them is earned.

In its treatment of forward-looking costs, TELRIC thus suffers two fatal flaws. As to initial expenditures, it devalues them after they are made. As to operating and incremental capital expenditures, it devalues them at the time they are made. Returning to its constant refrain, the FCC's position is that these devaluations raise no constitutional issue because TELRIC reflects the current market value of incumbent facilities.³⁶⁶

This argument reflects a basic confusion about the relevance of market value to the legality of utility rates. In general, when the government takes property for public use, the measure of just compensation is market value. Among the advantages of this standard are that market value generally represents an objective measure of the owner's economic opportunity in the taken property;³⁶⁷ that it replicates what would likely occur in a free exchange and thus avoids hold-up; and that it eliminates noncompensable "special" value of the property to the owner.³⁶⁸ But it does not follow that utility rates are compensatory if they are based on the periodic "market value" of the physical facilities at the time they are used to produce service.

***514** The FCC's argument repeats the error committed by the early cases that supposed that rates must be based on the "fair value" of utility facilities at the time they were used to provide service.³⁶⁹ As previously discussed, Justice Brandeis showed that this view misconstrues what property the government has taken for public use.³⁷⁰ By imposing an obligation to serve, the government takes private capital for public use. The property taken is the capital, not the particular physical facilities purchased with that capital, because the fundamental obligation is to provide service, not to install any particular facility. This view of the nature of the taking leads to the conclusion that the taking occurs at the time the government requires the capital to be dedicated to public use. The obligation to provide just compensation arises at the time the property is taken.³⁷ The "market value" of capital at the time it is dedicated to public use is, by definition, the amount of capital so dedicated. Consideration of the "market value" of the physical facilities at the time they are used to produce service is erroneous because it examines the wrong property at the wrong time. If the government compels our waterworks to spend \$1 billion up front and \$200 million more every year, it must establish a methodology that provides a net probability of recovering that amount in full.

The FCC cannot, in the name of an imagined "market value," deprive incumbents of the recovery of the capital that they are compelled to expend. To be sure, the government can set rates that limit the firm to recovering only those amounts that the government has actually compelled the firm to spend. Thus, the government may deny a utility the recovery of avoidable inefficiencies. But any methodology that compels a producer to achieve a level of cost efficiency therefore must be: (1) based on a determination that the producer can realistically achieve that level of efficiency; and (2) tethered to an

objective benchmark of cost or value outside the government's control. By denying recovery for “imprudent investment,” for example, the government has concluded that the producer can realistically achieve a lower cost on the theory that a producer can avoid being imprudent. Incentive pricing, such as price-cap regulation, takes the individual provider's actual cost of service as a benchmark and then imputes achievable levels of future efficiency based on real market data. Price ceilings are also constitutionally permissible, at least where such ceilings are based on average costs calculated from actually observed industry data and where producers are free to decline to produce.³⁷²

***515** Thus, in *In re Permian Basin Area Rate Cases*,³⁷³ the Court approved natural gas rates established by the Federal Power Commission (“FPC”) that were based on composite cost data for sellers operating in defined geographic areas, rather than on the individual costs of each producer.³⁷⁴ In setting these rates, the FPC used averages derived from actual cost data and incorporated a number of safeguards available to producers whose individual costs exceeded the averages. Among these safeguards were: (1) a right to seek a waiver from the rates where the utility's “out-of-pocket expenses . . . exceed its revenue . . . under the applicable area price”; and (2) a right to abandon “unprofitable activities.”³⁷⁵ The Court upheld these rates, relying specifically on the fact that the FPC's safeguards protected high-cost producers against a compulsion to spend without a fair opportunity to recover their prudent expenditures.³⁷⁶

Likewise, *United States v. Pewee Coal Co.*³⁷⁷ recognized that the government cannot compel a firm to spend money on the operation of a business without covering that firm's prudent expenditures.³⁷⁸ To avert a strike, the president issued an executive order directing that the government take over the operation of the nation's coal mines.³⁷⁹ During the time of the seizure--the time that the owner, like a utility, was forced to operate at the direction of the government--the owner's mine operated at a loss.³⁸⁰ The Court held that the government was required to compensate the firm for its unrecovered out-of-pocket costs: “When a private business is possessed and operated for public use, no reason appears to justify imposition of losses sustained on the person from whom the property was seized.”³⁸

As a result, the government cannot set compensation based on an assertion that it has found a “comparable market” by imagining that the producer is situated differently than it is in reality. The Supreme Court applied this principle in *United States v. New River Collieries Co.*³⁸² There, the government had requisitioned coal from a private firm, and sought to pay compensation based on a valuation that reflected only the price for domestic sales, ignoring the “considerably higher” price for export sales.³⁸³ The Court rejected the government's argument that its hypothetical market construct reflected the “real value” of the coal, and it concluded that the “owner was entitled to what it lost by the taking,” and that the “loss is measured by the money equivalent” of the property taken.³⁸⁴

***516** Similarly, in *United States v. General Motors Corp.*,³⁸⁵ the Court rejected an effort by the government to base compensation on the costs of a hypothetical owner.³⁸⁶ In that case, the United States had condemned a one-year interest in a commercial warehouse filled with General Motors' equipment.³⁸⁷ The Court rejected the government's argument that it should pay only a prorated share of the long-term lease price of an empty warehouse, and it concluded that the government was not free to assume that General Motors had a more attractive asset than it actually had.³⁸⁸ “If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing ‘just compensation’”³⁸⁹ Accordingly, the Court held that the costs of moving General Motors' equipment out of the warehouse and “preparing the space for occupancy” by the government, as well as any damage caused by the temporary occupancy, must be included in the calculation of just compensation.³⁹⁰ In other words, the government was required to take the warehouse as it existed, and it could not ignore the unavoidable costs of producing the output demanded by the sovereign (an empty warehouse).

Ultimately, the invocation of “market value” in the utility context fails because no real market exists in which the price of the services rendered can be observed through comparable and reliable market transactions.³⁹ The government has displaced the operation of the market through the regulation of prices. Any measure of “market value” in this context is a matter of conjecture and lacks the objective relation to the owner's economic opportunity, which is the principal virtue of using market value as a yardstick for compensation.³⁹² A hypothetical market value is far too manipulable to serve as an adequate protection of the owner's rights, especially in a ratemaking context in which the government argues that the courts should “defer” to the expertise of an administrative agency. For this reason, in the absence of a functioning *517 competitive market,³⁹³ “market value” cannot be used as the measure of compensation.³⁹⁴

The FCC's methodology represents the audacious claim that the government can dictate market value where no market exists--that the government does not have to compensate a compelled producer for its prudent expenditures because it can imagine a firm that could do it for less. At the same time, it can eliminate any reference to the real-world measures of value--the actual costs of production and the opportunity costs associated with surrendering the facilities. By this reasoning, General Motors could be forced to use its consumer truck factories to build tanks with compensation determined by a Defense Department extrapolation of the costs that might be incurred by the “least cost, most efficient” tank factory. If the government is free to ignore all external measures of value in favor of its own subjective valuation it becomes a judge in its own cause. Without reference to objective indicators of value, judicial review of a price fixed by the government is impossible.

The protections of the Takings Clause would have no meaning if the government could conscript capital into a venture that, by force of its own rules, has been defined as a losing venture. The FCC's justification for TELRIC has no logical stopping point, leaving the government free to dragoon private firms into production and pay in compensation only what it claims is a perfectly competitive price. The Takings Clause was intended to serve as a bulwark against precisely this abuse--namely, the pernicious desire *518 of democracies to harness the use and value of private property without paying full compensation.

D. The FCC's Invocation of the Total Company Test to Mask the Confiscatory Effects of Its Methodology

Standing alone, a firm that sold only UNEs with its compensation based on TELRIC could recover neither its past prudent investment nor its necessarily incurred forward-looking costs. As a result, the FCC's last line of defense is its assertion that the “total effect” of TELRIC on incumbents' business as a whole is something less than ruinous.³⁹⁵ As the FCC argued to the Supreme Court, TELRIC raises no constitutional problems because “the incumbents have continued to enjoy generous returns, on both their interstate and intrastate activities, in the years since they were required to lease network elements at rates based on forward-looking costs.”³⁹⁶

Although the Supreme Court avoided addressing this question, the FCC's formulation violates every one of the principles articulated in Part I governing the use of cross-subsidies to deliver constitutionally mandated compensation. At the outset, a vague allusion to “other revenues” does not constitute an effective cross-subsidy. Where the government insulates a utility from competition, a regulator may set the price of one product below cost as long as it pays for the shortfall by creating a sufficient cross-subsidy from another product. But to justify below-cost pricing on this ground, the regulator must first be responsible for generating a supracompensatory margin over and above what would otherwise be due on the subsidizing product. Thus, the regulator must actually have the capacity to create new incremental revenue--which it does in a closed market and does not in a market open to competition--and use that capacity to generate and protect a supracompensatory margin. Moreover, the regulator must make a reasoned determination that subsidizing revenues are available and adequate, and the regulator must calibrate the two revenue pools to ensure sufficient and predictable compensation in both lines of business. The 1996 Act, by opening all telecommunications

markets to competition and explicitly forbidding implicit subsidies, forecloses the FCC from making any such showing here.³⁹⁷

***519** The FCC's defense of TELRIC fundamentally misconceives what it means for activities to be regulated in such a way that the revenues generated by those activities can be claimed by the government as a source of payment for a taking. Contrary to the FCC's assumption, a regulator cannot claim credit for revenues from all activities that it burdens with regulation but only from those activities that it benefits by ensuring increased returns. For this reason, a regulator may not rely on competitive revenues or revenues from another sovereign's jurisdiction. Those revenues are already providing the compensation due in those respective lines of business, and the regulator lacks capacity to generate additional margins beyond compensatory levels.

The conditions for an effective cross-subsidy are not satisfied with TELRIC. The FCC's defense casually refers to the overall returns on incumbents' combined interstate business, but it plainly violates Brooks-Scanlon to rely on overall interstate revenues. Incumbents' interstate businesses are not monolithic, but include lines of business—including long distance and Internet access—that have long been competitive. These services comprise a large portion of interstate revenues, and many of these market segments have been formally deregulated by the FCC. Incumbents also face competition in their other key interstate service—access charges paid by long distance carriers for the origination and termination of interstate calls, which the FCC still subjects to price caps—particularly for the narrow segment of “high value” customers who disproportionately generate that revenue.

Moreover, the revenue from access charges is already spoken for. Those revenues are unavailable not only because they are subject to competition but also because the premise of the existing price cap regime is that resultant returns are compensatory and yield no “excess.” Price caps involve their own regulatory bargain—that if the carrier exceeds imputed efficiency levels, it has earned a higher rate of return. By definition, that return is necessary to compensate for risks inherent in a price cap regime. A regime that retroactively ***520** declares some of these revenues “excess” and applies them to cover shortfalls elsewhere vitiates the government's compensation obligation for the facilities used to provide access services by reducing the return below the level previously judged compensatory.³⁹⁸

The FCC's version of the “financial integrity” test nullifies the just compensation obligation for utility takings. As explained in Part I, that standard cannot be applied to a company with diversified lines of business subject to competition and to the jurisdiction of multiple sovereigns. Rather, the “financial integrity” test serves a useful purpose only when it is applied to an entity that is, on its own, actually raising capital in the market. Only then does the standard provide an objective check on government depredation—the return investors will insist upon before committing capital. Without that check, the “financial integrity” test is an empty slogan that—as in the case of TELRIC—both invites and cloaks theft from other lines of business.

Conclusion

Justice Brandeis dissented in *Mahon*, arguing that the adverse impact of Pennsylvania's regulation of mining on the owner of the subsurface estate did not make that regulation a taking. The next year he wrote his famous concurrence in *Southwestern Bell*, arguing that the property taken in a utility regime is prudent investment. Brandeis clearly understood that utility ratemaking was not simply a restriction on the owner's use of business property, à la *Mahon*, but presented fundamentally different takings questions arising from the appropriation of private capital for public use. We seem to have forgotten that distinction as the aimless drift of the regulatory takings cases has led to a judicial reticence to involve itself in utility regulation, at least until the utility is on the brink of a financial catastrophe.

This development is dangerous. Without a clear constitutional standard and judicial enforcement of basic takings principles, the staggering amounts of money invested in public utility enterprises are at risk. No longer can we rely on

the capital markets to reign in regulatory excess: diversification attenuates the impact of any single regulator's actions on the financial health of the money-raising enterprise. What is most needed is a judicial willingness to articulate and enforce the basic constitutional principle: ratemaking must be designed to produce sufficient revenue to compensate the utility for its prudent investment and operating costs.

Footnotes

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The authors thank Vikram Amar, Lynn Blais, Lance Liebman, and Andrew McBride for their helpful comments. The views expressed are the authors' own and do not necessarily represent the positions of their respective employers or clients.

¹ The Federalist No. 10, at 17 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966).

² Id. at 18.

³ Id. at 20-23.

⁴ Id.

⁵ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

⁶ See, e.g., Daniel A. Farber, *Public Choice and Just Compensation*, 9 *Const. Comment.* 279, 279 (1992); Saul Levmore, *Just Compensation and Just Politics*, 22 *Conn. L. Rev.* 285, 287 (1990).

⁷ See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 *Va. L. Rev.* 277, 278 (2001) (noting that “scholars and courts alike have struggled”); Eric Claeys, *Takings, Regulations, and Natural Property Rights*, 88 *Cornell L. Rev.* 1549, 1552 (2003) (“To hear the Supreme Court tell it, this confusion is the best we can expect.”); Hanoch Dagan, *Takings and Distributive Justice*, 85 *Va. L. Rev.* 741, 743 (1999) (stating that regulatory takings is “one of the most confusing areas of law”); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 *Sup. Ct. Rev.* 1, 3 (“No matter how hard or often it tries the Supreme Court seems unable to develop any coherent principles that mark either right or stable choices in that middle ground.”); Jed Rubenfeld, *Usings*, 102 *Yale L.J.* 1077, 1078 n.2 (1993) (describing the Takings Clause as “engulfed in confusion” and referencing scholarship).

⁸ *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 290-312 (1923) (Brandeis, J., concurring).

⁹ *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

¹⁰ See id. at 603; *Southwestern Bell*, 262 U.S. at 290-91 (Brandeis, J., concurring).

¹¹ See *Hope Natural Gas*, 320 U.S. at 603.

¹² Id. at 603.

¹³ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

¹⁴ See *infra* notes 186-88 and accompanying text.

¹⁵ See *infra* Part II.

¹⁶ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (internal quotations omitted).

- 17 See, e.g., scholarship cited *supra* notes 6-7. A notable exception is Glynn S. Lunney, Jr., [A Critical Reexamination of the Takings Jurisprudence](#), 90 Mich. L. Rev. 1892, 1897 n.16, 1917-19 (1992), which traces the interrelated development of takings doctrine with regard to utilities and evolving notions of the police power.
- 18 See, e.g., [Palazzolo v. Rhode Island](#), 533 U.S. 606 (2001); [Dolan v. City of Tigard](#), 512 U.S. 374 (1994); [Loretto v. Teleprompter Manhattan CATV Corp.](#), 458 U.S. 419 (1982).
- 19 See [Verizon Communications, Inc. v. FCC](#), 535 U.S. 467 (2002).
- 20 See *infra* note 32 and accompanying text.
- 21 See *infra* note 347 and accompanying text.
- 22 This distinction between appropriative takings and regulatory takings, and the significance of this difference in utility cases, will be addressed in detail in Part II *infra*.
- 23 See [Penn Cent. Transp. Co. v. City of New York](#), 438 U.S. 104, 124 (1978).
- 24 See [Lucas v. S.C. Coastal Council](#), 505 U.S. 1003, 1029 (1992).
- 25 The issues discussed in this paragraph will be addressed in greater detail *infra* Parts I.D-E.
- 26 See *infra* text accompanying notes 57-58.
- 27 See *infra* text accompanying note 110.
- 28 [Fed. Power Comm'n v. Hope Natural Gas Co.](#), 320 U.S. 591, 625 (1944) (Frankfurter, J., dissenting); see also [Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n](#), 262 U.S. 276, 291 (1923) (Brandeis, J., concurring) (declaring that a utility “is the substitute for the State in the performance of the public service”).
- 29 See *infra* text accompanying note 224.
- 30 See, e.g., J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States* 119 (1997) (“A utility carries an obligation to serve customers in its franchise region at posted prices.”); *id.* at 127 (noting that “the utility cannot exit a market at will but must obtain regulatory approval”); W. Kip Viscusi et al., *Economics of Regulation and Antitrust* 310 (2d ed. 1995) (referring to “regulations that forbid a regulated firm from abandoning a market without regulatory approval”). Compulsions to serve and limitations on exit are common features of state statutes and regulations governing the provision of retail telephone services. For example, in Massachusetts, companies that provide phone service to one thousand customers or more are defined by statute as common carriers, see [Mass. Gen. Laws ch. 166, § 15E](#) (2000), and they must serve all customers within their geographic market without discrimination, see *id.* ch. 159, § 1. All charges for phone service must be “just and reasonable,” and rates are regulated by a state utility commission. *Id.* § 14. That commission has authority to determine whether a phone company’s service quality is “improper or inadequate,” and to make regulations necessary to ensure that services are “reasonable, safe, adequate, and proper.” *Id.* § 16. Every common carrier is obligated by law to “obey every requirement established by the regulatory commission,” and do everything necessary or proper in order to secure absolute compliance with every such order by all its officers, agents and employees. *Id.* In order to ensure the universal availability of phone service, the state has designated certain utilities as carriers of last resort—firms that are “required to continue service to a particular area, even if that service is not profitable, if that area “is either left without or not provided with telephone service.” *Intrastate Competition by Common Carriers*, Decision No. 1731, at 71 (Mass. Dep’t of Telecomms. & Energy Oct. 18, 1985); see also [47 U.S.C. § 214\(e\)\(4\)](#) (2000) (requiring certain telecommunications carriers to obtain state permission to cease providing service); [Cal. Pub. Util. Code § 451](#) (West 2004) (requiring provision of service at just and reasonable rates); [220 Ill. Comp. Stat. Ann. 5/13 406](#) (West 2000) (declaring that an incumbent may not discontinue service without regulatory approval, which may be denied if contrary to the public interest); [Ohio Rev. Code Ann. §§ 4905.21, .231](#) (Anderson 2000) (authorizing commission to define “adequate service” and prohibiting exit without regulatory approval); [66 Pa. Cons. Stat. Ann. §§ 1102\(a\)\(2\), 1504](#) (West 2000) (prohibiting exit without regulatory approval and establishing quality of service standards); [Tex. Util. Code Ann. §§ 54.251, .302\(b\)](#) (Vernon

1998 & Supp. 2004) (requiring telephone companies to provide service and prohibiting exit without regulatory approval, which will be granted only if the public interest would be served by shifting the provider of last resort obligations to another carrier).

31 See Sidak & Spulber, *supra* note 30, at 105 (explaining that utility assets typically have little value outside their use for regulated operations).

32 As of 2000, incumbent phone companies had spent roughly \$342 billion building their networks. See FCC, Statistics of Communications Common Carriers 42 tbl. 2.7 (2000), <http://www.fcc.gov/Bureaus/Common Carrier/Reports/FCC State Link/SOCC/00socc.pdf>.

33 Technological evolution permits exceptions to the rule. Power grids may soon be able to deliver broadband Internet services. Telephone networks can be upgraded to deliver complementary services such as voicemail and broadband Internet access. The critical point, however, is that these alternative uses may not be known at the time the sunk investments are made. Furthermore, they generally require large additional investments to bear fruit, and they offer only a speculative possibility of delivering a return on the utility's original investment. The possibility that such opportunities may arise therefore does not offer any assurance of compensation.

34 See Sidak & Spulber, *supra* note 30, at 107 (“By incurring substantial capital expenditures to perform its obligation to serve, the utility is vulnerable to confiscation. ”).

35 *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 291 (1923) (Brandeis, J., concurring); see also *Smyth v. Ames*, 169 U.S. 466, 544 (1898) (declaring that because a utility is “created for public purposes” and “performs a function of the State, it is “under governmental control”).

36 See *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 541 (1923).

37 *Id.*

38 See, e.g., *United States Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 797 (Ind. 2000) (“The bedrock principle behind utility regulation is the so called ‘regulatory compact’ which arises out of a ‘bargain’ struck between the utilities and the state. ”); *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 655 N.E.2d 961, 971 (Ill. Ct. App. 1995) (“We are... aware of the special rights and obligations arising from the regulatory compact between the public and investor owned utilities. ”); Universal Serv. Principles & Policies for Telecomms. Serv. in the Commonwealth, Docket No. I 940035, 1994 PA PUC LEXIS 15, at *1 (Pa. Pub. Utils. Comm'n May 4, 1994) (“The regulatory compact was] struck between the industry and government in the early part of the 20th century. ”).

39 But see Sidak & Spulber, *supra* note 30, at 109.

40 See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 48 (1982); see also *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 53 (1986); *The R.R. Comm'n Cases*, 116 U.S. 307, 325 26 (1886); *Ruggles v. Illinois*, 108 U.S. 526, 531 (1883).

41 See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 874 (1996) (plurality opinion); *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531 32 (1848).

42 See, e.g., *Ruggles*, 108 U.S. at 531. But see *Russell v. Sebastian*, 233 U.S. 195, 204 (1914) (“The ordinance] plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. ”); *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U.S. 368, 384 (1902) (similar).

43 See, e.g., *Cal. Pub. Util. Code* § 451 (West 2004).

44 See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 15 (1989).

45 See *Winstar*, 518 U.S. at 881 82.

- 46 See, e.g., *Sidak & Spulber*, supra note 30, at 109. As an historical matter, utility regimes may have arisen in different ways. In some cases, utility obligations were unilaterally imposed on companies that would not otherwise have submitted willingly to the regimes. In other cases, the government clearly took steps to induce firms to subject themselves to the regime by offering certain rights and privileges. In each case, there is likely to be a problem of historical proof, and the significance of a firm's willingness to be a utility will diminish over time. Although early utilities received charters that established the terms on which they supplied service to the public, see *id.* at 144-60, modern utilities typically do not operate according to the terms of such express agreements. Their activities are, instead, controlled by a mix of statute and regulation. In the case of telephone companies, for example, even if some initially did volunteer to be utilities—a dubious historical proposition unsupported by any contract or other express indicia of agreement—all of the investments made at the time that utility regulation commenced have long been retired. All that remains are investments made under a regime of compulsion.
- 47 See supra text accompanying notes 36-37.
- 48 See, e.g., Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 *Yale L.J.* 801, 822 (1999) (book review).
- 49 *Id.* at 821.
- 50 In particular, Hovenkamp explains as follows:
Much more commonly, public utility investments are made at the behest of the utilities themselves, with agencies advocating limitation rather than expansion. Alternatively, they are made under circumstances in which the utilities have access to better information than the agencies and disclose this information selectively in order to maximize their own profits. In such cases, one can hardly conclude that the investment was compelled by the state.
Id. at 822.
- 51 *Id.* at 817.
- 52 See cases cited *infra* note 78.
- 53 See *W. Ohio Gas Co. v. Pub. Utils. Comm'n*, 294 U.S. 63, 72 (1935); *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 288-89 (1923).
- 54 This point can be illustrated by an example. If the government compels a firm to spend \$1 billion to make nuclear weapons during wartime, then refuses to take delivery because it has made peace, the government has still taken the \$1 billion in necessary expenditures incurred by the supplier. The government cannot sidestep its obligation by asserting that the weapons now have no market value because it does not want them and because the weapons cannot lawfully be sold to anyone else.
- 55 See generally *United States v. Miller*, 317 U.S. 369 (1943).
- 56 U.S. Const. amend. V.
- 57 As Justice Stevens stated:
A taking is a discrete event, a governmental acquisition of private property for which the state is required to provide just compensation. Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner. Precise specification of the moment a taking occurred... is necessary in order to determine an appropriately compensatory remedy. For example, the amount of the award is measured by the value of the property at the time of taking, not the value at some later date.
Palazzolo v. Rhode Island, 533 U.S. 606, 638-39 (2001) (Stevens, J., concurring in part and dissenting in part).
- 58 *Brown v. Legal Found.*, 538 U.S. 216, 235-36 (2003); see also *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.) (“And the question is what has the owner lost, not what has the taker gained.”).
- 59 *Olson v. United States*, 292 U.S. 246, 255 (1934).
- 60 See *Chi., Milwaukee & St. Paul R.R. Co. v. Ackley*, 94 U.S. 179, 179 (1877); *Peik v. Chi. & North Western Ry. Co.*, 94 U.S. 164, 178 (1877); *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

- 61 See *R.R. Comm'n Cases*, 116 U.S. 307, 331 (1886); see also *St. Louis & S.F. Ry. Co. v. Gill*, 156 U.S. 649, 657 58 (1895); *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 455 56 (1890).
- 62 See *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 346 (1892) (suggesting that the standard is recovery of debt and equity paid in, but rejecting the claim because of lack of evidence); *Dow v. Beidelman*, 125 U.S. 680, 690 91 (1888) (suggesting that relevant measure is return on investment made in reorganized utility).
- 63 *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894).
- 64 See *id.* at 410.
- 65 See *id.* at 411 12.
- 66 See *id.* at 412 13.
- 67 See, e.g., *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 298 99 (1923) (Brandeis, J., concurring); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 596 97 (1896).
- 68 See *Southwestern Bell*, 262 U.S. at 298 (Brandeis, J., concurring) ("The adoption of present value of the utility's property, as the rate base, was urged in 1893, on behalf of the community").
- 69 *Smyth v. Ames*, 169 U.S. 466 (1898).
- 70 *Id.* at 489. Bryan especially emphasized the fictitious capitalization of railroads. See *id.* at 544.
- 71 *Id.* at 546.
- 72 See *id.* at 546 47.
- 73 See *Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co.*, 192 U.S. 201, 214 (1904); *San Diego Land & Town Co. v. Jasper*, 189 U.S. 439, 442 43 (1903); *San Diego Land & Town Co. v. City of National City*, 174 U.S. 739, 757 58 (1899).
- 74 See *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 294 n.5 (1923) (Brandeis, J., concurring).
- 75 See, e.g., *Louisville & Nashville R.R. Co. v. Garrett*, 231 U.S. 298, 315 (1913); *R.R. Comm'n v. Cumberland Tel. & Tel. Co.*, 212 U.S. 414, 424 26 (1909); *Ill. Cent. R.R. Co. v. ICC*, 206 U.S. 441, 459 60 (1907).
- 76 See, e.g., *The Minn. Rate Cases*, 230 U.S. 352 (1913).
- 77 See, e.g., *Banton v. Belt Line Ry. Corp.*, 268 U.S. 413, 421 (1925); *Brooks Scanlon Co. v. R.R. Comm'n*, 251 U.S. 396, 399 (1920); *N. Pac. Ry. Co. v. North Dakota ex rel. McCue*, 236 U.S. 585, 604 (1915).
- 78 See *Smyth v. Ames*, 169 U.S. 466, 544 45 (1898); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 597 (1896). Imprudence, however, had to be proven and could not be assumed. See *W. Ohio Gas Co. v. Pub. Utils. Comm'n*, 294 U.S. 63, 73 (1935); *Southwestern Bell*, 262 U.S. at 288.
- 79 See John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U. L. Rev. 65, 80 (1985) ("Even the most radical theories in the 1890's acknowledged that operating costs should be recovered. "). Some earlier cases, however, suggested in dicta that a firm might not have the right to charge a rate sufficient to cover its operating costs if that rate was "exorbitant" as compared to rates charged by other utilities in similar situations. See *Minneapolis & St. Louis R.R. Co. v. Minnesota*, 186 U.S. 257, 268 (1902). These suggestions may have been motivated by an assumption that higher costs might reflect avoidable inefficiencies. In any event, even if the utility might not be allowed to charge a rate sufficient to cover its operating costs, no case holds that the utility can be forced to continue in business at such rates.
- 80 See *Southwestern Bell*, 262 U.S. at 289 312 (Brandeis, J., concurring).
- 81 See *id.* at 290.

- 82 See [Reagan v. Farmers' Loan & Trust Co.](#), 154 U.S. 362, 409 11 (1894).
- 83 [Southwestern Bell](#), 262 U.S. at 290 (Brandeis, J., concurring).
- 84 [Id.](#) at 291.
- 85 [Id.](#)
- 86 [Id.](#) at 292.
- 87 [Id.](#)
- 88 [Id.](#) at 292 93.
- 89 [Id.](#) at 297 98.
- 90 See [id.](#) at 298 99.
- 91 See [id.](#) at 298.
- 92 See [id.](#) at 299 301.
- 93 [Id.](#) at 306 08. Brandeis's point was borne out in [West v. Chesapeake & Potomac Telephone Co.](#), 295 U.S. 662 (1935). In [West](#), the Court continued to adhere to the fair value rule based on the eminent domain analogy. See [id.](#) at 671 72. But it rejected the use of an inflation index to escalate investment costs, finding that the sudden and massive fluctuations in prices in the 1920s and 1930s were not relevant in determining the value of utility property devoted to public service over the long term. See [id.](#) at 673 74.
- 94 [Fed. Power Comm'n v. Natural Gas Pipeline Co.](#), 315 U.S. 575 (1942).
- 95 See [id.](#) at 578 81, 598.
- 96 See [id.](#) at 602 04 (Black, J., concurring).
- 97 See [id.](#) at 606.
- 98 [Id.](#) at 607.
- 99 [Id.](#) (“Irrespective of what the return may be on ‘fair value, if the rate permits the company to operate successfully and to attract capital all questions as to ‘just and reasonable’ are at an end so far as the investor interest is concerned. Various routes to that end may be worked out by the expert administrators charged with the duty of regulation.).
- 100 [Fed. Power Comm'n v. Hope Natural Gas Co.](#), 320 U.S. 591 (1944).
- 101 [Id.](#) at 603.
- 102 [Id.](#) (citing [Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n](#), 262 U.S. 276, 291 (1923) (Brandeis, J., concurring)).
- 103 [Id.](#) at 602.
- 104 [Id.](#) at 603 (“The rate making process under the Act, i.e., the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests.); see also [Natural Gas Pipeline](#), 315 U.S. at 606 07 (Black, J., concurring).
- 105 See, e.g., Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 94 95 (3d ed. 2000).
- 106 As the United States Court of Appeals for the District of Columbia Circuit put it:
But there are limits inherent in the statutory mandate that rates be “reasonable, just, and non discriminatory. Among those limits are the minimal requirements for protection of investors outlined in the [Hope](#) case. And from the earliest cases, the end of public utility regulation has been recognized to be protection of consumers from exorbitant rates. Thus, there is a zone of

reasonableness within which rates may properly fall. It is bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates.

[Wash. Gas Light Co. v. Baker](#), 188 F.2d 11, 15 (D.C. Cir. 1950) (footnotes omitted); see also [Jersey Cent. Power & Light Co. v. FERC](#), 810 F.2d 1168, 1181 (D.C. Cir. 1987) (en banc) (declaring that “including prudent investments in the rate base is not in and of itself exploitative”). For a contrary and, we would submit, erroneous view that consumers' interest in lower rates is to be weighed against investors' interest in cost recovery, see [20th Century Insurance Co. v. Garamendi](#), 878 P.2d 566, 615 16 (Cal. 1994).

107 [Natural Gas Pipeline](#), 315 U.S. at 608 (Black J., concurring) (emphasis added).

108 See, e.g., [Jersey Cent. Power & Light](#), 810 F.2d at 1180 (rejecting the Federal Energy Regulatory Commission's argument that a utility must be “clearly headed for bankruptcy” before it can mount a successful challenge to rates).

109 See *infra* Part I.E.

110 [Preseault v. ICC](#), 494 U.S. 1, 11 (1990) (internal quotations and citations omitted); see also [Williamson County Reg'l Planning Comm'n v. Hamilton Bank](#), 473 U.S. 172, 194 (1985) (collecting cases).

111 The following passage, and certain other portions of this Article, previously appeared in a different form in briefs filed by petitioners in [Verizon Communications, Inc. v. FCC](#), 537 U.S. 807 (2002).

112 See, e.g., [Fed. Power Comm'n v. Hope Natural Gas Co.](#), 320 U.S. 591, 602 (1944) (noting that regulators are “not bound to the use of any single formula or combination of formulae in determining rates”).

113 [Mkt. St. Ry. Co. v. R.R. Comm'n](#), 324 U.S. 548, 554 (1945).

114 See *id.* at 554 56.

115 See *id.* at 566 68.

116 See *id.* at 569.

117 See, e.g., [Duquesne Light Co. v. Barasch](#), 488 U.S. 299, 315 (1989) (“The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks.”).

118 [Duquesne Light Co. v. Barasch](#), 488 U.S. 299 (1989).

119 *Id.* at 310 n.7.

120 As the FCC has explained:

In contrast to rate of return regulation, a regulatory system that caps prices creates profit incentives similar to those in fully competitive markets and generates positive motivations for reasonable rates, innovation, productivity growth, and accurate cost allocation, while reducing regulatory burdens. The plan's method is to control prices directly, rather than indirectly by examining costs and profits. The price cap limits are set by the Commission to assure that rates are reasonable and lower than under rate of return regulation. The effect of capping prices rather than profits is to replicate the marketplace forces of competition. Prices are held to a maximum level by the cap, much as they are by the rivalry among companies in competitive markets. The carrier gains the opportunity to earn higher profits, but may do so only by operating more efficiently or by developing new services customers want, not by raising overall prices. This opportunity to increase its profits in turn encourages the carrier to apply its resources in the most efficient manner possible, providing more and better service at lower cost. In this way, the carrier can increase its productivity, and thus its profitability. At the same time, customers directly benefit from lower prices and new services that better meet their needs, and indirectly from the lower costs of non telecommunications goods and services provided by firms that use telecommunications in their businesses.

[In re Price Cap Performance Review for Local Exch. Carriers](#), 9 F.C.C.R. 1687, 1688 (1994) (notice of proposed rulemaking).

- 121 There may come a point where the risks associated with a methodology are so high where, for example, the methodology generates results approaching those of a lottery that the regime may be subject to challenge under both the Takings Clause and the Due Process Clause. The location of this line is beyond the scope of this Article.
- 122 See *Duquesne*, 488 U.S. at 309 15.
- 123 See *id.* at 310 n.7.
- 124 See *id.* at 302.
- 125 See *id.* at 312.
- 126 *Id.* at 312, 315.
- 127 *Id.* at 315.
- 128 *Id.*
- 129 *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality opinion).
- 130 See *id.* at 868 69.
- 131 See *id.* at 883.
- 132 See *id.* at 870.
- 133 *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).
- 134 *Id.* at 605.
- 135 See *supra* Part I.B.2.
- 136 See, e.g., *Balt. & Ohio R.R. Co. v. United States*, 345 U.S. 146, 150 (1953) (“And so long as rates as a whole afford railroads just compensation for their over all services to the public the Due Process Clause should not be construed as a bar to the fixing of noncompensatory rates for carrying some commodities when the public interest is thereby served.). The Court did at one time hold that an order deliberately setting a rate for a particular service below cost was irrational and exceeded the permissible scope of the police power. See *N. Pac. Ry. Co. v. North Dakota ex rel. McCue*, 236 U.S. 585, 598 (1915) (noting that the government may not require a utility “to charge excessive rates to some in order that others might be served at a rate unreasonably low); see also *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 544 (1930) (describing the Court’s “rule that a public service company may not be compelled to serve, even in a branch of its business, at a rate which is confiscatory); *McCue*, 236 U.S. at 600 (declaring that the Court’s cases “furnish no ground for saying that the State may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire interstate business is adequate). This limitation fell away along with other restrictions on the police power. See *infra* notes 227 29 and accompanying text.
- 137 *Brown v. Legal Found.*, 538 U.S. 216, 252 (2003) (Scalia, J., dissenting).
- 138 *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (internal quotations omitted).
- 139 *Brooks Scanlon Co. v. R.R. Comm'n*, 251 U.S. 396 (1920).
- 140 See *id.* at 399.
- 141 *Id.*
- 142 *Smyth v. Ames*, 169 U.S. 466, 541 (1898).
- 143 See *Smith v. Ill. Bell Tel. Co.*, 282 U.S. 133, 148 49 (1930); *Chi., Milwaukee & St. Paul Ry. Co. v. Pub. Utils. Comm'n*, 274 U.S. 344, 350 51 (1927); *The Minn. Rate Cases*, 230 U.S. 352, 435 (1913); *Smyth*, 169 U.S. at 541.

- 144 Exclusive franchises have typically been justified on the grounds that they help to: (1) ensure the supply of a natural monopoly service; (2) bring stability to network markets that can sometimes be characterized by boom-bust cycles of alternating over- and underinvestment; (3) ease the administrative burdens associated with regulatory oversight; and (4) reduce the risks associated with a utility's enterprise, thereby curbing rates by lowering the required rate of return.
- 145 *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 311-12 (1989) (considering the “total effect” of the rate orders).
- 146 See *Hope Natural Gas*, 320 U.S. at 603 (“The] return... should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.”).
- 147 See *Bd. of Pub. Util. Comm'rs v. N.Y. Tel. Co.*, 271 U.S. 23, 31-32 (1926).
- 148 Different questions are raised if the regulator allocates costs prospectively—e.g., conditions the utility's ability to diversify into a competitive business on the allocation of a specific portion of joint costs away from the competitive service. In that situation, at least the firm can make an advance determination of whether it is willing to assume the risks of the competitive venture, including the risk of recovery of the portion of joint cost allocated to that service. If not, the utility would retain the right to recover those costs through regulated rates.
- 149 See *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).
- 150 See, e.g., *Balt. & Ohio R.R. Co. v. United States*, 298 U.S. 349, 364-69 (1936); *United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923).
- 151 *N. Pac. Ry. Co. v. Dep't of Pub. Works*, 268 U.S. 39 (1925).
- 152 See *id.* at 43.
- 153 See *id.* at 43-44.
- 154 *Id.* at 44.
- 155 See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) (“All of the subsidiary aspects of valuation for ratemaking purposes could not properly be characterized as having a constitutional dimension.”); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (“It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. (emphasis added)); *Fed. Power Comm'n v. Natural Gas Pipeline*, 315 U.S. 575, 607 (1942) (Black, J., concurring) (“If the rate permits the company to operate successfully and to attract capital all questions as to ‘just and reasonable’ are at an end so far as the investor interest is concerned. Various routes to that end may be worked out by the expert administrators charged with the duty of regulation. (emphasis added)).
- 156 See *supra* text accompanying notes 122-32.
- 157 See cases and text cited *supra* note 155.
- 158 See, e.g., *City of Louisville v. Cumberland Tel. & Tel. Co.*, 225 U.S. 430, 436 (1912); *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 223 U.S. 655, 669 (1912).
- 159 See cases cited *supra* note 158.
- 160 *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).
- 161 *Id.* at 523-24.
- 162 *Id.* at 524.
- 163 *Id.* at 519-22.

- 164 *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 308 (1923) (Brandeis, J., concurring).
- 165 *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 22 (2002) (emphasis added). The Court further stated:
Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.
Id. at 324 n.19.
- 166 See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); *United States v. Causby*, 328 U.S. 256, 258 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 30 (1922) (holding that United States military installations' repeated firing of guns over claimant's land is a taking); *United States v. Cress*, 243 U.S. 316, 327 28 (1917) (holding that repeated flooding of land caused by a water project is a taking).
- 167 See *infra* Part II.E.
- 168 See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 384 (1945); *Liggett & Meyers Tobacco Co. v. United States*, 274 U.S. 215, 220 (1927).
- 169 See, e.g., *Tahoe Sierra*, 535 U.S. at 322.
- 170 *Id.* (emphasis added) (citation omitted); see also *id.* at 330 n.25 (“U]nder our physical takings cases it would be irrelevant whether a property owner maintained 5% of the value of her property so long as there was a physical appropriation of any of the parcel.).
- 171 *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). Previously, courts had not applied the Takings Clause to analyze the impact of regulation although the courts had reviewed the permissible scope of government regulation under other rubrics. See *Claeys*, *supra* note 7, at 1574 77.
- 172 *Mahon*, 260 U.S. at 415.
- 173 In the context of regulation, the only categorical rule the Court has recognized is that government action that denies the owner all economically viable use of its property is a taking *per se*. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). On the other hand, the *Lucas* rule may not be as categorical as it appears at first blush. The Court allowed that a restriction that destroyed all economically viable use might not be a taking if “the proscribed use interests were not part of the owner's] title to begin with. *Id.* at 1027. As the Court said: “R]egulations that prohibit all economically beneficial use of land... cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. *Id.* at 1029. Arguably, this suggests that the no economically viable use of property test is not a *per se* rule but instead depends on the interpretation of preexisting property and nuisance laws as applied to the newly prohibited use of property. See *Rubinfeld*, *supra* note 7, at 1092 94.
- 174 *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).
- 175 See *id.*
- 176 See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 99 (1987); *Penn Cent. Transp.*, 438 U.S. at 136 38; see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (“O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.).
- 177 See *infra* text accompanying notes 189 99.
- 178 See, e.g., *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 23 (2002).
- 179 As one commentator put it:
Nevertheless, I think instead that this is a field in which pragmatic judgment under a standard an explicit balancing approach is better. The pragmatic ethical issue defies reduction to formal rules. When the Court's takings jurisprudence has not been conclusory, it has usually attempted to address in a practical way an underlying issue of political and moral theory: is it

appropriate to make this particular person bear the cost of this particular government action for the benefit of this particular community? Such is the burden of the Penn Central multi factor balancing test, created under the salutary influence of Frank Michelman's famous article. For all but true believers in the Platonic form of property, squarely facing the ethical/political issue in this way is far superior to any mediation through per se rules or conceptualism.

Margaret Jane Radin, [The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings](#), 88 Colum. L. Rev. 1667, 1684 (1988) (footnotes omitted).

- 180 Older cases speak more categorically of rate regulation of utilities as a “taking. The controverted issue was not whether private property dedicated to public use was “taken, but whether the rates established provided just compensation: This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.
The R.R. Comm'n Cases, 116 U.S. 307, 331 (1886).
- 181 [Duquesne Light Co. v. Barasch](#), 488 U.S. 299 (1989).
- 182 See *supra* text accompanying notes 122-32.
- 183 [Duquesne](#), 488 U.S. at 307.
- 184 *Id.* at 310.
- 185 *Id.*
- 186 [Fed. Power Comm'n v. Hope Natural Gas Co.](#), 320 U.S. 591, 602 (1944).
- 187 [Pa. Coal Co. v. Mahon](#), 260 U.S. 393, 415 (1922).
- 188 See, e.g., [Tex. Office of Pub. Util. Counsel v. FCC](#), 183 F.3d 393, 429 n.59 (5th Cir. 1999) (rejecting takings challenge to imposition of universal service charges on wireless carriers: “Even if we considered Celpage's takings claim, it would fail to demonstrate how its claim comports with the three factors the Supreme Court has established to analyze a regulatory takings claim....”); [Tenoco Oil Co. v. Dep't of Consumer Affairs](#), 876 F.2d 1013, 1026 (1st Cir. 1989) (“Determining whether DACO's price order provides just and reasonable, and thus nonconfiscatory, rates is an essentially ad hoc, factual inquiry. (internal quotations omitted)); [Jersey Cent. Power & Light Co. v. FERC](#), 810 F.2d 1168, 1192 (D.C. Cir. 1987) (en banc) (Starr, J., concurring); [Kavanau v. Santa Monica Rent Control Bd.](#), 941 P.2d 851, 860 (Cal. 1997) (reviewing application of rent control ordinance under three part Penn Central test); Drobak, *supra* note 79, at 67 (“The Supreme Court utility] ratemaking cases establish a loose constitutional constraint that is equivalent to the limit imposed on other kinds of government regulation by the takings clause of the fifth amendment. ”); Paul W. Garnett, [Forward Looking Costing Methodologies and the Supreme Court's Takings Clause Jurisprudence](#), 7 *CommLaw Conspectus* 119, 122 n.19 (1999) (stating that *Duquesne* applies a test that “mirrored the regulatory takings standard).
- 189 Oxford English Dictionary Online (2d ed. 1989) (relevant portions on file with The George Washington Law Review).
- 190 *Id.*
- 191 See Bernard Schwartz, [Takings Clause “Poor Relation No More?](#), 47 Okla. L. Rev. 417, 420-21 (1994) (citing Samuel Johnson's Dictionary, “the only one in existence at the time the Bill of Rights was adopted, which defined “take as “seize, “snatch, “get, “procure, or “appropriate).
- 192 The Court has noted the conceptual similarity between government acquisition of the incidents of ownership and government condemnation. See [Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency](#), 535 U.S. 302, 321 (2002) (“ The] plain language of the Fifth Amendment] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation.).
- 193 Rubinfeld, *supra* note 7, at 1119.

194 U.S. Const. amend. V.

195 See Rubenfeld, *supra* note 7, at 1120–24; see also Schwartz, *supra* note 191, at 419–20 (discussing state constitutions, predating the United States Constitution, that extended protection to public appropriation of private property).

196 As Rubenfeld recounts, the principle that the Fifth Amendment applies when the government mandates that private owners permit others to use their property is consistent with much of the case law. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 128 (1978) (“Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute ‘takings.’”); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (“To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. (emphasis added)). We disagree with Rubenfeld to some extent, however, in our understanding of the theoretical foundation of the use standard as well as its application in specific contexts, see *infra* notes 248, 298 and accompanying text. The most notable gap in Rubenfeld’s analysis is any discussion of the jurisprudence regarding the application of takings principles to utility ratemaking.

197 U.S. Const. amend. V.

198 See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (“It is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. (citations and internal quotations omitted)).

199 “Deprive” is defined as “to divest, strip, bereave, dispossess of.” Oxford English Dictionary Online, *supra* note 189. These words focus on the owner’s loss, rather than the transfer of use to another.

200 2 William Blackstone, *Commentaries* *2; see also *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (“An essential element of individual property is the legal right to exclude others from enjoying it.”).

201 See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (emphasizing that “the landowner’s right to exclude” is] one of the most essential sticks in the bundle of rights that are commonly characterized as property (internal quotations omitted)); *id.* at 435 (“The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”); *id.* at 436 (“An owner suffers a special kind of injury when a stranger directly invades and occupies the owner’s property.”).

202 See, e.g., William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 555, 572–73 (1972) (discussing early precedents which regarded compensation as required by natural law). But see William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 710 n.87 (1985) (“Madison clearly believed that the property right, for all its importance, was a creature of positive law.”).

203 See *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“A State, by ipse dixit, may not transform private property into public property without compensation.... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.”).

204 See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (stating that “it is against all reason and justice to presume that government can enact ‘a law that takes property from A. and gives it to B.’”).

205 See *The Federalist* No. 10, 19–20 (James Madison) (Roy P. Fairfield ed., 2d ed. 1996); Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* 2 (1990); *id.* at 18, 25–28 (discussing Madison’s prediction that “a great majority of people will not only be without landed but without any other sort of property, and then ‘conflicting feelings’ would emerge as those without property would ‘secretly sigh for a more equal distribution of its blessings’ and discussing Madison’s fear that if the republic was unable to control the tendency to redistribute, democracy could not survive and would turn into tyranny or oligarchy); Claeys, *supra* note 7, at 1570 (“But the more the people succumb to the temptation to confiscate property, the more they undermine the conditions of self government.”); Treanor, *supra* note 202, at 704 (discussing redistributionist legislation by revolutionary era legislatures, which led to the rise of liberal principles favoring protection of private property and culminating in the Takings Clause). But see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 844 (1995) (“At

times in his career, however, Madison appears to have moved beyond the position that redistributive consequences were a normal consequence of governmental actions, and to have favored government actions that had redistributive objects, if that redistribution accorded with republican ends.).

206 Taxation also involves redistribution of wealth and thus creates at least the potential for similar threats to political stability. But there are some inherent checks on taxation that mitigate these risks to some extent. For example, at least in the usual case, a tax applies generally. Indeed, a tax that singles out particular individuals might be deemed unlawful on that ground. See *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946) (“The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.). When the tax is of general applicability, the affected constituencies (who, by definition, are wealthier) can organize to defend their interests in the political process. When the government singles out specific property for use by the government or a third party, however, the isolated property owner is less likely to be able to defend its interests in the political process. Cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992) (noting that compensation may not be owing when a government regulation of general application destroys property; a law of general application means “a law that destroys the value of land without being aimed at land). In addition, if the tax is too burdensome, investment and income are generally deterred, resulting eventually in less government revenue. These effects are more attenuated when the government singles out specific property to be transferred to the government or the public.

207 This seems to have been Locke's view. See John Locke, *Second Treatise of Civil Government* 62 (Lester DeKoster ed., William B. Eerdmans Publ'g Co. 1978) (1690).

208 U.S. Const. amend. V.

209 There has been some debate about whether “public use” is a separate substantive requirement. The courts have assumed that it is, such that takings that are not for public uses can be deemed invalid, even if compensation is paid. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). But at the same time, the courts have rendered that substantive limitation all but meaningless by deferring broadly to the government's asserted justification for the taking. The “public use” provision is “coterminous with the scope of a sovereign's police powers. Id. In effect, any state interest that would be credited for purposes of rationality review under the Due Process or Equal Protection Clauses arguably satisfies the “public use” requirement of the Fifth Amendment. See id. 242–43; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (stating that “s) long as the taking has a conceivable public character, the public use requirement is satisfied). The Supreme Court may clarify these issues in *Kelo v. City of New London*, 843 A.2d 500 (Conn.), cert. granted, 125 S. Ct. 27 (2004). We do not enter this debate, other than to note that the interpretation we offer provides an indirect but highly effective means of ensuring that government action that transfers the use of property from the owner to the public is directed at a public use.

210 Cf. Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 3 (“The same compensation requirement serves the twin goals of equity in the individual case and of imposing sensible restraint on government power” to improve the odds that this power will be exercised only to advance the public welfare generally.).

211 See *Lucas*, 505 U.S. at 1030 (“The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.); *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (“P]roperty... is held under the implied obligation that the owner's use of it shall not be injurious to the community.); id. at 669 (holding that compensation is not required for pecuniary losses owners may sustain “by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community).

212 See *Lucas*, 505 U.S. at 1023–24 (“These cases are better understood as resting not on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy not unlike historic preservation” expected to produce a widespread public benefit and applicable to all similarly situated property. ‘Harmful or noxious use’ analysis was, in other words, simply the progenitor of our more contemporary statements that land use regulation does not effect a taking if it substantially advances legitimate state interests. (internal quotations and citations omitted)); *Andrus v. Allard*, 444 U.S. 51, 65 (1979). The expansion of the police power to include regulations designed to produce a benefit is discussed further at Part II.D *infra*.

213 See *infra* text accompanying notes 220–37.

- 214 See [Miller v. Schoene](#), 276 U.S. 272 (1928) (upholding an order to destroy diseased cedar trees to prevent infection of nearby apple orchards without compensation for value of cedars or reduction in value of remaining property); [Hadacheck v. Sebastian](#), 239 U.S. 394 (1915) (upholding a law barring operation of brick factory in residential area even though it destroyed 92.5% of value of defendant's property); [Mugler](#), 123 U.S. at 669 70 (upholding a law prohibiting manufacture of alcoholic beverages even though it destroyed seventy five percent of the value of defendant's brewery).
- 215 [Lucas](#), 505 U.S. at 1027 (“This accords, we think, with our ‘takings’ jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.); [Ruckelshaus v. Monsanto Co.](#), 467 U.S. 986, 1001 (1984). The Court may also be referring to the government’s ability to define what things may be owned at all or to specify the scope of the grant of benefits. See [Nollan v. Cal. Coastal Comm’n](#), 483 U.S. 825, 833 n.2 (1987).
- 216 See [United States v. Carolene Prods. Co.](#), 304 U.S. 144, 151 52 & n.4 (1938) (explaining that the political process generally protects economic rights as long as legislation does not target a discrete and insular minority).
- 217 [Pa. Coal Co. v. Mahon](#), 260 U.S. 393, 415 (1922); see also [id.](#) at 422 (Brandeis, J., dissenting).
- 218 See Epstein, *supra* note 7, at 60 (“The idea of ownership entails that whatever uses are permitted must fall within the exclusive province of the owner.).
- 219 [Mahon](#), 260 U.S. at 413; see also [Andrus v. Allard](#), 444 U.S. 51, 65 (1979) (“ G]overnment regulation by definition involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.).
- 220 See Claeys, *supra* note 7, at 1574 93. Claeys summarizes the nineteenth century doctrine as follows:
The law of nature entitled every person to a certain set of rights to control, to exchange, and especially to use her own property. “Regulations aimed to secure in practice the equal share of control, disposition, and use rights to which owners were entitled in principle. The main line of “regulations defined and protected property rights or other personal rights. They prevented one owner from overstepping his own fair and equal share of use rights and grabbing some of his neighbors’ in the process. Once these laws had equalized neighbors’ use rights, a smaller class of “regulations restrained and ordered the exercise of rights to enlarge every affected owner’s practical freedom over her property. Roughly speaking, the former prevented nuisances, while the latter forcibly rearranged owners’ uses of property to benefit all of them as a partnership benefits all of its partners. If, however, a law deprived a person of more rights in practice than necessary to satisfy either of these standards in principle, it stripped owners of “property in their use rights.
[Id.](#) at 1554 (footnotes omitted).
- 221 [Munn v. Illinois](#), 94 U.S. 113, 124 (1876).
- 222 “So use your own as not to injure another.
- 223 [Munn](#), 94 U.S. at 124.
- 224 See [id.](#) at 125.
- 225 [Munn v. Illinois](#), 94 U.S. 113 (1876).
- 226 See [id.](#) at 130 33.
- 227 See [Lochner v. New York](#), 198 U.S. 45, 61 (1905).
- 228 [Nebbia v. New York](#), 291 U.S. 502 (1934).
- 229 See [id.](#) at 531 32.
- 230 See, e.g., [W. Coast Hotel Co. v. Parrish](#), 300 U.S. 379 (1937).

- 231 Compare Epstein, *supra* note 7, at 112 25, with [Lucas v. S.C. Coastal Council](#), 505 U.S. 1003, 1024 (1992) (“The distinction between ‘harm preventing’ and ‘benefit conferring’ regulation is often in the eye of the beholder.”), and Rubenfeld, *supra* note 7, at 1099 1100.
- 232 In fact, once *Munn* affirmed the legislature’s prerogative to determine which businesses are sufficiently impressed with the public interest to justify regulation to promote the public good (not limited to restraining the owner from using property to harm others), it was but a small step for the legislature to assume the power of defining essentially the entire sphere of human conduct as sufficiently impressed with the public interest to justify such expansive regulation.
- 233 Cf. Lunney, *supra* note 17, at 1922 (explaining that the destruction of public/private distinction in *Nebbia* “had a profound impact on the Court’s approach to the compensation issue”).
- 234 [Pa. Coal Co. v. Mahon](#), 260 U.S. 393 (1922).
- 235 *Id.* at 415.
- 236 See *supra* text accompanying notes 211–18.
- 237 [Mahon](#), 260 U.S. at 417–18 (Brandeis, J., dissenting).
- 238 *Id.* at 413.
- 239 *Id.*
- 240 See, e.g., [Kaiser Aetna v. United States](#), 444 U.S. 164, 175 (1979).
- 241 See cases cited *supra* note 214.
- 242 See [Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency](#), 535 U.S. 302, 322 (2002). Professor Sax commented on this inconsistency as follows:
Nevertheless, the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results. The principle upon which the cases can be rationalized is yet to be discovered by the bench: what commentators have called the “crazy quilt pattern of Supreme Court doctrine” has effectively been acknowledged by the Court itself, which has developed the habit of introducing its uniformly unsatisfactory opinions in this area with the understatement that “no rigid rules” or “set formula” are available to determine where regulation ends and taking begins.
Joseph L. Sax, [Takings and the Police Power](#), 74 *Yale L.J.* 36, 37 (1964).
- 243 [Armstrong v. United States](#), 364 U.S. 40, 49 (1960); see also [Hodel v. Irving](#), 481 U.S. 704, 714 (1987).
- 244 See, e.g., [Penn Cent. Transp. Co. v. City of New York](#), 438 U.S. 104, 116–17 (1978).
- 245 Rubenfeld, *supra* note 7, at 1081–82.
- 246 See [Loretto v. Teleprompter Manhattan CATV Corp.](#), 458 U.S. 419, 427 (1982) (“When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.”).
- 247 See Rubenfeld, *supra* note 7, at 1125–26.
- 248 See [Loretto](#), 458 U.S. at 423. The Court relied principally on precedent to reach this conclusion. See *id.* at 427–35. The Court’s discussion of the rationale behind that rule is truncated and somewhat muddled. See *id.* at 435–38. The Court properly mentions that a permanent physical occupation involves a transfer of the use of the property from the owner to a third party—i.e., a destruction of the owner’s right to exclude. See *id.* at 435–36. But the Court also makes reference to limitations on the owner’s use and reduction in the value of the property, see *id.* at 436—factors that are present in most cases of government regulation. The Court’s explanation of the rationale for the *per se* rule for physical occupation is therefore incomplete, and the applicability of the principles animating that rule to the utility or other contexts is not made entirely clear by that opinion. Curiously, Rubenfeld concludes that the permanent physical occupation authorized in *Loretto* was not a conversion of the use of the property to the public. See Rubenfeld, *supra* note 7, at 1152. Rubenfeld views the government’s action in that case as functionally equivalent to a condition imposed on the operation of the property as an apartment building. See *id.* at 1153.

Perhaps the owner could have escaped the invasion by changing the use of the property. But the government has nevertheless appropriated the use of the property unless and until the owner takes such action. If the government condemns fifty percent of the output of all cigarette factories, it must pay just compensation for the amount so taken. See [Liggett & Myers Tobacco Co. v. United States](#), 274 U.S. 215, 220 (1927). It does not matter that the owner can avoid the directive by modifying its cigarette factory to produce cigars instead. In addition, as the Loretto Court observed, there is a significant difference between an order authorizing permanent physical occupation by a third party and a regulation that requires the owner to provide its tenants with cable TV hookups. See [Loretto](#), 458 U.S. at 440 n.19. The former expressly transfers the use of property to the cable TV company. See *id.* The latter may benefit the cable TV company but does not entitle it to use the owner's property. See *id.* The principles governing analysis of regulatory conditions are further examined *infra* text accompanying notes 294-318.

249 [Pumpelly v. Green Bay Co.](#), 80 U.S. (13 Wall.) 166 (1872).

250 The Court's rationale, however, was not based on appropriation of use. Instead, the Court referred to the "total destruction" of the value of the property as the foundation for the taking. See *id.* at 177-78. As noted, this focus on the economic impact of the government's action on the owner is an unsatisfactory explanation. See *supra* text accompanying notes 238-42. Subsequently, the Court characterized *Pumpelly* in terms of appropriation of the use of property: "[Pumpelly's] property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation." [Mugler v. Kansas](#), 123 U.S. 623, 668 (1887).

251 [United States v. Causby](#), 328 U.S. 256 (1946).

252 *Id.* at 262 (emphasis added).

253 [Kaiser Aetna v. United States](#), 444 U.S. 164 (1979).

254 *Id.* at 180 ("This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. "); see also [Nollan v. Cal. Coastal Comm'n](#), 483 U.S. 825, 832 (1987) ("We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. ").

255 The Supreme Judicial Court of Massachusetts explained this distinction as follows:

The police power] is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor.

....

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation.... But the property owner] is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain.

[Commonwealth v. Alger](#), 61 Mass. 53, 85-86 (1851).

256 See [United States v. New River Collieries Co.](#), 262 U.S. 341, 343-44 (1923).

257 See [Liggett & Meyers Tobacco Co. v. United States](#), 274 U.S. 215, 220 (1927).

258 Even in *Pennsylvania Coal Co. v. Mahon*, it might be said that the government was appropriating the use of the owner's coal to prop up the structures above ground. See *Rubinfeld*, *supra* note 7, at 1112.

259 See [Ruckelshaus v. Monsanto Co.](#), 467 U.S. 986, 1003-04 (1984).

260 See 17 U.S.C. § 203(a)(5) (2000).

- 261 See [Monsanto](#), 467 U.S. at 1011 n.15.
- 262 See [id.](#) at 1006 08.
- 263 See [id.](#); see also [infra](#) text accompanying notes 274 75.
- 264 See [Monsanto](#), 467 U.S. at 1005.
- 265 See [id.](#) at 992 93, 1010.
- 266 See [id.](#) at 994 97.
- 267 See [id.](#) at 1013.
- 268 See [id.](#) at 1008.
- 269 See [id.](#) at 1011.
- 270 See [id.](#) at 1011 12.
- 271 See [id.](#) at 1013.
- 272 [Id.](#) at 1011. The Court also notes that the effect of the 1978 statute is to deny Monsanto the right to exclude others i.e., it gives others the right to use Monsanto's property. See [id.](#) at 1011 12.
- 273 [Id.](#) at 1011 n.15.
- 274 See [id.](#) at 1007.
- 275 See [id.](#)
- 276 See [infra](#) text accompanying notes 298 300. Different considerations arise when the condition is imposed after the business is already operating and the regulation puts the firm to the choice of complying or forgoing recovery of sunk costs. See [infra](#) Part II.F.
- 277 In the *Legal Tender Cases*, 79 U.S. (Wall. 12) 457 (1871), for example, the Court held that the government's devaluation of currency did not constitute a taking:
The creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six per cent. less in weight and in market value, or to a smaller number of silver dollars. Yet he would have been a bold man who had asserted that, because of this, the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. No such assertion, so far as we know, was ever made. Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.
[Id.](#) at 552.
- 278 [Brown v. Legal Found.](#), 538 U.S. 216 (2003).
- 279 See [Phillips v. Wash. Legal Found.](#), 524 U.S. 156, 172 (1998).
- 280 See [Brown](#), 538 U.S. at 235.
- 281 [Id.](#) at 234.
- 282 The Court recognized this point in [Webb's Fabulous Pharmacies, Inc. v. Beckwith](#), 449 U.S. 155 (1980), in which it held that the government's appropriation of interest earned on amounts deposited in the court's registry in an interpleader action, over and above amounts charged as a fee for services rendered in receiving money into the court's registry, constituted a taking, [id.](#) at 164 65. The Court characterized the government's action as the "appropriation of the beneficial use of the fund, which it viewed as "analogous to the appropriation of the use of private property in [United States v. Causby](#), 328 U.S. 256 (1946).

Id. at 163 64 (emphasis added); see also id. at 164 (“The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry. ”).

283 See [Brown](#), 538 U.S. at 237.

284 See id. at 243 (Scalia, J., concurring).

285 See id.

286 See also infra text accompanying notes 357 63 (discussing time of taking in context of market value).

287 One of the early cases to recognize the propriety of judicial review of utility ratemaking orders spoke in these terms: If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?
[Reagan v. Farmers' Loan & Trust Co.](#), 154 U.S. 362, 410 (1894); see infra text accompanying notes 355 59 for a discussion of “market value.”

288 See [Duquesne Light Co. v. Barasch](#), 488 U.S. 299, 308 (“If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments. ”); id. at 309 (“Justice Brandeis... concluded that what was ‘taken’ by public utility regulation is not specific physical assets that are to be individually valued, but the capital prudently devoted to the public utility enterprise by the utilities' owners. (citing [Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n](#), 262 U.S. 276, 291 (1923) (Brandeis, J., concurring))).

289 See id. at 307 (“As public utilities, both Duquesne and Penn Power are under a state statutory duty to serve the public. ”). Rent control ordinances can also impose comparable obligations when they require the owner to continue renting. In [Fresh Pond Shopping Center, Inc. v. Callahan](#), 464 U.S. 875 (1983), Justice Rehnquist, dissenting from dismissal of the appeal for want of a substantial federal question, regarded a Massachusetts law that prohibited owners from evicting tenants except for the owner's personal use as tantamount to compulsion to continue operating the building for rental, id. at 876 77 (Rehnquist, J., dissenting). Justice Rehnquist viewed the effect of this compulsion as equivalent to physical occupation as in [Loretto](#): “T]he power to end or terminate the physical invasion is under the control of a private party. Id. at 877.

290 For example in [Yee v. City of Escondido](#), 503 U.S. 519 (1992), the Court stated: The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land....

... Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so.

Id. at 527 28. In [Garelick v. Sullivan](#), 987 F.2d 913 (2d Cir. 1992), the United States Court of Appeals for the Second Circuit put it as follows:

A property owner must be legally compelled to engage in price regulated activity for regulations to give rise to a taking. For example, public utilities are under a state statutory duty to serve the public, and must furnish “service on demand to all applicants at government determined rates. Because utilities generally are compelled to employ their property to provide services to the public, the Fifth Amendment requires regulators to provide utilities with reasonable compensation for their services.

By contrast, where a service provider voluntarily participates in a price regulated program or activity, there is no legal compulsion to provide service and thus there can be no taking.

Id. at 916 (citations omitted).

291 See, e.g., [Garelick](#), 987 F.2d at 917 (“The anesthesiologists argue that limiting themselves to outpatient practices is not an economically viable option, since most procedures requiring their services are performed in hospitals; yet, as the law presently stands, economic hardship is not equivalent to legal compulsion for purposes of takings analysis. ”).

292 See [Sidak & Spulber](#), supra note 30, at 105 (summarizing economic literature regarding regulatory opportunism, which “stems from the fact that regulatory assets... are likely to be transaction specific ”).

- 293 As the Supreme Court of New Jersey recognized:
The supposed freedom of landlords to abandon the business is largely illusory. Although in theory the owner of a large apartment building may convert it to other uses or tear it down and construct something else in its place, in practice such a course is ordinarily economically prohibitive, and to force it would be confiscatory. *Hutton Park Gardens v. Town Council*, 350 A.2d 1, 14 n.9 (N.J. 1975). In addition, the United States Court of Appeals for the First Circuit enunciated a similar principle in *Mora v. Mejias*:
It is ordinarily true that a member of an industry which is under price control can withdraw from the field and thus avoid control. But it is wholly unrealistic to apply this principle to the case before us. For the rice importers supply Puerto Rico with the most important staple in the diet of the people. Certainly it was not contemplated that the order would stop the importation of this necessity of the Puerto Rican people. Accordingly the application of the principle that the members of the industry could escape loss by withdrawing from the business of importing rice is not an honest answer to the question at issue. *Mora v. Mejias*, 223 F.2d 814, 817 (1st Cir. 1955) (footnote omitted).
- 294 *Great N. Ry. Co. v. Minnesota ex rel. State R.R. & Warehouse Comm'n*, 238 U.S. 340, 345 (1915).
- 295 *Id.*
- 296 *Id.*
- 297 *Id.* at 346.
- 298 Rubinfeld seems to suggest a similar idea in proposing that a “using” be determined by reference to whether “the state’s interest in taking or regulating something would be equally well served by destroying the thing altogether.” Rubinfeld, *supra* note 7, at 1116. If the harm would exist in the same degree even if the business is destroyed altogether, then the government is “using the property (in Rubinfeld’s terms) and also is effectively compelling the operation of the business to produce those benefits (in our terms). Rubinfeld does not draw out the latter inference. In fact, some of the cases in which he would find no using such as *Loretto* and rent control would seem to qualify as a using under his destruction test. See *id.* at 1152–55. Rubinfeld dismisses these cases as involving the voluntary choice of the landlord to use the property for rental purposes. See *id.* at 1153. Rubinfeld acknowledges the need for some limiting principle and suggests a nexus requirement, but stops short of relating that theory back to his main premise. See *id.* at 1154. Rubinfeld also concludes that rent control could amount to compulsion: If a rent control regime effectively takes over the regulated property for rental use if, for example, it gives tenants and then their children perpetual rights of lease renewal, rights that cannot be overridden by the owner’s decision to change the property’s use then an appropriation has taken place and compensation would be due. *Id.* at 1155. But he does not examine what other circumstances could “effectively” take over the owner’s property. As suggested in the text, a nexus requirement would ferret out those instances in which the government is effectively compelling continued operation.
- 299 Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (enunciating a rough proportionality standard); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987); *infra* text accompanying notes 312–17 (discussing *Pennell v. City of San Jose*, 485 U.S. 1 (1988)).
- 300 It is also possible that the costs of a government regulation that is related to the operation or output of the business might fall more heavily on some industry participants than others. But that may reflect the relative efficiency of various market participants or other factors that are not attributable to government action itself.
- 301 See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 n.19 (1982).
- 302 The Court stated as follows:
It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter’s broad “use dependency” argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger’s physical occupation of his land cannot be so easily manipulated.

Id. at 439 n.17.

303 See Rubinfeld, *supra* note 7, at 1152 55.

304 [Dolan](#), 512 U.S. at 374.

305 See *id.* at 377.

306 See *id.* at 379 80.

307 See *id.* at 392 93.

308 *Id.* at 393. Cf. [Kaiser Aetna v. United States](#), 444 U.S. 164, 179 80 (1979) (holding that the government could have prohibited dredging of marina, but it cannot thereafter grant a navigation easement to the public without paying just compensation: “This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.).

309 If the government both requires the business to pay more for inputs and to continue operating, a taking may exist. See [Charles Wolff Packing Co. v. Court of Indus. Relations](#), 262 U.S. 522, 543 44 (1923).

310 By price controls, we refer to the establishment of maximum prices. We do not address the issues arising from price floors.

311 See *supra* note 106 and accompanying text.

312 [Pennell v. City of San Jose](#), 485 U.S. 1 (1988).

313 *Id.* at 7.

314 See *id.* at 20 21 (Scalia, J., dissenting) (describing the first six factors: “cost of debt servicing, rental history of the unit, physical condition of the unit, changes in housing services, other financial information provided by the landlord, and market value rents for similar units). Justice Scalia noted that application of these six factors ensures that landlords receive “only a reasonable return. *Id.* at 21 (Scalia J., dissenting).

315 See *id.* at 21 (Scalia, J., dissenting).

316 See *id.* at 15.

317 *Id.* at 21 (Scalia, J., dissenting).

318 The rule that a cost based rate is not exploitative does not perfectly fit the San Jose ordinance, which considered market value separate from cost. It is not clear from the Court’s opinion how market value was to be determined in a city in which rents were controlled. In any case, “market value, even if a real market exists, cannot be used to compel a particular owner to provide service below the costs it necessarily incurs. See *infra* text accompanying notes 378 81.

319 For over sixty years, regulators used a ratemaking methodology based explicitly on the incumbent’s historical costs. Under this method, regulators generally set rates to allow recovery of the full amount of prudently invested capital. In the years leading up to the 1996 Act, some states (and the FCC when setting rates for interstate charges) began to adopt a modified version of historical cost ratemaking through a system based on price caps. Under this regime an incumbent’s current rates (which are set to recover historical costs) are taken as a starting point and are adjusted downward each year by a factor reflecting expected productivity gains (and typically are adjusted upward to reflect an inflation index). See generally [United States Tel. Ass’n v. FCC](#), 188 F.3d 521 (D.C. Cir. 1999). By determining rates through these adjustments, which place an upward bound on prices, this system eliminates the need to redetermine periodically an incumbent’s costs. Nevertheless, because the system uses rates designed to recover historical costs as its baseline and modifies them to reflect productivity gains based on actual industry data, it still provides incumbents, overall, an opportunity to recover prudent investment.

320 Telecommunications Act of 1996, [Pub. L. No. 104 104](#), 110 Stat. 56 (codified in scattered sections of 42 U.S.C.)

- 321 See 47 U.S.C. § 253(a) (2000). This requirement was intended to encourage the deployment of competing facilities by ensuring that entrants would have access to parts of the local network that maintained natural monopoly characteristics and therefore cannot economically be duplicated. See [United States Telecom Ass'n v. FCC](#), 290 F.3d 415, 427 (D.C. Cir. 2002).
- 322 See 47 U.S.C. § 251(c)(3). The 1996 Act also required incumbents to allow competitors to interconnect with their local networks, see [id.](#) § 251(c)(2), and to provide their finished services to new entrants for resale at wholesale rates, see [id.](#) § 251(c)(4). These requirements were intended, respectively, to ensure that entrants could achieve ubiquity (i.e., the ability for their customers to call and be called by all telephone subscribers) without replicating the incumbents' entire network, and to foster investment in competing local facilities by allowing entrants to build scale.
- 323 This combination is known as the “UNE Platform” or “UNE P,” and the FCC has maintained the obligation that incumbents provide it for more than eight years, notwithstanding the fact that courts have vacated these rules three times. See *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 18 F.C.C.R. 16,978, 17,128–29, 17,221–23, 17,237 (2003) [hereinafter *Triennial Review Order*], vacated sub nom. [United States Telecom Ass'n v. FCC](#), 359 F.3d 554, 594 (D.C. Cir. 2004); *In re Implementation of the Local Competition Provisions of the Telecomm. Act of 1996*, 15 F.C.C.R. 3696, 3772, 3805, 3846 (1999), vacated sub nom. [United States Telecom Ass'n](#), 290 F.3d at 422–28; *In re Implementation of the Local Competition Provisions of the Telecomm. Act of 1996*, 11 F.C.C.R. 15,499, 15,640–43 (1996) [hereinafter *First Report and Order*], vacated sub nom. [AT&T Corp. v. Iowa Utils. Bd.](#), 525 U.S. 366, 388–92 (1999).
- 324 [Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP](#), 540 U.S. 398, 410 (2004) (internal quotations omitted).
- 325 See *id.*
- 326 See *Common Carrier Services*, 47 C.F.R. § 51.307(c) (2003) (“An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.”); *id.* § 51.309(c) (“A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time.”).
- 327 But see [Qwest Corp. v. United States](#), 48 Fed. Cl. 672, 693–94 (2001).
- 328 47 U.S.C. § 252(d)(1) (2000).
- 329 See, e.g., *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769–70 (1968).
- 330 47 U.S.C. § 252(d)(1)(A).
- 331 *Id.* § 252(d)(1)(B).
- 332 See *First Report and Order*, supra note 323, at 15,844, 15,857–59.
- 333 See *id.* at 15,846–49.
- 334 See *id.* at 15,848–49.
- 335 *Common Carrier Services*, 47 C.F.R. § 51.505(d) (2003).
- 336 See *id.* § 51.505(b).
- 337 See *First Report and Order*, supra note 323, at 15,848–49.
- 338 See *id.* at 15,848.
- 339 47 C.F.R. § 51.505(b)(3). In response to this mandate, state commissions setting TELRIC rates “generally have used straight line depreciation, rather than accelerated depreciation that reflects the anticipated decline in value of assets.” *Triennial Review Order*, supra note 323, at 17,400. In the *Triennial Review Order*, the FCC clarified that, in “calculating depreciation expense,...

the rate of depreciation over the useful life should reflect the actual decline in value that would be anticipated in the competitive market that TELRIC assumes. *Id.* at 17,399. The FCC declined, however, “to mandate a particular method of deciding the useful life of an asset, *id.*, and it remains to be seen whether the states, in setting new rates under TELRIC, will set depreciation rates in a manner consistent with the extreme replacement assumptions of the model. When the FCC's Wireline Competition Bureau set rates for the state of Virginia, pursuant to the FCC's mandate to step in when a state fails to act, see 47 U.S.C. § 252(e)(5) (2000), it continued to use the straight line depreciation schedule and asset lives predicated on events in the real world, and not the hypothetical world of TELRIC. See *In re Petition of WorldCom, Inc.*, 18 F.C.C.R. 17,722, 17,770 74 (2003).

340 See First Report and Order, *supra* note 323, at 15,856 (concluding that the rate of return employed in setting rates during a period of regulated monopoly “is a reasonable starting point for TELRIC calculations, and directing that incumbents can secure an upward adjustment only if they can prove that “the business risks they face in providing UNEs as opposed to the methodological risks “would justify a different rate). In the Triennial Review Order, the FCC reversed field and directed that “states should establish a cost of capital that reflects the competitive risks associated with participating in the type of market that TELRIC assumes. Triennial Review Order, *supra* note 323, at 17,396. As with depreciation, it remains to be seen whether the states, in setting new rates under TELRIC, will establish a cost of capital that reflects the extreme assumptions of the model.

341 See Petition for Expedited Forbearance of the Verizon Telephone Companies at attach. B, tbl. 1, *In re Current Pricing Rules for the Unbundled Network Element Platform* (FCC July 1, 2003) (No. 03 157) (on file with The George Washington Law Review) (describing Pennsylvania switching rates that dropped eighty four percent between TELRIC proceedings held in August 1997 and September 1999, as well as similarly steep discounts in fourteen other states).

342 See *id.* attach. B; see also Michael J. Balhoff et al., Legg Mason, UNE P Relief: Investors Expect Too Much 9 (2002).

343 See Marc B. Crossman, J.P. Morgan Securities Inc., Industry Update No Growth Expected for Bells in 2003, at 15 (2002).

344 See Comments of the Verizon Telephone Companies at attach. 7, P 5, Review of the Comm'n's Rules Regarding the Pricing of Unbundled Network Elements (FCC Dec. 16, 2003) (03 173) (on file with The George Washington Law Review).

345 See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989).

346 See *United States v. Winstar Corp.*, 518 U.S. 839, 868 70 (1996) (plurality opinion).

347 The Supreme Court made a rudimentary error on this point in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002). In their briefs before the Court, incumbents explained that they had invested roughly \$342 billion in the construction of local telephone networks, and they argued that TELRIC produced a large shortfall based on the FCC's estimate that a TELRIC based network covering the entire country could be built for approximately \$180 billion. See *id.* at 525. The Court rejected this argument, suggesting that TELRIC did not create any shortfall because the “net plant investment after depreciation is not \$342 billion but \$166 billion, an amount less than the TELRIC figure the incumbents would like us to assume. *Id.* at 526 (citations omitted). The Court missed the elementary point that the relevant figures for comparison are annual depreciation expenses, not a comparison of TELRIC's total construction cost to the unrecovered portion of incumbents' actual investments. Because TELRIC retains existing depreciation schedules, the \$166 billion that the Court identifies reflecting about half of the incumbents' original expense is set to be recovered in roughly half the time it would take an entrant to recover the \$180 billion expended to build a TELRIC network. In other words, a network that originally cost \$342 billion will have annual depreciation expenses roughly double those of a network that cost \$180 billion. If one assumes straight line depreciation over ten years, for example, the first network would result in \$34 billion in annual depreciation expenses while the TELRIC network would deliver only \$18 billion. TELRIC thus cuts incumbents' cost recovery in half.

348 Under the Constitution a utility confronting a taking by a second sovereign is owed an equal opportunity to recover its prudent expenditures. In addition, if the initial statute governing the utility promises “just and reasonable rates, the utility also has an enforceable expectation rooted in the statute that requires the second sovereign to pay just and reasonable rates rates, in other words, that provide an opportunity to recover prudent expenditures. That is not to say that the Constitution or a statutory guarantee of just and reasonable rates gives incumbents a right in perpetuity to 100% of the returns generated by state ratemaking methodologies. If a state merely promised just and reasonable rates, but nonetheless set rates at a level designed to guarantee an excess return, the federal government would not be bound to a methodology that delivers the same

amount. If, on the other hand, a state expressly promised a utility more than just and reasonable rates for example, as a contractual inducement to enter the business the federal government would be bound to honor that expectation. In such a case, the federal government's taking would be akin to a taking of outputs subject to a requirements contract where the price for the property established in the contract defines the owner's economic opportunity.

349 [Monongahela Navigation Co. v. United States](#), 148 U.S. 312 (1893).

350 See *id.* at 314.

351 *Id.* at 324.

352 See *id.* at 314 15.

353 *Id.* at 314.

354 See *id.* at 344 45.

355 *Id.* at 329.

356 *Id.* at 343.

357 See *id.* at 343 44. The Supreme Court missed this key point in *Verizon*. In deferring resolution of the incumbents' constitutional claims on unrecovered historical costs, the Court first concluded that “there was no ‘switch’ of methodologies, since the wholesale market for leasing network elements is something brand new under the 1996 Act. [Verizon Communications, Inc. v. FCC](#), 535 U.S. 467, 528 (2002). This ignores the obvious fact that the facilities subject to the forced sharing obligation are not new, and the recovery of prudent investment expended to construct these facilities was governed by prior methodologies established by the states. Likewise, the Court rejected the notion that incumbents had any legitimate “expectation that some historically anchored cost of service method would set wholesale rates because] no such promise was ever made. *Id.* “Any investor paying attention, the Court concluded, “had to realize that he could not rely indefinitely on traditional ratemaking methods but would simply have to rely on the constitutional bar against confiscatory rates. *Id.* This analysis ignores the fact that state ratemaking methodologies were put in place to compensate incumbents for a prior taking of their prudent investment, and the expectations created by these “traditional ratemaking methods established the measure of compensation set by “the constitutional bar against confiscatory rates.

358 The Solicitor General, arguing on behalf of the FCC, asserted before the Supreme Court that a taking under the 1996 Act occurs each time a competitor uses a UNE, and that the required measure of compensation for that UNE is the market value of the facilities at the time they are so taken. See Transcript of Oral Argument at 59, [Verizon Communications, Inc. v. FCC](#), 535 U.S. 467 (2002) (No. 00 511) (“The taking occurs, if at all, when they have to surrender some portion of their system to allow someone else to use it.), available at 2001 WL 1196193. In fact, the taking occurred when the 1996 Act was passed when competitors were granted a right to use incumbent facilities. As is the case with an easement over land, the taking occurs when the servitude is imposed, not every time an interloper uses the property. The constitutionally mandated measure of compensation for this taking is the economic opportunity associated with that property at the time the servitude is imposed. This value can only be determined by reference to the ratemaking methodologies used by the states to compensate incumbents for the earlier taking of their prudent expenditures.

359 [Monongahela](#), 148 U.S. at 338.

360 [United States v. Miller](#), 317 U.S. 369, 374 (1943).

361 In [United States v. New River Collieries Co.](#), 262 U.S. 341 (1923), the Court enunciated this principle as follows: The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market. The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.
Id. at 345.

Furthermore, it has long been the rule that goodwill and going concern value are not to be included in a rate base that is properly computed on the basis of the utility's expenditures. See, e.g., [Galveston Elec. Co. v. City of Galveston](#), 258 U.S. 388, 396 97 (1922). But when the government seeks to reduce the rate paid to the utility by invoking the market value of the utility's physical assets, that value cannot be separated from the income producing potential of the property. See [id. at 396](#) ("In determining the value of a business as between buyer and seller, the goodwill and earning power due to effective organization are often more important elements than tangible property.).

362 [Kimball Laundry Co. v. United States](#), 338 U.S. 1 (1949).

363 [Id. at 12 14.](#)

364 See Reply Brief for Petitioners Federal Communications Commission and the United States at 8, [Verizon Communications, Inc. v. FCC](#), 535 U.S. 467 (2002) (No. 00 511).

365 See, e.g., First Report and Order, [supra](#) note 323, at 15,872; Brief for Respondents Federal Communications Commission and the United States at 35 36, [Verizon Communications, Inc. v. FCC](#), 535 U.S. 467 (2002) (No. 00 511).

366 See, e.g., First Report and Order, [supra](#) note 323, at 15,872.

367 See [United States v. 564.54 Acres of Land](#), 441 U.S. 506, 511 (1979).

368 See [Kimball Laundry Co. v. United States](#), 338 U.S. 1, 5 (1949) (" L]oss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it... is properly treated as part of the burden of common citizenship.).

369 See, e.g., [Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n](#), 262 U.S. 679, 690 (1923) ("Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. (emphasis added)); [San Diego Land & Town Co. v. City of National City](#), 174 U.S. 739, 757 (1899) ("What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. (emphasis added)).

370 See [supra](#) text accompanying notes 80 93.

371 See [supra](#) text accompanying note 57.

372 See, e.g., [In re Permian Basin Area Rate Cases](#), 390 U.S. 747, 769 72 (1968).

373 [In re Permian Basin Area Rate Cases](#), 390 U.S. 747 (1968).

374 See [id. at 761.](#)

375 See [id. at 770 72.](#)

376 See [id. at 770 73.](#)

377 [United States v. Pewee Coal Co.](#), 341 U.S. 114 (1951) (plurality opinion).

378 [Id. at 117 18.](#)

379 See [id. at 115 16.](#)

380 See [id. at 117.](#)

381 [Id. at 117 18.](#) Justice Reed concurred but would not have awarded compensation had the firm been losing money with or without the government's temporary occupation. See [id. at 121](#) (Reed, J., concurring).

382 [United States v. New River Collieries Co.](#), 262 U.S. 341 (1923).

- 383 *Id.* at 343.
- 384 *Id.* at 343, 345 (internal quotations omitted).
- 385 *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).
- 386 *Id.* at 382.
- 387 See *id.* at 375.
- 388 See *id.* at 382 83.
- 389 *Id.* at 381.
- 390 *Id.* at 383 84.
- 391 See *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961); *United States v. John J. Felin & Co.*, 334 U.S. 624, 629 30 (1948) (plurality opinion).
- 392 See *United States v. Miller*, 317 U.S. 369, 374 75 (1943) (declaring that in the absence of an objective standard of comparable transactions, market value is merely a “guess ; “ w]here, for any reason, property has no market, resort must be had to other data to ascertain its value); see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 n.10 (1989) (noting the “practical problems with fair value, which might be overcome by the emergence of a real “market for wholesale electric energy that “could provide a readily available objective basis for determining the value of utility assets (emphasis added)); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979) (listing “public facilities such as roads or sewers as within the category of property “so infrequently traded as to render the concept of market value meaningless).
- 393 See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949) (“ W]hen the property is of a kind seldom exchanged, it has no ‘market price, and then recourse must be had to other means of ascertaining value....).
- 394 The FCC sought to rehabilitate TELRIC by suggesting that it reflects the real market value of incumbent facilities. The core of this argument is an assertion that the mere availability of new technologies drives down the market value of existing network elements to the price of the newest, most efficient replacement.
- This argument confuses the market for a single piece of a network (e.g., an airplane) with the market for the output of that network (seat miles). As the FCC has explained, TELRIC purports to measure the cost of “the entire quantity of the network element provided. First Report and Order, *supra* note 323, at 15,850. Thus, for example, TELRIC measures the cost of all of the switching output generated by the local network not the cost of a single switch or the output of a single switch. Further, the time horizon considered by TELRIC is a “period long enough that all costs are treated as variable and avoidable. *Id.* at 15,851. There are no fixed costs in TELRIC. Consequently, although TELRIC's name suggests that it is an incremental cost methodology, in fact, what TELRIC actually measures is the average cost of the total output generated by a class of network elements.
- The relevant question, then, is what impact the presence of a new technology has on the market value the average cost of the total output generated by a class of elements. Or, returning to the airline example, what impact does the existence of a new, fuel efficient Airbus have not on the price of a United Airlines airplane but on a United Airlines seat mile?
- The answer, of course, is that the introduction of a new, more efficient Airbus does not immediately drive down the market value of a United Airlines seat mile to the average seat mile cost of an entrant operating a network comprised exclusively of new Airbuses. Rather, the new technology would reduce the average costs of the incumbent, and of new entrants, slowly, over time as they incorporate the new technology into their fleets. The FCC is therefore wrong that the price of new, more efficient technologies defines the market value of the total output generated by ILEC elements. Because firms in capital intensive industries practice anticipatory retardation replacing old equipment with new over time the availability of new, more efficient equipment has only a gradual impact on the average cost that TELRIC purports to measure.
- 395 See Brief for Respondents Federal Communications Commission and the United States at 13, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) (No. 00 511).
- 396 *Id.*

397 The 1996 Act explicitly requires that implicit subsidies be phased out of rates. See 47 U.S.C. § 254(d) (e) (2000); see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 393 94 (1999) (noting that § 254 “requires that [implicit] universal service subsidies be phased out”).

The 1996 Act... required that the implicit subsidy system of rate manipulation be replaced with explicit subsidies for universal service because Congress recognized that implicit subsidies “could not continue under a] market based regime in which a company charging supracompetitive rates to provide a subsidy would “be undercut by a competitor.

Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 318 (5th Cir. 2001). This iron rule of economics was applied to UNE pricing in *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1169 70 (D. Or. 1999), in which the incumbent asserted that UNE rates established by a state commission were confiscatory. The court rejected the defendants' contention that there was no confiscation as long as the incumbent was making money overall:

If GTE is forced to sell unbundled network elements or finished services at below cost to MCI, the PUC cannot simply compensate GTE by raising retail prices for other telephone services, because competitors could then under price GTE.

....

... T]he Act expressly requires that network element prices be based upon cost, and that GTE otherwise receive just and reasonable compensation for the services it provides to MCI and for any other takings effected by the Act. The Act does not say that GTE's other customers must pick up the tab.

... Suffice it to say that this court construes the Act to require that just and reasonable compensation be paid for the services GTE provides to MCI, and except as specifically contemplated in the Act in the case of resale] the PUC may not underprice those services in hopes that revenue from other customers or products will make up for the shortfall.

Id. at 1170 (emphasis added) (citations and footnotes omitted).

In addition, UNE rates that fail to cover the incumbent's actual forward looking costs violate the 1996 Act's requirement that such rates be “nondiscriminatory. 47 U.S.C. §§ 251(c)(3), 252(d)(1). As explained above, the incumbent cannot possibly achieve the “efficiencies assumed by TELRIC, giving competitors an artificial cost advantage in competing for retail customers. The incumbent, on the other hand, must continue to incur its actual operating and forward looking capital costs associated with these UNEs in order to compete for the same retail customers. This structural cost advantage for competitors is inherently discriminatory.

398 Cf. *L.A. Gas & Elec. Corp. v. R.R. Comm'n*, 289 U.S. 287, 313 (1933) (holding that “past profits cannot “be used to sustain confiscatory rates”); *Bd. of Pub. Util. Comm'rs v. N.Y. Tel. Co.*, 271 U.S. 23, 31 32 (1926) (“The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation is the company's compensation for the use of its property.... T]he law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future.”).

73 GWLR 429

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HIGH COURT CLERKS AND APPELLATE LAWYERS DECRY VANITY FAIR ARTICLE

Legal Times

September 27, 2004 Monday

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Section: Vol. 27; No. 39

Length: 689 words

Body

Court Watch

Letters

Response of Former Supreme Court Law Clerks and Supreme Court Practitioners to The Path to Florida, appearing in the October 2004 issue of Vanity Fair.

According to an article recently published in Vanity Fair magazine (David Margolick, Evgenia Peretz, and Michael Shnayerson, The Path to Florida, Vanity Fair, Oct. 2004, at 310), a number of former U.S. Supreme Court law clerks, who served during the Court's October 2000 term in which Bush v. Palm Beach County and Bush v. Gore were decided, intentionally disclosed to a reporter confidential information about the Court's internal deliberations in those cases. If true, these breaches of each clerk's duty of confidentiality to his or her appointing justice -- and to the Court as an institution -- cannot be excused as acts of courage or something the clerks were honor-bound to do. Contributors, Vanity Fair, at 102. To the contrary, this is conduct unbecoming any attorney or legal adviser working in a position of trust. Furthermore, it is behavior that violates the Code of Conduct to which all Supreme Court clerks, as the article itself acknowledges, agree to be bound.

Although the signatories below have differing views on the merits of the Supreme Court's decisions in the election cases of 2000, they are in their belief that it is inappropriate for a Supreme Court clerk to disclose confidential information, received in the course of the law clerk's duties, pertaining to the work of the Court. Personal disagreement with the substance of a decision of the Court (including the decision to grant a writ of certiorari) does not give any law clerk license to breach his or her duty of confidentiality or justify breaking an obligation [he or she would] otherwise honor. The Path to Florida, at 320.

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Editor's note: The OT listing next to many of the names above refers to the Supreme Court October Term in which they served as law clerks. Names with no OT listed were not Supreme Court clerks. An article about the statement and the Vanity Fair article it refers to appears on Page 11.

Load-Date: April 17, 2011

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NewsRoom

10/8/03 WashingtonPost.com (Pg. Unavail. Online)
2003 WLNR 19245205

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October 8, 2003

Tackling Terrorists, Quickly

The FBI faces an enormous challenge: to preempt terrorist attacks and to do so without infringing on civil liberties. To have any chance of success, the FBI must be able to use every legitimate weapon in law enforcement's arsenal, especially those that allow investigators to pursue leads as swiftly as possible. When terrorists come out of their sleeper cells to put their deadly plans in motion, they leave evidentiary tracks: financial transactions, hotel reservations and travel records. The FBI is then in a race against time. If lives are to be saved, agents must be able to pursue these tracks with lightning speed.

This is why the president's call to give the FBI administrative subpoena authority is crucial [front page, Sept. 11]. Congress first conferred administrative subpoena power on the Interstate Commerce Commission in 1894. Since then, dozens of federal agencies have been granted the right to seek records of public transactions by subpoenas issued in the name of executive agencies and enforceable by federal courts. Thus, for example, the IRS or the Federal Election Commission can obtain such records swiftly through an administrative subpoena when investigating tax evasion or violations of the campaign finance laws. It is ironic that this same power is not given to our counterterrorism agency, where speed is of the essence and the stakes are life and death. WILLIAM P. BARR McLean The writer was attorney general under President George H.W. Bush.

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Other Indexing: (WILLIAM BARR; George Bush)

Word Count: 238

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NewsRoom

TELECOMMUNICATIONS

ARE CLASS ACTIONS LAWYERS SYSTEMATICALLY TARGETING REGULATED INDUSTRIES?

REMARKS BY WILLIAM BARR AND BARBARA HART*

MR. WILLIAM BARR: On June 20 of this year, the Second Circuit decided a case called *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, the so-called *Trinko* case, which, we believe, radically changed the antitrust law in two respects: it expanded the scope of duties that incumbent firms owed to rivals; and it changed the traditional standing limits that barred suits by indirect purchasers. It significantly broadened the kind of conduct that, it could be argued, violated the antitrust laws, and it significantly broadened the scope of the people who can bring these claims.

Since *Trinko* was decided, 25 class actions have been filed in the Second Circuit. Among those, I believe, twelve were filed against Verizon, six against SBC. Others have been filed outside the Second Circuit against Qwest, and BellSouth.

A fellow named Dan Berninger, who appears to be something of a class action apparatchik, has said that the goal is to turn the Bell companies into the next “asbestos” and “big tobacco”. I think we all know what he means by that. I contend that these actions are really an end run around the regulatory process and will stultify the whole regulatory regime that has been developed by the FCC.

Generally, antitrust laws don’t require companies to help their rivals. Even monopolies have no obligation to assist in any way companies that are attempting to compete against them. Basically, the antitrust laws impose negative duties and enjoin certain objectionable conduct. There are no affirmative duties to help or cooperate with their rivals.

Something that may appear, at first blush, to be an extremely narrow exception that has never been recognized by the Supreme Court and has rarely been invoked by lower courts is the so-called Essential Facilities Doctrine. It has been sparingly employed, and in certain narrow contexts it has been held that firms have to provide access to their facilities to other firms.

But in the context in which it’s been previously applied, it has involved two markets—market one and market two. The notion has been that if facilities in market one are essential to competing in market two, then under certain circumstances, they will be made available to someone who is trying to compete in market two.

This has been done where the company that has the facilities in market one has voluntarily made them available to others. So the terms and conditions have been established in the marketplace. They are things to be set by courts in the abstract, but there’s a course of dealing that essentially sets the benchmark. In that context, the courts have said that you can’t refuse to deal with someone to keep them out of market two. You have to allow them access to your

facilities on the terms and conditions that you’ve essentially set as reasonable by your own course of dealing.

Moreover, in these contexts the incumbent who owns the facilities has not been displaced from their facilities and they are not being required to reconfigure their business. This has only heretofore been a claim for access that a rival firm or a competitor can bring. Customers or consumers have never been allowed previously to make claims that business that they’re buying from should have Essential Facilities rights in someone else’s facilities.

That’s the antitrust background.

In 1996, the Telecommunications Act was passed, and, as most of you know, the so-called Incumbent Local Exchange Carriers (ILECs), or primarily the Baby Bells, have been required under that act to provide access to their facilities to competing firms that are coming in to provide local phone service. This is a situation in which you’re dealing with one market, and Congress is trying to get people to come in and compete in that market, and as part of that regime, Congress is saying to the incumbents that those entrants have to be allowed to use your facilities on certain terms.

The Act tells the FCC to set out elaborate rules about what has to be provided on what terms and conditions, and at what price. Accordingly, the FCC has set up what has to be one of the most complex and pervasive regulatory regulatory regimes in history.

It involves hearings before state regulatory commissions on the setting of pricing. Complex and numerous rule-makings on the various pros and cons of allowing access to certain parts of the facility are weighed. There are processes for adjudication of complaints that insufficient access is being provided. There are working groups where all sectors of the industry, the entrants and the incumbents alike, get together to discuss how to provide access.

This has required substantial reconfiguration of the local telephone network. It’s involved billions of dollars of investment in new software and processes. These networks were not designed to provide a platform for multiple providers, and now they have to accommodate multiple providers. Extremely elaborate software, systems, and databases have had to be developed to do this.

The carrot for the ILECs to do this is that, once it’s done and the FCC says that you’ve done this and therefore your market is sufficiently contestable or open to competition, then the local company can compete in the long-distance markets that heretofore the local companies had been prohibited from competing in.

In short, there’s an elaborate process by which the issue of whether you have complied with the Act—and there-

fore, whether you can now compete to provide long-distance service—is adjudicated. These fights have been going on for several years. Basically, the long-distance companies are also CLECs (Competitive Local Exchange Carriers), and they're coming competing in local markets against the ILECs. They're among the companies that are trying to get access and use the facilities of the incumbents in local markets.

Long distance providers are coming in and using those facilities at very low prices, and at the same time they're trying to keep the local companies from moving up into the long-distance market. So there are usually scorched-earth regulatory battles as to whether the local companies are complying. The InterXchange Carriers—the long-distance companies—would say that you're not complying; you failed to do this, you failed to do that, you haven't done this well enough. They're trying to block the local company from the *quid pro quo* of moving up and competing in the long-distance market.

So that's the framework.

Two years ago, the Seventh Circuit, in *Goldwasser v. Ameritech*, dealt with a case brought by a CLEC that was complaining about the quality of access that was being provided by the local company and saying that the local company wasn't going far enough in providing access to them. The District Court dismissed the case and the Seventh Circuit upheld the District Court.

Barbara Hart will give her view of the case, but the *Goldwasser* case, in my view, said that the claims brought by the CLEC were really duties not under the antitrust laws, but under the statute. They were affirmative duties to help that were created by Congress specifically in this area.

Furthermore, it's not proper to invoke the Essential Facilities Doctrine under the antitrust law in this particular context because it was incompatible with this regulatory regime that was established by Congress. More than a dozen district courts have followed *Goldwasser* and have dismissed these cases as they've been brought.

Trinko was then brought in New York. Trinko is a plaintiffs' class action law firm. It was a customer of AT&T, which, as I said, was a CLEC and therefore was trying to buy products on a wholesale basis from Verizon to resell to its customers.

There was an incident during Verizon's entry into long-distance in New York in which a piece of software in our wholesale order-processing apparatus, which was provided by a third party, failed. As a result, when CLEC's competitive companies were placing their wholesale orders, the orders were being fulfilled, but the part of the software that notified the CLEC that its order had been received and was being processed wasn't working in some cases.

AT&T made a huge fuss about this in the regulatory regime because it was asking the FCC to take away our permission to go into long distance, saying that our systems weren't up to snuff and that they were being impeded from competing. Largely to resolve this situation so that our ability to go into the long-distance business was not taken away, we agreed with the FCC that we would pay CLECs \$10 million

because of this problem, namely, the failure to notify them in a certain group of orders over a relatively brief period of time.

Again, there was no evidence of actual service disruption—these orders were in fact filled, and the customers did get the service.

The Trinko firm brought a class action based on this incident for the customers at AT&T on the grounds that AT&T's business was disrupted by this and therefore they as AT&T customers suffered injury. We petitioned the Second Circuit to dismiss, on the grounds that there is no antitrust duty to spend money and create this kind of elaborate software and processing system.

These were affirmative duties to assist created by the Act, not under the antitrust laws. Moreover, this would be the first time in history that an indirect purchaser, a customer of the firm, would be allowed to bring an Essential Facilities case. We lost on those grounds. As far as the case, we're seeking cert to the U.S. Supreme Court.

Among other difficulties with this case, it requires inquiry as to whether this is a proper area to expand the concept of Essential Facilities and develop this court-fashioned doctrine and to expand access to the courts to indirect purchasers, in this regulated context.

This idea of allowing hundreds of district court juries and treble damage actions to be deciding the terms of access to our facilities is fundamentally incompatible with the regulatory regime and Congress's plan under the Telecommunications Act.

The Telecommunications Act is clearly consistent with the notion that the FCC should be the one determining whether rivals need access. The Act did not give blanket access to rivals. It said that the FCC under a particular statutory standard should determine what parts of the network they would get access to.

The courts have said that this requires a balancing test. The purpose here is not just to be as profligate as you can in turning over parts of the networks to rivals, because that is counterproductive in terms of investment.

The intent of the Act was that you balance various public interests in determining how much access you give and for how long, and to stimulate investment not only by entrants, but also to keep the incentives for investment by the incumbents. That is a judgment call that the FCC is supposed to make by weighing a number of circumstances.

In a number of these cases, the basis of the claim is that the customer should have access to something that they weren't given access to; the FCC hadn't yet ordered access, but they should have had access under the antitrust laws. The FCC is meanwhile in the process of determining whether they should have acted, and whether, in fact, public policy should allow access to these facilities.

Trinko also seems to create a completely separate regime that is potentially inconsistent with FCC determinations of terms of access. The FCC sets highly articulated rules, such as that you have to provide something in 90 days after the order. Or it has to be at such and such a price. The

prices, by the way, are huge discounts that have never been required in the Essential Facilities context.

So as the FCC sets these terms and conditions, but part of these class actions suits have to do with the terms and conditions that we provided access on. They said that we didn't provide it fast enough. Well, we provided it within the time required by the FCC. Yes, they said, but our claim is not under the Act; it's under the antitrust laws—and under the antitrust laws, you may have had a duty to provide it faster.

The third area is the multiplicity of entities making the decision. The whole rationale for the Telecommunications Act and for the FCC setting out its multi-thousand-page orders dictating all the details to the states as to how this was to be implemented was that you could have one national entity that could make some of these decisions—because in many respects, these are national markets.

Under *Trinko*, we could have every district court judge and jury in America making these decisions as to what terms and conditions of access are reasonable under those circumstances.

It's also fundamentally inconsistent with the ultimate finding of competitive injury. In order to have an antitrust case, the issue is whether competition has been adversely affected. The FCC is ruling precisely on that issue when it determines whether the local company can get into long distance. In 80 percent of the markets that we've applied to so far to move into long distance, there have been huge battles as to whether the market is open. They get to put in their proof, and we put in our proof. They throw in everything but the kitchen sink, and they show every little flaw and glitch in our software system to claim that ours is an inadequate performance. The duly appointed commissions, the state commission, and the FCC make a ruling. We have won every one of those cases. The markets are open, and competition has not been adversely affected. Yet the core of the antitrust case is that we've impaired competition in that market.

The other area that is affected is the skewing of the regulatory process. Once you allow this second front—litigation in district courts under the broad principles of the antitrust law—to open up, then what parties ask for and are willing to agree to in the regulatory process, to the extent to which the parties actually come in and treat the regulatory process with respect and make their full case, are fundamentally altered.

We may be less willing to agree in the regulatory process to make certain concessions because now they've become the floor of district court treble damage antitrust liability. By the same token, companies may be changing what they seek in the process in order to position themselves for their second bite of the apple in court.

We've already seen evidence that some actors are essentially sandbagging the regulators, because rather than fighting out the battles in the regulatory process, they think that they don't have to worry about the regulatory process because they can hold this thing up and make their case in a district court.

This represents a radical expansion of antitrust principles, and is clearly not an arena for judges to be fashioning and expanding this Essential Facilities Doctrine because it's incompatible with the very detailed regulatory regime that was put in place by Congress.

MS. BARBARA HART: I have some prepared remarks, but unsurprisingly, I want to comment that I couldn't differ more strongly on the rendering of the *Trinko* decision. The *Trinko* decision was not a breakthrough in terms of antitrust standing, given that it followed Supreme Court and Third Circuit precedent to the letter in analyzing who the injured party and who an appropriate party is, and it was squarely within the *McCready* decision of the Third Circuit on *Illinois Brick*. Moreover, it was not a breakthrough decision on the issue of clear repugnancy that there was some type of conflict between the Telecommunications Act and application of the antitrust laws.

Finally, on the *Trinko* decision, the Second Circuit is very measured in its approach. It talks about damages as not being disruptive to the regulatory process or interfering with the regulators' oversight of the industry, whereas it would be more cautious in applying a remedy of injunctive relief.

So it's a very well-measured decision and within the confines of a great deal of precedent. I would actually wonder what ramifications it has for our *Goldwasser* decision, which we had the unfortunate experience of losing in the Seventh Circuit for reasons that Bill articulated.

As for what I had intended to say, I guess the not-at-all-subtle issue for today's caucus is to ponder whether class actions are engaging in undue or counterproductive efforts by targeting regulated industries. This discussion is akin to saying that the problem is not that there are maggots in your meat, but that Upton Sinclair dared to write about them.

In today's environment, where companies are regulated by the FCC or the SEC, or local regulatory authorities, and are imploding as Enron and WorldCom did, it's almost laughable to think that regulations are sufficient or vigorously enforced and that there's no role for the class action bar.

Uniformly, courts and regulators, including numerous previous SEC chairs and recently, the Seventh Circuit in the *ADM High Fructose* antitrust case, have recognized the significant role that the class action plaintiffs' bar plays in augmenting enforcement and regulatory efforts.

The government agencies are stretched beyond their abilities in light of budget constraints, and therefore also in light of staffing constraints. Let's face it: corporations engage a very high-powered, very sophisticated defense bar. They're not sitting there like pigeons for us to attack. They have their own defenses, which certainly are used in response to government inquiries.

Moreover, the idea that we target highly regulated industry is just not well taken. Undertaking cases where one is likely to encounter doctrines such as filed rate preemption, implied repeal, or primary jurisdiction is not typically what we do, for a variety of reasons, including the fact that those cases are expensive and we often lose them. So it doesn't make a lot of sense.

In the *Goldwasser* case, as has been discussed, we alleged violations of the Sherman Act and the Telecommunications Act based on allegations that Ameritech was routinely failing to comply with collocation requests and interconnection requests, akin to what has been alluded to regarding access for the carriers, which is mandated under the 1996 Act.

The idea is that these entities are already monopolies and that they are supposed to give access. We spent a lot of money on experts investigating the facts of this case; they even found that the fax machine was intended to run out of paper. The fax machine was supposed to take a lot of calls, but it would be busy for hours and hours so that the interconnection requests were going unanswered. It was intended not to comply with the requirements of the 1996 Act.

That case was very costly for my firm and for other firms that undertook the effort. We were dismissed by the district court based on filed rate and ultimately by the Seventh Circuit, based on the idea that the Telecommunications Act had imposed its own regulatory regime and that the antitrust laws wouldn't apply.

It's hard for class action lawyers to stay in business that way. We aren't targeting highly regulated industries.

Similarly, we've encountered issues such as implied repeal or plain repugnancy, which was alluded to in the *Trinko* case in the *In re options antitrust litigation*. Our firm and others spent significant time and resources litigating claims that the exchanges were not competing on the listing of options.

We all know what the benefits of competition are, and we all want to enjoy those benefits. We were alleging that the exchanges were not competing on the listing of options. All the exchanges, except the New York Stock Exchange, which had the most *de minimus* risk in this case, settled the case for \$84 million. The New York Stock Exchange has thus far successfully held up that settlement by arguing the doctrine of implied repeal.

Judge Conway Casey agreed with the NYSE that plaintiff's claims were preempted despite the amicus views of the Justice Department and the SEC to the contrary. Judge Casey pointed to the fact that the SEC, in establishing the options market, had originally required only single listing of options.

In light of the prior regulation of the options market, Judge Casey found that the SEC, despite its argument in support of the application of the antitrust laws, could ultimately reassert its jurisdiction. He therefore held that he lacked jurisdiction to approve the settlement.

The idea was that somehow the SEC could whipsaw the exchanges by regulating, and then not regulating, and then one day deciding to reenter and reregulate. Therefore, the speculation regarding this whipsaw effect precluded—clearly, there was a plain repugnancy between the antitrust laws and the application of the antitrust laws—the possible reentry to regulate the options market.

The appeal in that case has been pending before the Second Circuit for over a year. So that \$84 million settlement is just hanging in limbo. I would tend to say that the *Trinko* decision bodes well for the outcome that the Second

Circuit will ultimately reach in light of the *Trinko* decision's holdings on the issue that there has to be a clear repugnancy between the specific regulatory regime and the antitrust laws for there to be a non-application of the antitrust laws.

My point being, we don't target regulated industries, except that, to some extent, all American industries are regulated. And to the extent that an industry is extensively regulated, it typically sends up flags as we analyze our cases, that we may have a hard row to hoe if we decide to undertake such a case for the reasons of the doctrines that I've already mentioned.

Yet when we do undertake such cases, we bring a real benefit. First, we compensate the victims. You'll find that almost no regulator compensates the people who have been injured.

For instance, in the CFTC case against Sumitomo, where the allegation was manipulation of the copper market, the CFTC got a breakthrough fine and a breakthrough recovery for the CFTC. Notwithstanding that, while a small portion of those monies was available to the victims of the copper-market manipulation, that small amount of money was not compensatory.

In fact, the class action bar—and I am involved in this case—will have ultimately recovered close to \$100 million for the companies. In this instance, we're talking about companies—small businesses and large businesses and probably some telecommunications carriers—that purchased the manipulated copper, and they will get back money. Not from the regulators, but from the class action bar.

Second, we push the dialogue about issues. Look at tobacco. The tobacco industry argued vigorously that it was a highly regulated industry. That was its effort to take the sword and turn it into a shield. It said no, the class action bar and the attorneys general cannot sue us; we are a highly regulated industry.

The plaintiffs' bar and the attorneys general, through discovery of the fact that the tobacco industry was less than forthcoming with regard to additives in cigarettes that increased addictiveness and other knowledge that the tobacco companies had, helped bring about an enormous recovery that has changed the public's perspective about both the trustworthiness of big tobacco and the health effects of smoking.

Ultimately, we will have saved lives. So the dialogue, the pushing forward, where some might say we shouldn't be engaged in a policy discussion—to silence this additional voice would be very unfortunate.

This is also illuminated by the issue of prescription drugs. Class actions brought regarding monopolization by the brand name manufacturers will probably ultimately recover close to \$1 billion cumulatively when you look at the monopolization of drugs such as Synthroid, Coumadin, Partisem, and some that are still pending regarding Buspar and Hytrin.

There the brand-name drug manufacturers have gamed the system, a highly regulated industry answering to the FDA. The Hatch-Waxman Act has supposedly put all

kinds of incentives into the industry for generic competition. Yet the industry is still gaming the system, and the class action bar has led to hundreds of millions of dollars in recoveries. In the end, it'll be close to a billion dollars in recovery for health-insurance companies as well as for consumers, and for union health and welfare funds that are paying the increased cost for prescription drugs.

In participating in that action, we've shaped the dialogue. Probably all of you are well aware that the Bush administration has come out in support of amendments to the Hatch-Waxman Act. We made that a hot-button and a palatable issue that the Republicans had to get behind. Drugs are clearly a regulated industry, yet I would argue that they weren't effectively regulated and that there was a role for the class action bar to play.

The other benefit that we bring to bear is our independence. Class action lawyers have the incentive to bring viable lawsuits, unlike the regulators, where we often see a revolving door from government to industry and sometimes back again.

I don't know why the plaintiffs' class action securities lawyers are never chosen to chair the SEC or even to act as a commissioner. Instead, you have the selection of someone whom the accountants are obviously comfortable with, a selection of cold comfort to investors and pensioners.

In this regard, the SEC is not unique. Regulated industries are big lobbying, big contributing, big players, and the regulators are not immune. Because the class action bar has the incentive to scrutinize, we will shine the harsh light on these industries, and we do have a role to play.

* William Barr is Executive Vice President & General Counsel, Verizon Communications. Barbara Hart is an attorney with Goodkind Labaton Rudoff & Sucharow LLP. Their remarks were part of The Federalist Society and Manhattan Institute's conference: "The New Class Action Targets: Are Class Actions Undermining Regulation in the Fields of Financial Services, High Technology, and Telecommunications?", held on October 30, 2002 at the Harvard Club in New York City.

Are military tribunals appropriate?; Yes, they conform to law

Milwaukee Journal Sentinel (Wisconsin)

November 24, 2001 Saturday, STATE EDITION

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Section: NEWS;

Length: 876 words

Byline: WILLIAM P. **BARR** AND ANDREW G. MCBRIDE

Body

The American Civil Liberties Union and some national commentators have criticized President Bush's executive order allowing the exercise of military jurisdiction over those suspected of conducting the Sept. 11 attacks. Some critics claim the president has the burden of showing that civilian courts are inadequate to the task. Others fear the order threatens civil liberties or is of dubious constitutionality.

The critics have it exactly backward.

In confronting the al-Qaida network, this country is exercising its powers of national defense -- its "war powers" -- to defend itself against attacks by an organized foreign force.

When the country is engaged in such a "state of armed conflict," it has long been recognized under both our Constitution and international law that foreign forces are subject to trial by military tribunal for any offenses against the laws of war.

It is equally well established that a foreign national who is engaged in armed conflict against the United States has no constitutional claim to the rights and procedures that would apply to a domestic criminal prosecution.

The president's decision to provide for military tribunals is well grounded in constitutional law, historical precedent and common sense.

His decision will actually preserve our civil liberties by refusing to insist upon their application in a context where their incongruity would inevitably lead to their erosion.

There can be no doubt that this country is engaged in an armed conflict against a foreign enemy. Al-Qaida is a well-organized foreign force that has mounted numerous attacks against this country. Our NATO allies have expressly recognized that a state of conflict exists.

Al-Qaida members are clearly subject to the laws of war. Their violation of those laws is also clear: They have carried out unprovoked surprise attacks out of uniform with the clear intent to target unarmed civilians. Their status under international law is that of "unlawful belligerents," and centuries of precedent support trying them for such offenses before military tribunals.

Since the Revolutionary War, this country has used military tribunals to try foreign nationals for offenses committed during armed hostilities. After World War II, more than 100 German soldiers were tried and sentenced by American military tribunals for violations of the laws of war, including a massacre of American prisoners of war at Malmedy.

DOUGLAS RATHBUN

Are military tribunals appropriate?; Yes, they conform to law

The most apt precedent is the case of the eight Nazi saboteurs. In June 1942, the Germans landed two groups of saboteurs on Long Island and the Florida coast. Armed with explosives, U.S. currency and civilian clothing, they intended to attack railroads, bridges and industrial plants to create terror and disrupt the American war machine.

Upon their capture, President Roosevelt ordered their trial before a military commission composed of seven U.S. Army officers. All eight were convicted, and six were sentenced to death and executed.

It is a fundamental error of reasoning to take the safeguards that apply in the realm of traditional domestic law enforcement and, as the president's critics would, artificially extend them into the entirely distinct realm of an armed conflict against a foreign aggressor.

Imagine a war fought within the strictures of the American criminal justice system. Would a lethal bombing or commando attack on an enemy base have to be predicated upon a finding of probable cause by a judicial officer? Would the president need a wiretap order to justify monitoring enemy communications? Could the president base his decision to attack and kill occupants of the base only upon evidence admissible in a federal court?

Terrorists are waging war against the U.S., and we are confronting them not to enforce our laws against them, but to defeat the security threat they represent. Our body politic is not attempting to discipline an errant member; it is protecting itself from an external threat to its own collective safety.

The status of foreign terrorists is not altered by their capture. By raising their hands, they cannot transform themselves into domestic criminal defendants. Nor does the fact that terrorists are apprehended after successfully infiltrating the U.S. -- itself a form of invasion -- in any way change their status or transform their actions into purely domestic criminal matters.

The physical location of terrorists -- whether here or abroad -- is constitutionally irrelevant. Nothing in our Constitution or laws accords such unlawful belligerents rights beyond a military trial. Army Rangers need not read captured terrorists their Miranda rights. In fact, one irony of the critics' position is that captured al-Qaida members would have more rights than our own soldiers if they were accused of crimes of war.

By candidly recognizing that our response to al-Qaida is a matter of national defense, the president in fact has taken an important step to preserve our domestic civil liberties.

William P. **Barr** is a former U.S. attorney general. Andrew G. McBride is a former assistant to the attorney general and a former federal prosecutor in the Eastern District of Virginia. This column originally appeared in The Washington Post.

Classification

Language: ENGLISH

Subject: EXECUTIVE ORDERS (90%); HUMAN RIGHTS & CIVIL LIBERTIES LAW (90%); SEPTEMBER 11 ATTACK (90%); TERRORISM (90%); WAR & CONFLICT (90%); HUMAN RIGHTS ORGANIZATIONS (90%); MILITARY COURTS (90%); JURISDICTION (90%); SENTENCING (89%); TERRORIST ORGANIZATIONS (89%); AL-QAEDA (89%); INTERNATIONAL LAW (89%); LAW OF WAR (89%); WORLD WAR II (78%); US ARMY (78%); CRIMINAL CONVICTIONS (77%); CAPITAL PUNISHMENT (77%); MANUFACTURING FACILITIES (60%)

Company: AMERICAN CIVIL LIBERTIES UNION (91%); AMERICAN CIVIL LIBERTIES UNION (91%); AL-QAEDA (85%)

Are military tribunals appropriate?;Yes, they conform to law

Organization: AMERICAN CIVIL LIBERTIES UNION (91%); AMERICAN CIVIL LIBERTIES UNION (91%); AL-QAEDA (85%)

Industry: US ARMY (78%); MANUFACTURING FACILITIES (60%)

Geographic: FLORIDA, USA (79%); UNITED STATES (96%); GERMANY (90%)

Load-Date: November 25, 2001

End of Document

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11/18/01 WashingtonPost.com (Pg. Unavail. Online)
2001 WLNR 13697917

WashingtonPost.com
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November 18, 2001

Military Justice for al Qaeda

William P. Barr and Andrew G. McBride

The ACLU, some national commentators and a Post editorial ["End-Running the Bill of Rights," Nov. 16] have criticized President Bush's executive order allowing for the exercise of military jurisdiction over those suspected of conducting the Sept. 11 attacks. Some critics claim the president has the burden of showing that civilian courts are inadequate to the task. Others fear the order threatens civil liberties or is of dubious constitutionality. The critics have it exactly backward. In confronting the al Qaeda network, this country is exercising its powers of national defense -- its "war powers" -- to defend itself against attacks by an organized foreign force.

When the country is engaged in such a "state of armed conflict," it has long been recognized under both our Constitution and international law that foreign forces are subject to trial by military tribunal for any offenses against the laws of war. It is equally well established that a foreign national who is engaged in armed conflict against the United States has no constitutional claim to the rights and procedures that would apply to a domestic criminal prosecution. The president's decision to provide for military tribunals is well grounded in constitutional law, historical precedent and common sense. His decision will actually preserve our civil liberties by refusing to insist upon their application in a context where their incongruity would inevitably lead to their erosion. There can be no doubt that this country is engaged in an armed conflict against a foreign enemy. Al Qaeda is a well-organized foreign force that has mounted numerous attacks against this country. Our NATO allies have expressly recognized that a state of conflict exists. Al Qaeda members are clearly subject to the laws of war. Their violation of those laws is also clear: They have carried out unprovoked surprise attacks out of uniform with the clear intent to target unarmed civilians. Their status under international law is that of "unlawful belligerents," and centuries of precedent support trying them for such offenses before military tribunals. Since the Revolutionary War this country has used military tribunals to try foreign nationals for offenses committed during armed hostilities. After World War II, more than 100 German soldiers were tried and sentenced by American military tribunals for violations of the laws of war, including a massacre of American POWs at Malmedy. The most apt precedent is the case of the eight Nazi saboteurs. In June 1942 the Germans landed two groups of saboteurs on Long Island and the Florida coast, armed with explosives, U.S. currency and civilian clothing. Their purpose was to attack railroads, bridges and industrial plants to create terror and disrupt the American war machine. Upon their capture, President Roosevelt ordered their trial before a military commission composed of seven U.S. Army officers. All eight were convicted, and six were sentenced to death and executed. It is a fundamental error of reasoning to take the safeguards that apply in the realm of traditional domestic law enforcement and, as the president's critics would, artificially extend them into the entirely distinct realm of an armed conflict against a foreign aggressor. Imagine a war fought within the strictures of the American criminal justice system. Would a lethal bombing or commando attack on an enemy base have to be predicated upon a finding of probable cause by a judicial officer? Would the president need a wiretap order to justify monitoring enemy communications? Could the president base his decision to attack and kill occupants of the base only upon evidence

admissible in a federal court? The terrorist is waging war against the United States, and we are confronting him not to enforce our laws against him but to defeat the security threat he represents. Our body politic is not attempting to discipline an errant member; it is protecting itself from an external threat to its own collective safety. A foreign terrorist's status is not altered by his capture. By raising his hands, he cannot transform himself into a domestic criminal defendant. Nor does the fact that a terrorist is apprehended after successfully infiltrating the United States -- itself a form of invasion -- in any way change his status or transform his actions into a purely domestic criminal matter. The terrorist's physical location -- whether here or abroad -- is constitutionally irrelevant. Nothing in our Constitution or laws accords such unlawful belligerents rights beyond a military trial. An Army Ranger need not read a captured terrorist his Miranda rights. In fact, one irony of the critics' position is that captured al Qaeda members would have more rights than our own soldiers if they were accused of crimes of war. By candidly recognizing that our response to al Qaeda is a matter of national defense, the president in fact has taken an important step to preserve our domestic civil liberties. William P. Barr is a former U.S. attorney general. Andrew G. McBride is a former assistant to the attorney general and a former federal prosecutor in the Eastern District of Virginia.

---- **Index References** ----

News Subject: (Legal (1LE33); Top World News (1WO62); International Terrorism (1IN37); Global Politics (1GL73); World Conflicts (1WO07); Sept 11th Aftermath (1SE05); Intellectual Freedoms & Civil Liberties (1IN08); Civil Rights Law (1CI34))

Region: (North America (1NO39); Americas (1AM92))

Language: EN

Other Indexing: (Roosevelt; George Bush; Andrew McBride; William Barr)

Word Count: 828

End of Document

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EDIT PAGE FEATURES

Let Starr Do His Job

Updated March 11, 1998 12:01 a.m. ET

The following statement was issued last Thursday by four former U.S. attorneys general. A related editorial appears nearby.

As former attorneys general of the United States, we oppose the Independent Counsel Act. We believed in the past, and we believe now, that the United States Department of Justice is capable of investigating all criminal and civil matters involving the United States government. We also believe that the Independent Counsel Act raises serious constitutional issues involving, among other things, separation of powers and due process. However, we also believe in the rule of law. In *Morrison v. Olson*, the United States Supreme Court ruled that the Independent Counsel Act is constitutional. Moreover, in 1994, after the law had lapsed, Congress reauthorized the Independent Counsel Act, and President Clinton signed it into law. Therefore, the Independent Counsel Act is today the law of the land, and it must be enforced.

As former attorneys general, we are concerned that the severity of the attacks on Independent Counsel Kenneth Starr and his office by high government officials and attorneys representing their particular interests, among others, appear to have the improper purpose of influencing and impeding an ongoing criminal investigation and intimidating possible jurors, witnesses and even investigators. We believe it is significant that Mr. Starr's investigative mandate has been sanctioned by the Attorney General of the United States and the Special Division of the United States Court of Appeals for the District of Columbia.

Further, Mr. Starr is effectively prevented from defending himself and his staff because of the legal requirements of confidentiality and the practical limitations necessitated by the ongoing investigations.

As former attorneys general, we know Mr. Starr to be an individual of the highest personal and professional integrity. As a judge on the United States Court of Appeals for the District of Columbia and Solicitor General of the United States, he exhibited exemplary judgment and commitment to the highest ethical standards and the rule of law.

We believe any independent counsel, including Mr. Starr, should be allowed to carry out his or her duties without harassment by government officials and members of the bar. The counsel's service can then be judged, by those who wish to do so, when the results of the investigation and the facts underlying it can be made public.

Griffin B. Bell

Attorney General for President Jimmy Carter

Edwin Meese III

Attorney General for President Ronald Reagan

Richard L. Thornburgh

Attorney General for Presidents Ronald Reagan and George Bush

William P. Barr

Attorney General for President George Bush

Document: Should Congress refuse to shorten sentences for crack?

Should Congress refuse to shorten sentences for crack?

Deseret News (Salt Lake City)

October 4, 1997, Saturday

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Section: OPINION;

Length: 424 words

Byline: By **William P. Barr** William Bennett, Edwin Meese III and John Walters

Body

President Clinton has announced that he will ask Congress to relax sentences for trafficking in crack cocaine. We are writing to congressional leaders to warn them that the president's proposal is bad policy and should be rejected out of hand.

It seems obvious that crack sentences should not be reduced, given crack's disastrous impact on vulnerable inner-city populations, including an unprecedented proportion of female addicts.

Crack dealers have destroyed the fabric of peace and harmony in inner-city communities all over America. Crack use is associated with the explosion of especially horrifying child abuse cases in recent years. Many crack sellers are remorseless killers and need to be taken off the streets.

Nor are crack sentences excessive in any absolute sense. A crack dealer has to traffic at least 50 grams ; approximately 1,500 "rocks" ; to trigger the 10-year mandatory minimum sentence. Selling 1,500 rocks of crack is an offense that easily merits 10 years in jail. Indeed, the United States Sentencing Commission reports that the typical dealer convicted under federal law last year was caught selling 109 grams of crack ; the equivalent of more than 3,000 rocks. Federal crack defendants are also more likely than any other category of federal drug defendant to have a serious criminal history.

Crack sentences are not, as commonly believed, 100 times more severe than those for powder cocaine, that widely cited figure is based on a misunderstanding of the statute. In fact, crack sentences range between two and six times longer than for a comparable quantity of powder.

Rev. Eugene Rivers, is co-chair of the National Ten Point Leadership Foundation in inner-city Boston. As Rev. Rivers sees it: "To confuse the concerns of crack dealers with the broader interests of the black community is at best inane and at worst immoral. Those who are straining to live in inner-city neighborhoods that are most adversely affected by the plague of crack, and who witness crack's

consequences firsthand, want (crack dealers) taken off the streets for the longest period of time possible."

We associate ourselves with the remarks of Rev. Rivers. Our urban communities want crack dealing in their neighborhoods to stop. Congress should do nothing to undermine their efforts.

William Barr and Edwin Meese are former U.S. attorneys general; William Bennett is former director of the office of National Drug Control Policy and John Walters is former deputy director of the drug office. Scripps Howard News Service

Classification

Language: ENGLISH

Subject: COCAINE (95%); ILLEGAL DRUGS (90%); SENTENCING (90%); DRUG TRAFFICKING (90%); CONTROLLED SUBSTANCES CRIME (90%); SENTENCING GUIDELINES (90%); CITY LIFE (89%); US PRESIDENTS (79%); DRUG POLICY (78%); US FEDERAL GOVERNMENT (78%); CORRECTIONS (78%); SUBSTANCE ABUSE (78%); NARCOTICS ENFORCEMENT (73%); JAIL SENTENCING (73%); EYEWITNESSES (71%); CHILD ABUSE (55%)

Company: SCRIPPS HOWARD NEWS SERVICE (51%); SCRIPPS HOWARD NEWS SERVICE (51%); US SENTENCING COMMISSION (55%); US SENTENCING COMMISSION (55%)

Organization: US SENTENCING COMMISSION (55%); US SENTENCING COMMISSION (55%)

Person: BILL CLINTON (59%)

Geographic: BOSTON, MA, USA (79%); UNITED STATES (92%)

Load-Date: April 3, 1998

Content Type: News

Terms: "william p. barr"

Narrow By: Timeline: Jan 01, 1993 to Dec 31, 2000

Date and Time: Dec 13, 2018 04:29:10 p.m. EST



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Fall 9-1-1997

The Independent Counsel Process: Is It Broken and How Should It Be Fixed?

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The Independent Counsel Process: Is It Broken and How Should It Be Fixed?, 54 Wash. & Lee L. Rev. 1515 (1997), <https://scholarlycommons.law.wlu.edu/wlulr/vol54/iss4/6>

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The Independent Counsel Process: Is It Broken and How Should It Be Fixed?

A Five-Panel Program Presented at the
Opening Session of the

SIXTY-SEVENTH JUDICIAL CONFERENCE OF THE FOURTH CIRCUIT

The Homestead
Hot Springs, Virginia
Friday, June 27, 1997

The Editors of the Washington and Lee Law Review are pleased to publish this panel discussion held at the Fourth Circuit's Sixty-Seventh Judicial Conference. The Washington and Lee University School of Law has always enjoyed a close relationship with the Fourth Circuit. Many notable W&L alumni have served in the Fourth Circuit, including Judge Hoffman, to whom we dedicate this issue, and Justice Powell, who sat in senior status with the Fourth Circuit for many years after his retirement from the Supreme Court. For twenty-five years, the Law Review published an annual review of cases from the Circuit and will soon publish biographical profiles of the Fourth Circuit judges from the last fifty years. Last fall, a Fourth Circuit panel held oral arguments in the Moot Court Room at the Washington and Lee University Law School – among the few times the Circuit has held oral arguments at a law school. The Editorial Board is honored that the Fourth Circuit chose the Washington and Lee Law Review to publish its in-depth discussion of the Independent Counsel statute.

The Judicial Conference presented an interesting investigation into the Independent Counsel statute, its faults and failings, and suggestions for changes. The discussion included an impressive panel of learned judges, attorneys, and special prosecutors who have been intimately involved in this process. The Editors would like to acknowledge the invaluable assistance of the Honorable J. Harvie Wilkinson III, Chief Judge of the Fourth Circuit, and the Honorable T.S. Ellis, III, Judge, Eastern District of Virginia. To preserve the open nature of the proceedings, the Law Review presents the text in its raw format, although the participants did have an opportunity to review and make minor changes to their language. The Editors and participants have indicated source references where appropriate.

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Honorable William L. Osteen, Sr., Judge, United States
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General Counsel, GTE Corporation; Attorney General of
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Honorable Jamie S. Gorelick, Vice Chair, Fannie Mae
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Honorable Cameron McGowan Currie, Judge, United States
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Speakers:

Honorable David B. Sentelle, Judge, United States Court of
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Special Panel for Appointments of Independent Counsel
Honorable John D. Butzner, Jr., Senior Judge, United States
Court of Appeals for the Fourth Circuit; Member, Special
Panel for Appointments of Independent Counsel

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Eastern District of Virginia

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Robert B. Fiske, Jr., Esq., Davis Polk & Wardwell, New York,
New York; Former Independent Counsel, Whitewater
Investigation

Jacob A. Stein, Esq., Stein, Mitchell & Mezines, Washington,
D.C.; Former Independent Counsel
Larry D. Thompson, Esq., King & Spalding, Atlanta, Georgia;
Former Independent Counsel for the Department of
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City, Oklahoma; Former Independent Counsel for the Iran-
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John W. Nields, Jr., Esq., Howrey & Simon, Washington,
D.C.; Former Independent Counsel for the Iran-Contra
Investigation

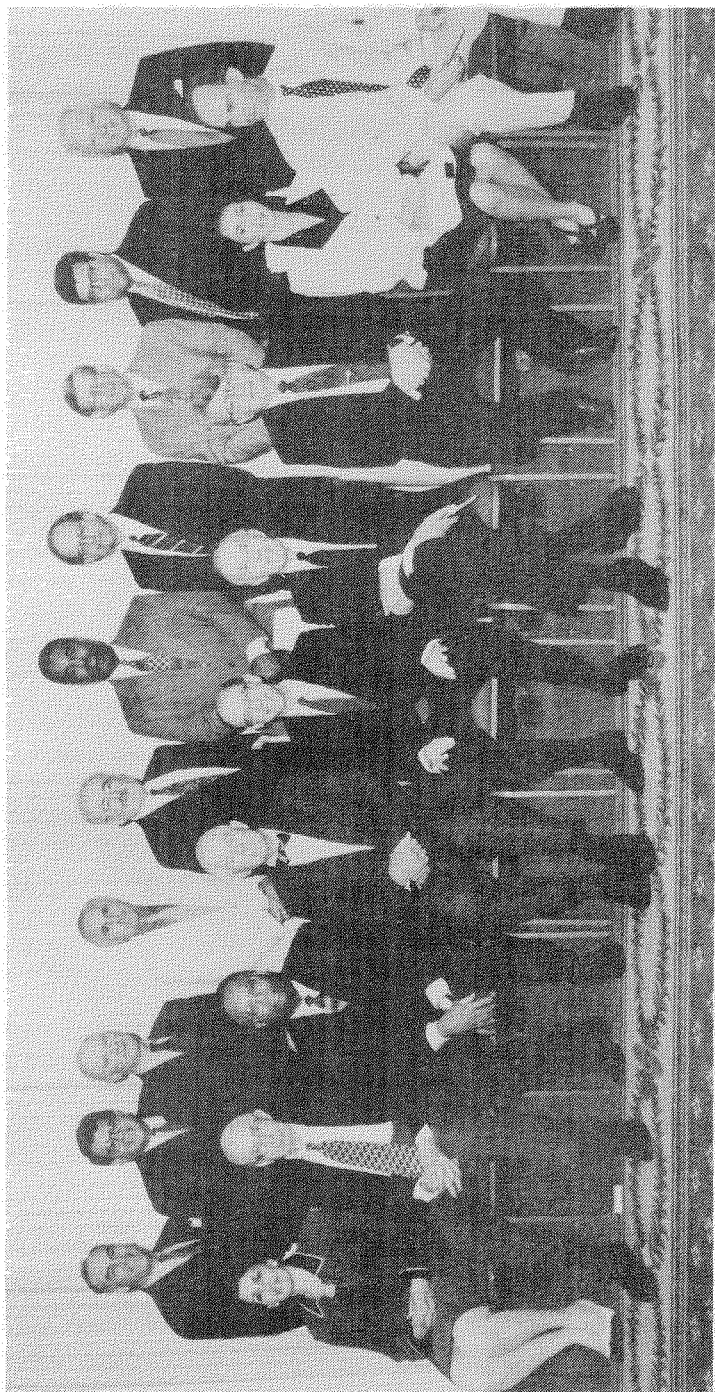
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Honorable Andre M. Davis, Judge, United States District
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Professor Archibald Cox, Harvard University Law School,
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Terry H. Eastland, Ethics & Public Policy Center,
Washington, D.C.; Author of *Ethics, Politics, and The
Independent Counsel*
Honorable Henry J. Hyde, Chairman, House Judiciary
Committee, United States House of Representatives,
Washington, D.C.
Theodore B. Olson, Esq., Gibson, Dunn & Crutcher,
Washington, D.C.; Former Counsel to President Reagan,
Iran-Contra Investigation



Sixty-Seventh Fourth Circuit Judicial Conference at The Homestead, June 27, 1997

Standing (left to right): T. S. Ellis, III; Richard J. Leon; Robert B. Fiske, Jr.; Jacob A. Stein; Charles F. Haden II; Andrew M. Davis; Terry H. Eastland; Theodore B. Olson; William P. Barr; William L. Osteen, Sr. Sitting (left to right): Jamie S. Gorelick; John D. Bulzner; Larry D. Thompson; Archibald Cox; J. Harvie Wilkinson III; Lawrence E. Walsh; David B. Sentelle; Cameron McGowan Currie; John W. Nields, Jr. Not pictured: Henry S. Hyde.

Foreword

Honorable J. Harvie Wilkinson III

The Judicial Conference of the Fourth Circuit Court of Appeals has a long tradition. Chief Judge John J. Parker convened the first circuit-wide judicial conference in Asheville, North Carolina, in 1931. The conference has flourished throughout the years. The sixty-seventh annual gathering of bench and bar took place at the Homestead in Hot Springs, Virginia, on June 26-28, 1997. Like all of its predecessors, the conference was an agreeable and convivial occasion.

The circuit conference, however, has always had a more serious aim than mere sociability. The statutory purpose of such gatherings is to review "the business of the courts" and to consider improvements in "the administration of justice."¹ For most of the year, judges and lawyers are properly attentive to their individual cases and clients. The conference is one occasion when we can step back and survey the broader landscape.

The independent counsel statute² is an ideal topic for a judicial conference. The statute is an intersection between the strongest imperatives of the rule of law and the most basic prerogatives of democracy. How we approach this statute will have a lot to say about what kind of republic we will have. The statute asks the most fundamental questions involving public responsibility. It challenges us to consider to what and to whom our highest officials are ultimately accountable.

In recognition of that fact, we have drawn our panelists for this program from a wide variety of backgrounds. Represented on the panels are Justice Department officials, judges of the Special Panel for the Appointment of Independent Counsel, former special prosecutors, the Chairman of the House Judiciary Committee, congressional investigators, and other experts in the independent counsel process. The panelists on our program represent different and divergent points of view. What they have in common, however, is an intimate acquaintance with how the independent counsel process works.

The ensuing dialogue follows that process from start to finish. It begins with an examination of requests for an independent counsel from the Department of Justice. It then discusses the appointment of independent counsel, prosecutorial investigations and decisions, and congressional investigations that parallel the prosecutors' work. The program then concludes with a discussion of whether the statute should be retained or how it may be improved in the future.

Inasmuch as the statute involves the potential prosecution of the top public officials of our country, any discussion of its operation is bound to be politically charged. That is all the more reason for a program such as this one. We have

1. 28 U.S.C. § 333 (1994).

2. 28 U.S.C. §§ 591-599 (1994).

asked the panelists to separate their judgments from the political temptations of the moment and to ask what is ultimately the only question worth asking: whether and how the institution of independent counsels serves the public interest and the ultimate well-being of this republic.

Honorable T.S. Ellis, III

Few topics in recent memory have been as widely discussed in the media as the activities of the independent counsel and the operation of the independent counsel statute. Yet it is also true that most members of the public, including many lawyers, do not know the statute's history, the details of how it operates, or the results of its use. In recognition of this, the conference committee responsible for planning the program decided to distribute to conference members a "fact sheet" setting forth some of this information for those members who might not be fully familiar with the statute. The intricacies of the statute are summarized below.

The statute is a relative newcomer to the political-legal landscape in this country. For almost two centuries there was no established institutional means for investigating and prosecuting senior-level officials in the Executive Branch. Instead, such investigations were carried out either by the Department of Justice, the Attorney General, or in some exceptional circumstances, by other ad hoc means.³ The enactment of the independent counsel statute in 1978 changed

3. As noted by the United States Court of Appeals for the District of Columbia Circuit, "[t]he need for a special counsel who is to some extent independent of the Justice Department and free of the conflicts of interest that exist when an administration investigates the alleged wrongdoing of its own high officials has been demonstrated several times this century." *In re Olson*, 818 F.2d 34, 39 (D.C. Cir. 1987).

For instance, in 1875, President Grant's personal secretary was implicated in the Whiskey Ring scandal, which involved a group of moonshiners bypassing the revenue laws through bribery. See Robert G. Solloway, Note, *The Institutionalized Wolf: An Analysis of the Unconstitutionality of the Independent Counsel Provisions of the Ethics in Government Act of 1978*, 21 IND. L. REV. 955, 958 (1988). President Grant fired the Federal District Attorney investigating the crime and appointed a "special prosecutor" to complete the prosecution. *Id.*

A more familiar example was the Teapot Dome scandal, which involved the Secretary of Interior taking bribes in connection with the lease of government oil reserves. See Peter W. Rodino, Jr., *The Case for the Independent Counsel*, 19 SETON HALL LEGIS. J. 5, 31 n.6 (1994); James B. Doyle, Note, *"Who Will Watch the Watcher?": Using Independent Counsel to Compel Federal Facilities to Comply with Federal Environmental Laws*, 26 VAL. U. L. REV. 671, 699 n.169 (1992). Although a subsequent congressional investigation revealed the Secretary's wrongdoing, the Department of Justice refused to conduct a full-fledged investigation. Rodino, *supra*, at 31 n.6. In response, President Coolidge appointed Harlan Fiske Stone as Attorney General, "with special instructions to clean up the Department." *Id.*

A final, somewhat prophetic example occurred during the 1950s, when the Truman administration was plagued with allegations that both the Department of Justice and the Bureau

this, institutionalizing in our law for the first time the circumstances and mechanism for appointing independent counsels and for conducting investigations and prosecutions of high-ranking, executive-branch officials.

The triggering event for the enactment of the statute, of course, was the so-called Saturday Night Massacre.⁴ Following that fateful event, many lawmakers became convinced that legislation was needed to deal with the special and thorny problem of investigating and prosecuting criminal wrongdoing of high-ranking, executive-branch officials. Ultimately, this sentiment led to the statute in existence today. Originally enacted as Title IV of the Ethics in Government Act of 1978⁵ and subject to a five-year sunset provision, the statute has been

of Internal Revenue (the predecessor to the IRS) were corrupt. President Truman first directed Attorney General McGrath, and then Newbold Morris, an outside "Special Assistant to the Attorney General," to investigate the allegations. See Joseph R. Biden, Jr., *Shared Power Under the Constitution: The Independent Counsel*, 65 N.C. L. REV. 881, 886 (1987); Rodino, *supra*, at 31 n.6. Morris publicly announced his own independence from the Executive Branch and declared that he would even investigate the Attorney General. See Solloway, *supra*, at 958. McGrath fired Morris when the latter inquired into the former's personal finances and official files, and then President Truman fired McGrath. See Biden, *supra* at 886; Rodino, *supra*, at 31 n.6. Under President Eisenhower, the Department of Justice ultimately secured several convictions in this matter. See Biden, *supra*, at 886; Rodino, *supra*, at 31 n.6.

4. The circumstances comprising this infamous event of Saturday, October 20, 1973, grew out of the now familiar investigation of the bungled Watergate burglary: Once the Watergate scandal reached full stride, Attorney General Elliot Richardson issued regulations that created, within the Department of Justice, the Office of Watergate Special Prosecutor. The eponymous position was held by Professor Archibald Cox, one of the program panelists. When Professor Cox subpoenaed tapes and documents in President Nixon's possession, Nixon ordered Richardson to fire Cox. (Cox was protected from removal unless there were "extraordinary improprieties on his part." 28 C.F.R. § 0.37 (1973).) Richardson refused, choosing instead to resign. Deputy Attorney General William Ruckelshaus, faced with the same directive from the President, also relinquished his office. Next in line was Solicitor General Robert Bork, who, as Acting Attorney General, fired Cox.

Three days later, Bork abolished the new office Richardson had created and ordered that the Watergate investigation be conducted out of the Department of Justice's Criminal Division. In the face of growing public concern, Nixon authorized Bork to appoint a new Special Prosecutor. Bork tapped Leon Jaworski, Cox's former assistant. At Jaworski's insistence, Bork also issued regulations reestablishing the office that Richardson had created, and that Bork had abolished, only weeks before. For a general discussion of the Saturday Night Massacre, see *In re Olson*, 818 F.2d at 41-42; Carl Levin, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11, 11-13 (1987); Rodino, *supra* note 3, at 10; Alton L. Lightsey, Note, *Constitutional Law: The Independent Counsel and the Supreme Court's Separation of Powers Jurisprudence*, 40 U. FLA. L. REV. 563, 566-67 (1988); Solloway, *supra* note 3, at 958. Moreover, the regulations provided that the Special Prosecutor would not be removed unless the President first consulted with the majority and minority leaders of both Houses, and the chairmen and ranking members of the two Judiciary Committees. See 38 Fed. Reg. 30,738-39 (1973).

5. See 28 U.S.C. §§ 591-598. The Supreme Court upheld the constitutionality of the independent counsel statute in the face of separation-of-powers challenges in 1988. See

reauthorized by Congress three times since.⁶

By its terms, the statute covers the President, the Vice President, Cabinet officers, top officials in the White House and Justice Department, senior officers in presidential campaigns, and any persons investigation of whom might present a conflict of interest for the Department of Justice.⁷ When the Attorney General receives information that any one of these persons may have engaged in criminal conduct other than a petty offense, she must review that information to determine whether it constitutes "grounds to investigate."⁸ If the Attorney General finds that the information is specific and from a credible source, or if she is unable to reach a decision on these matters within thirty days of receiving the information, she must initiate a "preliminary investigation."⁹ This investigation must be completed within ninety days, with a single sixty-day extension available.¹⁰

Upon completing the investigation, the Attorney General must file a report with the Independent Counsel Division of the Court of Appeals for the District of Columbia Circuit, in which she either declines or requests appointment of an independent counsel.¹¹ This Division – a special court, really – consists of three Article III judges appointed for two-year terms by the Chief Justice of the Supreme Court. One of these judges must be from the District of Columbia Circuit.¹² If counsel is requested, the Independent Counsel Division appoints the independent counsel and defines the counsel's prosecutorial jurisdiction.¹³ The counsel, in turn, has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," including conducting grand jury investigations, granting immunity to witnesses, inspecting tax returns, and receiving appropriate national security clearances.¹⁴

The independent counsel has no specified term of appointment, but instead serves until the duties defined by the jurisdiction granted have been fulfilled.¹⁵ Prior to such termination, only the Attorney General may remove the inde-

Morrison v. Olson, 487 U.S. 654 (1988).

6. The current statute will expire June 30, 1999, unless reauthorized. See 28 U.S.C. § 599.

7. See *id.* § 591(b)-(c).

8. See *id.* § 591(d)(1).

9. See *id.* § 591(d)(2).

10. See *id.* § 592 (a)(1), (a)(3).

11. See *id.* § 592 (c). The Attorney General's decision in this respect is unreviewable in any court.

12. See *id.* § 49. Since its inception, ten judges have served on the three-judge panel.

13. See *id.* § 592(c)-(d).

14. See *id.* § 594(a).

15. See *id.* § 596(b).

pendent counsel from office, and she may do so only for cause or mental or physical impairment. Such removal may be appealed to the District Court for the District of Columbia.¹⁶

Since enactment of the statute in 1978, independent counsels have been appointed to investigate, inter alia, allegations of drug use, perjury, bribery, conflicts of interest, financial improprieties, lying during an FBI background check, and abuse of executive power. To date there have been at least eighteen independent counsels appointed, some of whose investigations are still pending. These independent counsel investigations have cost the United States almost \$115 million. The table below sets forth more specific information regarding these various investigations.

INDEPENDENT COUNSEL INVESTIGATIONS: 1978-PRESENT ¹⁷			
<i>Independent Counsel</i>	<i>Subject(s)</i>	<i>Result(s)</i>	<i>Cost</i>
Arthur H. Christy (1979)	Hamilton Jordan	No Charges	\$182,000
Gerard J. Gallinghouse (1980)	Timothy Kraft	No Charges	\$3,300
Leon Silverman (1981)	Raymond Donovan	No Charges	\$326,000
Jacob A. Stein (1984)	Edwin Meese III	No Charges	\$312,000
Alexia Morrison (1986)	Theodore B. Olson	No Charges	\$2.1 million
Whitney N. Seymour, Jr. (1986)	Michael K. Deaver	1 Guilty Plea	\$1.6 million
Lawrence E. Walsh (1986)	Elliott Abrams Carl Channell Alan Fiers Albert Hakim Robert McFarland Richard Miller Richard Secord Thomas Clines John Poindexter Oliver North Clair George Duane Clarridge Joseph Fernandez Caspar Weinberger	7 Guilty Pleas 4 Convictions, 2 Overturned on Appeal 6 Presidential Pardons	\$47.4 million

16. See *id.* § 596(a)(1), (a)(3).

17. Participants received a substantially similar table with their conference materials. This updated table reflects the latest available data from the General Accounting Office Report dated September 30, 1997. See generally GENERAL ACCOUNTING OFFICE, FINANCIAL AUDIT: INDEPENDENT COUNSEL EXPENDITURES FOR THE SIX MONTHS ENDED MARCH 31, 1997 (1997).

<i>Independent Counsel</i>	<i>Subject(s)</i>	<i>Result(s)</i>	<i>Cost</i>
James C. McKay (1987)	Lyn Nofziger Edwin Meese III	1 Conviction, Overturned on Appeal 1 Acquittal	\$2.8 million
James R. Harper (1987)	Confidential	No Charges	\$50,000
Sealed (1989)	Confidential	Confidential	\$15,000
Arlin M. Adams (1990) Larry D. Thompson (1995)	Samuel Pierce Deborah Dean Tom Demery Phillip Winn S. DeBartolomeis Lance Wilson Carlos Figueroa J. Queenan Ronald Mahon Catalina Villapando Robert Olson Len Briscoe Maurice Steier Elaine Richardson Sam Singletary Victor Cruise	7 Guilty Pleas 11 Convictions 1 Acquittal (Investigation is ongoing)	\$27.1 million
Sealed (1991)	Confidential	Confidential	\$93,000
Joseph diGenova (1992) Michael F. Zeldin (1996)	Janet Mullins Margaret Tutwiler	No Charges	\$3.2 million
Robert B. Fiske, Jr. (1994)	William Clinton et al.	3 Guilty Pleas	\$6.1 million
Kenneth W. Starr (1994)	William Clinton et al.	6 Guilty Pleas 3 Convictions 2 Acquittals (Investigation is ongoing)	\$25.6 million
Donald C. Smaltz (1994)	Michael Espy	1 Guilty Plea 2 Convictions 2 Acquittals (Investigation is ongoing)	\$11.9 million
David M. Barrett (1995)	Henry G. Cisneros et al.	Ongoing	\$3.8 million
Daniel S. Pearson (1995)	Ronald H. Brown	Terminated (subject deceased)	\$3.2 million
Sealed (1996)	Confidential	Confidential	\$48,784

Program Introductory Remarks

CHIEF JUDGE WILKINSON: I welcome you to the Sixty-Seventh Annual Fourth Circuit Judicial Conference, and I think we've got a great program for you this morning.

The independent counsel statute, when we started planning this program some eight or nine months ago, seemed an ideal one for a Judicial Conference, and that was because the operation of this statute involved all segments of the legal profession, members of the Executive Branch, members of the judiciary, members of the House Judiciary Committee and Senate Judiciary Committee, Congress and members of the private bar.

So there is no topic that takes in more different aspects of the legal profession than this one does.

I want to say a brief word about the organization of this morning's proceeding.

We are going to go forward in five segments. There will be five different panels, and each of those panels will deal with a different phase of the independent counsel process. The idea is to try to take you through the independent counsel process from start to finish, from the very first time that a complaint comes in and the question of whether to refer that to the special court for appointment of counsel, all the way through the prosecutorial and investigative process, and then finally we are going to take a look at the independent counsel statute and what modifications or amendments, or whatever, should be done in terms of the future.

I don't think we have ever had a finer group of people available to discuss this problem. I have seen some discussions here and there on the independent counsel statute, but never before have I seen a group of people with such a breadth of viewpoints and such a range of experience as we have assembled here this morning, and I want to thank the Program Chairman for his indefatigable efforts in trying to get the very best commentators in the country on this question which has such a profound effect on our republic.

Tim Ellis has been absolutely dedicated in trying to put together a program that would really get to the bottom of the hard questions dealing with the operation of this statute.

We want, in the final analysis, not only to examine the nuts and bolts of this statute, the day-to-day operations of it, but to ask some pretty important overall questions: Has the effect of the independent counsel statute upon American government been good or bad? Should we applaud this institution of the independent counsel? Should we modify it or should we simply jettison it altogether?

Without further ado, I would like to ask Judge Bill Osteen from the Middle District of North Carolina to bring up the first panel members and introduce them to us.

Bill.

Panel One - Requests for Independent Counsel

JUDGE WILLIAM L. OSTEEN, SR. (U.S. District Judge, Middle District of North Carolina): All right. Thank you.

Ladies and gentlemen of the Conference and guests:

From the time this program was first conceived, the universal acclamation has been, "Wow, what a timely and interesting program we're going to have."

Our enthusiasm was heightened considerably after that when we found out who the panelists were going to be. So we are delighted to have the panels here for the five sections that we are going to have this morning.

Now, we could spend a lot of time introducing them – and they are properly deserving of the accolades that they have accomplished throughout their span of public service – but I think they have acceded willingly – and I know you will accede willingly – to the fact that we would rather hear from these people than to hear all of the accolades to which they are entitled. So for that reason, we are going to dispense with the customary introduction of our guests, and I would simply ask you to welcome, after I introduce both of them, first former Attorney General William Barr, and secondly, former Deputy Attorney General Jamie Gorelick.

Please welcome them here this morning.

(Applause.)

JUDGE OSTEEN: Our section of the panel deals with as you may guess, the introductory section of the statute.

Many of you already know that Title 28 of the United States Code, Sections 591 through 599, provides the independent counsel authority, formerly known as the special prosecutor section.¹⁸ It is a law that came into effect in 1978.¹⁹ It has been renewed from time to time since then and has a sunset provision which I believe expires in about 1999.²⁰

Our section deals with the preliminary portion, and so we will concentrate first on Section 591.²¹ That section, in summary, provides that the Attorney

18. See generally 28 U.S.C. §§ 591-599 (1994).

19. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867, 1867-75 (codified as amended at 28 U.S.C. §§ 591-599).

20. See 28 U.S.C. § 599 (stating that statute will expire five years after date of enactment of Independent Counsel Reauthorization Act of 1994).

21. *Id.* § 591.

General shall conduct an investigation to determine whether an investigation is necessary for certain people who may have violated the federal law.²² Those people whose investigation is mandated, including the President, the Vice President, members of the Cabinet, certain other members of the presidential staff, certain other members of the Attorney General's Office, and other people, such as the CIA Director and Deputy, and a few other officials, are covered under this section.²³

The statute goes further to say that the Attorney General shall consider the credibility and the specificity of the information that comes to the Attorney General in making a determination of whether to proceed further.²⁴

There is another section that is more inclusive from the standpoint of persons covered, but is not mandatory as Section 591(a) is.²⁵ Section 591(c) provides that the Attorney General may conduct an investigation where it appears that there may be a conflict of interest arising from financial, personal, or political interests.²⁶

Our panelists will discuss those matters.

I think there were two groups or two persons that I left out of the mandatory section. Those include people who are managers or heads of the Reelection or Election Committees of presidential candidates.

I would like now to turn to our panelists and ask Ms. Gorelick if she would sort of explain to us how these investigations begin, how many there are generally, and give us the preliminaries, please.

MS. JAMIE S. GORELICK (Vice Chair, Fannie Mae Corporation, Washington, D.C.): Surely.

Thank you very much for the opportunity to be here to discuss this important subject.

Let me try to set the scene a little bit and give you some numbers from the period '87 to '92. I use that period (1) because I am not comfortable in discussing any cases that may be open at the moment or that were opened during my tenure, and (2) because Senators Levin and Cohen put to the prior administration the question of how many cases had been reviewed by the Justice Department during that period and what the results were, so we have the history. I don't think the pattern is significantly different in recent years.

Suffice it to say that dozens and dozens and dozens of allegations appear at the Justice Department every year — assertions that an independent counsel

22. *Id.* § 591(a).

23. *Id.* § 591(b).

24. *Id.* § 591(d)(1).

25. *Id.* § 591(a).

26. *Id.* § 591(c)(1).

inquiry is warranted. These may come in over the transom from citizens or may be announced on the steps of the Capitol by members of Congress. And so you have the full gamut of allegations.

Many people do not understand what the independent counsel law does and does not do, so you get a very wide variety of allegations. This group of allegations is reviewed by a special unit within the Public Integrity Section of the Criminal Division, and this work keeps that group busy full-time, reviewing these allegations to determine whether a preliminary inquiry is warranted.

As Judge Osteen said, there are requirements before even a preliminary investigation is triggered. There must be specific and credible evidence as to a covered person for the mandatory section of the Act requiring an independent counsel to be triggered. In the period 1987 to 1992, there were specific and credible allegations made as to eight people who were not covered – and those were principally cases involving a person who was associated with a covered person, such as a family member or a close business associate – who had done something alleged to be wrong and it was alleged that the conduct reflected in the same way on a covered person. On these eight allegations, initial inquiries were undertaken and it was determined that they did not justify a referral. Thirty-five preliminary inquiries were undertaken where it was determined that the evidence was not sufficiently specific or credible to warrant a preliminary investigation. In nine cases, there was specific and credible information as to a covered person, but it was determined that no referral was appropriate because "no further investigation was warranted," which is the standard to get to the next stage. In five cases, there were applications for an independent counsel.

So that just gives you a sense of the numbers.

In the past four years, we saw a similar pattern, probably with a greater number of cases coming in over the transom, and a similar winnowing process.

The process involved is this: There is a thirty-day period for an initial inquiry, that is, thirty days from the time in which the Public Integrity Section gets the matter for a determination as to whether there should be a preliminary investigation. And that is where, in my view, the teeth in the statute are: at that stage, you need to determine whether there is specific and credible information as to a covered person. Once you do that and you begin a preliminary investigation, the standard for determining whether to go to the court and seek the appointment of an independent counsel is whether further investigation is warranted; and it is often difficult to conclude that no further investigation is warranted. And so relatively few of the cases that go to preliminary inquiry are turned back at that stage, and you can see that in the numbers that I just read.

During that preliminary inquiry stage, the Department cannot use the normal tools that a prosecutor uses; that is, you cannot subpoena records; you cannot use the grand jury process; you cannot summon someone to a grand jury; you

cannot give a witness immunity. And so you are very much limited in the kind of investigation that you can undertake.

That's the scene.

JUDGE OSTEEEN: All right. Thank you very much.

General Barr, would you please comment on what sort of standard you thought was appropriate in determining whether there was any credible information and if there was enough specificity to warrant going ahead.

MR. WILLIAM P. BARR (Executive Vice President and General Counsel, GTE Corporation, Stamford, Connecticut): The standard for commencing a preliminary investigation is very low. It is not evidence of a crime. It is information sufficient to warrant an investigation as to whether a person has violated the law; and once that is triggered, once you get that information, you are basically locked into going to court for an independent counsel, unless you can do a couple of things.

One, to avoid the preliminary investigation, as Jamie said, you have to say you don't have any credible information or you don't have any specific information; or the one most usually used, and is being used today, primarily is, "It's not a covered person; we don't have any information as to a covered person." And it is very hard to knock out an allegation on the grounds of lack of credibility because 90 percent of these things come from the newspapers; there are some facts set forth; congressmen then push it to get an independent counsel named—either Congress, congressional committees writing the Attorney General and producing more facts and submitting more documents. It is very hard to do it on credibility grounds. About the only way you can do it on credibility is when you get one of these letters in the mail, you know, with writing crammed in, written by someone who says that the head of the CIA requires them to wear a colander on their head to avoid getting rays, or something like that. But otherwise, it is very hard to knock it out on the basis of credibility and specificity. So you launch the preliminary investigation. And, as Jamie said, the real problem in this statute—she didn't say this was a real problem, but she said there are limitations on the Attorney General during this investigative phase, and the Attorney General of the Justice Department cannot compel testimony or production of documents, no subpoena power, can't use a grand jury—those are the two principal impediments—can't grant immunity. And if you can't do that during your preliminary investigation and then you reach the end of the preliminary investigation phase, for the Attorney General to stop the thing at that point, the Attorney General has to say that there are no reasonable grounds to believe that further investigation is warranted. The Attorney General can't say, "I don't think further investigation is warranted, exercising my discretion and my judgment here, because even if we found

particular facts, I'm not going to prosecute this case" or "This is not really a prosecutable case."

The standard is: No reasonable grounds to believe that further investigation is warranted.

It is very hard to conceive of a case where you can make that call where you haven't subpoenaed documents and you haven't brought witnesses before the grand jury, you haven't compelled certain people to speak to you, especially when a lot of these allegations have to do with lying — you know, "You misled Congress," or what have you.

So basically it creates a situation, a dynamic, under which it is virtually impossible, once information comes to you about a covered person, to prevent the naming of an independent counsel because your hands are tied during the investigation phase, you can't get all the facts, and ultimately you have to say, "There is no basis for further investigation." That's the tension in the statute that sort of creates the drive to name an independent counsel even on, you know, stuff that normally the Justice Department wouldn't be driving for a prosecution on.

You know, if an Inspector General gets mad at the Cabinet secretary and drops a dime on him for misuse of the vehicle, or something like that, you know, that is not the kind of thing that, in the ordinary course, you necessarily prosecute somebody over for a federal felony. But the statute creates a dynamic where you're going to name an independent counsel, hire people, and they're going to be driving against that individual because he misused his government automobile.

JUDGE OSTEN: What happens generally if the preliminary investigation cannot be terminated and finally must go on, but you begin to find that people named who are not mentioned in this statute? Do you obtain the authority to keep that in the department or does the whole ball of wax go with the one independent agency?

MR. BARR: Well, I think the Attorney General has a lot of discretion as to what to refer to the court and what to keep. I think, as a practical matter, if it is part of one transaction, as long as you have a covered person in there, you really can't refer a case as to one individual when you are dealing with a group of subjects. So, usually the whole subject matter goes over to the independent counsel.

MS. GORELICK: And if I might add a point there.

There recently was an instance in which an independent counsel sought to pursue matters that the Justice Department thought were not related to his original jurisdiction and the Justice Department opposed his application to the Special Division for an extension of his authority to that matter which he

considered to be related. In that case there was an exception to the general rule that no independent counsel can be appointed without the Attorney General seeking to give an independent counsel that case, because the Special Division decided, over the objection of the Attorney General, to grant the IC that jurisdiction.

So even the one fail-safe, which is that the Attorney General must be the person seeking the appointment of an independent counsel, has been whittled away some in the recent past.

MR. BARR: I would like to point out that there is an ambiguity – at least I think there is a big ambiguity in the statute.

It is not really an ambiguity. It is, I think, a failure to address what they really intended to do; and that is that technically the Attorney General doesn't have to go forward if he determines that there is no basis for further investigation. So there is a situation where the Attorney General says, "You know, I think I have all the facts here, and as the Justice Department, we would normally not continue an investigation at this time so I'm not going to go to the court for an independent counsel," and then actually rule on the case – essentially exercise his discretion and say, "we wouldn't prosecute this case, so we're not going to prosecute it, no grounds for further investigation."

The only time you have to go to the court is when there are grounds for further investigation, and I don't think that's the purpose of the statute. I think the purpose of the statute is to remove from the Attorney General those kinds of judgments and calls and decisions as to the prosecutive merit of the case.

MS. GORELICK: There is one element here that I think is very significant, which is that at the end of the Bush Administration the statute was changed to prohibit an Attorney General from declining to investigate and declining to refer on the basis of a lack of intent; that is, unless the Attorney General can find, by clear and convincing evidence, that the person had no intent to violate the law, the Attorney General must seek an independent counsel.

Now, anybody who practices in the white-collar area knows that what defines most crimes is intent. A failure to list an asset on a financial disclosure form is not a crime unless it was done with willful intention of not disclosing that asset, and yet that element of the offense is basically removed from the Attorney General's discretion. And so you get even greater pressure than Bill described in those cases where the only difference between a crime and an infraction of some administrative sort is intent.

JUDGE OSTEN: Go ahead. Do you have something?

MR. BARR: That is an area of great mischief, because I would say most of these cases turn on intent and it sort of reverses the burden to say that the Attorney General can't dispose of this unless he has clear and convincing evi-

dence of that, because ultimately the prosecutor has to have proof beyond a reasonable doubt; and what happens is, even though it is pretty clear that the prosecutor will not be able to prove beyond a reasonable doubt, the Attorney General still has to go to an independent counsel, down the independent counsel track, and the independent counsel's investigation really consists of, you know, months or years of trying to dig up some ancillary evidence somewhere to somehow prove a state of mind. I mean, you can pretty much say up front that it is going to be something that is going to be difficult to prove.

JUDGE OSTEN: Thank you.

Ms. Gorelick, would you please tell us why section (a)²⁷ is mandatory and section (c)²⁸ is discretionary in the preliminary investigation?

MS. GORELICK: You ought to ask Congress that question.

JUDGE OSTEN: Did you find that a difficult line to make a determination on whether you should, in your discretion, look at this or whether you are mandated to look at it?

MS. GORELICK: Well, the mandatory sections are easier to interpret. I think that the discretionary sections ought to be used in only rare circumstances. That is my own personal view.

I think Attorney General Barr could investigate almost anybody, with very, very few exceptions, without having a so-called political conflict of interest. Now, if he had a financial relationship with someone under investigation, that is another story; but that is not what comes up. It is the so-called political conflict.

I think that it undermines our system of justice to say that our primary institution of justice, the Department of Justice, cannot find the wherewithal, with all of those career prosecutors, with only a very thin overlay of political appointees, to investigate most cases. And so I would, if I were Attorney General, take a very, very narrow view of the discretionary power to seek an independent counsel.

MR. BARR: I took a very narrow view of it, too, because I disapproved of the statute in general and I wasn't going to invoke the statute unless I was absolutely compelled by the law to invoke the statute. So I never used the discretionary provision, but I do believe that there are quite a few cases that don't necessarily involve covered people, or don't clearly involve covered people, that should not be handled on a business-as-usual basis by the Justice Department with people, in the bowels of the department, carrying out the

27. *Id.* § 591(a).

28. *Id.* § 591(c).

investigation. I believe that high-level people of some stature with a little bit of distance and independence should be assigned those cases, and take responsibility for those cases, ultimately under the responsibility of the Attorney General.

So what I did was I used my inherent authority as Attorney General when these cases arose, and I brought people in from the outside. On the so-called Inslaw Octopus Scandal, whatever that was all about, I brought in Judge Bua from Illinois to take a look at; on the Iraqgate nonsense, I brought in Judge Lacey from New Jersey to take a look at; and on the House Bank, which didn't involve executive branch people, but created a lot of political tension because people who were involved in our oversight, and so forth, were involved, I asked Judge Wilkey to take a look at that.

So I did that on my own nickel, not under the statute.

JUDGE OSTEN: Thank you.

Now we are going to depart from our prescribed program and give each one of our panelists a free shot in saying why they think the statute is good, bad, or anything they wish to say. We are going to designate four minutes of free time for each one.

Ms. Gorelick.

MS. GORELICK: Well, I will be very brief about this.

Number one, I think that the statute ought to be restricted in its coverage. I don't think that there is any reason why Attorney General Reno couldn't investigate Henry Cisneros. I just don't. There are lots of examples of independent counsel designations that we have had that I think were unnecessary. I think it is overused – witness the number of calls now, on a routine basis, for independent counsels – and I think it undermines our fundamental respect for our institutions of justice. I do think that you need to have one, and the ability to seek one, in the most extraordinary cases, and I would limit the statute to the President, the Vice President, the Attorney General, and maybe the Deputy Attorney General, or the head of the FBI. You do have special issues when there is credible evidence of a crime at the highest level of the Department of Justice. But I would limit the scope of the Act considerably.

In the absence of that change, I would radically change the coverage with respect to campaigns because you end up with people who are covered persons who had, in fact, much less power and authority in the political process than people who are not covered. It is really serendipitous, depending on who was serving on what committee with what title, and that part of the statute does not work at all.

Third, I think you need to have some standard with regard to the importance of the underlying allegation. I haven't tried to articulate it – and I'm sure it is harder to be specific than it is simply to state the idea – but the issues under review by an independent counsel should be only those that are extraordinarily

serious. I would limit the use of an independent counsel to activities by someone while in office and of a serious nature, but I think that there is room for debate on the scope in this regard.

Fourth, I certainly would eliminate the reverse burden of proof for the Attorney General on the issue of intent. There are a number of independent counsel referrals that we did make which would not have been made in any sensible world, simply because we could not adduce clear and convincing evidence that there was not intent to break the law. That should happen.

Fifth, I would change the process by which an independent counsel creates authority under the "related matter" heading. If you have information that might implicate Mr. Barr, who might implicate Judge Walsh, who might then implicate the subject of an independent counsel's inquiry, under the case law, as it has developed on the issue of "related," I, as an independent counsel, would have jurisdiction to investigate, even though I would be looking at you, who is not a covered person, for something that has absolutely nothing to do with the original grant of jurisdiction.

Now, anybody who has been a prosecutor knows that you have to have some ability to deal with people who are potential witnesses against your target, but, in my personal view, there are no practical limitations on the jurisdiction of an independent counsel who wants to take his investigation out beyond secondary and tertiary witnesses to the "nth" degree. We have seen some of that and we have seen some litigation over that. And I would certainly make it very clear, if I were in Congress, that the Special Division has no authority to grant related-matter jurisdiction without the Attorney General having sought that in the first instance.

JUDGE OSTEEEN: Thank you very much.
General.

MR. BARR: Well, I have always been against the statute. I still am.

During the transition, Bernie Nusbaum came in and asked me for some advice and I said, "We killed the independent counsel statute. Take my advice, don't breathe new life into it. As a Republican, I'd love to see you live under it, but as an American, I can tell you it would be bad news if you get that thing going again."

He said, no, that they had a higher standard and they were going to resuscitate the statute.

I agree, there are some quick fixes you can do on the scope, and other things like that, but the problem – and Jamie was talking about this problem – you really can't draw a line on the seriousness of the matter because ultimately what you really are talking about are judgments, judgment, prosecutive merit of the case, the exercise of discretion, and common sense. And what the statute does is it takes it away from executive branch officials and an institution that

is making those judgments every day, and has a track record of making those judgments, and puts it outside and gives it to somebody else to make, someone who I don't feel has enough accountability, someone who has too narrow a scope and loses perspective as to where they are going and to drive against an individual.

I think that's bad and I think it's unfair.

So my substitute for the statute is, if you accept the premise that the Attorney General, you know, may cut someone a sweetheart deal and you can't trust them to exercise discretion, then the answer to that is to have the court put in somebody who is looking over the shoulder, writes a report, blows the whistle, announces to the world that a non-bona fide judgment has been made, something that is not within the realm of proper prosecutive discretion, and let the Justice Department explain its decisions and open up its decisions to these individuals, but let the decision ultimately be made by the politically accountable official.

You know, let's take the situation of – and obviously, this is suggested by the situation of Vice President Gore – but suppose the Vice President of the United States did make some fund-raising phone calls from the White House.

You know, call me a softy, but I don't think we should tie up the government by prosecuting the Vice President of the United States for a federal crime because he used the telephone in making a few fund-raising calls.

But under this is a statute, you know, you look for the technical federal felony, you find it, bring in an independent counsel, turn all the fund-raising of that party up on its ear because of those phone calls, looking for some indication of what the intent was.

I mean, as Attorney General, I'd try to find out what the facts are, let the political check operate in that case. Unless it was particularly contumacious behavior, rather than stupidity or ignorance of the law, or what have you, I would say I'm not going to prosecute the Vice President of the United States because he made five phone calls to raise money from the White House – it's ridiculous. It's not in the public interest – and let the Attorney General take the heat, if there is heat, publicly for it – the political check – and let the administration or the Vice President take the heat, if he did wrong.

But this criminalizing of every bit of conduct by executive branch officials is a political weapon. These things come in during election years; they're brought by political opponents: it's a political device, and it's wrong. And I say we can have more reliance on the political check than just removing these important judgmental issues from the people who should be making them.

JUDGE OSTEN: I know you want to join me in thanking our panel.

(Applause.)

Panel Two – Appointment of Independent Counsel

CHIEF JUDGE WILKINSON: The next phase of our discussion of this statute deals with the appointment process of the independent counsel and the court that does that, and I would like to ask Judge Cameron Currie from the District of South Carolina to bring Judge Sentelle and Judge Butzner to tell us about how the court goes about appointing independent counsel.

JUDGE CAMERON MCGOWAN CURRIE (U.S. District Judge, District of South Carolina): Thank you, Chief Judge Wilkinson, and good morning, everyone.

I knew that we had a timely subject here when, in the recent *New Yorker*, the cartoon shows the waiter arriving at the table with his tray and a man sitting on the tray and says, "Who ordered the special prosecutor?"

We are going to talk now about who does order the special prosecutor, and the panel members who are with me here today were not selected by anyone who had anything to do with this program, but rather by the Chief Justice of the Supreme Court pursuant to federal law.

These two gentlemen are two of three members of the Special Division of the United States Court of Appeals for the District of Columbia Circuit, which is the court established under Title 28²⁹ to go with, or go along with, the act and provide a mechanism for appointment of the special counsel.³⁰

To my left is Judge David Sentelle of the D.C. Circuit; to my right is Judge John Butzner of the Fourth Circuit.

Together, these gentlemen have a great institutional memory. Judge Butzner has been a member of this special division for a number of years and he is, as Judge Sentelle referred to it, the institutional memory of the court, and Judge Sentelle is now in his third two-year term on this court.

The third member of this court is Judge Peter Fay of the Eleventh Circuit in Miami.

The way in which this works is that the independent counsel statute established the court and said that the court shall appoint appropriate independent counsel and shall define that counsel's prosecutorial jurisdiction.

So we have the appointment authority; we have the defining authority in terms of jurisdiction; and, as I have learned in studying this statute, there is also quite a bit of other work that goes along with being a member of this court. So these gentlemen spend a great deal of time working on matters that have to do with the independent counsel statute and, as I said, they are appointed for two-year terms.

29. 28 U.S.C. § 49 (1994).

30. 28 U.S.C. § 593(b) (1994).

The statute requires that priority in selection be given to senior circuit judges and retired justices, and the statute also specifically requires that one member of the panel be a member of the D.C. Circuit.

The Clerk of this court is the Clerk of the D.C. Circuit and, as Judge Sentelle has indicated, he gets one additional staff member to assist in the work of this court.

Now, the first and most interesting part of their job is the appointment of the independent counsel, and so we will go first to that.

Assume for a moment that there has been an application filed by the Attorney General for appointment of counsel. Judge Sentelle, can you tell us what that does as far as your court? What do you have to do at that point?

JUDGE DAVID B. SENTELLE (U.S. Circuit Judge, District of Columbia Circuit Court of Appeals): We, of course, first have to review the application. If it appears to be in order in terms of the statute – and they always have been – it becomes our duty to select and appoint an individual to conduct the investigation.

Do you want me to go into where we get the person from now or –

JUDGE CURRIE: That's fine.

JUDGE SENTELLE: We maintain a talent book, but it is, by no means, exclusive, that contains the names and brief biographies of a large number of attorneys around the country whom we consider as possibilities for independent counsel. Those names can come to us from anywhere – first, from Judge Butzner's institutional memory or our own official institutional memory where we've accumulated names in prior instances. We don't throw them away. We keep them in the book for the next time.

I had an extensive white-collar crime background, not doing it but defending it. My former affiliation with the ABA was in the Criminal Law Section, White-Collar Committee, and my American Inns of Court is the White-Collar Inn, and so I know most of the practitioners nationally in that field.

So my memory, John's contacts in the judiciary, and at Judge Butzner's suggestion, we obtain from the Administrative Office of the Courts the names of the most recent resigned judges in the last several years. We also just get suggestions from attorneys and judges who just call us or mail us the names of people who they think would be good. We keep virtually all of them and we review that talent book, winnow it down to a short list, take off anybody who we see has obvious conflicts of any sort, and then we call them and see if they're interested in meeting with us and interview and decide if they should be an independent counsel.

JUDGE CURRIE: Judge Butzner, Judge Sentelle mentioned conflicts. Is there a problem in determining conflicts and have conflicts caused you to have to continue to move down the list extensively to find independent counsel who can accept the appointment?

JUDGE JOHN D. BUTZNER, JR. (Senior U.S. Circuit Judge, Fourth Circuit Court of Appeals): Oh, yes. The conflicts arise not because of any nefarious action, but simply because a member of the applicant's law firm or the potential appointee's law firm may represent a party that will have some effect in the investigation. A good example of that was in HUD.

It seemed like every law firm in the country, from New York to Chicago, to Miami, had some contact with HUD, and not necessarily in the area where the investigation was leading but just some contact.

For instance, I remember one law firm had litigation over a garage in New York. The investigation had nothing to do with a garage in New York. But we draw a strict line and since we don't know what's going to happen in these investigations, we cut that applicant out and went on to somebody else. Fortunately, we found a retired judge from the Third Circuit, Arlin Adams, who recently retired. He was an outstanding lawyer, a man of great integrity, whom we knew personally, and fortunately his law firm – after he retired, he joined his old firm – had no contacts at all with HUD. He undertook the job of independent counsel and did it very well.

That is the type of thing we run into.

Most of the Washington law firms have some kind of contact with the various departments, and for that reason, we look around the country and hope to get independent counsel who have no conflicts. But again I emphasize, these are not conflicts in the sense that there is anything wrong about them, they're just conflicts.

JUDGE CURRIE: Judge Sentelle, we have a list in our materials of a number of individuals who have been appointed independent counsel, and I wonder if you could comment on whether or not political affiliation is ever a factor in the decision of the court in determining who should be appointed independent counsel.

JUDGE SENTELLE: Obviously, in the first instance it is because the purpose of the independent counsel statute – and I want to underline the "independent" – is to find a special prosecutor or independent counsel who is free of connection with the administration that is under investigation. So if you have someone who is politically connected with the President or with the covered individual who is the subject of the investigation, that person doesn't have the kind of independence contemplated by the statute and we wouldn't choose that person. Beyond that, political affiliation per se is not really a consideration; it exists.

Nearly everybody who is qualified to be independent counsel has some kind of political involvement in their background. If there was someone directly connected in some way with the person under investigation, then we wouldn't have the independence. But beyond that, I think – I've seen Professor Cox in the front row there – I think of the Archibald Cox mode of what is a really good special prosecutor or independent counsel. A person who was, for example, Solicitor General in the administration before the one under investigation, as Archibald Cox was, who was perhaps active in the other party than the one under investigation, as he was, really is an ideal independent counsel because they underline the integrity of the investigation, that they have no ax to grind to defend any abuse of power that might exist. It puts the covered person in the same position they would be if they had been in a prior administration and the present Justice Department was investigating them.

So I guess, to that extent, you would say we know about the political affiliations, but beyond the obvious ones where they lack independence, we don't make it a part of our *sine qua non* at that point.

JUDGE BUTZNER: Let me add to that. Certainly when we get to the point of interviewing a person or people that we think would be independent counsel, we ask very pointed questions and expect very honest answers about contributions to a party – either party – and how much were those contributions and to whom did they go.

Now, many, many lawyers make contributions at a local level to their congressman. But some lawyers make contributions to both candidates, and we have to ask, "How much was it?" and if it was a large amount, why, we would rather have someone who wasn't that much interested in the election of that congressman.

It is not exactly a conflict of interest. It is sort of a judgment call. If it was not a large amount and we found out that that's generally what's going on, we would not necessarily disqualify the person for making the contribution to his congressman. But if the contribution was to the President or the candidates for President, I should say, either party, we generally – I should not only say generally but invariably – we will not accept that person because, by the terms of the statute, the investigation is going to be an investigation of the Executive Department.³¹

JUDGE CURRIE: Judge Sentelle, some commentators about the statute have stated that the independent counsel should be a full-time position and other commentators have suggested that perhaps there should be some sort of in-depth investigation of the person appointed as independent counsel before they are appointed.

31. *Id.* § 591(b).

Do you have any comments to make on those suggestions?

JUDGE SENTELLE: I suppose two.

Judge Butzner and I and Judge Fay have discussed that question of full-time independent counsel before, and while that model can exist, it would so greatly limit the people that you could find who would be willing to undertake this that we think could go on for years and years and years; and the attorneys who have the ability, the reputation and the proven integrity for the job do not want to give up years of their career that they have spent their lifetime up to now establishing – to take years of it out in order to do something that will be lower paying, unpopular, and may not lead to anywhere.

So the idea of requiring full time is something that, while it might not make our job impossible, would make our job very nearly impossible. Maybe a full-time staff could be found by the independent counsel particularly by detailing from Justice or from the U.S. Attorneys' Offices, but as far as the independent counsel himself, I don't think it can be done as a practical matter.

JUDGE BUTZNER: Let me add to that that the independent counsel is paid according to level 4 of the Executive schedule.³² He is paid on an hourly basis, and that amounts to \$55.43 an hour, with a maximum of \$115,682. So you can see that we would find it very, very difficult for someone who has a good law practice. That is the reason we have tried to get, and have gotten in some instances, retired judges – not senior judges; we can't touch them – but retired judges who can devote a great deal of their time because of the pension.

JUDGE SENTELLE: Even with that model, we have to find those who are not planning to spend the next several years doing a lot of particular kinds of practice because they are going to have to give it up, if they were to come full time. So it just may not work, if that were a requirement, of full time. We might find such a person in a given case; we might not.

The second part of your question was about the background.

What we do now – and some people might say it's not enough – but what we do now is, we contact the FBI. We have them send us what background they have already on the person we have under consideration. These people are usually public figures, with well-established reputations. Without exception, the FBI has investigated them for something in the past – they've been appointed or nominated – I don't mean they've investigated them as subjects of criminal – but they've been appointed or nominated or otherwise have been cleared by the FBI. So although we do not have it updated by an independent investigation, we have the benefit of often classified information that exists from the FBI.

32. *Id.* § 594(b)(1).

It may be that Justice should furnish us with an FBI agent to do a full background. I would have no objection to doing that, to get a more current background, but it has not really proven to be a problem in the past. It could in the future, and maybe if somebody wants to change the law to that effect—

Judge Butzner and I have agreed that we're not going to make a suggestion of how to change it. We follow the law however Congress gives it to us.

JUDGE BUTZNER: Yes. And we find a good deal of current information from LEXIS-NEXIS —

JUDGE SENTELLE: Yes.

JUDGE BUTZNER: — to supplement what the FBI has.

JUDGE CURRIE: The second part of the independent counsel division's work is defining the scope of jurisdiction of the independent counsel.

Judge Sentelle, could you comment on what that involves for the court?

JUDGE SENTELLE: Very little.

The Attorney General sends us a request which has within the request a requested scope. If we review that and it's legal—and it always has been—that's what we — we might change a word here and there.

Now, Ms. Gorelick referred to the fact that we did, in a recent case, grant, according to the words of the statute, when the application was made to us, an extension which looked to us like a clarification to cover a related matter. That was a very tiny modification of the original.

We had the statute before us; we reviewed it; we reviewed Justice's arguments and decided that the statute said "related matter"; it said we could do it. If the statute meant anything, it had to mean we could do that part.

Beyond that, I don't think we have ever done anything in defining the scope of an independent counsel's work that did not come from Justice. I think maybe in one instance we cut back on what Justice had asked for, but most of the time our job in defining scope is very, very little. We just have our secretaries lift out of Justice's document the part that defines scope and plug it into our document in most instances.

JUDGE CURRIE: Once the independent counsel has been appointed and the order signed defining his scope, what does the court have to do as far as the investigation?

JUDGE BUTZNER: Very little, and less than that.

The Supreme Court has made it very clear that we have no supervisory control over an independent counsel, and the reason for that is the doctrine of

Separation of Powers.³³ The independent counsel is an officer of the Executive Branch and the judiciary cannot tell the Executive Branch how to conduct its business. The statute provides that the Attorney General may remove an independent counsel for cause, but that hasn't ever been done – but it's there and it could be used.³⁴ The statute also provides that the appropriate committees of Congress shall have oversight of the independent counsel, and that is done up to a certain amount.³⁵

The independent counsel has to report financially what he is spending and what he intends to spend in the next six months in broad categories.³⁶ That report goes to the Congress. We get a copy of that – it is a public document, I think – and we have no way to say "You're spending too much; you're not spending it on the right things."

We get complaints about independent counsel, and we have to explain that we have no supervisory authority and we cannot, without violating the Constitution, exercise supervisory authority, as the Supreme Court has held.

JUDGE SENTELLE: There are a few little administrative details that we tend to such as if the independent counsel is using assets or personnel from his own law firm, there are certain waivers that we have to approve to make sure they are not running afoul of some conflict statutes. Under the last amendment to the act, if the independent counsel or his personnel are drawing per diem beyond certain dates, we have to annually review that and approve it or disapprove it.³⁷ We've always approved it.

As Judge Butzner said, we get copies of the financial reports, although I am not at all sure why because we have no power to do anything with it except look at it and put it in the files. Congress can act on it or maybe GSA. There is nothing we can do about it.

We get motions from time to time – usually a request from the Attorney General for an expansion of jurisdiction or a motion by the independent counsel to expand. We have had one or two of those that came directly to us from the IC.

Beyond that, during the course of the investigation, our role is just limited to those administrative things. It is only when we get to the end and get to the reporting phase that we get very busy and then inundated with work to do again.

33. See *Morrison v. Olson*, 487 U.S. 654, 677-85 (1988) (discussion application of Separation of Powers doctrine to Special Division).

34. 28 U.S.C. § 596(a)(1).

35. *Id.* § 594(a)(1).

36. *Id.* § 594(h)(1)(A).

37. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732, 733 (codified in 28 U.S.C. § 594(b) (1994)).

JUDGE CURRIE: One of the little known aspects of the work of the Special Division involves attorneys' fees of targets and subjects.

Under the law, someone who is a target or a subject of an investigation but who is not indicted is entitled to seek reimbursement of his attorneys' fees incurred in connection with the investigation, and so the annotations to the statute contain numerous cases of petitions for attorneys' fees.

Judge Butzner, do you spend a lot of time reviewing petitions for attorneys' fees?

JUDGE BUTZNER: Yes, we do. We have to look and see whether they were in fact a subject of the investigation.³⁸

Remember, by this time, the report of the independent counsel, which has not yet been released to the public, is available to us and we can go through that report and determine whether the person was a subject. Also, the person who is applying for counsel fees usually has a very articulate lawyer who understands the statute and points us to the fact, or presumed fact, that this person was a subject. Then we have to see that the fees are reasonable and that but for the Act, they would never have been incurred.

Every ruling we make on this is published. We have a firm rule that we will not dispense any money without making it public. Usually it is made public by a per curiam opinion, which Judge Sentelle has always kindly prepared, and it is published in West and available on the Internet.³⁹ But we don't want to spend any tax money privately.

We have requests to do that. We have motions, "Please don't make this request for fees public," and we deny those motions.

JUDGE SENTELLE: One other thing -- and these are hard questions about whether a person is a subject and whether the "but for" standard is met as far as they wouldn't have incurred these fees but for the Act -- on those and on the reasonableness, we are directed by statute to obtain the views of the Attorney General, and in the amended statute, also the views of the independent counsel.

It used to be we sent it to the Attorney General and they often said, "We don't know; we didn't have anything to do with this investigation."

So the amended statute says we must also serve the independent counsel and get the IC's views on attorney fee requests before we --

JUDGE BUTZNER: And that means, long after the independent counsel has filed his report, he's going to be busy.

38. See 28 U.S.C. § 593(f) (stating that subjects of investigations may recover attorney's fees).

39. See, e.g., *In re North* (Reagan Fee Application), 94 F.3d 685 (D.C. Cir. 1996); *In re Mullins* (Mullins Fee Application), 84 F.3d 459 (D.C. Cir. 1996); *In re North* (Cave Fee Application), 57 F.3d 1117 (D.C. Cir. 1995).

JUDGE SENTELLE: And isn't on the payroll any more and may not get reimbursed in any fashion for having to do a document for us that may take considerable time.

JUDGE BUTZNER: Now, the way we handle the report –
Do you want to take that up now?

JUDGE CURRIE: I think some other panels are going to cover some of that, but you're welcome to go ahead and –

JUDGE BUTZNER: Well, I will limit it to this.

We notify everybody who is listed in the report that they can go to the Clerk's Office, or their attorney can go to the Clerk's Office, and will have available to them that part of the report which pertains to them so that they can see what the independent counsel has said about them.⁴⁰ They couldn't function without that.

In the end, we direct the independent counsel to take all those applications for fees and responses to the report – and then sometimes there is criticism of the report – and to put it in an appendix and it is published in – not the application for the fee. I misspoke there – but the criticism of what the report says, and that is published in an appendix to the report when the report is released.

So far, we have released all reports, but there are several cases in which even the appointment of the independent counsel has not been released because it appeared to the Attorney General and it appeared to us that it would not be in the public interest to do it if this thing was –

Well, for example, a tax case, you look into it and it turns out to be a civil case the Department of Justice would never have prosecuted. It's settled civilly. There is no intent to evade the taxes. We usually try and get a good tax lawyer, as independent counsel, and he looks into it.

JUDGE SENTELLE: Those remain sealed and you never hear about them at all – not just the report but other things.

JUDGE BUTZNER: But I think, in the last eight or ten years, there have only been two cases like that.

JUDGE CURRIE: The only silver lining in all of this for lawyers is that the defense attorneys who defend the subjects and targets are not limited to \$55 an hour and are obtaining what is called a reasonable attorney's fee in line with the market in the area.⁴¹

40. 28 U.S.C. § 594(h)(2).

41. *See id.* § 593 (f) (allowing for subject of independent counsel investigation to receive compensation for reasonable attorneys' fees if independent counsel does not bring indictment

Thank you very much to our panel members.

(Applause.)

Panel Three – Prosecutorial Investigations and Decisions

CHIEF JUDGE WILKINSON: We next come to the prosecutorial stage of this process, and I will ask Judge Ellis if he will please assemble his panel and come up.

JUDGE T.S. ELLIS, III (U.S. District Judge, Eastern District of Virginia): Good morning, members of the Conference and guests.

My name is Tim Ellis. I'm a district judge from the Eastern District of Virginia, and it is my privilege this morning to preside over the panel that focuses sharply on the conduct of the independent counsel investigation. And for that purpose, we have assembled a panel of four very distinguished lawyers who have served as independent counsel. These individuals are not distinguished because they were appointed, but rather they were appointed because they are distinguished by virtue of a long and exemplary period of service at the bar or on the bench and, as you heard from Judge Sentelle and Judge Butzner, their sterling reputations for unshakable integrity.

Let me introduce them to you now.

On my far right, your far left, is Robert Fiske, a litigation partner in the firm of Davis Polk & Wardwell, and he was appointed in March of 1976, by President Gerald Ford, as United States Attorney for the Southern District of New York, and he has also served in other distinguished posts, but he was a United States Attorney, which I think is an interesting and important previous experience for an independent counsel. He will have, I think, an interesting perspective, as we will be asking the panel questions about the differences between serving as an independent counsel and as a United States Attorney.

In January of 1994, Mr. Fiske was appointed by Attorney General Janet Reno as independent counsel to conduct the Whitewater-Madison Guaranty investigation.

On my far left, your far right, is Mr. Jacob Stein, a partner in his own law firm in Washington, D.C., and those of us from the Washington, D.C. area are well familiar with Mr. Stein as one of the deans of the D.C. Bar for a very long time, young though he is.

In 1984, he was selected by the Special Division of the U.S. Court of Appeals to serve as the independent counsel in the Edwin Meese matter.

Incidentally, in your materials, you should have received a handout that summarizes some of the essential terms of the statute and some of the experience under the statute.

Then on my immediate left, closest to me, is Larry Thompson, a partner with the law firm of King & Spalding in Atlanta, Georgia. He was appointed as independent counsel by the special panel of the United States Circuit Court of Appeals, which you heard from previously, to investigate allegations concerning the Secretary of Housing and Urban Development.

Then to my immediate right is Lawrence Walsh. Lawrence Walsh was previously a U.S. District Judge for the Southern District of New York. He also served as President of the New York and the American Bar Associations, and he was appointed in 1986 and he served from 1986 to 1994 as the independent counsel to investigate the Iran-Contra matters.

So as you can see, we have assembled an absolutely magnificent panel to discuss with us today the independent counsel investigation process.

Now, the question most frequently, insistently and, indeed, urgently asked about the independent counsel investigation is: What are the supervisory checks that exist, or should exist, with respect to the independent counsel's authority?

And let me begin, in that regard, perhaps giving us some contrast with his experience as a U.S. Attorney, with Mr. Fiske.

MR. ROBERT B. FISKE, JR. (Davis Polk & Wardwell, New York, New York): I think the answer to that is pretty clear.

As United States Attorney for the Southern District of New York, I was part of the Department of Justice, headed, of course, by the Attorney General in Washington, and there is a whole system of review procedures in place that control what Assistant U.S. Attorneys or United States Attorneys can do in the investigation and prosecution of criminal cases. You can't take certain kinds of investigative steps, like subpoenaing members of the media. You can't bring certain kinds of cases, such as racketeering cases, without getting the approval of career people in the Justice Department. And the whole purpose of that is so that there can be a uniform, cohesive system of law enforcement throughout the United States, with the centralized control in Washington, to make sure that some Assistant or some U.S. Attorney isn't going off half-cocked in a way that would be detrimental to law enforcement in general.

There are no such checks or balances in the case of the independent counsel who, once appointed, has all of the authority of the Attorney General and the independent counsel doesn't have to seek authority from anybody to do anything. He or she can do whatever they feel is appropriate, without any review by anyone.

JUDGE ELLIS: Isn't it true, though, that in the case of *Morrison v. Olson*, the Supreme Court concluded that the independent counsel clearly fell within

the executive-branch side and that, therefore, counsel would be subject to supervision?⁴²

Indeed, the opinion is replete with references to the extent to which there are supervisory powers.

Let me turn to Mr. Thompson and see if you agree that there is a difference between the fact and the possibility – in other words, there isn't in fact any supervision, but there could and should be?

MR. LARRY D. THOMPSON (King & Spalding, Atlanta, Georgia): Well, I don't know, in reality, whether the difference in terms of the potential for supervision that you have in a regular criminal case is any different than what you have in an independent counsel situation.

I was United States Attorney at some time in my career in the past and I have dealt with situations involving high-profile criminal investigations, and what you really have now, I think – and it varies from administration to administration – if you have a high-profile criminal investigation, you typically have a very senior and very good Assistant United States Attorney on the case, and in reality – and I understand what Bob said with respect to certain kinds of charges, like RICO charges, and certain kinds of conspiracy charges that need to have review in Washington – but in reality, you do not really have, from a practical standpoint, very much supervision today; and I don't think, from a practical standpoint, there is a real difference between the authority that an independent counsel exercises and the authority that a regular criminal prosecutor exercises in terms of supervision.

I would think, and I would submit to this audience, that the real authority to control an abhorrent prosecution or investigation lies with the judiciary.

Article III judges have supervisory authority over grand juries. Lots of times these motions are brought by good, competent defense counsel. You certainly have supervisory authority over the conduct of an investigation after indictment; and I think, with respect to the independent counsel, that it is no different than any other prosecutor. Ultimately he or she is going to have to prove the case in court, and that's where the authority should lie with respect to a criminal investigation.

JUDGE ELLIS: All right.

Judge Walsh, do you agree that the ultimate repository of supervision is in the Article III branch?

JUDGE LAWRENCE E. WALSH (Crowe & Dunlevy, Oklahoma City, Oklahoma): It is, if the independent counsel strays beyond the assignment of the appointing court.

42. See generally *Morrison v. Olson*, 487 U.S. 654 (1988).

There are two checks, really, on the independent counsel.

The first is the scope of his authority as defined by the appointing court.

Now, this is, as Judge Sentelle explained, usually the authority that the Attorney General asks to have granted to it. So the Attorney General is in there at the beginning and there is no independent counsel ever appointed except at the request of the Attorney General, and there is no review of the Attorney General's decision. If he or she decides not to appoint an independent counsel, there is none.

Now, once she asks for his appointment, the court lines out his area of jurisdiction.

As I say, there have been motions brought by defense counsel challenging my activities as exceeding its defined scope.

The next check on independent counsel is the power of the Attorney General to remove him for cause.

Now, cause is an elastic category, but if there is anything unprofessional, unethical, or if he begins to stray from his activity, the Attorney General can raise that by a removal proceeding which is, in turn, reviewed by the district judge in the district in which the independent counsel is acting.⁴³ So although he seems to have an unsupervised way of going, he is conscious at all times of the intense public supervision that he is receiving, and often the supervision of a hostile administration.

MR. THOMPSON: Judge Ellis, —

JUDGE ELLIS: Yes.

MR. THOMPSON: — I would like to just point out, too, that the independent counsel at all times is subject to the code of professional responsibility of his or her state bar association, and many times those codes involve issues of conduct for public prosecutors, and that is another area of control or check, I think, on an independent counsel.

JUDGE ELLIS: Well, are you suggesting that if an independent prosecutor were to violate any of those provisions, that the state bar involved could then take action?

MR. THOMPSON: Well, certainly could commence an investigation in an appropriate situation, and I do know that that has happened with respect to at least two independent counsel investigations.

43. See 28 U.S.C. § 596(a) (1994) (discussing grounds and process for removal of independent counsel and procedure for review of removal decision).

JUDGE ELLIS: Well, Mr. Stein, we have the Attorney General able to remove for cause. And are there other checks or supervisory powers that you think exist here?

MR. JACOB A. STEIN (Stein, Mitchell & Mezines, Washington, D.C.): My experience is that I had unlimited authority as an independent counsel. These ideas expressed by others concerning limitations were not the way I saw it. I had no limits. I was astonished at the authority I had, and I felt it was a personal test of my own sanity in the exercise of that authority. I don't know whether others thought that I passed the test. But I had more authority than anybody should have. I was reviewing myself.

I think all of us who have had any experience with the statute believe the number of persons who come within the statute should be limited to the highest people in the government. The nature of the inquiry should be limited to things done in office, misuse of the office. The independent counsel should be limited so that he or she can't go into things that have nothing to do with the function of the office.

Now, I was hoping at some time I would get an opportunity to read something about investigations, and I am going to take that opportunity to do so right now.

Excuse me for doing this.

JUDGE ELLIS: I now know why our chief judge assigned me this panel. I think he said it would be something like throwing the rugby ball into the scrum: one must get out of the way, and that's essentially what I will do.

All right, Mr. Stein.

MR. STEIN: "[T]he least thing is seen as the center of a network of relationships that the [investigator] cannot restrain himself from following, multiplying the details, so that his descriptions and digressions become infinite. Whatever the starting point, the matter in hand spreads out and out, encompassing ever vaster horizons, and if it were permitted to go further and further in every direction, it would end by embracing the entire universe."⁴⁴

One other quote. This is from John Adams, a man of respectable authority.

"[G]uilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not."⁴⁵

I tried to keep those two things in mind because it seemed to me that the longer I was at large, the greater the danger that I, myself, would be investigated.

44. ITALO CALVINO, *SIX MEMOS FOR THE NEXT MILLENNIUM* 107 (Patrick Creagh trans., 1988).

45. John Adams, *Argument for the Defense*, in 3 *LEGAL PAPERS OF JOHN ADAMS* 242, 242 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

I want to tell you about a personal experience I had in my investigation.

I was visited by someone from the FBI once a week – a very high person in the FBI – and it was appropriate that he would visit me because he had lent me four FBI agents to help me and the FBI agents reported to me only. He would give me everything that the FBI collected over the week concerning Edwin Meese, all sorts of material. He would hand this to me; and when I would look at it, I would know that if any of this leaked, I would be under investigation. So I didn't want it; I'd hand it back to him and say to him, "If it ever became appropriate for me to have an article like this, you can be assured I will call you." And he would say to me, "Well, you know, we can put a safe in your office and you could put it in the safe," and I had had a little experience with things like that, and I said, "No, you've got better safes than I've got; you keep it in your office."

JUDGE ELLIS: I'm glad we didn't wait.

Mr. Fiske, you began this. Let me give you an opportunity to end it.

What kind of supervisory checks should exist?

And let me ask you also – I think omitted in the conversation that we've had so far – is there any role for Congress? Does the statute specifically contemplate such a role?

MR. FISKE: I don't think, once you have appointed an independent counsel, you can have any checks beyond what I consider the extremely limited checks that are currently in place.

Judge Walsh referred to the power of the Attorney General to remove an independent counsel for cause.

It is not surprising that that has not happened to date. It is hard to imagine politically how that could ever happen except in the absolutely most extreme circumstances. I don't think that is a realistic check against what some of the alleged abuses of conduct of independent counsel have been.

So I don't see a practical way to limit the authority of the independent counsel and still say that the independent counsel is independent.

I would agree with others who have suggested that the statute should be amended, and I would limit it to the very top people, as Jamie Gorelick said. I think I would disagree a little bit with her view as to the limits on the scope of the power of the independent counsel to pursue related matters.

When we get to that on the program, I will have more to say.

JUDGE ELLIS: Should there be time limits, Mr. Thompson, on an investigation? In other words, when an independent counsel is appointed, should she or he be given a time limit?

MR. THOMPSON: No, I think that is unrealistic.

If you look at your handout, many of these cases – and whether or not it should be an independent counsel case or whether it should have been handled by the Department of Justice is really irrelevant once you get the case as a professional prosecutor – and many of these cases did involve, and do involve, criminal investigations.

What you have in criminal investigations are cover-ups; you have many times active obstruction of justice issues.

It is very unrealistic to say that you need to complete an investigation within a certain time.

I agree with Bob. I think we need to be very careful about placing limits on investigating related matters because, in a criminal investigation, you need to take the investigation where someone who might have information might be with respect to the subject or target of the investigation.

So I think you need to be careful about placing artificial limits upon a criminal investigation.

JUDGE ELLIS: I think all of you, however, would agree that the longer that an independent prosecutor remains an independent prosecutor, the more likely it is that he or she becomes politicized in one way or another; and, therefore, while it may not be a good idea to have limits, Mr. Stein, I am sure, would agree that self-imposed limits make sense.

MR. STEIN: I think so.

I think it was Oliver Wendell Holmes who said that the rule of relevance is required as "a concession to the shortness of life."⁴⁶ And when the investigation goes on so long that it is divorced from public interest, there is a real problem.

I would like to know what the other panelists think about dealing with the press.

Should you never deal with the press? Should you deal with the press? When I was appointed, Judge Robb said to me, "Do you want some advice?" I said, "I certainly do."

He said, "I don't want to see you on the Today Show."

I would like to get the feeling of others about that.

JUDGE ELLIS: That is a critical point, but let me give Judge Walsh one last opportunity on the limits and resources.

Do you think, Judge Walsh, that there ought to be any limitations in terms of time or in terms of funds or personnel imposed on an independent counsel?

JUDGE WALSH: I agree with Jacob Stein that self-imposed limits are always desirable, certainly as a goal, because the longer you stay there, not only

46. *Reeve v. Dennett*, 11 N.E. 938, 944 (Mass. 1887).

do you lose public support, but you also invite public attack or political attack. So it is an inevitable thing and any independent counsel is going to be aware of that. But as to trying to impose arbitrary limits, that is the way in which the Iran-Contra congressional committee got into their basic trouble – and John Nields will be here and maybe he can give you a different explanation – but they imposed a six-month or seven-month limit on their investigation. It made them sitting ducks for the administration, which was withholding information.

We were dealing not just with – first of all, there were no stumblebumps in this business and we were dealing with the most expert groups in our national security community. We were dealing with our CIA, which is darn good and which is composed, in some elements, of people well-trained in deceit because that is their business – they do that for our country – and they also can turn those skills loose on Congress and an investigating counsel, such things as giving you a hundred thousand documents by holding out the ten that explain the other ninety-nine thousand. It is beautifully done, and I could talk with you at some length about that.

JUDGE ELLIS: Sounds like some of the people I litigated with for twenty years.

JUDGE WALSH: That is the basic problem with trying to put time limits on an independent counsel or on a congressional committee. You just put yourself in the hands of defense counsel who can make motion after motion and use up your time and you can't get –

MR. STEIN: Judge, could I ask you this.

On reflecting on the techniques that were used against you and the resourcefulness of the people who were using them, as you look back on it, is there anything that you would have done differently?

JUDGE WALSH: Yes, there is, Jake, because the limitation that Congress put on its own investigation hit back at me. Because they had to finish in six months and because they needed a storyteller like Ollie North to explain what happened, I was confronted with the inevitability of their giving him immunity; and in an effort to preserve the case against him, I had to get all of the evidence against him in the files before he testified so that we could say that we had it without listening to him. That didn't help in the end anyhow, as Judge Sentelle may tell you. But that's what we did at the time.

Now, in an effort to get as much as I could as quickly as I could, I relied on document requests.

The Attorney General before me, Attorney General Meese, had filed the original document request, addressed to all the agencies, and I followed it along. I expanded them to deal with my needs, but I took a chance on being able to use them as the basis for getting the documents. I figured that if we subpoenaed

them, we're going to get the same kind of a runaround anyhow, but in that case, we would have had a court to go to to enforce the subpoena. That, in turn, would have invited litigation which would have prolonged my work.

So I still think, though, to reply to Jake's question, I would have been better to proceed by subpoena, fight it out at the beginning, than to rely on document requests and then find out four or five years later that the Secretary of Defense had notes that explained the whole business or a lot of these things and hadn't produced them and had lied about them and we hadn't found it out.

JUDGE ELLIS: All right. Let's turn now to the interesting issue that Mr. Stein raised about contacts with the press.

Mr. Thompson, did you have many contacts with the press?

I don't recall seeing you on "Good Morning, America."

MR. THOMPSON: No, and there is that opportunity to get on TV and talk about the independent counsel statute and investigations in general or to talk about your specific investigation, and I think it is improper as a prosecutor, whether you are in an independent counsel's office or with the Department of Justice, to talk about your case or investigation in the media. I just think that that is something that you shouldn't do.

The only issue there is that many of these cases do involve highly politicized, high-profile matters, and sometimes you do need to make a fair response to defense counsel who is trying to improperly manipulate the media. So there is a balance there. But I do not think that the prosecutor should initiate those kinds of contacts.

JUDGE ELLIS: Mr. Fiske.

MR. FISKE: I tried to follow the same policy as independent counsel that I had followed when I was United States Attorney, which was making no comment to the press except when you announced an indictment or when there was some court proceeding that resulted, as some of ours did, in guilty pleas. Then, of course, it is perfectly appropriate to announce those. And, of course, you do appear in court and respond to motions, and so forth, and all of that is in the public arena and that is all duly reported. But I personally always believed that a prosecutor should not be appearing in the press other than to announce official actions of his or her office.

JUDGE ELLIS: Judge Walsh, what about contacts with the media? Did you have many?

JUDGE WALSH: I did. I dealt with them on a fairly regular basis, for two reasons.

One, I was under political attack from a very early stage and at times it was necessary to respond to that and at other times, as my investigation dragged

out over two years, three years, four years, five years, it was difficult, even for good reporters, to keep everything with some degree of continuity. So in the end, I would meet regularly.

There were a group of twenty, twenty-five reporters following us with some degree of regularity. They would have the option of coming to see me two or three times a year. I would tell them how much money we spent. That was in the public press at all times. We released our six-month figures to them as they occurred.

"Why are you spending so much money?"

You try to explain in a general way, without dealing with the specifics of any case.

Then, for example, after we had convicted North and Poindexter, the question was: "Why are you still going? Why don't you go home?"

So then there would be a series of meetings in which we would explain the framework of the investigation, again without identifying individuals or talking about a case against individuals, and always bearing in mind, of course, Rule 6(e), which forbids the disclosure of grand jury testimony.⁴⁷ We gave them no specifics, but gave them a generalized framework so that they would understand an event of the moment.

And if you think, by not talking, you were going to minimize their attention to what was going on, that's unrealistic because they were monitoring the grand jury.

The D.C. Court changed it finally in the end, but all the reporters had to do was stand at the elevators on the second floor and watch who went down a particular corridor to the grand jury room and they would know who the witnesses were today, and they were wise enough to understand the relationship of those witnesses to a particular department or a particular line of inquiry.

But I thought that the regular meeting with them – and they were an extremely decent, competent group – was helpful because it enabled them to keep their stories accurate and to give the public some idea of the continuity of the investigation.

JUDGE ELLIS: Mr. Stein, I take it that that varies a little from what you did during your investigation.

MR. STEIN: I felt it was unwise to talk to the press for the reasons given by two of the panelists.

JUDGE ELLIS: But when the investigation goes on some five to six years, does that change it?

47. FED. R. CRIM. P. 6(e).

And what about speeches to bar associations or speeches to other kinds of groups? Did you do any of those?

MR. STEIN: Never.

JUDGE ELLIS: Judge Walsh.

JUDGE WALSH: I did it on two occasions: One, after the immunity was granted to North, after North testified, not only – John Nields can explain all this – but when North was called as a witness, his attorney, a very able attorney, Brendan Sullivan, insisted that he only testify once, either in private or in public. So it meant he had to be put on the stand publicly, with no preparation, without knowing what he was going to say. And all of you who have ever questioned a witness without knowing what he is going to say know what is very likely to happen; and he ran away and a poll taken, at the conclusion of his testimony, of the ten most popular people in the world had North as number five; President Reagan was number four –

MR. STEIN: Moving up to one.

JUDGE WALSH: – President Reagan was number four and the Pope was number six. So at that point I thought I had to explain why I was going to prosecute him anyhow, and I did do that to the American Bar Association at its meeting a month later. And another time, when the statute was under attack, I spoke to the American Bar Association in defense of the concept of independent counsel and the statute.

JUDGE ELLIS: All right. Mr. Fiske, did you want to end this round where it began?

MR. FISKE: I think I started.

JUDGE ELLIS: All right. Let's turn now to the matter of the final report,⁴⁸ which is a matter of great interest to everyone. Let me ask whether there ought to be, as there is, a requirement for a final report, for, after all, there is no such requirement for a United States Attorney. When a United States Attorney declines a prosecution, she or he doesn't get up in front of the press or publish anything that says, "Well, I didn't prosecute, but I didn't prosecute because of this, that, and the other thing, and it's one of those cases where it probably should be prosecuted, but I don't have the resources."

What about the requirement for a report, Mr. Stein?

MR. STEIN: I think there are two elements.

48. See 28 U.S.C. § 594(h)(1)(B) (requiring that independent counsel submit final report after completion of duties).

The public is entitled to know how its money is spent, and perhaps a report should be written to give some information about that.

On the other hand, it can do a lot of damage to a lot of people. In addition, writing the report requires a lot of time.

I was requested by two senators to put in my report that Mr. Meese should be absolutely exonerated and from another senator that I should declare that he is unfit for the job of Attorney General.

Well, I had nothing to do with those issues. My issue was whether there was evidence to bring an indictment. If you explore other issues, you yourself become a political figure. That was not my assignment.

Anyway, if a report should be written – and there are many reasons why there shouldn't be a report – perhaps it should be confined to who you employed, what their backgrounds were to show that you had quality people, and some indication why the investigation took the time it did.

I also give advice to anybody who is going to be appointed an independent counsel. Start writing your report as soon as you are assigned. If you wait to the very end, you are going to have a tremendous problem.

JUDGE ELLIS: Mr. Thompson.

MR. THOMPSON: I agree. I owe a report to Judge Sentelle. It is a really daunting task. I think it is a very wasteful requirement; there is a tremendous potential for abuse.

When I was a prosecutor in the Department of Justice, when I ended a case, I simply shut the door and turned the lights out. Now I have to spend millions of your money doing this report. Right now what I have to give to Judge Sentelle is a full and complete report.

The statute says that I need to write a report setting forth fully and completely a description of the work of the independent counsel, including a description of all cases brought.⁴⁹

JUDGE ELLIS: Does that include, for example, having to tell Judge Sentelle and the other members of the court that while you thought there was evidence of some wrongdoing, you didn't think you could persuade a jury, or something of that sort?

In other words, what I heard you read and what I recall from the statute clearly doesn't require that you, as you're turning out the lights, throw rocks.

MR. THOMPSON: Absolutely, and hopefully we will not do that, but you will need to describe, as I understand the statute at this point, a basic degree of the work of the office and the investigative work and some description of the investigative details because I think now, as the statute is constructed, the

49. *Id.* § 594(h)(1)(B).

court needs that, the special panel needs that, to determine the attorneys' fees issue, especially who was the subject and the target of the investigation and did not get prosecuted.

JUDGE ELLIS: All right. Judge Walsh.

JUDGE WALSH: I think the report is an important requirement of the statute.

Where a person has the unsupervised power that we have all discussed and in a matter of this kind of sensitivity, dealing with the highest officers in government, he should be required to report on what he does.

The original idea of the statute was to create an independent investigator whose credibility would be accepted in deciding not to go ahead against someone.

The classic report that I always point to was the one by Leon Silverman, who was later President of the American College of Trial Lawyers, who wrote a thousand-page report on why Secretary of Labor Donovan should not be prosecuted, and he pointed out the lack of credibility of the witnesses.

Now, I think it was both important to Secretary Donovan and to the public who had supported the investigation to know why, after the Attorney General asked for an investigation, he concluded nothing should be done.

I think there are two questions.

One, should there be a report?

Second, should it be made public?

And again, this is a democracy where the public is entitled to know what is going on and if somebody spends, like I did, \$35,000,000, there is bound to be some question and it ought to be answered by someone other than by political opponents or people with an ax to grind, attacking either the statute or me.

There is another question also: whether that report should contain grand jury evidence.

And I thought Judge Sentelle did a beautiful job of meeting that question.

First, the classified information was put in a separate report that nobody saw except the court.

Second, he decided to leave the grand jury references in because they were necessary to the complete story.

But before that report was released, he issued an opinion. President Reagan had asked to suppress the report, and so had several others. He ruled on those motions with an opinion which pointed out that all the report was was a report by an individual. The conclusions expressed in it as to what the facts were and why someone wasn't prosecuted were those of an individual. So his opinion acted as a preface for the report to diminish it as a public accusation of any sort.

And then finally the statute provides that every person mentioned in the report is to have an opportunity to supply his comments, his explanations, his denials, which are to be published at the same time as the report.

My report is three volumes. The third volume, which has the comments by those mentioned in my report, is, by far, the longest. It is over a thousand pages, in dealing with the 400- or 500-page report.

So I think it is a dilemma.

Is it right to have a prosecutor saying things that may be unfavorable to an individual without having a grand jury indictment and a prosecution?

You know, we just shudder at that. But where you have to explain what happened and why you didn't do something as the statute requires—and I think it probably should require—why, it seems to me this is the best answer to it—give everybody an immediate opportunity to answer—so the press gets both the report and the answers at the same time and then have someone like Judge Sentelle set the stage by diminishing the report as a public accusation.

JUDGE ELLIS: Mr. Thompson.

MR. THOMPSON: Judge Walsh, I understand your points there, but we would not want that kind of report coming out of the United States Attorney's Office or the Department of Justice. For example, if Jamie Gorelick undertook an investigation of, say, a mayor of a large city and decided not to prosecute him or her, we would think that the prosecution would be closed, and there would be professional and ethical limitations upon her ability to write a report as to what happened with respect to that investigation. And the question I have is: I think that perhaps the filing of this report and the writing of the report actually serve to not only make the investigation go longer, but perhaps serve to overly politicize the investigation.

JUDGE ELLIS: Judge Walsh.

JUDGE WALSH: I could certainly say that it's a pain in the neck.

I worked for a year—the report took, I think, five or six months after we were through.

Nobody likes the idea.

But just to meet Larry's point, the Attorney General has to file an annual report. The structure there is in place. It is not something novel, like an individual independent counsel going off by himself.

Also, there is congressional oversight of the Department of Justice that is regular. Although there is congressional oversight of the independent counsel, it is very difficult to make that effective, and I think that to make congressional oversight effective, they need a report. And if the report is going to go to Congress, it certainly ought to go to the court, and I think Judge Sentelle was right in releasing it to the public.

JUDGE ELLIS: Mr. Fiske.

MR. FISKE: Larry contrasted this situation with that of the U.S. Attorney or the career prosecutors in the Justice Department, and it really does make the point very well, and it is sort of a one hundred and eighty-degree difference.

The traditional U.S. Attorney investigation is one where they investigate something. Hopefully the public, if it is done right, never even knows there is an investigation at all; and if the decision, at the end, is not to prosecute, then there is no prosecution, there is no announcement, and hopefully nobody ever knew the person was under investigation.

The very situation that creates the need for an independent counsel is that the allegation, which may be confidential or secret in the traditional investigation, is a public allegation. So the whole country knows about the allegation. And, secondly, it is deemed that the Department of Justice is unable to investigate that and, therefore, a person is picked from the outside to come in as an independent counsel to investigate this highly publicized investigation.

It's easy if the person brings an indictment. Then we go through the traditional system: The jury votes up or down and he gets judged on the result.

The problem comes – or the theoretical problem comes – when the independent counsel, who has been selected theoretically because of his or her independence and credibility, decides not to prosecute; and then, even in a nonpolitical politicized situation and certainly in the highly politicized situations that have been common recently, everybody wants to know why not, and that is what creates the demand for this report which is so otherwise antithetical to our whole system.

It is interesting that originally the statute required the report to say why the individual under investigation was not indicted. The most recent amendment, in fact, in 1994 makes that now discretionary so that that can be done or not in the discretion of the independent counsel.⁵⁰

I think it is a very tough call –

JUDGE ELLIS: And how would you come out on that issue?

MR. FISKE: Well, I think you can't answer that yes or no. I think –

JUDGE ELLIS: It depends on – it's fact-specific –

MR. FISKE: I think you have to depend on the facts.

I think there has to be some explanation to the public why an indictment wasn't brought. The problem comes when people say, "Well, we didn't indict,"

50. See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732, 734 (codified in 28 U.S.C. § 594(h)(1)(B) (1994)) (eliminating requirement that report contain reasons for not prosecuting matters within independent counsel's prosecutorial jurisdiction).

and then someone takes sort of a gratuitous shot like the kind that someone tried to get Jake Stein to take and say, "Well, we're not going to indict him, but I think he's unfit for office" or "there are some ethical violations here," things that go beyond the scope of the independent counsel's responsibility. That shouldn't happen.

The last point I want to make—and I think this is an important point—there is an interrelationship, I believe, between a report requirement and the complaints from so many parts of the media and the public about the length and expense of the investigation.

We all have situations, when we're regular prosecutors, a case comes in and an allegation comes in, you look at it, it doesn't seem to be going anywhere, and you say, "Let's move on to something else; we've got other things we want to spend our resources on."

The independent counsel has one case — one case. He is going to be judged — he or she — on that one case, not on their overall track record. And then when the results have to be laid out before the American people in a report, it is understandable that a prosecutor is going to bend over backwards to run down every last conceivable lead, dot every last "i," cross every "t," to make that report as bulletproof as possible from the criticism that is inevitably going to come out if there wasn't an indictment.

And so I think those two things are inextricably interrelated. As long as you have that report requirement, you are going to have these long and expensive investigations, because it all makes sense from the point of view of the person that is doing it.

JUDGE ELLIS: I think those comments adequately deal with the report issue.

Let me turn now to another very important, indeed sometimes incendiary, issue and ask: What kinds of questions arise, as is often the case, when there is a parallel congressional investigation? How should the issues be resolved?

Let's begin with Mr. Stein.

There was no congressional investigation in your case.

MR. STEIN: There was none, and I had none of the problems that Judge Walsh was confronted with. There were no questions of immunity, and things like that. So perhaps someone who was involved in the parallel should speak.

JUDGE ELLIS: Mr. Thompson, you had the same experience.

MR. THOMPSON: Yes. That was not an issue in my investigation.

JUDGE ELLIS: Judge Walsh, the spotlight seems to focus on you here.

JUDGE WALSH: Well, it does on this question because, from the very beginning, we were confronted with the problem of parallel investigations.

Those of you who have prosecuted know a parallel investigation is difficult on both sides – if you’re getting a criminal case ready and have somebody else working on a civil case, questioning the same witnesses, leading to possible confusion of your witnesses who are all reluctant to testify.

There was no one who wanted to come in and blow the whistle in our case. Every witness, from the beginning to the end, was essentially hostile and sensitive and uneasy in what they were doing, and to have two groups working with the same witnesses is bad, at best.

MR. STEIN: Judge Walsh, let me ask you this.

JUDGE WALSH: Yes.

MR. STEIN: You said, in reflecting on how you may have done it differently, you would have used the grand jury.

Quickly?

JUDGE WALSH: No. We had the grand jury fast enough.

MR. STEIN: But you would have brought the key figures before the grand jury?

JUDGE WALSH: No, no, no, no.

MR. STEIN: How would you –

JUDGE WALSH: I would have used the grand jury to subpoena documents, but I wouldn’t –

MR. STEIN: Okay.

JUDGE WALSH: I think that any of you who have prosecuted know you have to be very careful, with a hostile witness, before you perpetuate his testimony. He usually is reluctant at the beginning and he gives more and more as he gains confidence in you.

So you can’t solve the problem that way. But we did have overlap. John Nields actually had sent out requests to each of the agencies we were investigating, asking for duplicates of all the documents they gave me. So whatever I requested, he was asking for duplicates – so that we were being followed from the back as we went ahead, but –

JUDGE ELLIS: Did you ask Congress to refrain?

JUDGE WALSH: No. I think we asked John not to, and I can’t remember whether he agreed to or not. He’ll tell you when he gets up here.

But I must say that we worked weekly with counsel for the two committees – John Nields and Arthur Lyman – and they were just as cooperative

as they could be. We had different objectives; we had different time constraints; and they did their best to accommodate it, but it was difficult.

One of the key elements of proof in the case were Swiss records.

Under the treaty, Switzerland would produce those records, but only to a law enforcement agency, not to Congress, which they regarded as a political agency. So Congress couldn't get the Swiss records which had all of the details of the diversion of the funds from the Iranian arms sales to support the Contras, and so they had to give immunity to one of the persons that I intended to prosecute, Albert Hakim, who was the treasurer of the Contra supply enterprise.

Now, then the ultimate problem came with giving immunity to North and Poindexter, who were very important to us, first, as defendants and targets and then as a possible source of information.

JUDGE ELLIS: I take it, though, you would say that the problem of immunity is one of the principal problems.

Mr. Fiske.

JUDGE WALSH: Well, let me just say one more thing.

Under the law, Congress has the ultimate word, and it should be that way. Congress should make the decision as to whether it should grant immunity or not, and they are really the supreme governing agency in our government. And if they conclude that for political reasons – high-level political reasons – it is important to tell the public, the prosecutor should be subordinated.

JUDGE ELLIS: Mr. Fiske.

MR. FISKE: Yes. I did also have some experience with congressional investigations during my tenure.

I agree completely with what Judge Walsh says about Congress having the ultimate authority.

Within a month after I had started, Congress announced that it was intending to have hearings into the very issues I was investigating both in Arkansas and Washington, and I went to the leadership of the two committees and asked them to hold up their hearings because I felt it would interfere with our investigation, and they said, "We're not going to give anybody immunity; you don't have to worry about that." But I had the same concern about them calling people in, putting them under oath, and having them tell a story that would lock them in that would make them basically useless as witnesses later if it turned out that story prematurely told was false.

The Democrats controlled Congress at the time and they were receptive to my request to hold up hearings and the Republicans wanted to go forward, and we finally negotiated sort of an unhappy compromise, which was – I was working on some aspects of this in Washington – I said, "When I finish that, then I would have no objection to your going forward on those issues, but I don't

want to have hearings going on into what's going on in Arkansas." And that's the way it worked out, but there were some very unhappy voices.

A congressman from Wisconsin – this was right about the time of the O.J. Simpson arrest – said, "This is like saying to us, 'You can't ask him about the knife'; you can't ask him about the bloody glove; all you can say is, 'Say, O.J., how was the trip to Chicago?'"

But I think the reaction to Congress to holding up an investigation that may interfere with a prosecutor's investigation probably depends in large part on political considerations.

JUDGE ELLIS: Now, I promised this unruly bunch that before we ended this panel, each would have an unfettered opportunity to express his views about whether the independent statute should be changed or indeed scrapped.

We are going to be very brief – two minutes each – and we will begin now with Judge Walsh.

JUDGE WALSH: Briefly, the purpose of the statute, it grew out of the Saturday Massacre in which Archie Cox was fired because he subpoenaed the President's records and the Solicitor General carried out the President's direction to fire him.

The idea was to get someone who couldn't be dealt with that way.

The purpose also was, where there is a real possible conflict of interest of the Attorney General, to give him or her a double insulation. Not only can she or he appoint an independent counsel themselves, they can also ask a court to do it so the Attorney General is out of the appointive process.

Now, the statute is overbroad.

In the debate within the American Bar Association which developed the original concept, there was a question of whether the request for appointment of an independent counsel should be discretionary or mandatory. I happened to favor the discretionary against the mandatory, but the mandatory prevailed.

If there is to be a mandatory appointment, I think many of us agree that this requirement should be limited to the President, the Attorney General and – actually, we have language here that Jake Stein and Archie Cox worked with me on – or, actually, they're the draftsmen – it should be limited to a criminal abuse of power by the President or the Attorney General in the performance of the official duties of their office.

In other words, it shouldn't be a question of whether Hamilton Jordan smoked pot in a nightclub for which an independent counsel was once appointed or whether somebody had a mistress, and it should not relate to matters that occurred before a person took office. It should be limited to emphasize that it should be an important matter. In Iran-Contra there was a constitutional confrontation. In Watergate there was sordid activity by the President himself.

There may be room for language which would narrow it even further by emphasizing the need for something important and not trivial.

Now, that is my feeling.

JUDGE ELLIS: All right. Now, Mr. Thompson has the distinction of being the only one of our independent prosecutors who is not a *former* independent prosecutor. He is a *current* independent prosecutor, with pending matters, and that may –

Do you wish to have your two minutes or –

MR. THOMPSON: I will defer. I do have some post-conviction litigation going on, and I think it would be appropriate for me to just pass on that question.

JUDGE ELLIS: All right. Mr. Stein.

MR. STEIN: I think someone with the power the office confers should have a tolerance for the idea that you cannot rectify all the wrongs in the world; you can't pursue all the leads that come to you; and you've got to have the courage to close the investigation in spite of the fact that just when you're ready to close it, you get a letter from somebody who says that he has the goods on your man – he's got the goods and he will produce a woman in your office 10:30 tomorrow morning to blow this investigation wide open.

That's after you've been in office for, let's say, three months.

And suppose he's got the goods.

Well, he's got you, but you've got to have the courage to say, "We're through, we're closing down."

Thank you.

JUDGE ELLIS: All right. Mr. Fiske.

MR. FISKE: Well, I already said I think the statute should be limited to top officials in the Executive Branch – the President, the Vice President, the Attorney General, basically the same limitations that Jamie Gorelick listed.

There is one aspect that I would like to deal with, which goes back to what Bill Barr and Jamie Gorelick were talking about: the constraints on the Attorney General in the investigation that the Attorney General herself or himself conducts to decide whether to appoint an independent counsel in the first place.

I see absolutely no reason, it makes no sense, why the Attorney General is not allowed to use the grand jury, not allowed to use the same prosecutorial resources that he or she would ordinarily use in any other case in order to make this crucially important decision.

And the last point I would make is that I do think that it is very important that the independent counsel have the authority to pursue related matters when those related matters involve the use of a key witness that the independent counsel may not want to turn over to someone else and, secondly, when those

related matters, in his or her judgment, are reasonably designed to produce, in one way or another, evidence against the subject of the investigation.

JUDGE ELLIS: Ladies and gentlemen, please join me in thanking the panel.

(Applause.)

Panel Four – Congressional Investigations

CHIEF JUDGE WILKINSON: Our fourth phase of the independent counsel program will deal with the question of congressional investigations, and this time we will hear about the whole question of congressional investigations from the point of view of those who worked on such investigations in Congress. And so I will ask Chief Judge Haden of the Southern District of West Virginia to introduce the next panel.

JUDGE CHARLES H. HADEN II (Chief Judge, Southern District of West Virginia): Good morning, ladies and gentlemen.

Up to this point, the primary focus of the discussion has been on the independent counsel operation and how selected, et cetera. Our focus for this panel is on the counterpoint of recent years – the congressional investigation.

At the outset, I would remind you that the independent counsel statute has had a very brief life in the history of the country. It was enacted first in 1978, sunsetted in 1992 and, as previously remarked, was reinvigorated and reinstated in 1994, and it has a limited life through the end of 1999.⁵¹

On the other hand, before and after the advent of the independent counsel statute, Congress has freely exercised its authority to conduct investigations within the scope of its constitutional powers.

A congressional investigation, for our purposes, is a focused aspect of legislative oversight which shares the common goals of (1) informing Congress as to the best means of accomplishing its task in developing legislation; (2) monitoring the implementation of public policy; and finally, (3) disclosing to the public how its government is performing. This inquisitorial process also sustains and vindicates Congress's role in the constitutional scheme of separated powers and checks and balances.

When push comes to shove in the constitutional and policy arena, it is, as one of our previous speakers has conceded, thought generally that the congressional investigation, so long as it stays within the sphere of its authority, is paramount over independent counsel or other executive or quasi-executive authorized investigations that might conflict with or parallel a congressional purpose.

51. 28 U.S.C. §§ 591-599.

Conflicts have arisen between Congress and the executive over congressional investigations since the Union was formed.

For you who have an interest in the history of it, the first clash occurred when Congress investigated the failed Sinclair Expedition in 1792, where former revolutionary soldiers, who had defeated the British, were soundly vanquished by native Americans in the Northwest Territory.

Beyond the memory of most of us, but not some who are present here today, there was also the Teapot Dome Scandal investigation during the Harding administration; and the ones we are all aware of include Watergate, Iran-Contra, Whitewater and, most recently, the seminal investigation of campaign contributions from foreign supporters to candidates for important offices. And like other speakers, I too would not put a name on that investigation. I don't think the media has yet informed us what the appropriate final name is.

Our focus today compares and contrasts areas of direct conflict that can occur when Congress and the independent counsel are charged with investigating the same event and the same people. In any such parallel investigation, there is always that tension created by Congress's need to oversee the activities of government and to inform the public about overriding issues of public policy, that is, again, how the public's government is being conducted, with that of the independent counsel on the other hand, whose interest generally is to investigate criminal activity of events and persons in high offices and with the power that has never yet been exercised by an independent counsel to refer certain officeholders to Congress for impeachment.

Preeminent among Congress's various powers to investigate, but perhaps most dangerous to the success of an independent counsel prosecution, as previous speakers have noted, is the prospect of a grant of broad immunity to witnesses who may appear before Congress pursuant to the immunity statute of 1970—18 United States Code, Section 6000, and the following subsections.⁵²

Our panelists will no doubt discuss the implications of either the granting or withholding of immunity to prospective congressional witnesses.

There are also other essential tools that many of us from outside the Beltway are less acquainted with, and those are — and they have to do with legislative oversight — the power of subpoena, staff interviews, staff depositions, and the contempt power, the employment of which, either singly or together, may overshadow the success or failure of a concurrent investigation conducted by an independent counsel.

Our two panelists today bring a wealth of opinions and also years of experience to the conduct of or reaction to congressional investigations, vis-a-vis a concurrent independent counsel investigation.

I will introduce both briefly.

52. 18 U.S.C. §§ 6001-6005 (1994).

Mr. Richard Leon, to my left, and Mr. John Nields are fully covered in the biographical information on page 13 of the program, but for our purposes today, suffice it to say that Mr. Leon has served as deputy or chief counsel to the United States House Republican members on three different congressional investigations: Whitewater, October Surprise, and Iran-Contra.

Dick Leon also is an adjunct Professor at Georgetown University Law Center, where he teaches a course that is the very subject of this panel – congressional investigations. He teaches that with another person we had hoped to have present here today, John Podesta, who is Deputy Counsel to the President and who, no doubt, views this whole affair with a somewhat different perspective, but Professor Podesta was unavailable.

Mr. Nields has also functioned as Special Counsel for the United States Department of Justice to prosecute top officials of the FBI in the case of *United States v. Gray*.⁵³ But more relevant to this point here today, Mr. Nields served as Chief Counsel for congressional Democratic members, the relevant congressional committees investigating Koreagate and Iran-Contra. And also Mr. Nields, I hope, in his explanation, will distinguish for us, if it has not been done already, the difference between a special counsel and an independent counsel.

I also note for you that the program is in error in describing Mr. Nields as independent counsel for Iran-Contra. I think Judge Walsh should take full credit for that.

In any event, I suggest that both of our panelists have extensive experience in protecting the integrity of valid congressional investigations while working at all times to avoid jeopardy to the success of a concurrent independent counsel investigation, and they come to us with a wealth of talent. I think both of them are pretty good speakers on the subject.

I will commence with the first question, and that is:

If criminal investigations, John Nields, primarily are the responsibility of the independent counsel, what role or purpose should congressional investigations play? And how does what is being investigated play a role in defining the scope of the congressional investigation?

MR. JOHN W. NIELDS, JR. (Howrey & Simon, Washington, D.C.): This isn't an evasion, but I need to start off by saying that I bumped into Judge Walsh last night and told him that I had read the first chapter of his book⁵⁴ and how much I liked it. Apparently I didn't read far enough.

JUDGE WALSH: It gets better.

53. *United States v. Gray*, 502 F. Supp. 150 (D.D.C.1980).

54. LAWRENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP* (1997).

MR. NIELDS: I'll do a little more reading tonight.

I did not expect, at the beginning of my career, that I would end up speaking on behalf of Congress at an event like this. I began as an Assistant U.S. Attorney, doing criminal prosecutions, and we thought that Congress was hopelessly political and no place where any professional could do his job, but I have now done two congressional investigations for Congress and here I am, and I'll do the best I can.

Congress's functions in the kind of area we are talking about here are very important, and they are very different from those of an independent counsel, and they are different in ways that you could be confused about if you get your understanding of independent counsels from reading the press.

Congress performs a kind of watchdog function over the Executive Branch of our government. Congress holds hearings to explore issues of public policy about how we govern ourselves. Congress uncovers and exposes and publicizes misuse of government power, abuse of government power. Congress frequently targets particular individuals in the Executive Branch to expose misfeasance, with the result that those individuals resign or are, in some manner, run out of office; and very occasionally – and we hope this is very occasionally – Congress actually has an impeachment function.

This work of Congress is very political. It is sometimes partisan. It is often not pretty to look at, but it is very important. We live in a democracy in which the government is supposed to be accountable to the voters, and the voters can't perform their function unless they know what their government has done.

Congress also obviously has the responsibility for passing laws and I, for one, hope that at the end of the unnamed campaign finance investigation, Congress will actually address the issue of appropriate remedial legislation. But for the purposes of this discussion, it is really its watchdog function, I think, that comes into play; and, as I say, it is a political function, and it is very different from the function of an independent counsel, which is, or at least should be, not political at all.

The independent counsel is not a good way of finding out whether the government is performing its job correctly or whether there are, in general, people in government who are engaged in some manner of misfeasance. It is not a good way of doing that, first of all, because an independent counsel functions in secret under grand jury secrecy as independent counsel, as all prosecutors should. They frequently take a very long time to get the answer to the question, and their scope is much narrower than Congress's. They are to answer the question of whether someone should be prosecuted for crimes. Most of the misconduct in government does not result in violation of criminal laws or at least violations that ought to be prosecuted. And finally and most important, the independent counsel and any prosecutor's office ought not to

be attempting to serve a political role. They should be serving a role of ferreting out and prosecuting crime. It is a role of justice, not politics.

So Congress has a very important role in the kind of arena we are talking about, and it is different from – and we will get into this deeper as we go forward – from the function of the independent counsel.

JUDGE HADEN: Mr. Leon, do you want to try your hand at that?

MR. RICHARD J. LEON (Baker & Hostetler, Washington, D.C.): Well, it is a broad topic but a worthy one.

I think, as a general proposition, it has been very interesting to see the reversal that has occurred over the ten years since I first worked as a counsel to a congressional investigation as a colleague of John on the Iran-Contra investigation. Since the three occasions I've worked on congressional investigations, we have seen both the Congress and the administration change hands, and with it we have seen a new phenomenon that is rather interesting. When the Republicans controlled the White House and the Democrats controlled the Congress, the Republicans were always bitching and moaning that there were too many Democratic congressional investigations of the White House. Well, since it has turned around a hundred and eighty degrees, the Democrats are complaining that there's too much investigating of the Executive Branch by the Republican-controlled Congress.

I think the bottom line is that Congress has its institutional responsibilities, and it has to exercise them in a responsible way.

Of the investigations that I've been involved in, two of the three had public hearings, Iran-Contra and Whitewater I – Whitewater I being the initial Congressional investigation into contacts between White House and treasury officials that occurred in 1994 when Bob Fiske was serving as the Special Counsel. There was no question, there was no issue, that it was appropriate and necessary for public hearings to occur in both of these investigations. In both instances the Democrats controlled the Congress of the United States. And even within the Congress, there was no real serious issue as to whether there should be public hearings.

I think Congress, for the most part, especially through the leadership that has been exerted by the chairmen and ranking members who ran these committees, has exercised this power in a responsible way, as has the counsel that they have retained. Where Congress has gotten into trouble is when they have stopped focusing on legislating and educating the American people, which are their constitutional responsibilities, and started using the congressional investigative process for either political pontificating or to gain some form of leverage over the opposite party. The classic example of that was the one investigation I was involved in, during which an independent counsel was not appointed. That investigation, where I served as chief counsel for the Republi-

cans, was called the "October Surprise" investigation, and it was an investigation into the then sitting President George Bush during the election year 1992. The House Democrats in that case decided that it was appropriate to do a \$1.35 million investigation into twelve-year-old allegations about alleged conduct by President Bush and others to conspire with Iranians to hold back the release of the American hostages from Iran. That was the decision of the leadership in Congress. And as a result of that decision – and I might add we were fortunate to have Lee Hamilton, who had served as chairman of the Iran-Contra committee, as the chairman of that investigation and Henry Hyde as the ranking member – we conducted an investigation in a bipartisan manner and we issued a bipartisan report which completely cleared President Bush and President Reagan of the allegations that had been brought during that campaign year.

So Congress sometimes can be its own worst enemy – there's no question about it – but if you think about the various independent counsel investigations that have been going on recently, you haven't seen Congress overreacting.

Indeed, there are, or have been, independent counsel investigations during this administration with regard to Secretary Cisneros, Secretary Brown, and Secretary Espy, but you haven't had major congressional investigations with regard to any of those.

With regard to Whitewater, we have reached a point now where Whitewater is used as kind of a catch-all phrase. I think it is very dangerous to do that because "Whitewater" had some very distinct components to it. As Bob Fiske was faced with the responsibility of sorting those components out, so too, I think, we, in our discussion of the interrelationship between congressional and independent counsel investigations, must also sort those components out.

The component of the Whitewater affair that related to questionable contacts between senior Treasury Department officials and senior White House officials, and which was the subject of the three weeks of congressional investigations we held in the summer of '94, when Bob Fiske was special counsel and I was serving as Jim Leach's special counsel, were never questioned by anyone. Indeed, that investigation unmasked improper conduct at the very senior levels of the administration that resulted in the resignation of the Deputy Secretary of the Treasury, the General Counsel of the Treasury Department, and senior White House officials.

Travelgate and Filegate, which are other components under the "Whitewater" umbrella, have not been critically questioned as inappropriate topics for Congress to be investigating, even though technically they have been appended to Judge Starr's agenda.

So I think, when we use the term "Whitewater," we have to be careful to parse the various components of it. And I think, for the most part, despite the pontificating that goes on by certain congressional gadflies and the press,

Congress has exercised its constitutional responsibilities with gravity and with great concern.

JUDGE HADEN: The next question has to do with timing and the success of either a congressional or an independent counsel investigation or the success or failure of both.

As a matter of policy, I would put to Mr. Leon first, should congressional investigations precede or follow an independent counsel investigation? And if, or more appropriately when, a conflict develops between the two concurrent investigations, what tools can you use to minimize that conflict?

And that latter part, I might say, I'm certain I'd be interested in hearing about use of the subpoena power, the various methods of legislative oversight.

MR. LEON: Well, it is a tough question to answer, Your Honor, because it proceeds on an assumption that you could have an ideal world and, of course, you don't.

I think experience has shown, since Iran-Contra, certainly, and in the various situations where there have been congressional investigations that have had great public credibility, that Congress is wise to exercise self-restraint as to when it conducts these kinds of investigations, and how it goes about conducting them.

I think, in the case of Iran-Contra, even though John and I were working for members on opposite sides of the aisle, we were pretty much in agreement that it was a situation that necessitated an airing of the problem. A cloud had descended, so to speak, over the administration, and it had to be looked into. Neither President Reagan nor his administration would have been able to function effectively for the remaining two-year period of his administration without some attempt to look into what was going on.

I think the hearings that took place at that time obviously had to occur, even though Judge Walsh was going to take awhile to finish up his job.

So I think with respect to timing in the real world – it's hard to say which should go first or which should go second. I think, if Congress restricts itself, for the most part, to conducting its investigations and televising its hearings to those situations where there is a grave concern, not only within the Congress but within the country, whether or not the government, at its highest levels, is either not functioning or functioning improperly, then in that type of situation – of which Iran-Contra was clearly an example – it is appropriate for Congress to go first.

I think, as a general proposition, Congress should try to refrain, as it has in the Cisneros, Brown, and Espy investigations, from conducting investigations into criminal behavior that an independent counsel is pursuing. And I think Congress for the most part has done that.

JUDGE HADEN: John.

MR. NIELDS: Yes, I think it is hard to generalize. There are a number of issues, immunity being the most important one or the most difficult one, the one where the conflict is clearest.

There was a time when it was thought that a congressional hearing created the kind of publicity that would make a criminal prosecution impossible or require the delay of a criminal prosecution. Courts have pretty much come to the view that the publicity issues can be dealt with with interrogation of jurors and sequestration of the jury, and so on. But obviously, if Congress does not have an important interest in having a public investigation, it is creating problems for the criminal justice process by holding one at the wrong time and should refrain.

There is also the issue that Bob Fiske mentioned earlier that everybody is tromping over the same witnesses; and in an ideal world, you would have one investigation dealing with one set of witnesses, not two or three or four investigations. But if you have a situation, which I think we are all assuming here, where there is a role for an independent counsel—a criminal investigation—and also a role for Congress, those two issues you simply have to work out; and I would say I've done this twice for Congress, once when there was a Justice Department investigation parallel to me and once when there was an independent counsel investigation parallel to me, and actually I had an easier time dealing with the independent counsel in Iran-Contra than the Justice Department in Koreagate.

But the critical issue obviously is the immunity issue. Congress does have the final authority to decide whether it is going to grant immunity,⁵⁵ and if Congress does, it's a pretty sure bet that it's going to mess up the criminal prosecution.

MR. LEON: I would add one point in that regard, John.

I think the Congress, in its wisdom, has provided in the immunity statute that the congressional vote to grant immunity must be a two-thirds majority, not just a simple majority. By creating that requirement in the statute, Congress has acknowledged that a decision to grant immunity is a very serious decision that should not be taken lightly and a decision that should be bipartisan by nature.

Getting a two-thirds vote is no small task. We obviously succeeded in that regard in Iran-Contra, and there have been other instances, too. But in Iran-Contra we had a vote of a bipartisan majority—a clear majority—of the committee.

55. 18 U.S.C. § 6005.

So I think it is important to stress what Mr. Fiske and Judge Walsh said earlier this morning that it is Congress that ultimately has the authority – the ultimate authority in this area. I think Congress has been pretty careful in choosing their opportunities to do that.

MR. NIELDS: In the Iran-Contra situation, it is, I think, fair to say that everyone knew going in that Congress was going to do a thorough investigation and wasn't going to stop short of immunizing the witnesses that it needed to get there. I don't recall what the actual vote was when we eventually hit the issue, but I know that there was overwhelming support on both Republican and Democratic sides in both the House and the Senate to compel the testimony under immunity of both North and Poindexter. There was a view expressed by one or two members of Congress that the way to handle that investigation, a la Watergate, was to hold off, let Judge Walsh prosecute and convict North and Poindexter, and then he would have maximum leverage to turn them against the President. That view was expressed, and I think people understood that that was a way that would increase the likelihood that at the end of it, the President would be gotten; but the overwhelming view was that that was not our job and that we had a job that was very important, and I think you've got to look at each one of these investigations on its own facts.

One issue that is going to matter is: Is the issue at hand one that is primarily and at its core a criminal law problem or is it, at its core, something else? We thought, for example, that Watergate was, at its core, a criminal law problem. It blossomed into many other things, but at its core was a break-in – I don't know if it was a third-rate burglary, but it was a burglary – and that it was a cover-up of the burglary and who participated in the burglary.

The Iran-Contra affair is closer to what Judge Walsh said a little bit earlier. It was a real constitutional confrontation. Something very wrong had happened about the way we govern ourselves and about the way Congress and the executive branch dealt with each other, and it was understood by all to go very probably to the top official in the Executive Branch, the President, and it was an open question, when we began our investigation whether the result of it would be the toppling of the government or of the President himself.

People can differ about how likely that was, regardless of how the facts turned out, but that was an issue that was in our minds and in the public's minds, and it was viewed as paramount that we, in a reasonably expeditious fashion, answer that question so that the public would know whether this was an issue that ought to result in a change of government of some kind or not, and you couldn't do that, we thought – and I think everybody believed that – without compelling testimony from North and Poindexter.

Now, again, each one of these things is going to look different.

The campaign finance investigation may be one in which the public policy issues outweigh the criminal law issues.

Whitewater—at least the original Whitewater—seems obviously to be one that has a criminal law question in it and almost no public policy question in it, and each investigation is going to look a little different.

MR. LEON: I take issue with you, John, though, as to several of the component parts of Whitewater. I think there are at least three component parts under the umbrella of Whitewater that clearly have the public policy allure you mentioned. One was the one that we focused our hearings on in the summer of '94 involving the questionable contacts between senior Treasury Department officials and senior White House officials.

I think Filegate and the Travelgate components of Whitewater are two others where there are very clear public policy and good government issues. Educating the American people as to what was going on as to them—how it could be that these FBI files on these officials were all of a sudden showing up where they were—is appropriately the subject of congressional inquiry.

So I think those components of Whitewater, at a minimum, have to be segregated out from under the umbrella of "Whitewater" as being topics that merit that kind of attention.

MR. NIELDS: Yes, I agree with that. I think that I was referring to the land—

MR. LEON: Arkansas deal—

MR. NIELDS: The land deal.

One question, I guess, which is sort of out there is whether the history of the North-Poindexter immunities and reversals of their convictions has changed the map and the analysis.

JUDGE HADEN: That is what I wanted to follow up with John in that regard.

Knowing that some of these investigations are hybrid and the question needs yet to be resolved, after investigation or after some portion of the investigation, whether it is a public policy issue or a criminal issue, or both, what are some of the fallback mechanisms, less than a broad grant of immunity, that can be used to protect both investigations?

MR. NIELDS: Well, again, I think you have to look at that one case at a time. It is certainly hypothetically possible that you end up in a congressional investigation where there is a parallel independent counsel and the independent counsel has an interest in one or two people and one very small area and Congress can simply agree to stay out of that area. But most of the time I think it is going to be the way it was in Iran-Contra, and I think we probably would

be kidding ourselves if we thought that we could have some sort of limited area of taking testimony or some sort of plan for keeping the congressional immunized testimony secret for a long period of time so that the prosecution could move forward. I suspect that most of the time it is going to come at Congress the way it did in Iran-Contra, which is, if you do it, you've got to do it knowing that there is a very high probability that you're going to mess up the criminal prosecution.

And I think that what has happened is that because of what occurred in fact, which was the reversal of the convictions, the public and the press is now putting more pressure on Congress to stay out of immunity in a parallel investigation, and I think Congress will in fact stay out in most cases. Whether they would stay out if the Iran-Contra affair issues presented themselves anew in the same form next year, I doubt, but I think that is open to question.

MR. LEON: I think, from an institutional point of view, there certainly has been a lot of discussion and a lot of statements made by various congressional chairmen, ranking members, and leadership members to suggest that they are bending over backwards, in the aftermath of North and Poindexter, to be deferential to the independent counsel investigation and not step on the toes of the independent counsel.

I think we certainly heard that kind of talk from Chairman Gonzalez and ranking member Leach in Whitewater I and in the Senate from Chairman Riegle, ranking Republican and later chairman D'Amato, and of course, ranking Democratic Senator Sarbanes. Congress also has been responsible in selecting as its chief counsels in almost every instance that I can think of people such as John and I, who were former federal prosecutors and who are very sensitive to, and appreciative of, the difficulty of the position of an Independent Counsel and the collateral consequences of their decisions.

JUDGE HADEN: Dick, let me ask you: On the question of politics, do you believe that the independent counsel process, where there is a concurrent congressional investigation, has become irretrievably politicized where we are now, in operating with these two types of investigations?

MR. LEON: Well, that is a hard question to answer.

I think there's definitely been heightened and more concerted criticism and attack on our independent counsels, particularly Independent Counsel Starr. I think this is very disturbing and, in some ways, a matter of great concern. We have never seen before, to the extent we have seen to date, I don't think, the kind of concerted attack against an independent counsel that we have seen in Mr. Starr's case. There have been press reports — and I'm not in a position to validate them — that these attacks are being coordinated by political operatives

at the senior levels of a national party, and I think that it is most regrettable and I think that it should be avoided at all costs.

You know, looking at the chart that was handed out among the materials here and comparing the number of independent counsels that have been appointed and the number of congressional investigations that have occurred contemporaneous with them, I think Congress obviously has gotten in the act in criticizing and attacking independent counsels.

I think it is distressing when you have attacks on the appointment process of independent counsel. I think that is also a new phenomenon. I think Judge Sentelle and his panel were put through some unprecedented attacks on their appointment process, and that is not healthy for the process.

So there has been increased sniping, but the bottom line is that the press and the media love conflict. That is how they make their money; that is what they're there to report. And there has just been an increased interest, and increased industry within the media, to seek conflict wherever it is and to report on it.

JUDGE HADEN: John.

MR. NIELDS: Well, I think that sort of a short answer to your question is yes, but it is not just the independent counsel statute.

The thing that sort of resonates in my head is reading *The Washington Post*—I think it was the day after Newt Gingrich was made Speaker—and there was an article that essentially said, "Okay. Now he's Speaker, what are we going to investigate him for?" And the House Ethics Committee then, you know, answered the call, and that was a committee that I once represented.

We started off with a really, really important and good, American idea, which was that everybody, including the highest official in our government, is under the law and should not be treated any differently because of his station than an ordinary citizen. It is a rule of neutrality and equality in our criminal justice system. It is a really important idea, and the independent counsel statute was designed to preserve it. But what we have moved to, it seems to me, is a very different idea and a very bad idea, which is that we are going to use our criminal justice system against our high officials in a way that is much worse and harsher than the way we use it against ordinary citizens.

It is very important that our high officials be subjected to a special kind of scrutiny because of what they do. They have power and it is very important that we watch them carefully, but that is a political function and that should be done through the political process. It should not be done through our criminal justice system.

MR. LEON: I can't resist responding to one thing John said.

I think the pendulum has swung as far as it is going to go within Congress, and it is now swinging back in the other direction. For example, the members of Congress have grown so concerned about the use of the ethics process within the House as a political weapon of choice that they just recently convened a task force to come up with bipartisan reform of the ethics process in the hope that they can make it less partisan.

So I think Congress recognizes that this whole investigative process may have gone too far. I think Congress is attempting, perhaps not perfectly, to get itself more in the other direction. Ultimately, when you have people like Lee Hamilton and Henry Hyde and Dick Cheney running investigations, you get a high-quality product.

MR. NIELDS: I would just like to say it is not enough, in my view, that the ultimate decision whether to prosecute or not is made in a professional way. As far as I can tell, independent counsels have all done that. I can't think of a single example of an exception to that. We have had objective and fair decisions. But the decision of who you investigate is also important and, for the reasons I think Jake Stein mentioned and many others, that the question of who you use your criminal investigative powers against is just as important as whether you make a good decision at the end of the investigation.

JUDGE HADEN: As kind of a final question for this panel, I think several of the speakers, including the two here, have alluded to the enormous power the media brings to bear on the concurrent investigations of this type, and I suppose my question to you would be: Has the media played, in your estimation, since Watergate and considering all the investigations since, a constructive or a negative role in this process, on balance?

MR. LEON: John, do you want to go first?

MR. NIELDS: I am going to sort of repeat myself.

The media plays an absolutely essential role in watchdogging the government. They probably do a more important job of that than the Congress does, and it is very important that that be done. We can't function as a democracy unless it is done. But the problem is they don't understand how wrong it is to try to crank up the criminal justice system as part of that effort, and I used to hear people suggest this – and it only made me mad but now it's true – the criminal justice process is being used as a weapon in political warfare, and the press doesn't understand that that's wrong and they help make it happen, and it is very, very destructive.

MR. LEON: I think, if the press reflects a little bit more upon it, the press should realize that being party to concerted attempts to undermine and attack the appointment process of independent counsels, and the conduct of inde-

pendent counsels, is ultimately not in the best interests of the system. It is also not in the best interests of fair play, and it is not in the best interests of the institutions that they are covering.

JUDGE HADEN: Gentlemen, do either of you, or both, have closing remarks?

MR. NIELDS: I think I made mine.

MR. LEON: That's mine.

JUDGE HADEN: Well, the audience will join me in thanking a very knowledgeable and entertaining panel. Thank you.

(Applause.)

Panel Five - The Future of the Independent Counsel Process

CHIEF JUDGE WILKINSON: We are ready now for the final panel this morning, and that will take a look at the overall independent counsel process and what does the future hold for the independent counsel statute.

With that in mind, I will ask Judge Davis to assemble his panel.

JUDGE ANDRE M. DAVIS (U.S. District Judge, District of Maryland): Good morning again, ladies and gentlemen.

I say, with great confidence, that those of you with the endurance and stamina to stick around will be rewarded. We have a spectacular panel, as you can see. I commend to your review the biographical sketches contained in your programs, but I will briefly introduce the four panelists for this, the fifth and final panel this morning.

To my far left, your far right, we are pleased to have the Honorable Henry J. Hyde, congressman from Illinois, who has represented the Sixth District of Illinois for more than twenty years in the Congress.

We are particularly pleased to have Congressman Hyde as a guest here at the Fourth Circuit, for he is a friend of the federal judiciary and we appreciate his work.

Next to Congressman Hyde is Mr. Theodore B. Olson, who has, for more than thirty years, conducted a national law practice, with stints in the Justice Department, and, like all of the panelists, has been intimately involved in many ways with the independent counsel process, as he will address, I'm sure.

To my right, we have Terry Eastland, a Fellow at the Ethics and Public Policy Center in Washington, D.C. Terry, unlike all the other panelists this morning, brings his wisdom and insight into this process unburdened by a formal legal education. So I think we can look with anticipation at what he has to say.

Finally, of course, we have Professor Emeritus Archibald Cox.

I am convinced that many of you in here will remember Professor Cox from the classroom, but certainly we all remember Professor Cox as the first special prosecutor in the modern era and whose circumstances in connection with his role as special prosecutor in 1973 and the manner and means by which that role came to an end obviously created the ground swell of support for the independent counsel statute, and certainly Professor Cox has very clear and firm ideas about what the process holds.

Our charge has been to focus on the fundamental question of: Should we permit the sun to set on this thing in 1999? And if not, what might we provide to Chairman Hyde this morning to take back to the Congress in the way of ideas as to how the statute might be improved upon?

We are going to do that first by taking a retrospective look at some of the specific investigations.

I have encouraged the panelists to provide a critique in response to the following question, specifically: Are there particular independent counsel investigations that you believe are models of what such an investigation should be? And to tell us why.

And they have assured me that they are willing and happy to do that.

We will go on from there to talk a little bit more about how the statute, if it is to remain in effect, might be changed properly.

Let me start with Professor Cox.

Professor Cox, can you point to any models of investigations that you would hold up for future consideration by future independent counsels?

PROFESSOR ARCHIBALD COX (Harvard Law School, Cambridge, Massachusetts): I think the first investigation of Edwin Meese by Jacob Stein was probably a case for which something like the independent counsel procedure is needed, and that the investigation was pressed forward quickly and efficiently.

That is the only case that I would say was an example of the way it should go in terms of what the statute ought to be.

MR. STEIN: I want to thank you for that from the floor.

PROFESSOR COX: The Iran-Contra affair seems to me to be an example of a situation where such a statute is needed, but the investigation was, to some extent, made less useful than it might have been by forces outside of Judge Walsh's control.

If I may, I would say that Watergate again illustrates the kind of situation where such a procedure is needed, and I would say that Leon Jaworski's conduct of the investigation was first rate.

The others, I think, shouldn't be covered by such a statute. So I would list them all on your bad category.

JUDGE DAVIS: What would you point to, Professor Cox, with respect to the Meese investigation that made it especially appropriate?

PROFESSOR COX: His high rank in the White House.

JUDGE DAVIS: Is there any aspect as to the conduct of the investigation that you wish to cover?

PROFESSOR COX: No, I wouldn't, except that it was done quickly, —

JUDGE DAVIS: So speed and —

PROFESSOR COX: — effectively.

JUDGE DAVIS: Speed and efficiency is virtue.

PROFESSOR COX: Provided they also are fair and thorough, and I believe it was.

JUDGE DAVIS: Congressman Hyde, are there any past investigations that you would hold up as a model of either an excellent job or less than desirable job?

CONGRESSMAN HENRY J. HYDE (Chairman, House Judiciary Committee, House of Representatives, Washington, D.C.): Well, I think the Ray Donovan investigation finally gave him some measure of clearance, which is important in the interest of justice. It is hard to be critical of any of them without having an intimate knowledge of the problems they encountered.

Judge Walsh catches a lot of criticism because of the length of the investigation, but his problem was complicated by our investigation. I remember Judge Walsh coming up and pleading with us to defer this and defer that, but we were hell-bent—and I say "we"—the Democrats wanted to move into the public arena because they were going to nail Ronald Reagan and this was an opportunity too good to be missed. But it did complicate and get in the way of what Judge Walsh was doing, particularly on the immunity. They were willing to give immunity to anybody if it would lead to the top gun. It didn't, which of course breaks my heart, but Judge Walsh had lots of problems. But I really wouldn't like to rate the various investigations.

I think, in listening to Mr. Stein, he clearly didn't want to nail Ed Meese, and I don't think an independent counsel should want to nail anybody. They should go where the evidence leads them. So I don't really have a report card on all of them.

JUDGE DAVIS: Mr. Olson.

MR. THEODORE B. OLSON (Gibson, Dunn & Crutcher, Washington, D.C.): Well, I think I agree with the sentiments of Professor Cox in the sense that I

think almost everyone who has studied this subject has been asked this kind of question about, if you can stand this statute at all if we have to have it, how should it be done.

Jake Stein conducted the best model of an investigation; and I say that because it was quick, it was relatively short in duration, and it was as quiet as Jake could make it.

Everybody knew what was happening because it involved the nominee to be Attorney General of the United States. But Jake is a very discreet guy and was not talking to the press and conducted it in a very, very discreet way. It was very specific and narrowly focused. He didn't branch out, as discussed this morning, into every allegation that might have come to his attention. He was decisive at the end. He made it clear what he decided and what he was not going to comment on. And in that respect, he was very prosecutorial in the sense that he made a prosecutorial judgment; and when invited to by all kinds of other people, including the press and members of Congress, to comment on whether Edwin Meese was a suitable candidate for Attorney General or was he too sloppy in the keeping of his records, or anything, Jake said, "It's not my business." And members of Congress, as I recall, pressed him to answer these questions and he said, "I'm not going to answer those questions," and that's why I think it was a good investigation.

Unfortunately, with respect to the other ones, the institution of the independent counsel statute causes things to happen that shouldn't happen and people seem to think that all of a sudden this process has gotten bad and it's gotten politicized and it's gotten out of control.

Well, this was inevitable from the very beginning because of the nature of the statute. Some of them have gone on too long, and it may not have been Judge Walsh's fault that he served in office, as I like to say, longer than World War II – he served in office longer than President Reagan served as President of the United States.

The Supreme Court upheld the independent counsel statute in part because it was a temporary office. Yet Judge Walsh held the office longer than any Attorney General in the history of the United States, with the exception of one.

There are other things – and I won't spend too much time on this – but Ed Meese had the good fortune of being investigated by three different independent counsels, which is, I guess, the hat trick of the independent counsel world. The second investigation of Ed Meese resulted in a report that said he was not going to be prosecuted. But the independent counsel issued an opinion stating that Meese had violated the law and he could have proved it, if he wanted to, and I thought that was a very inappropriate thing to do.

I've got other criticisms of each of the other ones, but don't want to take up all that time.

JUDGE DAVIS: Mr. Eastland.

MR. TERRY H. EASTLAND (Ethics & Public Policy Center, Washington, D.C.): I think it would be important to say at the outset that I wouldn't want to buy into the notion that if only we had good independent counsels, we should retain the statute. I would agree with what Ted Olson said – that so much of what people today – especially today – find problematical with the statute is built into it in its origins, but if we are going to enumerate those who were good and bad in answering this question, let me say, with respect to Jake Stein – I will go ahead and praise Jake Stein again – I want to supply some dates.

He began on April 2, 1984, I believe it was, and issued his report on the 20th of September. That was a quick investigation and it was thorough, and it was regarded as such.

The important aspect of his investigation was the fact that in his report he did not go beyond what I think is the proper mandate of any prosecutor. He did not opine on the ethics, if you will, of Mr. Meese, instead speaking directly to the issues that were before him.

So that is what made that a good and, I think, probably the best model, if you will, of any investigation we have had.

I think the earliest two, the first two – these were appointees during the Carter administration – Hamilton Jordan and Tim Kraft were both accused of using cocaine, and both of the independent counsels investigating them had the good sense to decline to prosecute. These were not ordinarily the kinds of cases the Justice Department would have brought. So I think, at least in that respect, those early investigations could be credited; perhaps also the investigation by Arlin Adams recently that Larry Thompson has now had to take over, a very long-running one, but as far as I can tell, there have been a few complaints but not of the kind that would lead me to think that that has been, on balance, a badly conducted investigation.

On the other side of the question, I would say that Ed Meese's second investigation by Mr. McKay was flawed in terms of the final report. In the report, he said that Mr. Meese had probably – probably – violated federal tax laws. And again, I don't think it is appropriate for a prosecutor of any kind to say that someone has probably violated a federal criminal law. You should do that, I think, in a court of law. You should prove your case, and I think it is inappropriate to say what was said in that report.

That, by the way, was the first ever use of a report to say something such as that about an individual under investigation. It had not been done prior to the McKay report on Ed Meese.

I would also say, with respect to the investigation of Michael Deaver, there was a problem with that investigation by that independent counsel in that there was an attempt to subpoena – twice there were attempts to subpoena – the

Canadian Ambassador. These were resisted by Canada. These were also objected to by the State Department, and ultimately this effort was undone in the district courts. But I think, again, an ordinary prosecutor would not have tried such a thing.

I save the best for last.

I have criticized Judge Walsh publicly. What I have said about him is already in the record, but I will simply repeat some of those things here.

I think that the conspiracy charge that was brought initially in the Iran-Contra matter, a very broad-ranging effort dealing with the notion of defrauding the federal government, that is not the kind of case that I think the Justice Department would have brought, and certainly even a Watergate-style appointee out of the Justice Department would not have seen that kind of case being developed. And, of course, it did not make it, it did not develop as such.

I would say secondly that – and this is not something that Judge Walsh did alone – there were others in the 1980s – and, again, I would say that these – what I am speaking of here are – the kind of developments that I would criticize are really inherent in the nature of the statute, but there were a number of cases in which the charges concerned representations made by individuals, including Casper Weinberger, to the Congress, and the point here was that these individuals had committed crimes, whether it be perjury or whether they be false statements made to the Congress, and there were no other charges, other than those dealing with the representations made to Congress, in the indictments. I think a serious question should be raised here as to whether an independent counsel should be making those kinds of cases.

Finally, I do think it was inappropriate for Judge Walsh to say, when President Bush did pardon Casper Weinberger and five others, the Christmas Day Pardon of 1992 – I think it was highly inappropriate to say, as he did, that Casper Weinberger lies as well to the press as he does to Congress.

Again, I think, if you are going to say that someone is guilty of a crime, that that should be done formally and not, if you will, to the press.

JUDGE DAVIS: Perhaps we should go straight to the question, then, Congressman Hyde.

What is the mood in Congress about the statute? And is it likely to survive the sunset?

CONGRESSMAN HYDE: Well, Congress is in a very political frame of mind, as you might imagine. It depends whose ox is being gored. When the Reagan Administration and the Bush Administration were in the White House, why, there was great Democratic support for independent counsels. Now that the shoe is on the other foot, the Republicans are looking more kindly at this institution.

I think, for myself, I don't like the notion of creating a legal Frankenstein who is accountable to nobody, with an unlimited bank account, with a charter that is as comprehensive as many independent counsels have treated it--it just lacks accountability. On the other hand, you have situations of conflict of interest where the public's trust in the system is at risk.

So as Churchill once said, "Democracy is a terrible form of government except for all the others," and an independent counsel is not a very nice way to prosecute people, but there may be circumstances where it is necessary.

JUDGE DAVIS: So the statute is a necessary evil?

CONGRESSMAN HYDE: That is my conclusion at this point. I want to say today's testimony from your panelists has been extraordinarily useful. I'm hoping to get a transcript of it when you're through because we will have to look at this for reauthorization purposes, and what has happened here today is going to be helpful.

But I support it reluctantly because the conflicts of interest are too patent. They seem to be very patent in this administration, and I think we need the institution, but it needs some correction. It needs accountability. It needs some more regular budget authority. It needs a narrower charter so it can't roam all over the ball park. The targets have to have some rights so that maybe they come in and appear before the court and say, "Can't we close this long-playing Eastland down?" So there are changes we need to make, and I would look to all of you for help in that.

JUDGE DAVIS: Ted, I take it your first choice would be to scuttle the statute.

MR. OLSON: Yes. I guess I'm on record almost as much as Terry Eastland is on the subject.

We got along in this country for almost 200 years without an independent counsel statute, and I want to make the point, which I think others probably have as well, that there is nothing wrong with the idea of going outside the Department of Justice to pick someone special to pursue an investigation if public confidence requires it. Bill Barr, when he was Attorney General, did that three times, as I heard him describe this morning, and dealt with delicate matters about which public credibility suggested to him that he ought to get someone that was not a direct subordinate of the Attorney General or the President to conduct an investigation. Indeed, as we all know, because of public pressure on the administration, the Watergate investigation was conducted by individuals who performed that function without an independent counsel statute.

I think that the thing that is bad about the independent counsel statute is that it is mandatory in so many respects. It has so many opportunities for use for political purposes. If you don't mind, I will read just one paragraph from

Justice Scalia's dissenting opinion in *Morrison v. Olson*⁵⁶ which I think, if you were to read anything about this subject that is worth reading again and again, it is Justice Scalia's dissenting opinion saying that the statute was unconstitutional. It is just a couple of sentences. He says:

How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.⁵⁷

And I, of course, agree completely with Justice Scalia.

CONGRESSMAN HYDE: Judge Davis, may I intervene, because you are going to ask Mr. Cox and Mr. Eastland, and I would like to read, as a predicate to what they might say, something Janet Reno said when we reauthorized the statute in 1994, and I am quoting from her testimony before the Senate.

In 1975, after his firing triggered the constitutional crisis that led to the first version of this Act, Watergate special prosecutor Archibald Cox testified that an independent counsel was needed in certain limited cases and he said, "The pressure, the divided loyalty, are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential." . . .

....

The reason that I support the concept of an independent counsel with statutory independence is that there is an inherent conflict whenever senior Executive Branch officials are to be investigated by the Department and its appointed head, the Attorney General. The Attorney General serves at the pleasure of the President. Recognition of this conflict does not belittle or demean the impressive professionalism of the Department's career prosecutors . . .

....

It is absolutely essential for the public to have confidence in the system and you cannot do that when there is conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. There is an inherent conflict here, and I think that that is why this Act is so important.

....

56. *Morrison v. Olson*, 487 U.S. 654 (1988).

57. *Id.* at 732 (Scalia, J., dissenting).

The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level Executive Branch officials and to prevent . . . the actual or perceived conflicts of interest. The Act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters, and to avert even the most subtle influences that may appear in an investigation of highly-placed Executive officials.⁵⁸

I might point out parenthetically that she has distanced herself, it seems, from this sentiment in our current controversy, but I think she said it well, and I would like to throw that in the mix.

JUDGE DAVIS: Professor Cox, what, if any, evolution have your views enjoyed in the twenty years since you're quoted there?

PROFESSOR COX: Perhaps it depends a little on how you would interpret the views as they were expressed before.

I think the present statute contains more evils than benefits – the present statute. I think it has been widely politicized, with the result that it has lost the confidence of the public. I think, by losing the confidence of the public, it has destroyed the real value of such a statute if applied to a very limited number of cases, such as Judge Walsh suggested earlier. It's been expensive; it's been expensive to defend it.

I do agree with my earlier statements and with Attorney General Reno to this extent: I think, in the case of a far narrower number of high officials in the executive branch – the President, the Vice President, the Attorney General, perhaps some, but not all, other Cabinet officers, and the very top – very top – echelon of a few White House officials, that the appointment of an independent counsel is the only way to assure public confidence.

I think, as she said – I guess I said it before – that the conflict of personal loyalty that the Attorney General would face if it were the President seriously charged with a crime is something that no man should be forced to deal with. No matter how conscientious he was, he would be wrestling with himself, "Am I leaning over backwards? Am I going too far in his favor?"

And then I think that the department does have some institutional conflicts. I think the Department of Justice, in Watergate, for example, might well have taken the position that the President was not subject to any judicial process and was not subject to the subpoena for the tapes, and there was a lot of law that would support them.

58. *The Independent Counsel Reauthorization Act of 1993: Hearings on S.24 Before the Senate Comm. on Governmental Affairs*, 103d Cong. 11-12 (1993) (testimony of Janet Reno, Attorney General).

Equally, their normal position is one for defending and expanding executive privilege.

We were challenging executive privilege.

So there are some real conflicts. So I do think that it is needed, but I would greatly narrow the statute.

And I've got – I'm not sure whether you want them now, but I've got a list of changes that I –

JUDGE DAVIS: I will let you go ahead, Professor Cox.

PROFESSOR COX: Well, I would first limit it, as I say, to a few senior high officials beyond the President.

Second, I would, as Judge Walsh said earlier, limit the crimes to abuse of official power, including criminal attempts to improperly influence executive, legislative, and administrative decisions.

Assuming that those two are done, then certain other changes follow along with them.

I think that the test that further investigation is warranted is a little too easy, that some more stringent strainer is needed, something less than probable cause. I haven't got just the phrase, but that was suggested.

I was also shaken by what Judge Walsh said.

I would, in such a statute, limit it to a year, unless the judicial panel extended the time for cause shown, shown in camera, of course.

I have no answer, but I would try to come up with advice as to how far the investigation might extend to related crimes and crimes related to related crimes, and so forth.

And I would make it a mandatory full-time job for the independent counsel. I think that is symbolic in various ways, that it probably would speed things up.

JUDGE DAVIS: How do you respond to the suggestion from an earlier panel that to narrow the class of potential candidates to those willing to work full time would, in Judge Sentelle's illustration –

PROFESSOR COX: Well, I think that difficulty is much less likely to arise if you narrow the scope of the statute, by my hypothesis, to cases which, very close to my definition, involve a national crisis. I can't believe that there aren't qualified people who aren't willing to put aside their normal lives in order to serve in a position of this responsibility under those circumstances.

JUDGE DAVIS: Ted, as one who would scuttle the statute entirely, what do you think of Professor Cox's amendments?

MR. OLSON: Well, I agree with many of them.

My feeling about the independent counsel statute is to starve it from any oxygen at all, but if you are going to give it some, then make it as little as possible.

I agree with the notion that the independent counsel should be a full-time job, particularly. I know that might narrow the scope of people available for the assignment and make Judge Sentelle and his colleagues' job more difficult, but we go through a process of finding people to serve in the Justice Department who agree to a full-time job all the time; we hire U.S. Attorneys. And it may be, for a short period of time, someone is just going to have to give up what they do in order to do this sort of thing because if it is not a full-time job, that means that the independent counsel's priorities are separated; maybe they've got private clients that are calling upon them. The subject of the independent counsel investigation wants this dumb thing to be moved ahead and be over with as quickly as possible and feels that as long as the independent counsel has divided loyalties with respect to his or her time, that it is a very difficult situation and that someone should do that full time.

The other changes, if you have invited me to do that, —

JUDGE DAVIS: Go ahead.

MR. OLSON: — is that the idea of these reports is very destructive, it seems to me, and that if there has to be a report, it should be an extremely narrow report. The reports as to how money is spent should not be used as a means by which the independent counsel can indict, through language, the conduct or character of the persons that were investigated or subject to the investigation.

One independent counsel came out at the end of his investigation and said, "Well, these people shouldn't have been indicted, they didn't commit any crimes, I shouldn't have even conducted this investigation, but they were stupid and political in their behavior."

Well, we don't need to appoint a public official to make those types of pronouncements. There's plenty of people in the press that can do that sort of thing.

The report that Judge Walsh prepared is full of grand jury material — selective grand jury material. It may be fair, it may not be fair — and Judge Walsh, I'm sure, believes that it is fair — but the person responding to this report has no way of knowing whether something has been taken out of context from several thousand pages of grand jury testimony and used to characterize the conduct of that individual. There is no way the individual has an opportunity to respond to that.

That is one of the changes.

I would also — Judge Walsh probably won't like this — make the independent counsel sign a promise, like we do with people in the intelligence community, that they are not going to write any books about the independent counsel

experience, and if they do, the profits go back to the government, because I think that also provides an opportunity for doing damage to the people who were the subjects of the investigation and it is not a necessary thing to do.

I've got some other changes, but other people --

JUDGE DAVIS: Well, we will get to Terry in a moment.

Have you got a couple more, --

MR. OLSON: Well, there was some discussion about --

JUDGE DAVIS: -- other than printing it in disappearing ink?

MR. OLSON: There was a discussion of the question of attorneys' fees.

Right now, the statute provides that the subject of an independent counsel investigation can only recover attorneys' fees if they are not indicted, but if they are indicted, even if they are acquitted, they cannot recover any attorneys' fees.⁵⁹

I think that that should be changed because a prosecutor can get an indictment very easily. It is not difficult to get an indictment when you have been conducting one of these investigations; and in one instance that I know of, the threat of an indictment was used to cause the subject of the investigation to waive the statute of limitations. The subject, knowing that if the indictment was returned that he could never recover his attorneys' fees, waived the statute of limitations and allowed the investigation to go on longer because of that threat.

You can also not recover attorneys' fees if you are simply a witness.

Many people have to get dragged before these proceedings, spend a tremendous amount of time involved in the process, and they can't recover their attorneys' fees.

You can't recover attorneys' fees for the period before you were identified as a subject or for the period after you are no longer identified as a subject.

That seems unfair.

The court, for reasons which I'm sure make sense to the court, cuts back on the recovery of attorneys' fees in a lot of different aspects of the investigation. One of the court's rules with respect to this is that to the extent the attorney has to deal with the press to defend the subject with respect to the allegations which are being made by the independent counsel, possibly through the press or in other contexts -- to the extent that the lawyer for the subject of the independent counsel investigation has to deal with the media -- and Judge Walsh agrees that you have to deal with the media at least in some respects when you

59. See 28 U.S.C. § 593(f)(1) (1994) (allowing subject of independent counsel investigation to recover attorneys' fees if independent counsel does not bring indictment against subject).

are representing someone in this capacity and only the attorney can do it—you can't recover attorneys' fees for that.

Now, if you are a subject of one of these investigations, your life is on the line. You ought to be able to find a good lawyer and pay that lawyer according to what the normal rates are. Otherwise, it is a tremendous disincentive for lawyers to represent people in these circumstances. As it is, you can't recover attorneys' fees until the investigation is over, and then it takes a certain period of time to file the report and recover the fees. So you have suffered a discount already because of the passage of time.

And I think I have taken too much time.

There are lots of other ways in which the statute could be changed, but those are the ones that are on my list right now.

JUDGE DAVIS: Terry.

MR. EASTLAND: Well, I guess we could discuss all the many ways in which the statute could be changed. There are two vehicles that have been proposed already. Representative Conyers has one reform vehicle, as does Congressman Dickey from Arkansas. Both parties have therefore representatives willing to offer ways in which the statute should be reformed. I think, however, that we would be best to do without the statute entirely; I would not have it. And I would say that the only reason the statute now is in such bad odor, the reason that we are having this session here this morning, is because Democrats, frankly, have experienced it for four years now. There is a certain mutual assured destruction quality. And so I think that the revisionism that has gone on in the press and with many Democrats, I would have to say, about the worthiness of the statute is explained entirely by where people sit now, notwithstanding that I would say there are plenty of Republicans that are Democrats with respect to the statute now. They seem far more in love with it than they did when Ronald Reagan and George Bush were in the White House.

Let me say this: This is an ancient problem we are dealing with. The problem is this: What do you do with executive malfeasance? And that is the essential problem.

It was not unknown to the framers who met in Philadelphia. They pondered this question. They provided certain means with which to get at executive malfeasance. These included, of course, the impeachment mechanism; implicitly, I would say, congressional investigations as well, which precede, of course, actual impeachment efforts.

But as well, the President has the take-care authority, does he not, in Article II?⁶⁰

60. U.S. CONST. art. II § 3.

Now, it is interesting, with respect to the take-care authority, that the Constitution does not also try to eliminate the built-in conflict of interest there, does it?

The President, yes, has the authority to enforce laws even against himself.

And so for a hundred and – whatever it was – seventy-five years we went without an independent counsel statute. We did not have such a means of trying to deal with this problem of executive malfeasance. We dealt with it through other means and, yes, there were special prosecutors or outside counsels named before Professor Cox was named.

President Grant was the first President ever to name an outside counsel. He also was the first President to fire an outside counsel, not with the same ill effects, I might say, in 1875. But there have been other examples of outside counsels being named by Presidents or by Attorneys General. That happened in the Truman years as well. It happened at the turn of the century in the first Roosevelt administration.

But all that history be as it may, once we get to Watergate, what, to me, is interesting about Watergate is that we have the firing of the man to my right and it is that firing which galvanizes, which energizes, those on Capitol Hill to find a new means of dealing with this old problem, and all of those early proposals thought that the problem could be dealt with so long as you could change the manner in which an outside counsel was to be appointed and so long as you could change the ability of the President to control, through the removal power, that outside counsel.

In fact, the early proposals were – Judge Sentelle, you would be interested in this – to have the judges remove an independent counsel, which I think, if that case had gone to the Court in *Morrison*, the Court would have had to have held that statute unconstitutional.

So there was this search for this mechanism, for this new device, which many in Congress described as an auxiliary precaution, quoting Federalist 51,⁶¹ and they thought that this new device would lead us to a new period in which all would be well with the country.

Well, if we ever heard of the law of unintended consequences, you know, so it has been, and so we are having this session here today.

I would just say this: that the Watergate Special Prosecution Force – bear this in mind – did not endorse the notion of a statutory independent counsel. It said, "Look, do it the old-fashioned way: either have Presidents or Attorneys General name an outside counsel in that particular case to investigate."

Other instrumentalities would be the ones that Bill Barr mentioned this morning.

61. THE FEDERALIST No. 51 (James Madison).

There are other ways in which one can, in extraordinary cases, try to overcome that conflict of interest, whether real or apparent, but, in any event, the Attorney General would be responsible, and ultimately the President would be responsible, consistent, in my judgment, with what the Constitution provides.

One other way in which the problem might be approached, other than by retaining the current statute and revising it in the many, many ways we could describe – and I would be happy to go into all of those arcane details, but it seems to me there are more fundamental issues to be brought forward – but the Office of Special Counsel idea is one that Howard Baker suggested in 1974, and it is one that Andy Frye and others in Washington have also recommended, and by this mechanism there would be an office permanently created that would be located within the Justice Department and it would be headed by someone nominated by the President, and confirmed by the Senate, perhaps to a ten-year term, such as the FBI Director.

This might be one way of trying to deal with this particular issue. I think it, on balance, would probably be a better means than the one we have now with the statute because at least you would have an institution in place where prosecutors could have the ability to compare and contrast cases. In other words, they wouldn't be focused just simply on the case at hand.

There are also problems with this suggestion as well. Ultimately my view is that we ought to go back to what we did in Watergate.

JUDGE DAVIS: A number of states have gone that route.

I would be interested in hearing from the panel members whether they think any of this is of real concern to the American people. To what extent are the American people interested or concerned about these issues as we have discussed them today?

Congressman Hyde.

CONGRESSMAN HYDE: Well, I think it depends on the press treatment.

Conflict is mother's milk for the media, and if you can develop a conflict, they can demonize people. They shredded the Nixon Administration, and it is one of the fascinating aspects of human nature. With all of the negative press President Clinton has received, his acceptability figures are very, very high.

But I think you're always going to have conflicts of interest; you're always going to have perceptions of unfairness and injustice. And I think we have to have a way to deal with them.

JUDGE DAVIS: Ted, is this a matter of interest to the man on the street, woman on the street?

MR. OLSON: Well, I think the answer to that is somewhat like Congressman Hyde said. Most of the people on the street think that the idea of the independent

counsel is a good idea because the President can't be trusted to prosecute himself, but it ought to be of a deeper importance to the American people.

If you look through the list that was passed out here of the amount of money and time that has been spent with respect to these various different prosecutions, and so forth, and now everybody is saying, "Well, we ought to narrow it down to a narrower group of people and to a narrower list of crimes," and that sort of thing, most of these people on the list would fall out.

I suspect that ultimately the amount of damage that has been done by this statute to individuals who have been brought through the process in one way or another vastly exceeds the benefit; and when we decide that our Constitution needs to be altered in this way where we are taking the executive power away from the President and putting it in the hands of someone who is really uncontrolled through that process and when we are amending the Constitution, in a sense, through this statute in a way which does not bring about improvements in the system, the American people ought to care about it.

We do have the impeachment process, we do have a free press, and as Justice Scalia said in his dissenting opinion, the idea that every single violation of every single law should be prosecuted sounds like a good idea, but it isn't the great overriding value that it is perceived to be.⁶²

If we have a mechanism that deals with misconduct by the President or an Attorney General, which we do in the Constitution, with our free press, congressional oversight, the office that Terry is talking about creating in the Department of Justice already exists – it is called the Office of Public Integrity – there is a permanent part of the Department of Justice that investigates officials, and they do a pretty darn good job, plus the impeachment process, and so forth. We have plenty of ways of dealing with official misconduct and we don't need to keep adding to it.

At some point we are going to have an independent counsel – I think Jake was worried about this – appointed to investigate the independent counsel. I mean, there was a risk there because some classified documents were lost in the course of the Walsh investigation and there may have been an investigation of that. I guess it didn't turn out to be one.

But we could keep adding different officials to investigate the officials who we've created to investigate the officials, and so forth, but we had a pretty good system created in 1787. That is what the people ought to care about. I think it is ultimately, whether they know it or not, very important to the American people.

JUDGE DAVIS: Professor Cox.

62. *Morrison v. Olson*, 487 U.S. 654, 732-33 (1988) (Scalia, J., dissenting).

PROFESSOR COX: Well, I am inclined to think that the American people see the present statute and system as being used as a political weapon back and forth, a political football. They get a certain amount of pleasure out of following this—at least some of them do—but fundamentally, they have come to distrust—the proceedings and to think that it doesn't serve the purpose which I think, in a fundamental sense, they feel is needed, going farther back to Watergate.

JUDGE DAVIS: Terry.

MR. EASTLAND: Well, as a writer of books, what I don't like is, the public does not buy political or governmental or public policy books anymore.

I mean, why do Americans hate politics in government? I have a self-interest in this. I think the independent counsel statute is but one of the many reasons. What does the public think about the independent counsel statute?

Yes, I would agree with what Professor Cox said. I think they see it as something that is used to gain perhaps partisan advantage in Washington. I think it is important, though, to understand something.

We made a fundamental decision, after Watergate, in the run up to the enactment of the statute in '78, and the decision was this: that the pursuit of executive branch criminality should have a much higher priority in our politics than it has had before—that is a fundamental assumption—and, therefore, we needed an independent place in a government that theretofore consisted of three separated powers—we needed an independent place in which to be able to investigate, to pursue, executive branch criminality, and we have been pursuing that to a fare-thee-well now over many investigations over the years. This absorbs ever more time, not just the lawyers who can bill, not just the defense attorneys and the others who are engaged in partisan roles on the outside, but it takes an enormous amount of time.

We have twenty-four hours in a day still, do we not?

And so there is less time to devote to ordinary politics, and this is a point that cuts across parties, whether it be Republicans or Democrats, whoever might be in the White House.

Bill Clinton has complained about the investigations of independent counsels, and so on and so forth; it is not allowing him to perhaps spend as much time as he might governing. He is making a fair point, I think.

This, of course, is the consequence of the independent counsel statute.

I would also add this. I think the statute may work a disproportionate effect upon a Democrat in the White House than it does upon a Republican if the Democrat is trying to govern in the progressive tradition of expanding the central government because it only tends to weaken presidencies; whereas a Republican president who, perhaps, is not as interested in expanding the central government—it may not have as much of an adverse impact. So there is a certain irony in the way the statute works in terms of how it can enervate an executive.

Finally, I would just add this, speaking of Bill Clinton, and we ought to mention Bob Woodward at some point, I suppose. Bob Woodward's paperback edition just came out recently – *The Choice* – and he has an afterword.⁶³ That book was written during the election season, as you know. He writes very fast. And the afterword – and I suppose there was some deep-throat in the room which gave him this information – but he paints a scene, over a couple of pages, where Bob Dole and Bill Clinton have this post-election meeting. To paraphrase the conversation, Bill Clinton says to Bob Dole, "Bob, you know, you were right and I was wrong. You were right about the independent counsel law that you had opposed for so many years and I was wrong."⁶⁴ The wisdom of four years later.

Now, in 1992, when Bill Clinton and Al Gore were running, there was, of course, from Al Gore the demand that Bill Barr, whom we've heard from earlier, seek the appointment of an independent counsel in the Iraqgate matter.

That was then; this is now.

I think the political coordinates have sufficiently changed that it is quite possible that in 1999 – this would be my advice to Henry down there – my advice to you would be, don't pass the statute. The statute cannot be enacted by the President of the United States alone. We still have to go through two houses of Congress, do we not? And I think that President Clinton might be agreeable to not having the statute in the future.

JUDGE DAVIS: I will treat that as Terry's final statement.

Professor Cox, I extend to you ninety seconds to make a final statement and give final advice to Congressman Hyde.

PROFESSOR COX: I will just make one remark first, if I may, about what Terry was last saying, –

JUDGE DAVIS: Yes, sir.

PROFESSOR COX: – and that is, I think what faults he finds, this public response that he describes, the amount of time given to charges and defense of the executive wrongdoing, is a result of the present statute and its breadth, and that those saying if it were narrowed as drastically as I suggest, that it would be something there for the rare crisis and not something that was used all the time.

The last point I would add – I do say this very general – I do think it important that everything possible be done – you can't just legislate it – to wipe out the picture which has been growing that the job of independent counsel, as it's created by this statute – and I am not directing this to independent counsel

63. BOB WOODWARD, *THE CHOICE* (1996).

64. *See id.* at 444.

so much as others — has come to be seen as a hunt and it's a failure unless the hunt gets the game.

Surely, the right position, particularly if the statute is narrowed as I said, is that it is really an impartial inquiry.

President Nixon would never believe that I saw it that way. I think I saw it that way, truly, and that there would have been more advantages in finding that there was no criminal wrongdoing by our President rather than finding that there was. And I think the job should be seen as a success whether independent counsel, in this narrow range of cases, finds that there is ground for seeking an indictment or whether he concludes that an indictment should not be sought. And therefore, so far as the administration of criminal justice is concerned, the President or the one or two other high officials are entitled to, just like any other individual in this country, the presumption of innocence of any criminal wrongdoing and that is the end, or should be the end, of counsel's responsibility. And while I think he needs to report on that much, he shouldn't be reporting a lot of other comments that don't lie in the area of criminal law.

JUDGE DAVIS: Ted, final say.

MR. OLSON: The only thing that I would add is that Justice Scalia again foresaw a lot of this,⁶⁵ and one of the things that he said was — and I'm reminded by what Terry said about President Clinton now agreeing that this independent counsel statute is a bad idea — when Attorney General William French Smith took office in 1981, when the Reagan administration began, former Attorney General Griffin Bell came to him and said, "The one thing that you are really going to hate is that independent counsel statute." He said, "It's the worst thing that we did. We shouldn't have done it," referring to the Carter administration.

So this pendulum swings back and forth and people are now coming around to recognizing these things. But Justice Scalia foresaw the political difficulty with it, the same political difficulty that the Clinton administration had when they allowed the statute to come back after Bill Barr and the Bush administration had allowed it to die.

Justice Scalia said:

[I]t is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called . . . the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.⁶⁶

65. *Morrison*, 487 U.S. at 732 (Scalia, J., dissenting).

66. *Id.* at 733 (Scalia, J., dissenting).

JUDGE DAVIS: Congressman Hyde, you are going to get the last word. I have been prevailed upon by Terry to give him a few more seconds.

MR. EASTLAND: I just want to make a final comment, which is this, Ted. The statute does grandfather in existing independent counsel. So those already at work right now would continue after June 30, 1999.

Now, the Republicans might think that is the best of all possible worlds – keep those current counsels going and not take the gamble that perhaps they can recover the White House in 2000.

The political circumstances, I think, have changed. This will be the first ever circumstance in which the Republicans, if they are reelected and they can control Congress in '98, would have that option.

But the final comment I wanted to make was simply this. There is an important paradox at the heart of the independent counsel statute. The statute presumes the prosecution of a sitting President of the United States.

Now, I ask you this – this is a roomful of judges – is that constitutional? That's an interesting question.

And it is not a question the Supreme Court has rendered an opinion on, as we know. It was, by the way, rolled into the Nixon privilege case. The Court took cert. on that question and then decided not to render an opinion on it. But it is a very interesting question, of course, in constitutional law, and I would say the policy at the Justice Department is that a sitting President may not be prosecuted.

That is what Robert Bork wrote in 1973. In litigation in 1973 regarding Spiro Agnew, he had occasion to treat that question.

And the government's amicus in the Paula Jones case, the Solicitor General's brief in that case,⁶⁷ has a footnote in which it alludes to the learning at the Justice Department on this question.

And so I think that the position of the United States still today remains that. So here is an interesting question: Can an independent counsel, charged with investigating a President, violate the Department of Justice policy by indicting a sitting President?

JUDGE DAVIS: Congressman Hyde.

CONGRESSMAN HYDE: I can't predict what is going to happen in the coming year, but my guess would be that we will reauthorize an independent counsel statute. I think we will learn a lot from the experience we have had in the past years and from the information provided by you gentlemen and ladies.

67. Brief for the United States as Amicus Curiae in Support of Petitioner at 15 n.8, *Clinton v. Jones*, 117 S.Ct. 1636 (1996) (No. 95-1853).

It should be of some limited duration, with permission to extend it for good cause shown, a narrower charter, accountability in terms of funding, but not cross the line to where we use that as a device to impair the independence.

The fact is, human nature is human nature.

I wouldn't have trusted Ed Meese to prosecute Ronald Reagan and I don't trust Janet Reno to prosecute Bill Clinton.

Now, I am not saying they should be prosecuted. I am simply illustrating the inherent conflict of interest with a prosecutor who is a political appointee trying to prosecute or investigate her patron or his patron. It's not going to happen. So you need this institution. You need to have public confidence that people are being treated justly and fairly, but we ought to try to make it as workable an institution as we can.

This meeting has been a great contribution, and I am going to talk to Ted again and again. I know how he feels and his ideas are good. So are yours, Terry, and Mr. Cox – just fine – and this has been very useful.

Thank you.

JUDGE DAVIS: Please thank each panelist.

(Applause.)

NOTES

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FEC APPEARS TO HAVE FOCUSED ITS ATTENTION ON CONSERVATIVE GROUPS

The Virginian-Pilot (Norfolk, VA)

August 22, 1996, Thursday,, FINAL EDITION

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Section: FRONT,

Length: 1123 words

Byline: BY WILLIAM P. BARR

Body

Over the past 20 years, the Federal Election Commission has mounted a sustained assault on First Amendment freedoms. It has persistently attempted to expand its authority over campaign-spending limits into a sweeping license to suppress issue-oriented speech by citizens' groups. Most recently, the FEC has brought a much-publicized lawsuit against the Christian Coalition, claiming that it was illegal for the coalition to distribute voter guides that merely described candidates' positions on various issues without endorsing any candidate.

This suit is an especially pernicious attack on First Amendment liberties. The Christian Coalition has been singled out and publicly savaged for distributing guides that were clearly legal. Moreover, in challenging these guides, the FEC has conjured up a radical new theory that, if accepted, would sweep away carefully crafted safeguards designed to protect citizens' groups from FEC harassment and would confer on the FEC sweeping control over their speech. Finally, the FEC position, if enforced evenhandedly, would prohibit a broad range of organizations from engaging in issue advocacy.

The FEC's suit is based on the Federal Election Campaign Act, which places limits on contributions to, and expenditures by, federal election campaigns. One provision of the act prohibits corporations and labor unions from making expenditures on behalf of campaigns. The purpose of this restriction is to prevent campaigns from circumventing spending limits by having other entities fund campaign activities.

Over the years, the FEC has sought to convert this narrow rule into a sweeping prohibition against political speech by citizens' groups. It has argued that whenever an incorporated organization engages in speech that might influence an election - even the mere advocacy of issues - that speech should be deemed an impermissible "expenditure" on behalf of a campaign. Because most policy-oriented groups today are incorporated - ranging from the National Organization for Women to the Chamber of

Commerce - the FEC's position would mean that these organizations could no longer say or do anything that might influence an election.

The Supreme Court has repeatedly rejected the FEC's arguments, recognizing that they strike at the core of First Amendment freedoms. The central purpose of the First Amendment is to enable self-government by protecting the flow of relevant information to the electorate and fostering the broadest possible debate over policy issues and candidates. The freedom to engage in political speech extends not only to individuals but to organized groups as well.

To protect citizens' groups from the FEC's overreaching, the Supreme Court established two bright-line tests. Under the first test, a group's speech is a campaign "expenditure" only if it explicitly calls for the election of a particular candidate. Short of this, an organization is totally free to advocate its policy positions and engage in political debate during election time. In this regard, courts have repeatedly ruled that groups like the Christian Coalition have the right to publish voter guides informing the public of candidates' positions.

The second bright-line test applies only when an organization has made an expenditure by explicitly endorsing a candidate. Under this test, such expenditures are permissible unless it can be shown that they were made in "coordination with a campaign. An issue-oriented group, says the Supreme Court, has the First Amendment right to advocate the election of its preferred candidates as long as it acts independently. The Supreme Court just rejected an effort by the FEC to expand the concept of "coordination." In a case against the Colorado Republican Party, the FEC had argued that any expenditure made by the party must be "presumed" to be coordinated with the candidate's campaign because of the close relationship between the party and its candidate. Rejecting this notion of "presumptive coordination," the court ruled that for an expenditure to be coordinated, the specific communication at issue must have been actually coordinated.

Under both of these tests, the Christian Coalition's voter guides were entirely lawful. They did not call for the election of any candidate, but merely set forth the position of candidates on issues. Thus, they were not "expenditures" and were completely permissible regardless of whether they were coordinated. Moreover, even if the guides contained explicit calls for a candidate's election, they still would have been permissible because the FEC has failed to point to any evidence of coordination.

How then can the FEC attack voter guides that were so clearly permissible under existing law? The agency has unveiled a new theory: It now argues that the voter guides were prohibited because the Christian Coalition had sufficiently close contacts with Republicans that the FEC could presume its activities were coordinated. In other words, while the Supreme Court has insisted that two conditions be met before speech can be banned - "explicit candidate advocacy" and "actual coordination" - the FEC now asserts that it can ban speech when neither condition is met.

The implications of the FEC's latest theory are breathtaking. If enforced evenhandedly, it would mean that issue-oriented groups having appreciable contact with political parties - groups such as the National Organization for Women, the NAACP or the AFL-CIO - could be prohibited from engaging in any speech that might influence an election. It would also supplant the Supreme Court's bright-line tests with subjective, manipulable standards. The FEC would be free to pursue any group it felt had a political impact and had contacts with a political party. Such subjectivity would have a chilling effect on political speech and would also be an invitation to selective enforcement.

Selective enforcement is a particular concern in this case. Numerous organizations are engaged in issue-advocacy activities that go beyond what the Christian Coalition has done. For example, the AFL-CIO, which is officially represented on the Democratic National Committee, has embarked on a \$ 35 million campaign to unseat freshman Republican congressmen by criticizing their records. Yet the Christian Coalition has been singled out. Indeed, a disturbing pattern has emerged, as the FEC appears to be targeting only conservative groups such as the Colorado Republican Party, Gopac and the Christian Action Network. Even though the FEC has lost all of these cases, the cost to the citizens' groups is high - both in legal fees and damaged reputation.

The cost to the First Amendment, however, is even higher.

Classification

Language: ENGLISH

Subject: CAMPAIGN FINANCE (90%); ELECTIONS (90%); ELECTION AUTHORITIES (90%); CAMPAIGNS & ELECTIONS (90%); CHRISTIANS & CHRISTIANITY (90%); ASSOCIATIONS & ORGANIZATIONS (89%); POLITICAL DEBATES (78%); ELECTION LAW (78%); PLATFORMS & ISSUES (78%); SUITS & CLAIMS (77%); LITIGATION (76%); WOMEN (72%); BUSINESS & PROFESSIONAL ASSOCIATIONS (72%); CHAMBERS OF COMMERCE (67%); LABOR UNIONS (66%); LAW COURTS & TRIBUNALS (65%); SUPREME COURTS (65%)

Company: FEDERAL ELECTION COMMISSION (94%); CHRISTIAN COALITION (91%)

Organization: FEDERAL ELECTION COMMISSION (94%); FEDERAL ELECTION COMMISSION (94%); CHRISTIAN COALITION (91%); CHRISTIAN COALITION (91%)

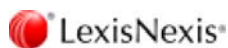
Load-Date: August 29, 1996

Content Type: News

Terms: "william p. barr"

Narrow By: Timeline: Jan 01, 1993 to Dec 31, 2000

Date and Time: Dec 12, 2018 05:13:51 p.m. EST



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Rule of Law: The FEC's War Against the First Amendment

The Wall Street Journal

August 14, 1996 Wednesday

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THE WALL STREET JOURNAL.
U.S. EDITION

Section: Pg. A13

Length: 1142 words

Byline: By William P. Barr

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candidates. The freedom to engage in political speech extends not only to individuals but to organized groups as well.

To protect citizens' groups from the FEC's overreaching, the Supreme Court established two bright-line tests. Under the first test, a group's speech is a campaign "expenditure" only if it explicitly calls for the election of a particular candidate. Short of this, an organization is totally free to advocate its policy positions and engage in political debate during election time. In this regard, courts have repeatedly ruled that groups like the Christian Coalition have the right to publish voter guides informing the public of candidates' positions.

The second bright-line test applies only when an organization has made an expenditure by explicitly endorsing a candidate. Under this test, such expenditures are permissible unless it can be shown that they were made in "coordination" with a campaign. An issue-oriented group, says the Supreme Court, has the First Amendment right to advocate the election of its preferred candidates as long as it acts independently. The Supreme Court just rejected an effort by the FEC to expand the concept of "coordination." In a case against the Colorado Republican Party, the FEC had argued that any expenditure made by the party must be "presumed" to be coordinated with the candidate's campaign because of the close relationship between the party and its candidate. Rejecting this notion of "presumptive coordination," the court ruled that, for an expenditure to be coordinated, the specific communication at issue must have been actually coordinated.

Under both of these tests, the Christian Coalition's voter guides were entirely lawful. They did not call for the election of any candidate, but merely set forth the position of candidates on issues. Thus, they were not "expenditures" and were completely permissible regardless of whether or not they were coordinated. Moreover, even if the guides contained explicit calls for a candidate's election, they still would have been permissible because the FEC has failed to point to any evidence of coordination.

How then can the FEC attack voter guides that were so clearly permissible under existing law? The agency has unveiled a new theory: It now argues that the voter guides were prohibited because the Christian Coalition had sufficiently close contacts with Republicans that the FEC could presume its activities were coordinated. In other words, while the Supreme Court has insisted that two conditions be met before speech can be banned -- "explicit candidate advocacy" and "actual coordination" -- the FEC now asserts that it can ban speech when neither condition is met.

The implications of the FEC's latest theory are breathtaking. If enforced evenhandedly, it would mean that issue-oriented groups having appreciable contact with political parties -- groups such as the National Organization of Women, the NAACP or the AFL-CIO -- could be prohibited from engaging in any speech that might influence an election. It would also supplant the Supreme Court's bright-line tests with subjective, manipulable standards. The FEC would be free to pursue any group it felt had a political impact and had contacts with a political party. Such subjectivity would have a chilling effect on political speech and would also be an invitation to selective enforcement.

Selective enforcement is a particular concern in this case. Numerous organizations are engaged in issue-advocacy activities that go beyond what the Christian Coalition has done. For example, the AFL-CIO, which is officially represented on the Democratic National Committee, has embarked on a \$35 million campaign to unseat freshman Republican congressmen by criticizing their records. Yet the Christian Coalition has been singled out. Indeed, a disturbing pattern has emerged, as the FEC appears to be targeting only conservative groups such as the Colorado Republican Party, Gopac and the Christian Action Network. Even though the FEC has lost all of these cases, the cost to the citizens' groups is high -- both in legal fees and damaged reputation.

The cost to the First Amendment, however, is even higher.

Mr. Barr was attorney general in the Bush administration.

(See related letter: "Letters to the Editor: Why We're Suing the Christian Coalition" -- WSJ Sept. 10, 1996)

Notes

PUBLISHER: Dow Jones & Company

Load-Date: December 5, 2004

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A PRACTICAL SOLUTION TO CRIME IN OUR COMMUNITIES

*Hon. William Barr, Fourth Panelist**

I want to start with the concept of “root causes” of crime and explore what I believe to be the ultimate solution: stepped-up law enforcement is not the ultimate solution to crime, but I think it is the indispensable *foundation* for any solution.

The Framers believed that society requires restraints. Now, if we are fortunate, those restraints will come from within, resulting in self-government. If we do not restrain ourselves, however, external government restraint is required. We have established a system with both internal and external controls. It relies principally on self-restraint, but it does recognize the need of the community to set standards. Over the last thirty years, we have seen both of these kinds of restraints destroyed and undermined.

In my view, the root causes of today’s problems are the destruction of self-restraint, the erosion of the family, and the undermining of traditional values. However, we have also seen the undermining of society’s ability to set and enforce minimal standards of conduct. Thus, it is no accident that over the last thirty years we have seen a five-fold increase in criminal activity along with all the other pathological signs of society’s deterioration. Of the problems facing our society over the past thirty years, crime is certainly the most gripping.

Although a five-fold increase in criminal activity over a thirty-year period is incredible, things are going to get much worse. We should be seeing a significant downturn in crime because the number of the most violent-prone cohort, those between the ages of fifteen and twenty-four, is at a low point in the population. But from now until the year 2005, the numbers will surge again, and I think we are headed for a sharp increase in violence in this country.

We all know that most of those victimized today are the people in the inner city — people who can least afford it. I am not talking about just violent crime but property crime as well.

There is a great deal of talk about taking back control of the neighborhoods and letting the people take back the streets. I have been a big proponent of that, but I think that two important legal tools are presently

* 77th Attorney General of the United States, 1991–93.

missing; tools that, from a law enforcement standpoint, make it difficult for the community to take back the streets.

The first tool the community lacks is the pretrial detention power. Lousy bail laws make it difficult for law-abiding citizens to cooperate with the police, to turn in the gangs, to turn in the drug dealers, and to identify the stash houses. What I heard most frequently when I was in the inner city as Attorney General was "These punks are right back out on the street. When are you going to take them off the street and keep them off the street? We are afraid of them. We are afraid to turn them in because if we turn them in, then they are going to be right back here tomorrow."

We tried a program in Philadelphia, the basis of our Weed and Seed Program, where we used the federal pretrial detention law. Over a period of two or three years, we arrested more than 600 gang members in that area. Those arrested were never given bail. The day they were taken off the street was their last day of freedom, and now they are all spending extended periods of time in federal penitentiaries. When the community saw for the first time that these criminals had been taken off the street and would not be returning, cooperation began. It had a snowball effect. People could now exercise control over their communities.

The second legal tool the community currently lacks is a group of laws, such as vagrancy and anti-loitering laws, that give the police discretion to intervene before a crime is committed. These vagrancy and anti-loitering laws would allow police to act upon their educated and professional suspicions that something is awry. The power of the police to intervene before a crime is committed has largely been destroyed over the past thirty years by judicial decisions. These vagrancy and anti-loitering laws were not imported from the Soviet Union or other totalitarian societies. Instead, these laws have been around in free societies from time immemorial, which came up through the English system.

There have been antivagrancy laws since the twelfth century. The original rationale was based on the principle of economic necessity: Everyone has to work to survive in society, and if you are not working it means someone else is pulling double duty, so society can force you to work. Under traditional antivagrancy law, any able-bodied person under the age of sixty had to work whenever called upon by someone who needed his services. If the person did not work, he could be imprisoned. In addition, it was a crime to give alms to anyone who was under sixty-years-old and able-bodied because it encouraged idleness.

By the seventeenth century, we still had antivagrancy laws, although the rationale had changed somewhat. Two theories developed to support such laws. The first was that vagrancy was an inherently offensive mode

of life. It was related to a loose lifestyle cultivated by drunks, prostitutes, and people who were not supporting their families. The second theory used to support antivagrancy laws was the close connection between vagrancy and crime. Those with no visible means of support were more likely to become involved in criminal activity.

In colonial America, there were antivagrancy laws. Every colony except Georgia — originally a colony of convicts — had ouster and removal laws, which permitted local authorities to return vagrants to their last place of residence.

In modern times, three kinds of vagrancy laws persisted. The first kind of law penalized those individuals whose status or activity was defined as vagrancy. The second type, which prohibited loitering, was essentially a behavior-oriented statute. The third kind was a specific intent statute prohibiting loitering for a specific purpose.

Not surprisingly, the courts found ways to strike down all of these kinds of statutes over the past thirty years. Part of the theory behind the courts' decisions has been the notion of cruel and unusual punishment. The reasoning is as follows: Being a vagrant, a "bum", or a "tramp" is considered a status which involves no misconduct, and is thought to be cruel and unusual punishment to punish an individual solely because of status. Vagueness and overbreadth were also used to strike down most of the statutes. Many courts have held that no real notice is given as to what is prohibited by antivagrancy laws, the laws may inhibit protected activity like free speech, and they may give the police too much discretion. Finally, the right to travel has also been used as a basis for striking down these statutes.

I think the inability to deal with the disorder on the street corner, which, as Judge Sarokin has asserted, is frequently quasi-criminal activity, has a dramatic effect on communities. We are not talking solely about people with squeegees. We are talking about the pimps, the gang members, the drug dealers, the drunks, and the abusive people that take over and destroy communities.

As these communities are destroyed, the inner-city families that can afford to move out emigrate, leaving an underclass that is far less prepared to function in that area. Looking around the country, we are witnessing an amazing pattern. Affluent whites are moving farther and farther away from the cities, commuting forty-five minutes to an hour to get away from cities. Members of the inner-city communities, once they gain the opportunity, follow suit. People keep running away. No one is takes a stand in his or her community anymore.

Communities are like disposable items: People use them as long as they are new, and then throw them out. Why do people fail to take a

stand in defense of their community? It is because over the past thirty years the tools and opportunity has been taken from them. This begins a vicious spiral that ultimately results in those neighborhoods becoming crime-ridden and dangerous. Individuals left behind are exploited by criminals.

I think Professor Kelling's analogy of the broken window is perfect. As he pointed out in his famous article in *Atlantic Monthly*, "It has been shown that if you break a window in a building and leave it there broken and unfixed for a long period of time, then more vandalism will occur in that building that has the broken window."¹ You have not set a standard and attempted to uphold it.

Similarly, that is what happens in a community. The inability to deal with the abusive bum on the street or the criminals who are selling drugs and extorting money from kids sent to the store by their parents, breaks down the community and ultimately opens the way for crime.

While I was Attorney General and Deputy Attorney General, I spent most of my time traveling to the inner city. Let me just say that from my experience — and I would like to pick up on what Chief Greenberg said — I have never met any family in the inner city that has complained about too much police discretion. The two complaints I did hear were that there were not enough police, and that the police would not do anything when called.

On the other hand, I did hear other people, including self proclaimed civil rights leaders, talk about police abuse or complain that the police enforce the laws against crack cocaine in a discriminatory manner. Repeatedly, I found that these people did not live in the inner city. They are not the ones whose kids have to run the gauntlet every day.

I think there is a double standard involved here, and I am sure it has been said before at this conference. If we took the crime rates that exist in the inner city and set them down in the middle of Potomac, Maryland or McLean, Virginia, we, as a society, would not tolerate the situation for a single minute. If we took some of the criminals that are out on the street right in the front of people's apartment houses, and we put them right in front of a house in Potomac, they would be out of there so fast their heads would be spinning. We would not let our kids play in the front yard with these people hanging around on our stoop.

The key civil rights issue of today, the real civil right, is the ability to live with some modicum of safety. When we have a society where

1. James Wilson & George Kelling, *Broken Windows*, *THE ATLANTIC MONTHLY*, March 1982.

more than half of the people are afraid to be outside of their homes at night, there is a fundamental problem of freedom and civil rights.

I think we have to step back and look at what we have done in our country. Most of our ancestors — at least for the people in this room — came from Europe. They fled oppressive societies, perhaps, but I will bet you that before leaving, they had more personal freedom and were less concerned about arbitrary violence than we are today in the United States. That is the kind of society that we have created.

I think people who are overly concerned with the use of antivagrancy laws to help arrest the decomposition of our cities operate from faulty premises. The first premise is that there is no blameworthy conduct involved in vagrancy because it is just a status offense. I think that we have to look at that premise more carefully. There are a lot of people who are homeless and mentally ill who do need help. We have to take care of them as mentally ill people. The reason they are out on the street is because the rights revolution essentially expelled them from institutions where they could be helped. A lot of those on the street, however, are pimps, drug addicts, and other people whose conduct is blameworthy and should be dealt with accordingly. I also think those people who are concerned with the use of antivagrancy laws do not understand the substantial fear that these vagrants really cause and the desertion of the cities that results.

The other thing that bothers me is people who say that the police should not have this kind of discretion. If we do not allow some discretion so that the police can target the people that really have to be dealt with, we are left with blanket prohibitions that fall more heavily on the law-abiding citizens and further restrain our liberties, such as curfews. There must be order on the streets eventually. If you cannot chase the gang member off the street corner, then you are ultimately going to do things like in Dallas where no young people, good or bad, can be out on the street after a certain time. This is a further restraint on liberty.

I believe that, in our society, limited police discretion will lead to the greater good for the greater number. Remember something else: there is a check on police abuse, but there is no way to restore a community. A judge cannot sit there and order a life back into being or a community back into being, but he or she can throw out an action taken by an overzealous police officer.

Finally, I would like to address the issue of vagueness. I must say that the dual standard of vagueness in the laws of the United States never ceases to amaze me. Anyone who knows anything about white collar law, the law applied against U.S. businesses, knows about vagueness and arbitrariness. Compare a line of decisions about the laws under

which you can lock businessmen up with the hand-wringing Supreme Court decisions about vagueness. Because a law could theoretically be imposed to limit first amendment rights, the Court struck the law down even though the person was a prostitute and a criminal.

Those two different sets of opinions make people think they are operating in two different countries. I think if a “scheme or artifice or design” tells a businessman enough information that he has to know to put him in prison for fraud for forty years, then some of the statutes that say you cannot loiter on a street corner for the purpose for selling drugs are plenty clear enough.

Judge Sarokin laid out three options: garbage, spread, or absorb. By absorb I think he means spending more money on social programs. I am for garbage in the sense that if you want to prevent crime, the greatest crime preventor is taking the violent criminal and putting him in prison for a period of time. I would say from an enforcement standpoint, as opposed to a root-causes standpoint, that this is the number one priority. The number two priority from an enforcement standpoint is what we have been talking about: giving the police more power to clean up the community.

I would say that if there is anything that has demonstrably failed over the last thirty years, it is social programs. We have spent increasingly more money for thirty years, and now we are spending over \$300 billion—that is \$3000 per taxpayer—on social programs, and all we have gotten in return is a five-fold increase in crime. The notion that if we just spend a few more billion dollars we will breakthrough to nirvana is fanciful.

NewsRoom

1/1/95 Telecommunications 30
1995 WLNR 5446430

Telecommunications
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January 1, 1995

Volume v29; Issue n1

Regulatory reform: Recognizing market realities.

The FCC has not implemented a policy of fundamental reform during the 10 years following the 1984 breakup of the Bell System. Instead, the agency has attempted to modify its traditional regulatory model, struggling to make the old system work in the new, more competitive world. Price cap regulation has been an exception, but even in this area, policy has been timidly implemented and has not been effective. Incremental reform in a context of monopoly-based regulation is not appropriate in today's markets. Telephone, television and computer technologies are converging. Meanwhile, the marketplace is fragmenting as data, image and video services become increasingly important. The communications industry is poised to enter a new age, and there is a consensus among industry observers that policy should aim to maximize competition. Regulators need to face realities.

In 1978, well before the 1984 Bell System breakup, the Federal Communications Commission (FCC) began a searching re-examination of its regulation of the telephone industry. The FCC considered what changes might prove necessary to achieve its fundamental regulatory goals of maintaining universal service and maximizing consumer welfare by fostering competition wherever feasible and, where not feasible, applying monopoly regulation to induce providers of monopoly service to price as if facing competition.

As part of this process, the FCC re-examined its policies on universal service, pricing of access, and transport service, separating costs of competitive service from regulated service, and opening the national public-switched network to wider access for newer, non-traditional service providers. It was a good start. But, 16 years later, the FCC's dream is still far from reality.

What has emerged over the past decade has not been the fundamental reform one might have expected after divestiture. Rather, the FCC has attempted to tinker with its traditional regulatory model in order to make it work in the new environment. Open network architecture has followed the traditional model by placing requirements on a few incumbents, a strategy increasingly out of step with a public network fabric of interlaced networks. Despite having cost separation rules in place for years, the FCC remains bogged down in endless wrangling over each new service offering by a telephone company. And while telephone companies are impeded in their efforts to enter new markets, their competitors flourish by skimming the cream of network traffic, thus damaging the ability of incumbent common carriers to discharge their universal service obligations.

A partial exception to this has been price cap regulation. Had it been boldly implemented it could have driven fundamental reform, but, as currently in place, it remains wedded to earlier concepts of monopoly-based common carrier service regulation. The result has been to impede access reform.

What should be done to promote genuine reform? In the face of emerging competition for local exchange access and other services, it should be clear that incremental reform within the context of monopoly-based regulation cannot reasonably be expected to serve the FCC's objectives of protecting universal service and maximizing consumer welfare.

Growing competition is the product of technology convergence and market divergence: microchip, digital, and software technologies have blurred the lines between formerly distinct telephone, television, and computer technologies. The telecommunication marketplace is becoming highly fragmented as the dominance of voice gives way to faster-growing markets for data, image, and video. By the turn of the century, voice revenues will account for less than 50 percent of telecommunication service revenues.

Price Caps and Access Pricing. The rationale for substituting price caps for traditional cost-plus regulation was simple: incentive-based regulation would encourage carriers to price services at levels that would prevail in a competitive marketplace, while eliminating the need for cumbersome cost-of-service regulation. Under "pure" price caps this would indeed be the case, because "pure cap" pricing is driven by the market. Thus, there is no rate increase the regulated carrier can derive from shifting costs to the regulated side. Under modified price caps, cost of service remains a factor, but less of one than under cost-plus regulation, where service costs are the basic criteria for evaluating rate requests.

Cost Allocation. After the FCC's exhaustive proceeding examining joint costs (those attributable, in part, to both regulated and non-regulated services), one might have thought the way had been paved for significantly greater freedom of entry for telephone companies desiring to offer new services. This has not been the case. Each telco filing is greeted by the same flood of complaints that swamped the FCC with the earlier proposals. Initial claims cite procedural nuance; then come cries of anticompetitive, illegal, and/or immoral conduct. After the comment cycle ends, requests can languish in limbo for a year or more.

That the rules already in place are working is clear from the record of telephone company competition in markets adjacent to telephone service. Telcos have entered and exited long-distance, equipment, cellular, and paging markets with no apparent ill effects on non-telco competition. Perhaps most notably, a 1993 study showed that Centrex service, a natural candidate for cost-shifting because it is provided directly out of the central office, has lost market share to PBX vendors since divestiture. Clearly, telcos compete lawfully and, equally clearly, their market conduct has yet to result in any of the ghastly consequences repeatedly predicted by critics.

Market Entry. Every time telcos seek new market entry, opponents cite telcos' "over 99 percent of the local access market" as conclusive evidence that competition does not exist in the local loop. To reach this number, competitors ignore "self-supply" traffic carried over their own networks that completely bypasses the local exchange carriers' points of access. Thus, they distort what antitrust lawyers call "market power" and the "relevant market."

Market power is the ability of a market firm to raise prices above or restrict output below the levels that would prevail in a freely competitive marketplace. Determining the relevant market is the first step in ascertaining market power.

The FCC and the Justice Department both proceed on the assumption that the local exchange market is essentially unitary, and then conclude that the market share of the local exchange carriers makes them "dominant carriers" who can thus impede competition and reap monopoly profits for themselves. But the local marketplace is no longer unitary. Growing data, image, and video markets are competitive subsets of local service and access, and competitors are making inroads in these markets.

To understand this, one needs only to pose the question: If GTE or an RBOC tried to raise prices for special access, would its customers passively accept this or would they call the competition? Clearly, any hope to reap excess profits would be dashed. It is true that the average residential customer does not yet have comparable alternatives. But those

customers with alternatives represent a distinct market segment. In the final analysis, regulators must "keep their eye on the ball." It is the ability to extract excess profits (in antitrust jargon, "supra-competitive" profits), not simply market share, that determines whether market incumbents possess genuine market power.

Network Interconnection. Open network architecture was designed to enable providers without their own facilities to gain access to the network assets of facilities-based common carriers. increasingly, however, providers who themselves have deployed facilities - e.g., competitive access providers, cable companies, and even long-distance providers - are seeking access to local exchange "carriers networks" in order to compete with them.

While insisting on a legal right to connect to telephone networks, however, these carriers do not wish to assume reciprocal obligations. The traditional notion that there is a "right" to non-discriminatory common carriage was predicated on access being afforded to customers; today, systems integrators seek access to common carrier high-density facilities as competitors. This situation, if allowed to continue without local companies having reciprocal rights of interconnection, will signal, in the words of former New York state regulator Eli Noam, the "impending doom of common carriage."

Universal Service. The source of "impending doom" is the combination of asymmetrical carriage obligations coupled with the extreme maldistribution of local exchange carrier revenues. New carriers target the small subset of customers - mostly large businesses - that provide a hugely disproportionate share of local exchange carrier revenues (as few as 5 percent of customers may provide as much as 50 percent of carrier revenues).

They build skeletal fiber networks, while leaving the common carriers to serve high-cost customers with vastly under-utilized copper wire plant. And, as Noam notes, when the local carriers' own facilities provide the most economical service, the systems integrator may avail itself - as a matter of legal right - of the common carriers' network. But when the reverse is true, the common carrier has no comparable recourse. Noam warns that such an arrangement simply cannot last. The resulting asymmetry can only imperil the ability of the common carrier to provide "last resort" service to less attractive markets.

The FCC should fundamentally recast its regulatory models to reflect new realities. Incentive regulation must be fully adopted, so that the endless wrangling over cost of service comes to an end. Cost allocation will be moot if pure price caps make cost irrelevant to provision of regulated service. And for those carriers not subject to price caps, cost accounting mechanisms already in place have demonstrated beyond reasonable doubt their effectiveness to prevent anti-competitive conduct by regulated carriers. It is time to base policy on the actual evidence, not bogeymen.

In an era of increasingly interconnected and proliferating networks, carriage rights can no longer be limited to non-common carrier providers. Reciprocal carriage rights will enable all customers to benefit from available network economies. It is the welfare of the consumer and not that of marketplace providers that must guide policy. An "open network" policy should mean that all those interconnecting to the public network must offer reasonable reciprocity to the common carrier.

Universal service will be protected only if those charged with that responsibility can compete fully and fairly in the marketplace. They must be able to respond rapidly to pricing and service changes offered by competing entrants. Waiting until a specified market share is achieved by new entrants will substantially undermine universal service. This must not be allowed to happen.

Our industry stands at the threshold of an exciting age. There is virtual unanimity on how best to achieve its benefits: by maximizing competition. Regulators must recognize realities.

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Company: GTE INTERNETWORKING; VERIZON COMMUNICATIONS INC; PBX; FEDERAL COMMUNICATIONS COMMISSION; GTE DELAWARE LP; GTE CORP; FOMENTO DE CONSTRUCCIONES Y CONTRATAS SA; JUSTICE DEPARTMENT

News Subject: (Market Share (1MA91); Sales & Marketing (1MA51); Antitrust Regulatory (1AN52); Monopolies (1MO68); Market Data (1MA11); Economics & Trade (1EC26); Business Management (1BU42))

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Region: (Americas (1AM92); USA (1US73); North America (1NO39); District of Columbia (1DI60))

Language: EN

Other Indexing: (FCC; FEDERAL COMMUNICATIONS COMMISSION; GTE; GTE CORP; JUSTICE DEPARTMENT; PBX) (Caps; Eli Noam; George Bush; Initial; Noam; Potts Trowbridge; William P. Barr)

Keywords: (Business); (Telecommunications industry); (Telecommunications); (Telephone Communications); (Home TV Data Service); (United States. Federal Communications Commission); (United States. Federal Communications Commission - Science and technology policy); (Telecommunications industry); (Telecommunications industry - Laws, regulations and rules); (Information services); (Information services - Laws, regulations and rules); (Telephone companies); (Deregulation); (Telephone services); (Videotex systems); (Telecommunications services industry); (Telecommunications services industry - Laws, regulations and rules); (Information services industry); (Information services industry - Laws, regulations and rules)

Product: Telephone Communications; Communication Services, NEC; Telecommunications; Wired Telecommunications Carriers; On-Line Information Services

Sic: 4810; 4899

Naics Code: 5133; 51331; 514191

Word Count: 2361

End of Document

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LEGAL ISSUES IN A NEW POLITICAL ORDER

WILLIAM P. BARR*

INTRODUCTION

This discussion addresses the challenge of representing Catholic institutions in this day and age. Rather than deal with this topic on a technical, legal plane by addressing the latest ways of protecting tax exempt status or handling charges of clergy misconduct, it takes a broader view by examining the overall challenge confronting the Church that affects us as lawyers for Catholic institutions.

I. BREAKDOWN OF TRADITIONAL MORALITY

We live in an increasingly militant, secular age. We see an emerging philosophy that government is expected to play an ever greater role in addressing social problems in our society. It is also expected to override various private interests as it goes about this work. As part of this philosophy, we see a growing hostility toward religion, particularly Catholicism. This form of bigotry has always been fashionable in the United States. There are, today, even greater efforts to marginalize or "ghettoize" orthodox religion.

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Recently, in coverage of the Waco, Texas incident,¹ many of us saw the media's subtle efforts to equate the cult in Waco with the Church.² Stories in the news regarding cults showed Catholic priests involved in the work of the Church.³ Two thousand years ago, the Church was a strange cult on the periphery of a great pagan empire.⁴ Some among us may feel that we might be headed in the same direction; this time not as an ascending, but as a declining faith. Indeed, a growing number of historians say that we are embarking on the "post-Christian era."⁵ In this hostile environment, it is critically important that lawyers work to preserve the integrity of the Church and fend off encroachments on its beliefs and practices.

However, as important as this is, in many ways this legal jousting is really a rear-guard action. We are being pushed steadily off the battlefield, or have been for the last few decades. Occasionally, we are jabbing back and poking back as we backpeddle off the field. What is our larger strategy for preserving the Church and seeing it prevail? How will we get back on the battlefield? How are we going to see the Church transform the world for the better?

We are locked in a historic struggle between two fundamentally different systems of values. In a way, this is the end product of the Enlightenment.⁶ On the one hand, we see the growing ascendancy of secularism and the doctrine of moral relativism.⁷ On the other, we see the steady

¹ See Sue Anne Pressley, *Koresh's Body Identified Among Victims in Waco: Cult Leader Died of Gunshot to Head*, WASH. POST, May 3, 1993, at A1. On February 28, 1993, the Branch Davidian cult compound in Waco, Texas was raided by the Bureau of Alcohol, Tobacco, and Firearms. *Id.* The government agency besieged the cult and its leader, David Koresh, for 51 days. *Id.* Ultimately, the standoff ended when a fire caused by officials engulfed the compound. *Id.* Seventy-seven people died by either fire or gunshot wound. *Id.*

² Cf. ANTI-CATHOLICISM IN THE MEDIA (Patrick Riley & Russell Shaw eds., 1993) (examining media bias against Church).

³ See Bob Harvey, *Government's Role in Tragedy at Waco*, OTTOWA CITIZEN, Apr. 24, 1993, at C6 (discussing work of Catholic clergy and noting some believe Waco incident "can be explained by the fact that religion is dangerous and synonymous with fanaticism"); cf. Jon Nordheimer, *Ex-Members Compare Campus Ministry to a Cult*, N.Y. TIMES, Nov. 30, 1994, at B1 (describing high-pressure tactics used by campus ministry to indoctrinate members).

⁴ See generally PHILIP HUGHES, *A POPULAR HISTORY OF THE CATHOLIC CHURCH* (1954) (relating history of Catholic Church).

⁵ See, e.g., HAROLD BLOOM, *THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION* (1992).

⁶ See HENRY STEELE COMMAGER, *THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT* (1977). The Enlightenment was a period of European intellectual development during the seventeenth and eighteenth centuries in which art, philosophy, science, and politics were revolutionized. *Id.*

⁷ See Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995, 1049-58 (1986); Raymond A. Belliotti, *Law and Revolution: The Formation of the Western Legal Tradition*, 50 BROOK. L. REV. 351, 360 n.39

erosion of the traditional Judeo-Christian moral system. Although we are all familiar with the tenets of Judeo-Christian tradition, they sound increasingly jarring to the modern ear when set forth.

Traditional Judeo-Christian doctrine maintains that there is a transcendent moral order with objective standards of right and wrong that exists independent of man's will. This transcendent order flows from God's eternal law—the divine will by which the whole of creation is ordered. This eternal law is impressed upon and reflected in nature and all created things. This is the natural law. Man can know God's law, not only through revelation, but also through the natural law, which he can discern by reason and experience.

The great insight of the Judeo-Christian tradition is that these rules of right and wrong that make up traditional morality—and which modern secularists dismiss as otherworldly superstition—are, paradoxically, the ultimate utilitarian rules for human conduct. They are the rules that are best for man—not in the by and by, but in the here and now. These are the rules that accord with the true nature of man. Therefore, adherence to them promotes what is good for man in the long run, both individually and in society. By the same token, deviation from these principles and moral laws have bad practical, real world consequences for man and society. We may not pay the price immediately, but we will eventually.

The American government, as Father John Courtney Murray wrote, was predicated precisely on this Judeo-Christian system.⁸ Its demise would have grave consequences for the future of self-government in the United States.⁹ We are already seeing some of the consequences of the weakening of the Judeo-Christian tradition. The Founders believed that popular government and its laws necessarily rested on an underlying moral order that was antecedent to both the state and man-made law.¹⁰ For the Republic to work, the Founders thought, people must be guided by inwardly possessed and commonly shared moral values.¹¹ Self-government did not mean the mechanism by which one elected representatives to a legislative body. Self-government referred to the capacity of each individual to restrain and govern themselves. In the words of James Madison, "We have staked our future on the ability of each of us to govern ourselves according to the Ten Commandments of God." The

(1984). In contrast to natural law's adherence to objective moral principles, moral relativism suggests that there are no moral principles that are applicable in a universal manner. Belliotti, *supra*, at 360 n.39.

⁸ JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* ix (1960).

⁹ *Id.*

¹⁰ *Id.* at 36-37.

¹¹ *Id.*

greatest threat to free government, the Founders believed, was not governmental tyranny, but personal licentiousness—the abandonment of Judeo-Christian moral restraints in favor of the unbridled pursuit of personal appetites.

Thus, the Founders believed the choice was clear. We could govern ourselves guided by religion and morality, or we could lose our liberty altogether. In the words of John Adams, “We have no government armed with power which is capable of contending with human passions unbridled by morality and religion. Our Constitution was made only for a moral and religious people. It is wholly inadequate for government of any other.”

The Founders viewed themselves as embarking on this great experiment: Could a free people retain the moral values that would promote self-discipline and the public virtues needed to restrain licentiousness and promote the public good? After two hundred years of this experiment, I think our liberty appears indeed to be threatened. It is undeniable that, since the mid-1960s, there has been a steady and mounting assault on traditional values. We have lived through thirty years of permissiveness, the sexual revolution, and the drug culture. Moral tradition has given way to moral relativism. There are no objective standards of right and wrong. Each individual has his or her own tastes and we simply cannot say whether or not those tastes are good or bad. Everyone writes their own rule book. So, we cannot have a moral consensus or moral culture in society. We have only the autonomous individual.

After thirty years of this upheaval, what can we say about its results? Has it contributed to the sum total of human happiness? The facts speak for themselves. We are all familiar with them. We have had unprecedented violence.¹² We have had soaring juvenile crime,¹³ widespread drug addiction,¹⁴ and skyrocketing venereal diseases.¹⁵ In fact, the more we educate people about venereal disease, the more it has in-

¹² See *Southern States Top List of Highest Murder Rates; About 70 People are Slain Each Day in U.S.*, WASH. POST, Feb. 2, 1995, at A16. Based on statistics from the National Center for Health and the Federal Bureau of Investigation's Uniform Crime Reports, one study concluded that approximately 70 people are murdered each day in the United States, which averages 25,500 homicides each year. *Id.* The United States' homicide rate is 17 times that of Japan and Ireland, 10 times that of Germany, France, and Greece, and 5 times that of Canada. *Id.*

¹³ See Sonia Nazario, *Many Teen-agers Facing Harder Lives, Study Finds*, L.A. TIMES, Apr. 25, 1994, at A3. The number of American teens arrested for violent crimes increased 50% between 1985 and 1991. *Id.*

¹⁴ See, e.g., Sally Squires, *A Profile of Area Drug Use*, WASH. POST, Nov. 8, 1994, at Z8. In a survey of Washington, D.C. area residents, 40% had taken one or more illicit drugs during their lifetime. *Id.* Twelve percent had used illicit drugs in the past year. *Id.*

¹⁵ See Shari Roan, *America's Silent Epidemic; Despite Publicity About AIDS, Sexually Transmitted Diseases Are Flourishing Among Young; Experts Blame Ignorance, Double*

creased.¹⁶ We have 1.5 million abortions per year¹⁷ and record psychiatric disorders.¹⁸ Teenage suicide has tripled in just twenty years.

An example from the California school system really drives home how much things have changed in the past twenty-five or thirty years. Several decades ago, in a California school system, the top seven problems were talking out of turn, chewing gum, making noise, running in the halls, cutting into line, dress code violations, and littering. By the mid-1980s, in that same school system, the top seven problems were drug abuse, alcohol abuse, pregnancy, suicide, rape, robbery, and assault.

Of course, the most significant feature of contemporary society has been the battering that the family has taken. Today in America, we have soaring illegitimacy rates. Almost thirty percent of children are born out of wedlock¹⁹—quadrupling in just twenty-five years. In many inner city areas, the illegitimacy rate is eighty percent.²⁰ We have among the highest divorce rates in the world. Divorce is as common as marriage.²¹ As a consequence, we now have the highest percentage of children living in single parent households.²²

This breakdown of the family is particularly distressing because the family is the principal institution by which we conduct moral education and transmit values from one generation to the next. As the family is weakened, so is our ability to transmit those values. We are sitting, right now, on top of a time bomb—a whole generation of disturbed and dis-spirited children. I can discuss at length the fruits of the new secular age, but the point is clear—the trashing that traditional morality has taken over the past twenty-five years has brought immense suffering, wreckage, and human misery.

There have been other times and places where the traditional moral order has been shaken and societies have lapsed into periods of licentiousness. But, it seems that today we are facing something quite unprecedented. In the past, society, like the human body, has had built-in,

Standards and a Lack of Honest Discussion, L.A. TIMES, Oct. 26, 1994, at A1. Each year, there are 12 million new sexually transmitted disease infections. *Id.*

¹⁶ *Id.*

¹⁷ See *A Goal For All: Fewer Abortions*, WASH. POST, Feb. 3, 1995, at E3.

¹⁸ See *Survey: Mental Illness Strikes 48% of United States Population*, N.Y. TIMES, Jan. 14, 1994, at A1. Forty-eight percent of Americans have suffered from a mental disorder at some point in their lives, while thirty percent suffer from one in any given year. *Id.*

¹⁹ *Reaffirming the Family*, CHRISTIAN SCI. MONITOR, Feb. 2, 1994, at 22.

²⁰ Mary McGrory, *Low-Caliber Protection*, WASH. POST, Jan. 31, 1995, at A2.

²¹ See Nancy Ross-Flanigan, *Bliss or Bust; Simple Formulas Can Tell if a Union Will Succeed or Fail*, DETROIT FREE PRESS, Feb. 14, 1995, at F8 (suggesting marriages are more likely to end in divorce, rather than succeed).

²² See *Half of U.S. Children Live in Nontraditional Families*, DETROIT FREE PRESS, Aug. 30, 1994, at 2A.

self-corrective mechanisms that help things get back on course if the society gets too far adrift. Decent people rebel; people coalesce and rally against obvious excess; eternal truths are rediscovered. The analogy is to the pendulum. We've all thought that somehow the pendulum will naturally swing back. Are we sure now that it will? Today, I think we face a number of factors that are unprecedented—which may mean that we cannot count on the pendulum swinging back.

II. BARRIERS TO THE RETURN OF TRADITIONAL MORALITY

A. *High-Tech Popular Culture*

First and foremost, we face the immense power of mass communications, popular culture, the entertainment industry, academia, and so forth. The power and pervasiveness of our high-tech popular culture not only fuels the collapse of morality, but also drowns out the scattered voices that are raised against excess. When those people who seek to restore some traditional morality stick their heads up above the trenches, they suffer what amounts to a saturation bombing of ridicule. A good example of this experience is the response to Cardinal O'Connor in New York.²³

B. *Government's Subsidization of Social Problems*

Another modern phenomenon that makes it harder for society to restore itself is the new role of governmental power. When past societies had deviated too far from sound moral principles regarding how to conduct themselves, they ended up paying a very high price. They recoiled from the excess and readjusted their paths. This corrective mechanism relates back to the concept of natural law being the ultimate utilitarian rule. Venereal disease is the price that we pay for sexual licentiousness in terms of health costs and other losses.²⁴ Dis-spirited children, violent crime, and poverty are the price we pay for the breakdown of the family

²³ See, e.g., Judy Foreman, *Abortion Foes Want Hecklers Arrested; Activists Disrupted Cardinal's Speech*, BOSTON GLOBE, Jan. 21, 1992, at 18 (describing "planned disruption" by gay-rights activists at speech given by Cardinal O'Connor regarding his religious beliefs opposing abortion); Peter Steinfeld, N.Y. TIMES, Sept. 14, 1991, at A25 (describing dispute over telecast of documentary, "Stop the Church," featuring disruption of mass given by Cardinal O'Connor at St. Patrick's Cathedral).

²⁴ See Roan, *supra* note 15, at A1 (citing increasing promiscuity as factor in alarming rate of sexually transmitted diseases among youths); Sidney Callahan, *Society Needs Sexual Evolution: Permissiveness vs. Authentic Liberation*, NAT'L CATH. REP., June 4, 1993, at 19 (reporting 56 million cases of sexually transmitted diseases per year as negative consequence of "serial sexual encounters").

structure.²⁵ Today, there is something new. The state no longer sees itself as a moral institution, but a secular one. It takes on the role of the alleviator of bad consequences. The state is called upon to remove the inconvenience and the costs associated with personal misconduct. Thus, the reaction to disease and illegitimacy is not sexual responsibility, but the distribution of condoms; our approach to the decomposition of the family is to substitute the government as the "breadwinner;" the reaction to drug addiction is to pass out needles.²⁶ While we think we are solving problems, we are actually subsidizing them. By lowering the cost of misconduct, the government serves to perpetuate it. The corrosive impact on society continues, and like most solutions that deal with symptoms rather than causes, it only makes matters worse.

This phenomenon of the government serving as the alleviator of bad consequences has gained much impetus by the emergence of a new moral code. There are essentially three different competing moral codes in the marketplace of ideas these days. There is the concept of rampant autonomous individualism at the vanguard of the secularist movement: Everyone "does their own thing."²⁷ Unless one can point to an immediate victim, don't bother me. I'll write my own rules. We also have the traditional Judeo-Christian morality that focuses on private action, but requires each individual to exercise self-control in their personal lives and to sacrifice their own interests and appetites when necessary for the greater good. This approach seeks to transform the world by focusing on the individual person and on private morality.

The new morality might be termed "macro-morality." To impose strictures on private conduct would be in bad taste. We do recognize, however, that some of the licentiousness goes too far since there are social problems that result. So, we have to act collectively to deal with manifestations of social problems. Morality is thus gauged by one's com-

²⁵ See James H. Andrews, *Cities Identify 'Risk Factors' that Lead to Juvenile Crime*, CHRISTIAN SCI. MONITOR, Nov. 18, 1986, at 25 (suggesting correlation between absence of fathers and juvenile crime).

²⁶ See *Focus on Prevention Tools, Mayoral AIDS Tasks Force Told*, 2 HEALTH CARE POL'Y REP. (BNA) No. 5, at D-34 (Jan. 31, 1994) (citing AIDS Task Force Chairman Hector Luis Acevedo as recommending condom distribution and needle exchange programs as principle prevention methods). At a meeting of the House Energy and Commerce Subcommittee on Health and the Environment on July 12, 1994, Subcommittee Chairman Henry Waxman (D-Calif.) "warned his colleagues to ignore 'right wing politicians' who refuse to provide federal funding for condom and hypodermic needle distribution programs." *House Panel Told Local Approach to Halt Spread of HIV Necessary*, 2 HEALTH CARE POL'Y REP. (BNA) No. 29, at D-19 (July 18, 1994).

²⁷ See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 171 (1993) (noting that, although secular humanism is not properly a religion, it might be considered an ideology that is "characterized by an emphasis on moral relativism and the celebration of self").

mitment to social action that ameliorates the consequences of misconduct. This system tolerates and encourages individuals to ignore strictures on personal conduct and suggests, in effect, that one can find salvation on the picket line, by being involved in the environmental movement, by promoting condom distribution or a host of other causes. That's the gauge of morality.

C. *Law as a Weapon for Promotion of Secularization*

The third phenomenon that makes it difficult for the pendulum to swing back is the way the law is being used as a weapon to break down traditional morality and establish moral relativism as the new orthodoxy. This use of law as a legal weapon is what should concern us most as lawyers. Since we are a very legalistic society, it should not surprise us that the law has become one of the principal battlegrounds for this struggle. The law is being used in several ways.

First, through legislative action, litigation, or judicial interpretation, secularists continually seek to eliminate laws that reflect traditional moral norms. Decades ago, we saw the barriers to divorce eliminated.²⁸ Twenty years ago, we saw the laws against abortion swept away.²⁹ Today, we are seeing the constant chipping away at laws designed to restrain sexual immorality, obscenity, or euthanasia.³⁰

These developments are very serious and cannot be viewed with equanimity. We cannot just worry about our own private morality. The content of the law plays a very important part in framing and shaping the moral culture of the society—morality will follow the law. What is made legal will ultimately be viewed, by most people, as moral. There is no better example of this than abortion. Prior to the United States Supreme Court's decision in *Roe v. Wade*,³¹ the vast majority of Americans believed that abortion was a moral evil, an abomination, and a scandal. Since *Roe*, the number of Americans, including Catholics, who consider abortion a moral evil is steadily declining.

The second way in which secularists use law as a weapon is to pass laws that affirmatively promote the moral relativist viewpoint. Such laws seek to ratify, or put on an equal plane, conduct that previously was

²⁸ See GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 156 (1991). By 1970, all states allowed divorce. *Id.* By the beginning of the 1980s, 50% of all marriages ended in divorce. *Id.*

²⁹ See *Roe v. Wade*, 410 U.S. 113 (1972).

³⁰ See, e.g., *In re Quinlan*, 355 A.2d 647, 662-64 (N.J.), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (holding woman in persistent vegetative state had constitutional right of privacy to terminate treatment); *Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 424 (Mass. 1977) (withholding chemotherapy from terminally ill, mental incompetent based on right of privacy and informed consent).

³¹ 410 U.S. 113 (1972).

considered immoral. For example, laws are proposed that treat a cohabitating couple exactly as one would a married couple. Landlords cannot make the distinction, and must rent to the former just as they would to the latter.³² This kind of law declares, in effect, that people, either individually or collectively, may not make moral distinctions or say that certain conduct is good but another is bad. Another example was the effort to apply District of Columbia law to compel Georgetown University to treat homosexual activist groups like any other student group.³³ This kind of law dissolves any form of moral consensus in society. There can be no consensus based on moral views in the country, only enforced neutrality.

The third way in which the law is used to promote secularization is as a weapon directly against religion and religious institutions. Increasingly, we can expect efforts to use the Establishment Clause³⁴ to exclude religiously motivated citizens from participation in public benefits and from the public square generally. *Lee v. Weisman*³⁵ was a very disappointing setback for those who had hoped for more reasonable Establishment Clause jurisprudence—less hostile to religion and more faithful to its original intent.³⁶ The psychological coercion test embraced by Justice Kennedy³⁷ is susceptible to radical expansion in ways that will continue to press religion to the margins.

Two recent decision, however, indicate that the Supreme Court may not be willing to go to extremes. In *Lamb's Chapel v. Center Moriches Union Free School District*,³⁸ the Court held that the denial of access to a

³² See, e.g., *Attorney General v. Desilets*, 636 N.E.2d 233, 235 (Mass. 1994) (applying state statute prohibiting discrimination by landlords on basis of marital status to cohabitating couple); *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1203 (Alaska 1989) (declaring landlord's refusal to rent to unmarried couple constituted unlawful discrimination based on marital status).

³³ The United States Court of Appeals for the District of Columbia held that Georgetown University's refusal to grant a homosexual rights organization equal status constituted a violation of D.C.'s Human Rights Act. See *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. Cir. 1987).

³⁴ U.S. CONST. amend. I.

³⁵ 112 S. Ct. 2649 (1992).

³⁶ In *Lee*, the United States Supreme Court held that a Long Island school system's practice of including invocations in graduation ceremonies violated the Establishment Clause of the First Amendment. *Id.* at 2655. As Professor Carter points out, however, "this was not daily prayer of the sort with which earlier decisions were concerned." CARTER, *supra* note 27, at 188.

³⁷ 112 S. Ct. at 2657-59. "[T]he school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* at 2658.

³⁸ 113 S. Ct. 2141 (1993).

school premises after hours to show a Dobson film, *Turning Our Hearts Home*, that addressed family issues from a religious perspective was unconstitutional.³⁹ In *Zobrest v. Catalina Foothills School District*,⁴⁰ the Court held that the state's provision of an interpreter to a profoundly deaf student did not violate the Establishment Clause.⁴¹

Nevertheless, other battles over participation in public problems are brewing. Perhaps the most important are the proposals for various school choice programs, many of which are limited to public schools or secular private schools.⁴² We can also expect to see laws of general applicability used to encroach on religious practices and the autonomy of religious institutions. In the wake of the "peyote case," *Employment Division, Oregon Department of Human Resources v. Smith*,⁴³ it remains to be seen just how much protection is actually afforded by the Free Exercise Clause.⁴⁴ Unfortunately, we may see a trend toward increasing constraints on religious belief and practices to promote competing secular values that are deemed more "worthy" of protection and advancement. A favorite device among facially neutral laws are the laws prohibiting discrimination on the basis of religion, marital status, and sexual orientation.⁴⁵ There will be an effort to apply those laws to Catholic institutions and override matters of conscience. Much depends on the character of the judiciary over the next several years to see just how that process works.

CONCLUSION

In the face of such a pervasive popular culture, mass media, and powerful state that sees itself as a secular institution alleviating the consequences of misconduct and often promoting moral relativism, how can

³⁹ *Id.* at 2145-48.

⁴⁰ 113 S. Ct. 2462 (1993).

⁴¹ *Id.* at 2467.

⁴² See CARTER, *supra* note 27, at 192-95 (discussing voucher programs and Catholic schools).

⁴³ 494 U.S. 872 (1990). In *Smith*, the Court held that the Free Exercise Clause did not prohibit the state of Oregon from denying unemployment benefits to individuals who had ingested peyote as part of a ceremony at a Native American church. *Id.* at 890. The Court reasoned that exempting certain conduct on the basis of a constitutional exercise of religious freedom alone would open the door to exemptions from laws regarding military service, payment of taxes, and even manslaughter and child neglect laws. *Id.*

⁴⁴ U.S. CONST. amend. I.

⁴⁵ See, e.g., CAL. HEALTH & SAFETY CODE § 1365.5 (Deering Supp. 1995) (prohibiting refusal to provide health care plans based, in part, on religion, marital status, or sexual orientation); MINN. STAT. ANN. § 363.03 (West Supp. 1995) (prohibiting labor organizations from discriminating based, in part, on marital status, religion, or sexual orientation); MASS. GEN. LAWS ANN. ch. 151B, § 4 (prohibiting employers from discriminating based on sexual orientation or religion).

we be confident that the pendulum will swing back? In a sense, I have painted a very bleak but realistic picture. The real message is that we are going to have to do more than joust around the margins. We must re-enter the fray in an effective way; take the battlefield and enter the struggle, rather than just retire in good order. The key is a return to basics—in a sense, to reassemble the flock.

The key is Catholic education.⁴⁶ Failing to prepare Catholics to hold their own has led to an erosion of the Catholic base. In a sense, the power of our numbers is dwindling. Poll after poll show that Catholic views are indistinguishable from the general views of the secular public.⁴⁷ In fact, in many areas, we appear less faithful to traditional morality than do many other denominations. The fundamental mission of the Church is precisely to transmit faith from one generation to the next. We have relaxed in this mission, just at the time where the counter-propaganda has reached its peak. As a consequence, Catholics are less and less equipped to deal with the marketplace of ideas that exists today. What good is it for us to charge up a hill and fight issues—whether abortion, tax exemption, or foster care—when there are fewer and fewer people following the leadership of the Church? This seems to have grave consequences for the Church as a whole. If the Catholic faithful do not take the hierarchy seriously, why should anybody else in the political structure? It is no accident that the homosexual movement, at one or two percent of the population, gets treated with such solicitude while the Catholic population, which is over a quarter of the country, is given the back of the hand. How has that come to be?

We need to go back to basics and reassemble the flock. We may be frittering away our limited moral capital on a host of agenda items. Ultimately, it will make very little difference unless we eventually train the next generation in the Catholic faith. From a legal standpoint, our initial focus should be on education and efforts to strengthen and finance education. This means vouchers at the state level and ultimately at the federal level to support parental choice in education. We should press at every turn for the inclusion of religious institutions. We need to fight those cases in the states up to the Supreme Court. Whether or not we prevail on programs should make no difference. The message will get stronger.

⁴⁶ See 1983 CODE c.798. "Parents are to entrust their children to those schools in which Catholic education is provided; but if they are unable to do this, they are bound to provide further suitable Catholic education outside the schools." *Id.*

⁴⁷ See, e.g., *Washington Post-ABC News Poll*, WASH. POST, Aug. 13, 1993, at A15 (reporting that 76% of Catholics aged 31 to 44 do not consider Pope's stance against artificial birth control personally binding); *id.* (reporting that 70% of Catholics aged 18 to 30 do not feel bound by Pope's opposition to divorce); *id.* (reporting the 71% of Catholics aged 18 to 30 do not consider Pope's opposition to premarital sex personally binding).

Even without legal change, we need to restructure education and take advantage of existing tax deductions for charitable institutions to promote Catholic education. We must rethink some changes implemented in Catholic education over the last twenty or thirty years. Education in the basics of faith should again be the primary mission of the parish Church. We should reaffirm the mission and duty of Catholic parents to educate their children in the faith,⁴⁸ and we should help change laws to reduce the costs to parents who want that choice. That is the single most important thing we could do; the ramifications carry far beyond mere education. Such change would give renewed vigor to many of the other things that we are pursuing as a Church in both political and other realms. It would accomplish more than any other single thing we could do.

⁴⁸ 1983 CODE c.798.

FOREWORD

Fighting Crime: A Question of Will and Priorities

With the publication of this first *Report Card on American Crime and Punishment*, the American Legislative Exchange Council (ALEC) presents a remarkable insight into the history of crime and punishment over the last three decades, the sea change which divides the period into two distinct eras, and the effects of these changes on the innocent and the law abiding.

The *Report* shows that the seeds of the present disorder were sown thirty years ago, and that societal order, once lost, is difficult and costly to restore. But ALEC has also shown, through its critical analysis, a way out.

There are 50 different state criminal justice systems in America. In the summer of 1992, as U.S. Attorney General, I reported to the President on 24 recommendations to strengthen the criminal justice systems in the states. In *Combating Violent Crime*, it was recognized that violent crime was "still primarily a state and local problem... 95 percent of violent crime is prosecuted by state and local authorities."

In this volume ALEC has documented the validity of those recommendations by demonstrating the powerful, indeed singular, effects that punishment rates have on crime rates. The message clearly is that *getting tough works*. This study makes a strong case that increasing prison capacity is the single most effective strategy for controlling crime.

Over the course of the last thirty years, most notably from 1960 to 1980, America lost its moorings. On criminal justice policy, it adopted a "blame-society-first" attitude that abandoned punishment and moved toward social spending and rehabilitation programs as the response to crime. However well motivated, these policies failed. The pain of those failures was not felt by the inanimate state, but rather by the victims of the crime wave which engulfed America and, indeed, by all law-abiding Americans. No one in this country remains untouched by this crisis of crime.

And so the question arises -- what must be done? ALEC points the way. States must reform their justice systems to ensure that the interests of the law-abiding are paramount. This means, first and foremost, that prison capacity must be sufficient in each state to imprison every violent and repeat offender and to keep them for terms more closely approaching the sentences imposed.

In order to utilize that capacity effectively the laws must insert needed discipline into the system by mandating prison terms for the most serious violent offenders.

At the U.S. Justice Department, we observed regularly that the problem of violent crime in America was largely the problem of the repeat violent offender. The consequences of this revolving door are found in ALEC's assessment of the level of crime committed by criminals we have caught and then set then set free on bail or parole. A free civil society cannot long endure a justice system which returns violent predators to the streets. Yet today, as this report is issued, and tomorrow, and every day this

year, 14 people will be murdered, 48 women will be raped, and 578 people will be robbed by a criminal we have caught, convicted, and then returned to the streets on probation or parole. Indeed, when you add pre-trial release, almost 2,000 violent crimes will be committed every day by criminals on probation, parole, or pre-trial release.

These are self-inflicted wounds that America can no longer suffer. While we have made some progress over the course of the 1980s, the challenges remain profound. The recent federal crime bill shows we are not up to meeting them. If we are to build on the successes of the eighties we must learn the lessons of the ALEC study. There is recorded here substantial evidence that the eighties worked and the sixties didn't. It does not take a rocket scientist to decide which path to follow.

William P. Barr
October 20, 1994

William P. Barr served as the 77th Attorney General of the United States. He is currently the Senior Vice President and General Counsel for GTE Corporation.

2/22/94 Richmond Times-Dispatch A9
1994 WLNR 1012138

Richmond Times Dispatch (VA)
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February 22, 1994

Section: Editorial

VIRGINIA MUST CLOSE THE REVOLVING DOOR FOR VIOLENT CRIMINALS

WILLIAM BARR AND RICHARD CULLEN William P. Barr, former U.S. Attorney General, and Richard Cullen, former U.S. Attorney for the Eastern District of Virginia, are co-chairmen of the Governor's Commission on the Abolition of Parole and Sentencing Reform.

As public opinion polls show Americans rapidly getting behind a variety of proposals to combat violent crime, Virginia is poised to be a national leader in the one area that demands radical change: the repeal of liberal outdated parole laws that result in violent criminals serving only a fraction of their sentences.

The best evidence of the dramatic shift of attitudes toward government's response to violent crime is last Tuesday's action by the House Courts of Justice Committee and the full House of Delegates in calling for immediate passage of a law abolishing parole. For many years, this committee was seen as an obstacle to -- if not a graveyard for -- real reform in the criminal justice system. While the bill as reported does not answer many thorny issues (including the failure to evaluate funding mechanisms or to include any sentencing reform), it demonstrates the correctness of Governor Allen's instincts in believing that he could get the General Assembly to follow his strong lead in reforming a bad system.

In electing George Allen as Governor, Virginians declared their intention to reclaim Virginia's communities from violent criminals. They accepted Allen's challenge to stop the revolving door of justice that allows criminal predators to return to the streets before they have served even half of their prison sentences.

Virginians understand that the failure to incarcerate violent criminals results in an enormous amount of preventable crime. Every day in Virginia crimes are committed by prisoners released early -- crimes that would not have been committed had the prisoners remained in prison for the duration of their sentences. Nationally, two-thirds of the offenders paroled from state prisons are re-arrested for a new crime within three years. And this number is even higher for criminals in their late teens and early 20s. Moreover, several studies have shown that career criminals commit a staggering number of crimes when they are free. The Federal Bureau of Alcohol, Tobacco, and Firearms reported in 1992 that such offenders committed an average of 160 crimes each year.

TO STOP THIS revolving door, Governor Allen has established the Commission on the Abolition of Parole and Sentencing Reform. The job of this commission -- a bipartisan group of criminal justice experts, judges, prosecutors, lawmakers, victims, and concerned citizens -- is to consider the best way for accomplishing sentencing reform and prepare recommendations for the Governor.

The commission's work will not be easy. There are some who will oppose change and attempt to keep the revolving door of justice spinning. Some will argue that the financial cost of keeping violent criminals locked up is too high. Others will fight to protect the current parole laws. They will claim that the decision of when to release a prisoner should only be made by a small group of "experts" at some point after the offender enters prison. Ultimately, these arguments will be overcome by the facts regarding the high costs of crime and the strong desire of crime victims and the public for honesty in the criminal justice system.

It is well established that the costs of crimes are enormous. In addition to the direct and indirect losses suffered by victims, the costs include lost jobs, lost sales when people are afraid to leave their homes or go into business communities, lost tax revenues, high insurance rates, and private security. A 1990 study estimated an annual savings of \$172,000 to \$2.4 million by simply keeping a chronic offender behind bars. And while the economic costs of crime far exceed the annual cost of incarcerating a violent offender (somewhere between \$15,000 and \$30,000), the losses suffered by victims because of the early release of violent criminals cannot be measured.

Addressing the need to build more prisons, Governor Pete Wilson of California said it well recently when he asked the lawmakers of his state what the life of 12-year-old Polly Klaas was worth. Many will recall that she was kidnapped from her home at knife-point and killed by a man who just a few months earlier had been paroled after serving only half of his prison sentence, even though he had two prior violent crime convictions.

Besides enhancing public safety, the abolition of parole is necessary simply as a matter of honesty to victims and the community. As it now stands, violent criminals in America only serve about one-third of their actual prison sentences. For example, a convicted rapist serves an average of only three years in prison even though the average sentence is eight years. This practice makes a mockery of the suffering of those who experience the trauma of testifying against an accused attacker, and it greatly contributes to the public's frustration and anger toward the criminal justice system. The time has come for truth-in-sentencing in Virginia.

GOVERNMENT HAS no higher duty than to protect the safety of its citizens. There is simply no excuse for allowing criminals whom we know to be dangerous to return to the streets shortly after they have been convicted of their crimes. It results in more victimization, it undermines the dedication of police and prosecutors who at great personal sacrifice continually arrest and convict such offenders, and it deceives victims and the public.

Our commission will attempt to balance that responsibility with our commonwealth's long and honored tradition of being fiscally prudent. We will search for ways to cut the costs of housing prisoners, including the exploration of alternatives to incarceration for non-violent offenders when appropriate. We must seek and find sound ways to free up prison space for the violent prisoners. We welcome suggestions from the public and will hold town meetings to solicit ideas for needed reform.

Over the next few months, Virginia will reaffirm the cause of freedom. For all who have seen their liberty diminished and have watched opportunity slip away because of continued violent crime, there is reason for hope. If we succeed in stopping the revolving door, not only will Virginians regain their full freedom, but the entire country will have a model for genuine reform.

DRAWING

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---- Index References ----

News Subject: (Crime (1CR87); Judicial (1JU36); Legal (1LE33); Social Issues (1SO05); Legislation (1LE97); Criminal Law (1CR79); Prisons (1PR87); Government (1GO80))

Region: (USA (1US73); Americas (1AM92); Virginia (1VI57); North America (1NO39))

Language: EN

Other Indexing: (DRAWING; FEDERAL BUREAU OF ALCOHOL; GOVERNMENT; HOUSE COURTS OF JUSTICE COMMITTEE; HOUSE OF DELEGATES; VIRGINIA) (Allen; Assembly; George Allen; Pete Wilson; Polly Klaas; Sentencing Reform; Ultimately; Virginia; Virginians)

Edition: City

Word Count: 1238

End of Document

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NewsRoom

Panel IV: Culpability, Restitution, and the Environment: The Vitality of Common Law Rules

*William P. Barr, Moderator**

Are traditional common law doctrines of tort liability adaptable to modern complex environmental problems? This panel will explore various aspects of that question. Today, the traditional common law system is overlaid by a comprehensive system of statutory regulation. Increasingly, direct government regulation is replacing the common law as the primary means of managing risk.

Central government bodies, particularly the Federal Government, set standards and seek to control emissions or exposure beyond those standards through various pricing or deterrence systems. Modern statutes authorizing civil litigation have now substantially departed from traditional common law rules by relaxing causation requirements, expanding notions of joint and several liability, and eliminating fault as a basis for liability.

Additionally, over the past decade, statutes have increasingly included criminal law sanctions as a means of deterrence. Traditional criminal law requirements have also been relaxed, particularly with the steady erosion of the mens rea requirement and a move towards strict liability. The result is really a quasi-strict liability in the area of criminal law.

It has been suggested that these developments have been necessary because traditional common law principles ineffectively deal with complex environmental problems. Is this true or are there areas where these common law principles remain viable? Even if it is true, what is being lost by giving up traditional common law doctrines?

It is certainly true that there are difficulties in adapting common law rules to modern environmental problems. The common law system originally dealt with more ascertainable risks with more localized impacts than many of the environmental problems we face today. Modern risks, however, are highly uncertain and broadly distributed throughout society.

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How usefully do common law principles address these environmental risks? What should be the standards of causation considering the number of different issues that are transected? What kind of evidence should be allowed to establish those standards? Are courts and juries appropriate places to determine these issues on a case by case basis?

Does asbestos cause cancer? Even if asbestos causes cancer, did it cause this cancer? Even if this cancer was caused by asbestos, whose asbestos was it? Maybe some of those issues are amenable to the common law adjudication, but perhaps others are more usefully addressed through central agency decisionmaking.

How effective are common law principles in apportioning cost? Can the common law system move quickly enough to deal with threats that may be latent, but potentially catastrophic? Can the common law system provide uniformity? Is uniformity desirable? These are some of the questions that we will address in this panel.

The first speaker needs no introduction. Justice Mosk is a legend in the history of common law and a member of the Supreme Court of California. He is going to be talking about some of the advantages of the common law system at the state level. The second speaker is Judge Steve Williams, who is no stranger to the Federalist Society. He was a well known student of regulation as a law professor and now is a distinguished judge on the nation's foremost regulatory court. Judge Williams is going to carry along this issue by discussing the implications of the shift of economic regulations from the state to the federal level. Our last speaker is Professor Daniel Farber, a distinguished professor at the University of Minnesota and a recognized expert on environmental law and on regulation generally. Professor Farber was going to speak on the issue of causation in the *Daubert*¹ case, but tells me that having heard the conference, the whole conference, he has been moved to expand his comments. I am looking forward to what he has to say.

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). For a discussion of this case earlier in the conference, see Patrick J. Michaels, *Round Table Discussion: Science, Environment, and the Law*, 21 *ECOLOGY L.Q.* 368 (1994).

Viewpoint: Punishment that exceeds the crime - The crackdown on corporate fraud threatens to stifle the financial system warns former US Attorney General William P Barr

The Banker

November 1, 1993

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Section: Vol. 143, No. 813

Length: 1942 words

Byline: **WILLIAM P BARR** and IRA H RAPHAELSON

Body

Multinational corporations doing business in the United States are becoming aware of the need to familiarise themselves with the changing enforcement climate in this country. Regulatory systems have been shifting to a more confrontational and punitive approach. In area after area - from securities, to environmental matters, to worker safety - regulatory regimes have been re-cast to decrease reliance on directive authority and to increase reliance upon the imposition of sanctions as a means of achieving compliance with regulatory goals.

As part of this trend, there has been a marked increase in the use of criminal prosecution as a means of business regulation. Infractions that only a few years ago would have been routinely handled through administrative or civil proceedings are now aggressively pursued as potential 'crimes.'

Increasingly, criminal prosecutions are brought, not only against individual wrongdoers, but also against corporate entities under the doctrine of vicarious liability. The doctrine was developed as a means of inducing companies to take steps to ensure that employees meet the requirements of the law. Under this doctrine, companies are held criminally liable for violations committed by their employees in the course of employment.

The trend is unmistakable. Corporate indictments - which averaged about 40 a year in the early 1980s - have now jumped to about 400 a year, with about 10% of these cases involving Fortune 500 Companies, or entities of comparable size. In the same period, criminal fines exacted in these cases have climbed from an average of dollars 50,000 to over dollars 1 million, with fines in the multiple millions becoming increasingly common.

Much of the trend has been driven by Congress. Over the past decade, Congress has revamped various regulatory systems, creating broad new areas of potential liability and proliferating new requirements. Today, there are more than 300,000 regulations, the violation of which could serve as the basis for criminal liability. Indeed, it seems as if Congress' automatic response to any newly perceived social malady - from bank failures to wetlands protection - is to enact another new set of severe criminal penalties.

Nowhere have these dynamics been more evident than in the arena of financial institutions. The Savings & Loan crisis was brought on by a series of economic factors, as well as Congressional and regulatory mis-steps. Congress sought to re-focus the US taxpayer's attention from Congress' role in the S&L crisis to the relatively small percentage of cases involving 'criminal fraud.' They passed tough new laws by enacting the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) in 1989 and the Crime Control Act of 1990.

FIRREA included a king-pin statute, punishments up to life in prison without parole, and forfeiture powers. Subsequent legislation, including the Crime Control Act of 1990 (CCA), provided even more severe penalties and

Viewpoint: Punishment that exceeds the crime - The crackdown on corporate fraud threatens to stifle the financial system warns former US Attorney General William

broader authority for the banking regulators, including the ability to debar entities from doing business with the government and to seek civil monetary penalties administratively.

Regulators reacted to public criticism by lowering the threshold for criminal referral, sending tens of thousands of matters to Justice for evaluation for criminal prosecution. While large numbers of these matters were declined as not fitting traditional prosecutive standards, many were prosecuted - and deservedly so. During the Bush Administration, more than 3,700 people were prosecuted for big financial institution frauds; 96% were convicted, 77% were incarcerated, and 30% were the presidents, CEOs and significant insiders in the institutions involved.

As the crisis abated, it has become increasingly clear that the premise for Congress' approach has not been borne out. For instance, when considering FIRREA and the CCA, Congress estimated that 33-75% of the total cost of the bail-out (inclusive of interest costs) was attributable to fraud. However, in July of this year, the National Commission on Financial Institution Reform, Recovery and Enforcement issued its Report to the President and Congress of the United States concluding that 'fraud was not the cause of the debacle' and accounted for only 10-15% of the pre-interest losses.

Even before the 'S&L crisis', international financial institutions faced regulation by a myriad of federal, state and local authorities in addition to the Justice Department. In the wake of the S&L debacle, a more severe enforcement atmosphere has now been put in place and will affect how banking business is done in the US for years to come. The Justice Department, Federal Reserve and Office of the Comptroller of the Currency are giving greater scrutiny to foreign banking activity within the US. Increasingly, American branches of foreign financial institutions are viewed both as a source of information and as potential subject for investigation. US authorities focus on these domestic branches not only for their domestic activities but as a means of pressuring multinational parents and holding companies to comply with US laws, including tax laws.

The use of so-called Bank of Nova Scotia subpoenas by US authorities appears to be on the upswing as even the Antitrust Division requests authority to use this controversial discovery device. Such subpoenas are directed at domestic branches of multinational institutions calling for production of extra-territorial records. This places the institution in the untenable position of facing contempt and fines within the US for failure to comply and violation of the bank secrecy laws of other nations where the records and or customers are located.

In a related development, US authorities recently seized an interbank account used for clearing international transactions through the US. The account contained funds which were alleged to be the proceeds of illegal drug money laundering. However, by seizing the entire interbank account, the government effectively tied up untainted customer funds as well. The case is still in litigation but being closely monitored by banks around the world.

A relatively new and important feature of the evolving regulatory regime is the mandate for companies to self-police and self-report violations. The recently promulgated US Sentencing Guidelines for Organisational Defendants are a part of this trend. The guidelines purport to address business misconduct through the schedule of fines, which increase with the severity of the violation and can reach hundreds of millions of dollars, as well as a list of intrusive conditions of corporate probation. The carrot lies in the prospect of mitigation credit if, before an offence occurs, a company has 'an effective programme to prevent and detect violations of law'.

The guidelines have been criticised for having too much stick and not enough carrot. By steeply escalating organisational fines, the guidelines create powerful incentives for enforcement agencies to pursue corporate 'deep-pockets'. At the same time, the guidelines fail to provide sufficient assurance of mitigation to companies that engage in the mandated self-policing and self-reporting.

The guidelines also leave unaddressed whether a corporation should be indicted where an employee violates the law notwithstanding the corporation's best efforts to achieve compliance with the law. An argument can be made that once a company demonstrates its diligence, the purpose of the vicarious liability doctrine is achieved and that no further purpose is served by punishing it with criminal sanctions.

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Prosecutors must bear in mind that without some assurance that self-policing will bar prosecution, self-reporting becomes tantamount to a confession without immunity - a precursor to a corporate guilty plea sometimes without full appreciation of the potential collateral consequences of a corporate criminal conviction.

Beyond the sanction, stigma, and loss of goodwill, a convicted corporation faces layered and successive enforcement actions, shareholder derivative actions, and director and officer liability claims. Responsible enforcement officials must consider the fact that a guilty plea also undercuts a corporation's ability to defend against the collateral lawsuits that may result - thereby radically increasing the severity of the criminal sanction.

At the same time, while many corporations see only the burdens imposed by the Organisational Sentencing Guidelines, some corporations have found compliance helpful. The international shutdown of Bank of Credit & Commerce International (BCCI) stands in stark contrast to the civil settlement reached by federal prosecutors with Salomon Brothers, over illegal efforts to manipulate the T-bond market. In that case, a dollars 290 million global civil settlement, including restitution and forfeiture, was reached with the company as a result of remarkably quick corporate action to sever contact with the wrong-doers and co-operate with government investigators.

Yet, the unmistakeable trend towards criminalisation of business regulation can be expected to continue. This is particularly true in light of Administration calls for harsher jail terms for white collar offenders and Congressional oversight of international matters. A recent episode suggests that the enforcement system has additional maturing to do. Last May, the US Department of Justice agreed to settle certain environmental crimes against a big US corporation for a record civil penalty of dollars 11.1 million plus a requirement that the company invest dollars 70 million in new anti-pollution equipment.

Rather than applaud this seemingly formidable outcome, some Congressional and media critics castigated the department for failing to indict criminally the company or its officers. The fact that the prosecutor had found no evidence of wilful misconduct at the corporate level made little difference. Criminal prosecution, argued the critics, is the only language that corporations understand.

While no one should object to severe punishment of real wrongdoers, care must be taken that the emerging US emphasis on criminalisation does not become unfair or counterproductive. The same standards should be applied to corporations as other potential violators - no better, but no worse. Traditional safeguards of the criminal justice system should not be sacrificed in a rush to collect corporate scalps or revenue.

In addition to offending our notions of fundamental fairness, an overly hostile enforcement atmosphere is not without other risks. Entrepreneurial investment may be deterred. A confrontational regulatory regime may chill much-needed dialogue between industry and regulators in achieving a balanced regulatory scheme which achieves compliance in a minimally intrusive and cost-effective manner.

Moving consideration of good corporate citizenship and self-policing from charging to sentencing phase potentially deters the very self-policing sought to be achieved. Until the system reaches its ultimate balance in the US, responsible multinational corporations are monitoring enforcement developments in the US, designing and implementing internal compliance programmes to prevent and detect violations of US law which may otherwise expose them to serious consequences.

By **William P Barr** and Ira H Raphaelson (former Special Counsel for Financial Institutions Crime and Former US Attorney, Northern District, Illinois. They are now with the Washington DC-based law firm of Shaw, Pittman, Potts & Trowbridge.

Load-Date: July 25, 2000

The science of compliance US-style

Companies which ignore US corporate sentencing guidelines do so at their own risk. By William P Barr* and Gadi Weinreich of Shaw, Pittman, Potts & Trowbridge, Washington DC

The US Department of Justice recently agreed to settle certain environmental claims against a major US corporation for a record civil penalty of \$11.1 million plus a requirement that the company invest \$70 million in new anti-pollution equipment. Rather than applaud this seemingly formidable outcome, some congressional and media critics castigated the department for failing to indict criminally the company or its officers. The fact that the prosecutor had found no evidence of wilful misconduct at the corporate level made little difference. Criminal prosecution, argued the critics, is the only language that corporations understand.

A few weeks later, a congressional subcommittee launched a review of the department's environmental crimes section, suggesting that it had not been aggressive enough in prosecuting corporate environmental offences. It meant little that the section had set an all-time record of 174 criminal prosecutions in 1992.

These two incidents reflect a growing tendency to use criminal prosecutions as a means of regulating business activity in the United States. Regulatory infractions that only a few years ago would have been handled through civil or administrative proceedings are now being pursued as 'crimes'. Principles of vicarious liability are being used with increasing frequency to hold companies criminally accountable for the actions of their agents (including low-level and newly-hired employees) who commit crimes in the scope of employment. The trend is unmistakable: corporate indictments - which averaged about 40 per year in the early 1980s - have now jumped to about 400 per year; the fines exacted in these cases have become exorbitant, skyrocketing from an average of \$50,000 to over \$1 million.

The recently promulgated US Sentencing Guidelines for Organizational Defendants are a part of this trend. The guidelines purport to address business misconduct through the proverbial carrot and stick approach. The stick is a mandatory schedule of stiff fines, which increase with the severity of the violation and can reach hundreds of millions of dollars. The carrot lies in the prospect of mitigation credit if, before an offence occurs, a company has instituted 'an effective programme to prevent and detect violations of law'.

The guidelines have been justly criticized for having 'too much stick and not enough carrot'. By steeply escalating organizational fines, the guidelines create powerful incentives for enforcement agencies to pursue corporate 'deep-pockets' simply to maximize revenue. At the same time, the guidelines fail to provide sufficient assurance of mitigation to companies that engage in the mandated self-policing and self-report-

ing. The focus on the reduction of applicable fines is exclusive, leaving the more fundamental question whether a diligent company should be able to avoid prosecution altogether unanswered.

Benefits of compliance

Despite these troubling defects, companies doing business in the United States cannot afford to disregard the guidelines. As one commentator recently opined, '[f]or general counsel to ignore [the implementation of a compliance programme under] these guidelines is professional malpractice'.

Without a compliance programme, a fine imposed under the guidelines has the potential to be staggering, if not tantamount to an economic death sentence. The absence of a programme may further prompt a sentencing court to impose onerous probation requirements on a company - effectively introducing a government management team into the corporate structure. By instituting an effective compliance programme, however, a firm may avoid probation and



earn sufficient mitigation 'points' to reduce the applicable fine by as much as between 80% and 90%.

An effective compliance programme may also prove pivotal in avoiding prosecution. A company without a programme will be viewed as being indifferent to, or worse still, tolerant of, business misconduct. In contrast, an organization that has exercised due diligence to prevent violations can argue credibly that any wrongdoing constitutes aberrant behaviour by an employee for which the company should not be pun-

*US attorney general, November 1991 to January 1993)

Practise and preach

An organization's standards and procedures should be properly communicated to, and understood by, all employees. Hence, the guidelines' emphasis on training. While written manuals are an important training tool, they are not enough. Other useful training techniques include live seminars, video presentations, posters, electronic mail, and on-line computer services. There is no magic to the method used. An organization should use the medium which will best communicate the particular information to the particular audience.

Under the guidelines, training must be an ongoing process, not a one-time event. Employees should be apprised of new legal or policy developments and periodically reminded of previously communicated compliance fundamentals. New employees must be provided compliance training as part of their orientation. All employees should be required to execute written certifications (on an annual basis at minimum) attesting that they are familiar with corporate policies and procedures, understand them, and will abide by them.

Documenting compliance training is important. It helps ensure that all those who need training will receive it. Further, such records can constitute compelling evidence of the company's diligence in the event the programme comes under scrutiny.

ished. The difference may mean the survival of the company itself.

Indictment often has a crippling impact on business, be it through debarment or suspension from participating in US government procurements, intolerable levels of negative publicity, or loss of consumer confidence. The recent investigation by the Securities and Exchange Commission of Salomon Brothers' government trading department is illustrative. Fearing a mass desertion of investors, Salomon used the guidelines' framework successfully to persuade the US Attorney's Office in Manhattan to forego criminal prosecution.

There are other reasons to implement a compliance programme. A good programme promotes a law-abiding corporate ethos and discourages wrongdoing; it provides some protection for officers and directors from individual criminal and civil liability; it affords the opportunity to detect and contain misconduct before it gives rise to civil liability or mushrooms into a fully-fledged criminal matter; and it bestows non-legal benefits such as gaining a reputation for being a good corporate citizen.

Structuring a compliance programme

Structuring an effective compliance programme is not an easy task. Comprehensive compliance is a specialized area of the law that presents many pitfalls for the unwary, not the least of which are the disproportionately steep costs associated with misdirected compliance efforts. The guidelines provide little specific direction on designing a comprehensive compliance programme - they simply spell out seven general criteria by which to gauge the effectiveness of a compliance programme. The cornerstone of a successful compliance programme is practicality. Formalistic adherence

to the guidelines' seven criteria is not recommended; nor is the spending of every profit dollar in what typically amounts to a fruitless effort to shield against every conceivable risk. Rather, experience suggests that compliance is best achieved in a cost-effective, level-headed manner. Using the guidelines' criteria as a reference point, each company should design a programme customized to its specific needs; an effective programme will focus on the true risks facing the company, given its size, resources, history, culture, and, of course, the nature of its business.

A compliance programme must have the unequivocal support of the highest levels of an organization, even if the impetus for establishing it originates in the general counsel's office. Endorsement and involvement by the board of directors and senior management sets the tone for the entire programme. It communicates to employees and law enforcement officials alike that the organization is fully committed to achieving genuine compliance.

As a first step towards developing a comprehensive system of compliance, the board of directors should direct that a preliminary study be undertaken of the particular compliance needs of the company. This study should encompass existing and contemplated business activities, operational areas posing the greatest threat of exposure, past legal and ethical problems, existing compliance efforts, policies and procedures, industry-wide practices, and applicable laws and regulations. A broad survey of this kind will not only generate information about the substantive areas that need to be addressed, but also provide invaluable insight into the types of compliance measures most likely to succeed. Because the study may unveil potentially damaging, if not incriminating, information, legal counsel must be involved. There are certain advantages in retaining outside counsel to spearhead the compliance effort. Outside counsel can lend additional protection to the compliance team's work under both the attorney-client privilege and the work-product doctrine. Their involvement may also provide a measure of independence and credibility which may ultimately help to persuade a prosecutor of the bona fides of the programme. Having completed its survey, the organization is ready to develop its formal programme. While the degree of formality will vary according to the size and nature of the business, effective compliance programmes have certain common elements: an ethics compliance officer or committee to oversee the programme; written statements of company policy and codes of conduct; training; monitoring mechanisms; and disciplinary procedures.

The guidelines require that an effective programme be administered and enforced by one or more 'high-ranking individual[s]'. This requirement is practical, emanating from the tension that frequently arises as compliance measures conflict with the bottom-line. In general, it is not a good idea to designate in-house counsel because that can create ambiguity as to whether and when counsel is acting in a legal versus an administrative capacity. Such ambiguity can easily result in the evisceration of important legal privileges.

The next component of an effective compliance programme is its written policies and codes of conduct. In a sense, these serve as the 'Ten Commandments' of the organization, for they decree to all employees what shall and shall not be done. The most commonly used format for such policies is the 'compliance manual'.

The compliance manual should be a concise document, the primary function of which is to disseminate a positive corporate ethos and outline basic rules for employees in a straight-forward manner.

The corporate ethos is often conveyed in a message from the CEO. This message introduces the programme and its administrators and establishes the organization's commitment to operating within the law and maintaining the highest ethical standards. The outline of basic rules is typically set forth in a series of paragraphs addressing substantive topics of concern to the company like quality control, improper influence (including bribes, gratuities, and kickbacks), insider trading, antitrust, accuracy of corporate books and records, confidential and proprietary data, conflicts of interest, and employment considerations such as US equal-opportunity and anti-harassment laws. The manual should also stress the compliance obligations and accountability of all employees, irrespective of title or rank, explain the steps employees should take if they discover possible non-compliance or other wrongdoing, and review the nature of disciplinary procedures.

The general language of the compliance manual may not always suffice. According to the guidelines, 'If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must . . . [take] steps to prevent and detect those types of offenses.'

One such step is the distribution of supplemental policies and procedures. These supplements are rarely distributed to all employees. They are designed to give detailed guidance to specific divisions or departments on complex or technical matters. For example, a labour-intensive division of a government contractor should issue a time-keeping procedures manual; a unit dealing with toxic substances must establish written procedures for handling those substances; and, individuals with price setting authority must receive guidance on antitrust law.

Compliance enforcement and discipline

Monitoring compliance is crucial under the guidelines. As one US Court of Appeals pointed out in a different, but related context, '[m]erely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of the employee who violates them outside of his scope of employment'. Thus, businesses must take reasonable steps to ensure that their practice conforms with their stated policies and procedures.

There are two primary tools to monitor compliance. The first is a system by which employees can report suspected wrongdoing. The precise nature of this system will vary according to the size and nature of the business. Methods used include direct communication with one of the programme administrators, suggestion or post-office boxes, toll-free telephone numbers or some other answering service. Employees must be provided with two fundamental guarantees, without which the reporting mechanism will be deemed ineffective. First, they must be able to report without fear of retribution. Second, they must be afforded the maximum possible confidentiality. Organizations should be careful with respect to the latter commitment, since an employee's anonymity or confidentiality may have to be compromised if the matter is subsequently reported to law enforcement officials.

The second evaluation tool is the compliance audit. While audits tend to have retrospective or backward-looking connotations, compliance audits involve contemporaneous inspections of business practice. For example, in the case of the government contracting division that issued a time-keeping procedures manual, a compliance audit would be likely to involve unannounced floor-checks of employees' time sheets. Such contemporaneous monitoring should be formalized and carefully documented. Enforcement of compliance standards raises the spectre of internal investigations, discipline, dismissal of employees, and even litigation. Consequently, corporate counsel should maintain an active role in all efforts to monitor corporate compliance. While the involvement of lawyers may create the perception of 'overkill', the preservation of legal privileges should be paramount, especially to companies with a history of compliance failures.

Discipline is also essential to programme effectiveness. It may be worse to have an unenforced compliance programme than to have none at all. Moreover, courts have expressed their extreme displeasure when companies respond with insufficient vigour to tangible indications of illegal conduct. Accordingly, disciplinary procedures must be implemented and followed consistently. Sanctions must be commensurate with the nature of the wrongdoing and must seek to promote not only punishment, but also specific and general deterrence.

Compliance does not have to be achieved through the threat of discipline alone. Positive forms of motivation are important as well. Though compliance objectives are sometimes harder to measure than output or profit, compliance experts can assist an organization to tie compliance goals to common reward mechanisms such as promotion, salary increases, and bonuses.

A company's responsibilities do not end with the imposition of discipline. First, a compliance programme must be re-examined and possibly modified in light of each offence. The guidelines require such follow-up to ensure continued effectiveness. Modification may also be necessary to reflect developments in the law, industry practice, or the nature of the business. Second, the need to report the incident to the appropriate legal authorities has to be assessed. The guidelines promise substantial mitigation benefits to organizations that promptly report, cooperate, and accept responsibility for wrongdoing. Moreover, the mitigation credit otherwise available for having an effective compliance programme may be forfeited if an organization fails (or unreasonably delays) voluntarily to disclose misconduct to the appropriate governmental authorities. While exhorting organizations towards voluntary disclosure, the guidelines are silent about the inherent risks. The guidelines do not guarantee the reporting entity confidential treatment of the matter. Nor do they contend with the troubling reality that self-reporting under the guidelines amounts to nothing less than a confession without immunity. Disclosure also exposes the reporting party to arguments that it has waived all legal privileges attendant to the reported matter.

Significantly, the guidelines afford a company 'a reasonable period of time' to conduct an internal investigation. Rather than make a precipitous decision to report, an organization would be well advised to conduct such an investigation. The investigation will not only help determine whether the offence involved is 'reportable', but will also place the incident in its

proper context. If a report is necessary, an effective strategy for disclosure to the government should be devised, for the manner and forum of a report can materially impact the outcome for the company.

Internal investigations are often conducted by outside counsel familiar with compliance laws and the law enforcement apparatus. The involvement of outside counsel may improve the odds that the confidentiality and legal privileges attendant to the matter will be preserved. Further, a report stemming from an investigation conducted by outside counsel is likely to

be accorded greater weight and may eliminate the need for, or at least reduce the scope of, an intrusive investigation by law enforcement officials into the reported incident and other business affairs.

Finally, counsel may prove instrumental in advising the organization how best to present the matter to the appropriate government authorities so as to achieve the very objective which prompted corporate compliance in the first instance - the maximizing of credit to be received by the organization for its good corporate citizenship. □

How to negotiate the tax gross-up clause

Ask not for whom the tax roll calls. Lee C Buchheit of Cleary, Gottlieb, Steen & Hamilton, New York continues his series on negotiating skills with a look at the tax gross-up clause

If you are a taxing authority, the only sin for which you can be held accountable (in this life) is lack of imagination. No aspect of the human condition, even the leaving of it, should be overlooked as a potential opportunity for levying a tax. And when the good people of Ruritania invoke the assistance of Our Lady of Lourdes to shield them from further plundering, don't worry. She probably won't appear and, on the off chance that she does, simply assess her the airport departure tax. The populace will get the message.

A government that has run out of creative ideas for taxing its own citizenry should seriously consider taxing somebody else's citizenry. For the Republic of Ruritania, taxing foreigners has two inestimable advantages over taxing the natives: the foreigners aren't entitled to vote in the next election and you won't have to listen to that pathetic bleating that follows each domestic tax increase.

The problem, of course, is how to get foreigners to pay Ruritanian taxes. So many people these days cling to their money with an unseemly obstinacy. After surrendering most of their money to their own federal, state and local taxing authorities, foreigners may balk at handing over the last few coppers to the Republic of Ruritania. What is needed, therefore, is some plausible excuse for levying a tax on non-residents and, equally important, some effective method for ensuring that the tax will actually get paid.

The conventional solution is a withholding tax. It works like this: assume that a cash-strapped Ruritanian company doesn't fancy borrowing at the interest rates prevailing in the local capital market. One obvious alternative is for the company to sign up a loan with a foreign bank at an interest rate based, for example, on the US dollar London interbank rate. To the Ruritanian tax authorities, however, the stream of interest payments due to the foreign bank under this loan acts like a beckoning finger. By imposing a tax on these interest payments, Ruritania can achieve three important objectives. First, it taxes. Second, it levies the tax on a foreigner - the bank recipient - rather than the Ruritanian company (an ephemeral benefit, as described below). Third, it can collect the tax by forc-

ing the Ruritanian borrower to withhold or deduct the amount of the tax from the interest payments due to the foreign bank.

The buzzing fly in this ointment is likely to be the foreign lender. That institution may not relish the prospect of making regular contributions to the Ruritanian exchequer through deductions from the interest payments it expects to receive under the loan. Indeed, if it thought this consequence were unavoidable, the bank probably wouldn't make the loan in the first place. As protection, the bank will look to a provision in the loan agreement that goes by the name of the tax gross-up clause.

Purpose of the clause

The purpose of the tax gross-up clause is to shift to the borrower the risk that a withholding tax might be imposed on payments due under the loan. Withholding taxes are often expressed to be the legal responsibility of the recipient of the interest payment, not the payor. The gross-up clause requires that if ever such a withholding tax becomes applicable to payments due under a loan, the borrower will pay that tax on the lender's behalf and will pay an additional amount to the lender (in the jargon, a 'gross-up' payment) so that the lender will receive the precise amount that it would have received in the absence of such tax. Any deduction as a result of the imposition of withholding taxes thus becomes the borrower's responsibility because the borrower's payment to the lender must be topped up to compensate for the deduction.

By the way of example, assume that the interest payment due to the lender is \$100 and the borrower's jurisdiction imposes a 30% withholding tax. By virtue of the tax gross-up clause, the borrower will be obligated to pay \$30 to the local taxing authority on the lender's behalf and then pay a full \$100 to the lender (reflecting a \$30 gross-up payment to compensate for the withholding tax). The score at the end of the first inning will therefore be: lender + \$100; Ruritanian Internal Revenue Service + \$30; and borrower - \$130.

ATTORNEY GENERAL'S REMARKS,
BENJAMIN N. CARDOZO SCHOOL OF LAW,
NOVEMBER 15, 1992

*William P. Barr**

While the modern Attorney General is active in a broad array of policy decisions and legal matters, this evening we are concerned only with what was once the core of the Attorney General's duties: legal interpretation within the executive branch. First, I would like to trace the evolution of the office of Attorney General from part-time legal advisor for the new government to head of a major department involved in making policy across a broad range of subjects. Second, I want to discuss the Attorney General's role in interpreting the law, both in rendering legal advice to the executive branch and in determining its litigating positions. In doing so, I will discuss the alleged tension between the Attorney General's roles as a legal advisor and as a policy subordinate of the President.

I.

Although the office of Attorney General was among the first cabinet positions created in 1789,¹ it was some time before the office carried the same weight and rank as the other departments, in both size and responsibility. Initially, the Attorney General was in many ways like an attorney on retainer. He had no staff, no office space, and no supplies.² It appears that he was not required to live in the capital.³ And he was paid half what the other cabinet secretaries were paid.⁴ In keeping with the contemporary practice in England, the Attorney General was a part-time government employee. Congress expected him to supplement his meager salary through private practice. In offering the job to Edmund Randolph, the first Attorney General, George Washington suggested that it would help him attract clients.⁵ So much for government ethics in those days.

* Attorney General, 1991-1993; Deputy Attorney General, 1990-1991; Assistant Attorney General for the Office of Legal Counsel, 1989-1990.

¹ See Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 93.

² Luther A. Huston, *History of the Office of the Attorney General*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 1, 1-2 (1968).

³ *Id.* at 6.

⁴ CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 16 (1992).

⁵ Huston, *supra* note 2, at 5-6.

Initially, the Attorney General's duties were quite limited. As specified in the Judiciary Act of 1789, he had only two responsibilities: one, "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned,"⁶ and two, "to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments"⁷ Although that statute was enacted in 1789, it remains the law. As head of the Office of Legal Counsel, I was often asked by members of Congress for legal advice. I would refuse: it is not the responsibility of the Attorney General's office to give legal advice to Congress, which has its own counsel. They would protest, but the statute dictates that the Attorney General is to give advice when asked by the President.

The Attorney General was not initially responsible for the conduct of litigation in the lower courts, and did not have supervisory authority over the district attorneys. Soon it was recognized, however, that even the limited functions of the Attorney General would require more than part-time work. In 1818, Congress finally gave the Attorney General one clerk, an office, and some supplies.⁸ The next year, Congress increased the Attorney General's salary to that of other cabinet officials.⁹

Yet by tradition as much as by duties, the Attorney General was primarily a detached legal advisor, and not really involved in policymaking. Abraham Lincoln's Attorney General, Edward Bates, observed: "The office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of State to uphold the Law and to resist all encroachments, from whatever quarter, of mere will and power."¹⁰

After the Civil War, the office of the Attorney General began to expand dramatically. In 1870, the Department of Justice was formed, and Congress placed litigation conducted by district attorneys in the lower courts under the supervision of the Attorney General.¹¹ Over the next century, federal law enforcement became a far greater concern, and the Attorney General acquired further duties and responsibilities. Today, the Attorney General's office is responsible for the

⁶ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 93.

⁷ *Id.*

⁸ Act of Apr. 20, 1818, ch. 87, 3 Stat. 445, 447.

⁹ Act of Mar. 3, 1819, ch. 54, 3 Stat. 496, 500.

¹⁰ See Arthur S. Miller, *The Attorney General as the President's Lawyer*, in *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 41, 51 (1968).

¹¹ Act of June 22, 1870, ch. 150, 16 Stat. 162, 164.

Immigration and Naturalization Service, the Bureau of Prisons, the Drug Enforcement Agency, the Federal Bureau of Investigation, the United States Marshals, the United States Trustees, the Pardon Attorney, the Parole Board, ninety-four U.S. Attorneys, six litigating divisions in Washington, a large grant program, an asset forfeiture program that has \$1 billion in the pipeline at any one time, and numerous other responsibilities. It has been the fastest-growing department by far since 1980. Its budget is almost \$12 billion. Thus, the Attorney General now has substantial policy as well as legal responsibilities.¹²

While the Attorney General has been acquiring increased policy responsibilities, the other agencies and departments have acquired their own legal staffs. This has somewhat reduced the Attorney General's burden of advising on day-to-day operations; at the same time, it has created complications and conflicts. For every day that I am glad that there is a general counsel available to each agency, there is another day that I wish there were one general counsel in the Justice Department who answered all the questions. Yet on significant and constitutional issues, the Attorney General has clearly remained the principal legal advisor to the President and to the executive branch.

II.

Today, the Attorney General remains responsible for his two initial functions: providing advice to the executive branch officials on matters of law, and conducting litigation in the Supreme Court. The advice function is performed by the Office of Legal Counsel, and the litigation function is performed by the Office of the Solicitor General. The Attorney General's greater policymaking involvement has created additional challenges in remaining a detached and effective legal advisor. Those challenges vary with the context in which the legal advice is given. Before directly addressing those issues, I will briefly discuss the Attorney General's various interpretative functions.

First, the Attorney General acts as a counselor, in a paradigmatic attorney-client sense, to the President in his official capacity and to the heads of the executive branch agencies. The most obvious example is providing opinions on contemplated executive actions. No less important is the advice provided on bills presented to the President for his approval. Second, the Attorney General is responsible for the resolution of legal disputes between agencies within the executive

¹² See generally 1992 ATT'Y GEN. ANN. REP. (describing current activities of the Department of Justice).

branch. A third and sometimes overlooked aspect of legal interpretation by the Attorney General is the control the Attorney General exerts over the litigating positions of the executive branch. But the bulk of the Attorney General's role, and certainly the most controversial aspect of it, is the legal interpretation that is done as the direct legal advisor to the President and to the cabinet. Here the Attorney General functions most like a typical attorney, advising a client on his legal options.

For example, when I was head of the Office of Legal Counsel under Attorney General Thornburgh, we gave advice about the United States's options in Panama, the legal justification for the invasion, and how we could arrest Manuel Noriega—and make it stick in court.¹³ We also dealt with the international law questions that would be raised.¹⁴ We gave advice on establishing martial law in St. Croix after Hurricane Hugo. Sometimes the questions are extremely important. Some of you may have read the book *The Commanders*,¹⁵ about the war in the Persian Gulf. In that book, Bob Woodward writes that when Attorney General Thornburgh was out of town and I was Deputy Attorney General, I was asked to advise the President on whether or not he could initiate operations against Iraq without the authorization of Congress.¹⁶ Woodward writes that I told President Bush that he could.¹⁷ Of course, we also get more mundane questions, such as "What is the effective date of this statute?" and "When does the ninety days run out?" But sometimes the questions are quite interesting, and do keep one awake at night.

The unique position of the Attorney General raises special considerations. The Attorney General's oath to uphold the Constitution raises the question whether his duty lies ultimately with the President who appointed him or more abstractly with the rule of law. I said in my confirmation hearings, and have said several times since, that the Attorney General's ultimate allegiance must be to the rule of law.¹⁸ In my experience, there has not been any substantial tension between the role of upholding the rule of law and the role of the Attorney

¹³ 13 Op. Off. Legal Counsel 387 (1989).

¹⁴ Giving advice on international law questions is a long-standing practice of the Office of the Attorney General. See, e.g., 1 Op. Att'y Gen. 27 (1792) (applicability of "law of nations" to United States); 1 Op. Att'y Gen. 30 (1793) (reprisals against foreign states under law of nations); 1 Op. Att'y Gen. 68 (1797) (entry into Spanish territory to recover property under law of nations).

¹⁵ BOB WOODWARD, *THE COMMANDERS* (1991).

¹⁶ *Id.* at 356-57.

¹⁷ *Id.*

¹⁸ See *Confirmation Hearings on Federal Appointments*, 102d Cong., 1st Sess., pt. 2, at 1, 16-17, 80 (1991).

General as a policy subordinate of the President. As with any lawyer, the Attorney General best serves his client by providing unvarnished, straight-from-the-shoulder legal advice as to what the Attorney General thinks the law is, without regard to political considerations. Being a good legal advisor requires that I reach sound legal conclusions, even if sometimes they are not the conclusions that some may deem to be politically preferable.

Much depends on the question that is asked. As head of the Office of Legal Counsel and as Attorney General, I have paid a great deal of attention to what question is being asked of me as a lawyer. In this administration, my experience has been that the question asked usually is, what is the right answer. What is the *legally* right position? You could get another question, which is, can you advance a reasonable argument to sustain a given action. But more than nine times out of ten, the question is, is this regulation lawful, in your best judgment. That certainly was the question asked about the line-item veto. My predecessor, Charles J. Cooper, wrote a long memorandum concluding that the line-item veto was unconstitutional.¹⁹ I spent about six months reexamining that issue. I came to the conclusion that the line-item veto was not in the Constitution, and that it would be very difficult to mount any reasonable argument that it was.

Another more recent example is the question of indexing capital gains.²⁰ There was a great deal of pressure—not from the administration but from writers and from Republicans on the Hill—to conclude that the President could index capital gains. There again, I paid close attention to the question that was being asked. Robert Novak wrote that the real problem was that I was not sent sufficient signals as to what answer was wanted.²¹ While I agree with Novak on many things, here he was mistaken. On the contrary, I was clearly told what the question was, which was, is indexing lawful. Also, I understood the policy preferences of the administration. The question was: Can we, simply through administrative action, index capital gains. And not only did I not think we could, I did not think that a reasonable argument could be made to support that position.²²

The reason that I had no hesitation in rejecting the legal bases for a line-item veto and capital gains indexing is rooted in my view that the President has a responsibility to his office to advance responsible

¹⁹ 12 Op. Off. Legal Counsel 159 (1988).

²⁰ 16 Op. Off. Legal Counsel 145 (1992).

²¹ See Rowland Evans & Robert Novak, *A Presidential Test on Capital Gains*, WASH. POST, Sept. 2, 1992, at A21.

²² 16 Op. Off. Legal Counsel 145 (1992).

positions of law. I believe that President Bush fully shares this position. Ultimately, if you attempt to push too hard—even as a matter of litigation risks—and take legal positions that clearly will not be sustained, or that are not responsible and reasonable legal positions, you will lose ground. That certainly was the consequence of the *Steel Seizure Case*.²³ And so in this administration, that is why the question has been, what is the right legal answer—not whether we can provide a veneer of justification for a given action. Our view has been that if we go into court with untenable positions and lose, we ultimately weaken the office of the President.

Another special consideration that confronts the Attorney General that does not confront the private attorney when giving advice is that the Attorney General's opinions are binding in a way that private attorneys' opinions rarely are. Obviously, Attorney General opinions cannot bind the President, but by executive order, the Attorney General's opinions do bind the executive branch, at least with respect to interagency disputes.²⁴ This highlights another change from the early days of the Office of the Attorney General. Although the opinion is not uniform, many of the early Attorneys General looked upon their advice as no more binding on the executive branch than is a private attorney's on his client. Attorney General Jeremiah Black, for example, observed in 1857 that:

The duty of the Attorney General is to advise, not to decide. . . . You may disregard his opinion if you are sure it is wrong. He aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own.²⁵

In the interest of uniformity within the executive branch, the contrary view has prevailed, although the issue is not free from debate as to so-called "independent" agencies. Therefore, when giving his opinion, the Attorney General, unlike a typical lawyer, must pay close attention to consistency and precedent, rather than simply to the immediate interests of his client. This necessary concern for continuity contributes to the Attorney General's resistance to temporary political pressures.

²³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 61-98 (1987).

²⁴ Exec. Order No. 12,146, § 1-401, 3 C.F.R. 409 (1979), reprinted in 28 U.S.C. § 509 (1992); see generally Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 489-91 (1993) (discussing role of the Department of Justice in resolving interagency disputes).

²⁵ 9 Op. Att'y Gen. 32, 36 (1857).

Interagency disputes on legal matters present a particularly strong test of that resistance. By executive order, the President has delegated to the Attorney General the responsibility for resolving disputes between agencies over what the law is.²⁶ In this context, the Attorney General's role is much like a court's in an adversarial proceeding. Because each agency has its own staff of lawyers, disputes between them come before the Attorney General with legal positions already well-established. Each agency will usually have legal authority or good arguments to support its view. The Office of Legal Counsel requires each side to come in with briefs, just as if it were a judicial proceeding. Deciding among the positions being taken requires the Attorney General—or in most cases the Office of Legal Counsel—to function as a judge.

The Department of Justice does not in this context make policy decisions. Just as a court would, the Department confines itself to the legal questions presented. Its reason for doing so, however, is different from a court's reason. If a court were making the decision, we would say with certainty that policy choices should be left to the political branches of government. Being part of a political branch, however, the Department cannot fall back on that principle. Some observers might argue, therefore, that if both positions are arguably correct, the Attorney General should, as the President's legal advisor, favor the approach most consistent with the administration's overall program. Some argued this during the capital gains indexing debate (although this was not a dispute between two agencies).

In the context of resolving legal disputes under the executive order, we reject this view. Furthering the administration's policy goals is not our role in giving legal advice, and it is not our role in resolving disputes. The question in both contexts is, what is the right legal answer. The Attorney General's authority to decide at all comes from the President.²⁷ Traditionally, this mandate has been understood to encompass only legal questions. Policy disputes are resolved elsewhere within the executive branch. Any other arrangement would undermine the Attorney General's credibility in rendering legal opinions. Hence, both prudence and the President's delegation of authority require the Attorney General to consider, when resolving disputes, not the administration's policy objectives, but the rule of law. This is true unless a different question is asked, which is, can you sustain a given position with reasonable, good faith legal arguments.

Different concerns arise in the context of advice on bills

²⁶ Exec. Order No. 12,146, § 1-401, *supra* note 24.

²⁷ *See id.*; see U.S. CONST. art. II, § 2.

presented to the President for approval. The role of presidential signing statements in executive branch legal interpretation is sometimes overlooked, but is of growing importance.²⁸ The use of signing statements dates back at least to Andrew Jackson,²⁹ but Presidents Reagan and Bush have used them much more frequently to identify constitutionally problematic provisions. The Attorney General advises the President on potential constitutional problems in all legislation presented for his signature. The Department of Justice reviews more legislation than any other government agency by far. Many people in a practical, pragmatist government are contemptuous of the Department of Justice for examining constitutional details in legislation.

But consider, for example, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),³⁰ the savings and loan bailout statute. The Office of Legal Counsel recognized an Appointments Clause problem in the FIRREA bill. The director of the Office of Thrift Supervision should have been appointed by the President; he could not be grandfathered in by the chairman of the Home Loan Bank Board.³¹ Many people in the Treasury Department and on the Hill thought it was absurd that the Department of Justice was worried about that kind of issue, while they were trying to solve the savings and loan crisis. So the views of the Department of Justice were overridden. Political deals were made, and the bill passed. The law was then struck down by a federal court as unconstitutional.³² This created a panic, and delayed dealing effectively with the savings and loan crisis. When a provision raises constitutional difficulties, in most cases the Attorney General should recommend veto.³³ I have—I even recommended the veto of our own appropriations bill. No other agency, I think, has ever done that.

²⁸ See generally Douglas W. Kmiec, *Of Balkanized Empires and Cooperative Allies: A Bicentennial Essay on the Separation of Powers*, 37 CATH. U. L. REV. 73, 81-83 (1987) (describing increasing use of presidential signing statements).

²⁹ Douglas W. Kmiec, *Judges Should Pay Attention to Statements by President*, NAT'L L.J., Nov. 10, 1986, at 13.

³⁰ 12 U.S.C. § 1462a (1992).

³¹ The Office of Thrift Supervision replaced the Federal Home Loan Bank Board under FIRREA. See 12 U.S.C. § 1462a(e)(1) (1992).

³² *Olympic Fed. Sav. & Loan v. Assoc. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C.), *dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990).

³³ The President ultimately must act on the basis of his own understanding of the Constitution. If the Attorney General believes that a given statute is unconstitutional, but also believes that it is more probable than not that the statute would be upheld by the courts, it would still be appropriate to recommend veto on constitutional grounds. Providing one's view on a statute is not merely a question of predicting litigation risks. See Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 771-76 (1993) (discussing President's responsibility to veto bills believed to be unconstitutional).

In many cases, the Department of Justice will propose, as a fall-back position, that an issue be addressed in a signing statement if it would be politically impossible simply to veto a bill. For instance, at the very end of its session, Congress frequently passes large bills and then leaves town. The only choice we have is to veto the bill and, say, shut down the foreign operations of the United States altogether for six months, or to sign the bill and note exception to some provision we think is unconstitutional. Thus, in some instances, signing statements have directed subordinate officials to disregard provisions of a bill that are thought to be clearly unconstitutional and severable.

The use of signing statements to say that agencies should refuse to enforce part of a law because it is unconstitutional has been extremely controversial. Our position, or my position when I was at the Office of Legal Counsel, was that the President could use signing statements in that way where the law encroached on executive authority.³⁴ For example, a 1990 foreign relations bill had a provision forbidding spending funds on sending a delegation to a negotiating session, unless the delegation included members of the (Congress-controlled) Commission on Security and Cooperation in Europe.³⁵ Essentially, Congress tried to control the President's appointment power by forcing him to appoint members of a legislative entity to a diplomatic delegation. In our view, that was a clearly unconstitutional encroachment on the President's appointment authority as well as on his authority to administer the foreign relations of the United States.³⁶ Since the bill contained all of our foreign relations money, we said that the President could sign the bill and at the same time announce that the provision would not be enforced.³⁷ In fact, that is what was done, and no legislative members were appointed. We said that the power to decline to enforce the law flows from the Take Care Clause—"take Care that the Laws be faithfully executed . . ."³⁸ The Constitution is the law. If the President is confronted with a circumstance where the Constitution says one thing and a statute says another, the President or the Attorney General has to choose the supreme law of the land. Particularly where a law encroaches on executive power, the only effective way of challenging the law is by declining to enforce it. Otherwise, the President would be at the mercy

³⁴ 14 Op. Off. Legal Counsel 38 (1990).

³⁵ Foreign Relations Authorization Act, Fiscal Years 1990 & 1991, Pub. L. No. 101-246, § 102, 104 Stat. 15, 19 (1990).

³⁶ 14 Op. Off. Legal Counsel 38 (1990).

³⁷ Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 PUB. PAPERS 239 (Feb. 16, 1990).

³⁸ U.S. CONST. art. II, § 3.

of Congress. The only reference to this issue at the Constitutional Convention was by James Wilson, who said that one of the President's defenses to encroachments on presidential power is the President's refusal to execute those unconstitutional parts of the law.³⁹

We have also used signing statements to set forth the President's understanding of how a particular provision in the bill is to be interpreted, his understanding of what it means, or his directive as to how the executive branch is going to interpret it. It is unclear what weight, if any, the courts will give such statements. The President has a constitutionally-mandated part in the legislating process. To the extent that legislative history is given effect, it may be that presidential signing statements should be viewed as part of legislative history. Beyond that, the Constitution requires that the President "take Care that the Laws be faithfully executed"⁴⁰ Signing statements provide the needed direction to guide subordinate executive officers on how to execute the law faithfully.

The final method of executive branch legal interpretation I would like to address tonight is the Attorney General's role in determining the litigating posture of the United States. Obviously, the position that the Department takes in a brief carries no weight apart from its persuasiveness. But it is in this area that it is most likely that charges of political gamesmanship will be leveled. It must be remembered that in litigation, the Attorney General represents the United States. And I believe that the Attorney General as an advocate must strive for the correct legal result. Observers often equate the correct result with that which is most consistent with a position previously adopted by the courts. Thus, when the Department tries to persuade a court to reconsider its position, or advances a novel argument on a subject previously thought to have been closed, some people have suggested that this is inappropriate—that this is being political. But it is entirely consistent with the Attorney General's duties to advocate such a position. If the Attorney General concludes that a particular line of precedent is incorrect as a matter of law, it is as much a policy decision, if not more so, to acquiesce in that line of decision as to urge that it be discarded. Like the President, the Attorney General is sworn to uphold the Constitution. While the executive branch will not disregard a decision of the Supreme Court, even one that is clearly wrong, this does not mean that presidents are forever debarred from seeking reconsideration of a position that has previously been taken by the

³⁹ 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 450-51 (Merrill Jensen ed., 1976) (statement of James Wilson on Dec. 1, 1787).

⁴⁰ U.S. CONST. art. II, § 3.

Court.⁴¹ I believe that urging the Court to reconsider a prior decision serves the executive branch's obligation to the Constitution, without diminishing the Court's constitutional role.

III.

The issues I have highlighted afford no easy solutions. Much depends on the personal integrity of the attorneys at the Department of Justice and throughout the executive branch who are responsible for the professional and faithful implementation and administration of the law. Of course, the policymakers themselves must value the legal conclusions of those attorneys. Robert Novak said that if Lyndon Johnson—and I do not necessarily believe this of Lyndon Johnson—were then President, William Barr would have been out on the street thirty seconds after giving the capital gains indexing opinion.⁴² Indeed, it is true that President Jackson once consulted his Attorney General on a proposal to designate certain banks as depositaries of U.S. funds. The President told his Attorney General, "Sir, you must find a law authorizing the act or I will appoint an Attorney General who will."⁴³ Ultimately, it falls upon the Attorney General to resist such pressure, in Attorney General Bates's words, "from whatever quarter."⁴⁴ Honest legal advice is valuable to policymakers in assessing the litigation risks of their actions, but more importantly it is essential to our system of government. Nothing would be so destructive to the rule of law as to permit purely political considerations to over-run sound legal judgment.

⁴¹ See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 394-96 (1993).

⁴² See Rowland Evans & Robert Novak, *A Presidential Test on Capital Gains*, WASH. POST, Sept. 2, 1992, at A21.

⁴³ See Miller, *supra* note 10, at 51.

⁴⁴ See *supra* note 10 and accompanying text.

THE HERITAGE LECTURES

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**Crime, Poverty,
and the Family**

*By The Honorable
William P. Barr*



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Crimes, Poverty, and the Family

By The Honorable William J. Barr

He spoke at the H-

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PANEL I: SHOULD THE BILL OF RIGHTS FULLY PROTECT FUNDAMENTAL FREEDOMS?

THREE LEVELS OF HUMAN DECISIONMAKING AND THE PROTECTION OF FUNDAMENTAL RIGHTS

WILLIAM P. BARR*

Should the Bill of Rights fully protect fundamental freedoms? This question is not tightly focused. It is like asking, "Should courts do justice?" One is tempted to respond "yes" and go home. By delving deeper into this question, however, one encounters a number of difficult questions of political philosophy. The panelists have approached this broad topic from a number of different angles. Because their discussion is far-ranging, it will be useful to describe a framework which, though quite rudimentary, may provide direction and focus.

Let me suggest three spheres or levels of decisionmaking that affect the way people lead their lives. First, there is the private sphere: the realm of individual choice, private contract, and personal liberty. The decisionmaker is the individual. "I am going to live in this neighborhood." "I am going to marry this person." "I am going to educate my children in this way." "I am going to buy that hat." This private sphere represents the most basic level of human decisionmaking.

For self-interested individuals to live together peacefully and to pursue their private happiness meaningfully, there must be a second level of decisionmaking—the level of collective decisionmaking by civil government. The Declaration of Independence and the Preamble to the Constitution both remind us that it is precisely the need to protect individual liberty that justifies the existence of civil government.¹ At this government-

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1. See U.S. CONST. pmbl. ("We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men . . .

tal or political level, the rules applicable to private choices at level one are made and enforced.

At this second level, governments may operate along two interrelated axes. The first axis represents the degree of community participation in decisionmaking. This axis ranges from absolute monarchy to direct democracy. The second axis represents the degree to which the government, in whatever form, is authorized to restrict, supplant, or reverse private choice. On this axis, the potential intrusiveness of government can vary between extremes. It can be a limited, laissez-faire, libertarian government designed to protect the broadest range of private choice and individual liberty. Alternatively, it can be an all-encompassing, Orwellian state that controls virtually every aspect of life and leaves little room for private choice. Most political theorists would agree that there is a relationship between these two axes.² The more a community participates in governmental decisionmaking, the greater the authority with which that government can be trusted. The greater the community involvement, the lesser the likelihood that government will unduly intrude in the private sphere. The converse is also true.

In addition to the private and political spheres, there is a third level of decisionmaking. This third level, the constitutional level, is the level at which constitutional rules are framed—rules that are binding on, and enforceable against, the government itself. Constitutional rules directly or indirectly control the extent to which the political sphere is permitted to intervene in the private sphere. Constitutional rules made at this third level indirectly control the reach of government by setting guidelines of structure or procedure.³ Constitutional rules can also directly control the range of government action.⁴

are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .").

2. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181 (Henry Reeve trans., 1961) (1838); JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980).

3. See *Morrison v. Olson*, 487 U.S. 654, 697-98, 727 (1988) (Scalia, J., dissenting); *Bowsher v. Synar*, 478 U.S. 714, 721-22 (1986); *INS v. Chada*, 462 U.S. 919, 963 n.4 (1983) (Powell, J., concurring).

4. See Rodney A. Smolla, *Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321 (1990). "The Constitution, a negative document drafted in the language of restraint against officials, protects individual liberty by limiting government action." *Id.* at 336.

Substantive rules can secure private rights by restraining the government from acting in certain ways. For example, the government cannot abridge freedom of speech.⁵ Freedom of speech is a restraint, a constitutional rule that binds the government and prohibits it from acting and intervening in the private sphere. Theoretically, constitutional rules can also create another kind of private right or entitlement by affirmatively requiring the government to take action.⁶ For example, a constitution could proclaim, "Every citizen is hereby guaranteed an education." Such a declaration is a rule at the constitutional level that compels the government to intervene in the private sphere in some way.

Now let us turn to our Constitution. The proposed Constitution that emerged from the Philadelphia Convention of 1787 did not contain a Bill of Rights.⁷ The Federalists generally believed that, as far as the federal government was concerned, a Bill of Rights, a set of constitutional rules protecting rights by restraining the government, was unnecessary.⁸ Of course, the Federalists wanted to protect private liberty, but they sought to achieve this result through structural rules—not by direct restraints on government actions.⁹ Thus, they attempted to structure the political decisionmaking process at the second level in a way that reduced the threat of undue intrusion into the first level. By creating a sound representative system of government with limited enumerated powers, with separation of powers, and with an independent judiciary, the Framers sought to limit the threat that the federal government posed to individual liberties.¹⁰ Many Federalists saw a written Bill of Rights as a mere parchment barrier. They argued, as Publius asserted in *The Federalist Number 84*, that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."¹¹ In their view, the Constitution secured rights because it was derived from the people themselves, it provided

5. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

6. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

7. See CLINTON ROSSITER, 1787: THE GRAND CONVENTION 226-27 (Norton 1987).

8. See THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

9. See THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

10. See *id.*; see also THE FEDERALIST No. 49, at 316 (James Madison), No. 78, at 469-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

11. THE FEDERALIST No. 84, *supra* note 8, at 515.

for a sound system of representative government, and it granted limited powers to a balanced and mixed government.¹²

Thus, the Constitution that emerged from the Philadelphia Convention contained few direct restraints on the reach of government. So long as the federal government acted pursuant to one of its enumerated powers, there were few formal barriers to its intrusion into the private sphere. A consensus quickly emerged that structural safeguards were not enough.¹³ Indirect controls on the reach of the federal government could not protect individual freedoms by themselves. The Bill of Rights, the first ten amendments adopted in 1791, represents a set of constitutional rules agreed to at the third level that directly restrain the extent to which the political process at the second level can intrude upon the realm of private choice and individual liberty at the first level.

Such direct restraints, binding on the government, require an enforcement institution. The institution developed in the United States is judicial review, whereby courts, largely insulated from the political process, apply constitutional rules to restrain and control government action.¹⁴

Committed as we are to maintaining an effective representative government and to securing a wide range of individual liberties, how should we allocate decisionmaking among these three decisionmaking levels? What kind of decisions should we reserve to the private sphere at the first level and how should we protect them? We have established a balanced representative government at the second level. What range of decisions should it be allowed to make? What latitude should we give representative government in its decisionmaking ability? How far should we defer to the majority? Finally, to what extent should we set specific constitutional rules at the third level to interdict the decisions of the representative political process?

One key insight of the Federalists was that there are costs associated with packing protections into the third level in the form of constitutional restraints wielded against representative government. Do we necessarily become more free and do our

12. *See id.* at 513-14.

13. *See* Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 THE PAPERS OF JAMES MADISON 163-64 (Robert Rutland et al. eds., 1977); *see also* ROSSITER, *supra* note 7, at 284, 302-05.

14. *See* U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

freedoms become more secure if we have more level three constitutional constraints? As Publius observed in *The Federalist Number 51*, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."¹⁵ As this insight suggests, we have two goals that are somewhat in tension. On the one hand, we want effective civil government because effective government is essential to securing individual liberties. On the other hand, unconstrained government, even a representative one, can threaten the liberties it has been established to protect. Yet, as we impose direct restraints on representative government, we risk inhibiting government's effectiveness and thus risk losing important freedoms. For example, the more procedural constraints that apply to the government as it attempts to perform its police functions, the less able the government becomes at protecting persons and property.¹⁶

Applying excessive restraints to second level decisionmaking, in the form of constitutional rules, also creates an adversarial relationship between the individual and his representative government. Such a relationship undermines the individual's sense of belonging to a community and reduces the ability of the government to embody and express the community's values. Instead of a self-governing community, we may become a collection of Rousseau's noble savages with no meaningful bond to one another.¹⁷ At that point, we will have lost any meaningful individual rights to another enemy—not the government, but licentiousness. Publius warned that "liberty may be endangered by the abuses of liberty as well as by the abuses of power; that there are numerous instances of the former as well as of the latter; and that the former, rather than the latter, is apparently most to be apprehended by the United States."¹⁸ Thus, what seemed like a simple question at the outset, is in fact a very complex dilemma of political theory. With contributions from both the Federalist and Anti-Federalist camps, our Framers arrived at a particular calibration of what I have called level three and level two decisionmaking. The task

15. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

16. See THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

17. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (Maurice Cranston trans., 1979).

18. THE FEDERALIST No. 63, at 387-88 (James Madison) (Clinton Rossiter ed., 1961).

of our panelists is no less than to revisit and critique that balance.

FOREWORD

William P. Barr*

Let me start with a proposition, fundamental, yet disputed by some: the white collar crimes prosecuted by the Department of Justice are not simply regulatory violations or civil torts. Instead, such crimes involve truly culpable conduct and result in truly palpable harm.

White collar crimes are unlawful acts driven by greed and frequently committed by persons in positions of trust. They are offenses that jeopardize the financial security of individuals, the public and private enterprises. They are money laundering transactions that finance further illegal activity, hamper law enforcement efforts, and cheat taxpayers. White collar crimes are violations of environmental laws, done deliberately or with a contemptuous disregard for the public well-being, that threaten the health and safety of our citizens. They are misdeeds committed as a matter of corporate policy that are both unlawful and disdainful of the public interest. They are acts of official corruption that undermine the fundamental institutions of public life. White collar crimes are, in short, morally repugnant crimes which both individuals and institutions fall victim.

While the ethical nature of white collar crime remains unchanged, traditional schemes are often presented in modern garb. Regrettably, new communication technologies and the global capital markets support lawful and unlawful dealings with equal facility. Computer aided crimes by technologically sophisticated thieves are emerging. Because cheats and con-artists find inventive ways to exploit vulnerabilities in government and private programs, white collar crime priorities must be highly flexible and sensitive to a changing society. The Department of Justice's white collar enforcement priorities adjust to meet the new challenges, and under our new policies, white collar criminals can expect to find law enforcement waiting for them.

I, thus, disagree emphatically with critics who attack the Department's enforcement effort as punishing civil wrongs that are neither clearly criminal nor culpable under community standards.¹ I also reject emphatically

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1. For example, the criticism that the Department has extended the criminal law to reach behavior previously thought only civilly actionable is set forth at length in a recent law review article concluding that the disappearance of a clearly definable line between civil and criminal laws is the "dominant development in substantive federal criminal law over the last decade." John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections On the Disappearing Tort/Crime Distinction In American Law*, 71 B.U. L. REV. 193, 238 (1991).

the underlying notions often embodied in the criticisms that the only "real crime" is "street crime;" it is bad government policy to divert substantial resources to investigate, prosecute, and impose criminal penalties on the white collar offender; prosecutions of corporations are largely contrary to the public interest; and white collar crime should be pursued primarily through civil sanctions. Such arguments harken to an earlier age and represent a simplistic approach to crime.

In February 1991, the Department of Justice's Economic Crime Council realigned our economic crime law enforcement priorities. Three areas of economic fraud were identified as top national priorities: Financial Institution Fraud, Defense Procurement Fraud and Health Care Fraud. These priorities still occupy a substantial portion of our resources and deserve the strongest criminal sanctions. Two singular themes unite them: (1) they all involve conduct that is both unlawfully done and is knowing, willful, and intentional; and (2) their costs to persons and the public are incalculable.

FINANCIAL INSTITUTION FRAUD

In the last two years, Congress has authorized unprecedented staffing levels for federal prosecutors to deal with the explosion of white collar crime in the financial services industry. The Department's efforts to prosecute financial institution fraud have been well-documented. More than 1700 defendants have been convicted in "major" financial institution fraud cases.² The cases together involved an estimated loss of over \$10.5 billion to the institutions.³

The increased number of bank prosecutions, however, has led some within the defense bar to express concern that well-intentioned but ineffective business decisions are being criminalized by over-zealous prosecutors. These criticisms are unfounded. Insiders who abuse financial institutions are being tried and convicted for the same acts that they are always tried and convicted for: lying, cheating and stealing. Bank fraud cases are based upon fraudulent nominee loans, kickbacks, double pledging of collateral,

2. For these purposes, "major" financial institution fraud ("FIF") cases require that the loss sustained be \$100,000 or more; the defendant was an officer, director, or owner of the defrauded institution; the schemes involved convictions of multiple borrowers in the same institution; or that the scheme involved other major factors.

3. Between October 1, 1988 and September 30, 1991 (Fiscal Years 1989-1991), Department of Justice statistics show:

- 2295 defendants charged in FIF cases.
- 1770 defendants convicted in FIF cases.
- 77% conviction rate in FIF cases.

In fiscal year 1991 alone:

- 1085 defendants charged in FIF cases.
- 855 defendants convicted in FIF cases.
- 79% conviction rate.

reciprocal loan arrangements, land flips and linked financing—not speculative investment strategy. It is not that a speculative venture turned out bad which draws criminal scrutiny; rather, it is whether the banker fraudulently put the institution's money at risk through bribes, kickbacks, self-dealing or false financial statements. Accordingly, federal law criminalizes neither bad judgment nor even stupidity.

The Department is, of course, mindful from our internal investigations, as well as from Congressional and media reports, which suggest that the recent increase in insurance company insolvencies may be a warning sign of a larger future problem that will deplete state insurance guaranty funds and victimize insurance companies and individual policy holders. Among the factors supporting the conclusion that the insurance industry may become the Savings and Loan crisis of the 1990's are the rapid expansion of insurance companies; minimal regulation; poor underwriting; reckless, incompetent management; and extensive and complex reinsurance. In addition to our own experience, Congressional and industry reports have identified fraud as a significant factor in the rising number of insolvencies.⁴ One insurance industry report even blamed two-thirds of the recent failures of life insurance companies on fraud and "questionable practices" that might include fraud.⁵

DEFENSE PROCUREMENT FRAUD

Defense procurement fraud is not new. During the Revolutionary War, George Washington castigated the defense contractors who were supplying his Continental Army with defective arms and bullets: "These murderers of our cause ought to be hunted down as pests of society and the greatest enemies to the happiness of America. I wish to God that the most atrocious of each state was hung . . . upon a gallows five times as high at the one prepared for Haman."⁶

Procurement fraud is not merely a failure to comply with regulations. It is affirmative misrepresentation and concealment, it is cutting corners in the performance of contracts, it is submitting false claims and bills. In all these manifestations procurement fraud cheats the government and, both directly and indirectly, threatens human lives through the use of substandard products or product substitution. As a 1987 Senate Appropriations

4. See SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON ENERGY AND COMMERCE, 101st Cong., 2d Sess., *FAILED PROMISES: INSURANCE COMPANY INSOLVENCIES*, 101 (Comm. Print 1990).

5. THE REPORT OF THE AMERICAN COUNCIL OF LIFE INSURANCE, TASK FORCE ON SOLVENCY CONCERNS (September 1990).

6. MARSHALL CLINARD, *CORPORATE CORRUPTION: THE ABUSE OF POWER* 69 (Praeger Publishers 1990).

Committee Report explained, "the sale of faulty ammunition . . . is tantamount to treason."⁷

For these reasons, defense procurement fraud has been designated by the Economic Crime Council as the second national law enforcement priority. The Department will continue to support aggressive investigations such as the Ill Wind probe, which led to fifty convictions and the recovery of fines, penalties and restitution of more than \$230 million. The Department will also continue its strong support of the Voluntary Disclosure Program. Under this program, which was implemented in 1986 in accordance with the recommendations of the President's Blue Ribbon Commission on Defense Management, the Fraud Section's Defense Procurement Fraud Unit reviews, coordinates and/or prosecutes criminal matters that are voluntarily disclosed by defense contractors. The Voluntary Disclosure Program has been a useful supplement to the government's efforts to combat procurement fraud and to protect the integrity of the defense procurement process. As of January 1, 1992, there have been 227 voluntary disclosures. As a result of these disclosures, the Department has recovered over \$133.6 million and convicted three contractors and forty-four individuals.⁸

HEALTH CARE PROVIDER FRAUD

Fraud, waste and abuse in the health care industry cost the government, private insurers, and all American citizens, billions of dollars a year and cause incalculable damage to the quality of our nation's health care. In 1991, United States health care expenditures were \$738 billion—twelve percent of the Gross National Product—and has grown at a rate faster than ten percent each year. Federal expenditures alone now exceed \$200 billion—the second biggest procurement in the federal budget. Health care frauds are, unfortunately, equally impressive. In a recent prosecution in the Central District of California, twelve defendants were convicted in connection with a \$1 billion scheme to use mobile labs to perform batteries of unnecessary diagnostic tests. More than \$50 million worth of assets were forfeited in this case.

Health care frauds, abuses, and crimes committed by health care professionals strike those least able to protect themselves. Elderly and infirm Americans seeking medical treatment are the unwitting recipients of unnecessary supplies and services that defraud the government. Additionally, these frauds expose patients to needless surgeries, laboratory tests, x-rays, and prescriptions that potentially subject them to unnecessary dangers.

7. SENATE COMM. ON APPROPRIATIONS, 100TH CONG., 1ST SESS., REPORT ON FOREIGN ASSISTANCE AND RELATED APPROPRIATION BILL 12 (1987).

8. OFFICE OF THE ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS, DEPARTMENT OF DEFENSE (1992)(unpublished).

More recently, many American workers have suddenly found themselves without health insurance coverage because of fraudulent practices by con-artists masquerading as representatives of insurance companies.

In response to this increasing problem, the Department of Justice has assigned an additional fifty agents to the investigation of health care fraud. A total of ninety-six FBI agents will be devoted full time to Health Care Units established in twelve cities—Baltimore, Charlotte, Chicago, Dallas, Detroit, Las Vegas, Los Angeles, Miami, New York, Newark, New Orleans, and Philadelphia—where health care fraud is most acute. In addition to prosecuting criminally those responsible for health care fraud, the Department will maintain active civil and antitrust enforcement efforts directed at health care fraud.

OTHER AREAS OF CONCERN

Beyond the priority areas of financial institutions, defense procurement and health care fraud, the Department will give special emphasis to other areas that are impacted by emerging technologies, such as computer crime, international fraud and telemarketing fraud.⁹ According to industry estimates, computer-related crime may cost U.S. companies as much as \$5 billion per year.¹⁰ The proliferation of computer offenses compounds the fraud losses suffered throughout the nation. Embezzlers or outsiders can enter computer networks and create accounts, move money among accounts, or eliminate records of financial obligations; there are few limits to creative computer criminals.

Beyond the substantial dollar losses, computer crime carries with it another particular danger. In less than an hour, a hacker outside the United States can penetrate a dozen government and private computers to search for sensitive information, including military information. These significant national security concerns cannot be overstated and our efforts to deter and punish computer crime cannot be underplayed.

Meeting the challenges of crimes involving new technologies will require new laws. The most significant change needed is to criminalize certain conduct which currently falls outside the ambit of the Computer Fraud and Abuse Act.¹¹ As currently written, the Computer Fraud and Abuse Act prohibits intentionally or knowingly accessing a computer without authority. Unfortunately, this language does not clearly criminalize makers of computer viruses because the only "access" to the computer is the em-

9. The Justice Department has created special units within the Criminal Division to deal with computer and telemarketing crime.

10. SPAFFORD, ET. AL., *COMPUTER VIRUSES, DEALING WITH ELECTRONIC VANDALISM AND PROGRAMMED THREATS* (Ernst & Young, Survey of Computer Crime 1989).

11. 18 U.S.C. § 1030 (1984).

ployee voluntarily accessing his own machine. Therefore, the statute should be amended to reach conduct where an individual intentionally dupes an innocent party into inserting a malicious programming code into his own machine.

No enforcement area is immune to the impact of technologies.

For instance, the Internal Revenue Service now permits taxpayers to file tax returns by computer. The Electronic Filing Program started as a limited pilot program in 1987 and permitted taxpayers who were due refunds to file electronically. This year, the program was expanded to include tax filings where tax is owing and to handle more than 10 million returns.

Along with the program's obvious benefits have come individuals who take advantage of the system and file multiple fraudulent refunds. The Department's response to such thefts has been swift. The Department has revamped case review and authorized procedures to permit arrests and virtually immediate prosecution of these offenders. In fact, over sixty defendants were indicted in 1991 for participating in fraudulent electronic refund schemes arising during the 1990 filing season. This quick administration of justice to fraudulent electronic filing cases is in sharp contrast to the traditional paper return cases, where indictments have often followed the actual offenses by years.

There also is a need to keep pace with the benefits that new technologies are providing to crooked telemarketers. With the convenience of speed dialing, fax machines, credit cards, mailing systems, and aggressive use of advertising on public airwaves the telemarketing companies are flourishing. The Department is constantly monitoring this evolving industry and developing flexible approaches to combat fraudulent activities.

CONCLUSION

White collar crime touches everyone. It causes enormous dollar loss, endangers the well-being and the future of individuals and industries, and deprives victims of their critical sense of economic security. The government has an obligation to provide—and the people a right to expect—its best efforts to combat criminal activities. This includes the use of penal sanctions to deter and punish fraudulent conduct in all its myriad forms. The Department of Justice, founded on a commitment to the protection of the public interest, remains dedicated and committed to that endeavor.

Bush's Crime Bill: This Time, Pass It

By WILLIAM P. BARR SEPT. 24, 1991

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Now that the House Judiciary Committee has begun deliberating on a Federal crime bill, it should be mindful that the nation and law-enforcement community deserve better than the legislative sleight-of-hand that foiled President Bush's approach to criminal law reform last year. In 1990, both houses of Congress passed major elements of the President's anticrime proposal, but then a conference committee jettisoned substantial portions of it.

For more than two years, the Administration has sought legislation providing for an effective Federal death penalty, for reform of a habeas corpus system that encourages abuse and delay of the legal process and for revision of the exclusionary rule on evidence. Every major law-enforcement group supports

this package.

Critics of President Bush's bill say it cannot solve the problem of violent crime. Yes, no single legislative initiative -- a waiting period for gun purchases, Federal aid to local law enforcement or the Administration's legal reforms -- offers a pat solution to the complex problem of criminal violence. Only an approach combining tough law enforcement with physical, moral and educational revitalization of high-crime areas offers the prospect of a safer America.

While reform of our criminal justice system does not offer a complete solution, it is an essential part of any solution. The system is riddled with loopholes and technicalities that render punishment neither swift nor certain. The three reforms President Bush proposes will help build a more just, more efficient system.

First, we need a death penalty to deter and punish the most heinous Federal crimes such as terrorist killings. That penalty would send a message to drug dealers and gangs.

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The need for a death penalty was highlighted by the recent hostage crisis at the Federal prison at Talladega, Ala. Detainees, faced with deportation to Cuba, seized control of the prison and held 10 Federal officers hostage. The prisoners threatened to kill them unless the Justice Department granted their demands to remain in the U.S. Fortunately, no one was killed, and the prisoners were deported. If the crime bill had been law, the prisoners would have faced the death penalty for killing a hostage, increasing the chances our personnel would be recovered safely.

Second, we need to reform a Federal habeas corpus system that encourages endless challenges to state criminal convictions. After trial and appeals,

state prisoners may file repeated challenges to their convictions and sentences in Federal court, opening issues decided in state courts years, even decades, ago.

This lack of finality devastates the criminal justice system. It diminishes the deterrent effect of state criminal laws, saps state prosecutorial resources and continually reopens the wounds of victims and survivors.

Death-row inmates use repetitive habeas corpus filings to effectively nullify their sentences through delays that now average more than eight years. The bill limits these inmates to one round of Federal review and requires that due deference be paid to decisions by state judges and juries: the petitioner would have to show that a clearly established Federal right had been violated.

Finally, we must reform the exclusionary rule. Too often, it results in violent criminals returning to the streets because information about weapons used in their crimes and drugs seized are kept from juries deciding their cases. Police officers must act quickly to seize wrongdoers and obtain evidence while protecting themselves and bystanders. It is easy to second-guess their search-and-seizure decisions in a secure courtroom.

The Bush bill follows the lead of several Federal courts of appeal by providing that where the police act in good faith -- trying to follow the law of search and seizure as understood at the time -- evidence should not be suppressed if it turns out that a technical error was committed. Congress should avoid political shell games and send these reforms to President Bush's desk this fall.

A version of this op-ed appears in print on September 24, 1991, on Page A31 of the National edition with the headline: Bush's Crime Bill: This Time, Pass it. Today's Paper | [Subscribe](#)

Death-Penalty Delay Doesn't Promote Justice

The New York Times

October 5, 1990, Friday, Late Edition - Final

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Section: Section A; Page 36, Column 4; Editorial Desk; Letter

Length: 504 words

Body

To the Editor:

In "Pro-Justice, Not 'Pro-Criminal' " (editorial, Sept. 26), you defend the House Judiciary Committee crime control bill (H.R. 5269). In particular, you support the proposed Racial Justice Act and extol its provisions to authorize successive habeas corpus petitions challenging convictions and sentences in capital cases. You assert that "pro-criminal" is a "false label" that I have placed on the bill and that, far from abolishing the death penalty, the bill "would only require states to administer capital punishment fairly."

The fundamental unfairness in our death penalty system is not a lack of procedures to raise meritorious claims. Rather, it is the abuse of the writ of habeas corpus to delay, and ultimately to avoid, just punishment. As of 1988, the average delay from time of sentencing to time of execution in this country was approximately seven years. That year, more death-row inmates died of other causes than had their sentences carried out. As Justice Lewis F. Powell Jr. told a House subcommittee this year, "The hard fact is that the laws of 37 states are not being enforced by the courts." Obviously, such delay undermines the deterrent and retributive force of the death penalty and breeds a justified frustration with our criminal justice system.

H.R. 5269 will make matters worse. The "racial justice" provisions of the bill would erect a virtually irrebuttable presumption of racial bias in capital sentencing based on raw statistical comparisons. The habeas corpus "reform" provisions of the bill would overrule Supreme Court decisions that have attempted to place reasonable limits on habeas corpus filings and would authorize filing successive petitions raising technical claims unrelated to guilt or innocence.

That's why the National Association of Attorneys General and the National District Attorneys Association have joined with President Bush and Attorney General Dick Thornburgh in opposition to this bill, indicating that its practical effect would be to nullify the death penalty in this country. That's why spokesmen for these organizations, which represent more than 7,000 prosecutors in all 50 states, have repeatedly labeled this bill "pro-criminal," a characterization I agree with and stand by.

That's why Justice Powell has indicated his view that the habeas corpus provisions in H.R. 5269 would increase the inordinate delay in capital cases. And that's why a bipartisan coalition in the House of Representatives, by a vote of 258 to 166, sent this bill back to the House Rules Committee with the message that its habeas corpus provisions were unacceptable.

In sum, you are wrong. A bill that fosters further delay and injects racial statistics in death penalty cases in no sense promotes justice. Apparently, both the nation's prosecutors and a majority of the House of Representatives agree this bill is "pro-criminal" and should be amended or defeated.

WILLIAM P. BARR

Death-Penalty Delay Doesn't Promote Justice

Deputy Attorney General

Washington, Sept. 26, 1990

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9/13/90 L.A. Times 7
1990 WLNR 3663880

Los Angeles Times
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September 13, 1990

Section: ME-Metro

PERSPECTIVE ON CAPITAL PUNISHMENT
Wolves Fighting Crime Go 'B-a-a-a'

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The House of Representatives is poised to take a major step backward in the fight against violent crime. In a bill purporting to be an anti-crime measure, the House Judiciary Committee has sent to the floor a proposal that would effectively abolish the death penalty in this country.

An overwhelming majority of Americans believe that the death penalty is a just punishment for the most heinous crimes. Thirty-six states have adopted capital punishment. Yet, for more than a decade, these laws have been rendered almost unenforceable by a system that allows convicted murderers to delay indefinitely, and ultimately to avoid, imposition of their sentences. After exhausting all appeals, murderers are allowed to file endless habeas corpus petitions in state and federal court, raising largely technical challenges to their convictions and sentences.

The writ of habeas corpus originally was a legal device used to challenge attempts by the government to seize and detain an individual without trial. During the Warren court era, the writ was converted into a right to multiple appeals of issues already decided. This radical expansion of the scope of habeas corpus has allowed inmates sentenced to death to nullify their sentences through strategic delay.

As of 1988, the average delay from time of sentencing to time of execution of a capital sentence was almost seven years. In that same year 296 individuals were convicted of first-degree murder and sentenced to death while only 11 capital sentences were actually carried out. Obviously, such delay undermines the deterrent and retributive force of the death penalty and breeds frustration and disrespect for our criminal justice system.

The case of Robert Alton Harris illustrates the point. In 1978, while on parole for voluntary manslaughter, Harris shot two teen-age boys to steal their car for a robbery. Later, he confessed to the murders. He was convicted of first-degree murder and sentenced to death by a California jury in 1979. In 1981, the California Supreme Court upheld this conviction and sentence, finding that "none of the many contentions raised by (Harris) has merit." Since that time, Harris has filed several state and four federal habeas petitions, each of which has been rejected. His sentence has still not been carried out.

A panel of jurists chaired by retired Justice Lewis F. Powell Jr. has offered a solution to this problem. If a state provides those on Death Row with counsel at state expense in state habeas corpus proceedings, the prisoner will get only two

"bites at the apple"--one state proceeding and one full federal review. No further habeas corpus petitions could be filed unless a claim of factual innocence were raised. The Bush Administration, the National Assn. of Attorneys General and the National District Attorneys Assn. support the principles behind Justice Powell's reform proposals. The House bill, far from curing present abuses, would make matters worse.

First, the House proposal rejects the Powell Committee's quid pro quo principle. It affirmatively encourages the filing of successive habeas corpus petitions containing claims unrelated to guilt or innocence. At the same time, it imposes requirements for state-appointed counsel that very few lawyers can meet and even fewer state taxpayers can afford. Under the House proposal, convicted murderers like Harris would go on avoiding punishment by raising alleged technical "defects" in their sentences--"defects" that have nothing to do with their guilt or innocence.

Second, the House proposal overrules two recent Supreme Court decisions that attempt to provide some reasonable safeguards against habeas corpus abuse. In *Teague vs. Lane*, the Supreme Court held that prisoners cannot use habeas corpus to challenge their convictions based on judicial decisions that were not even rendered at the time of their trial and appeals. The House proposal overrules *Teague*, and thus renders every criminal conviction in the nation subject to constant challenge based on cases that have not yet even been decided. The Judiciary Committee proposal also overrules the court's decision in *Wainwright vs. Sykes*. The *Sykes* decision requires that defendants follow state procedural rules in order to preserve claims for federal review, thus preventing criminal defendants from "sandbagging," that is, from holding back their claims in state court only to raise them years later in a federal proceeding. The House proposal would effectively reward defendants who ignore state procedural rules.

It is one thing to openly and honestly oppose the death penalty outright--a position the American people have rejected. It is another thing entirely to proclaim support for the death penalty in order to curry political favor while at the same time voting to erect a labyrinth of procedural rules to prevent the penalty from ever being applied. This crime bill is a sheep in wolf's clothing.

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---- Index References ----

News Subject: (Legal (1LE33); Judicial (1JU36))

Region: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

Other Indexing: (CALIFORNIA; CALIFORNIA SUPREME COURT; HOUSE; HOUSE JUDICIARY COMMITTEE; HOUSE OF REPRESENTATIVES; JUDICIARY COMMITTEE; JUSTICE POWELL; NATIONAL ASSN; NATIONAL DISTRICT ATTORNEYS ASSN; PERSPECTIVE; POWELL COMMITTEE; SUPREME COURT; SYKES; TEAGUE; WARREN) (Bush; Fighting Crime; Harris; Lane; Lewis F. Powell Jr.; Robert Alton Harris; Thirty)

Edition: MO-Home Edition

Word Count: 991

NewsRoom

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PANEL IV

THE APPROPRIATIONS POWER AND THE NECESSARY AND PROPER CLAUSE

EDWIN MEESE III*

During the earlier portion of the day, we were talking about the separate exercise of power and the sharing of power in a governmental structure that was unique when it was originally created. Particularly, we have been talking this morning about what some might call unconstitutional acts of Congress in restraining the executive branch, or at least actions and questions of unconstitutionality.

I was interested in Mr. Davidson's categorizing the various things Congress-people do into legislative, oversight, and constituent services—although he says that a particular problem seldom falls neatly into one of these categories. This concerned me a bit and, fortunately, I was sitting next to Harvey Cook, who always carries a pocket copy of the Constitution with him. I borrowed his copy of the Constitution and I found nothing that talked about oversight and absolutely nothing about constituent services. So I might present the direct view: there is no official constitutional authority for either oversight or for constituent services. If you follow this analogy a little bit further, a letter to a department head or agency employee from a member of Congress has no more official authority or weight than a letter from any other citizen. Now obviously in the practical world, there are certain coercive features associated with members of Congress that make that letter at least seem more authoritative than, perhaps, the average communication from an ordinary citizen.

This morning, we are going to talk about some of the coercive aspects that the Constitution, in a sense, gives to the Congress, because there are some constitutional powers given to the Congress which directly relate to how the executive branch does its job. And that is why this panel, today, is talking about the appropriations power¹ and the necessary and proper

* Distinguished Fellow, The Heritage Foundation and 75th Attorney General. The Honorable Edwin Meese III was the moderator of this panel discussion.

1. U.S. CONST. art. I, § 9, cl. 7.

clause.²

Every citizen knows that a legislature, whether it be city, county, state or federal, has potentially enormous power over his or her life, because the legislature has the authority to make the rules by which lives are lived. In a system of separated powers under a written Constitution, we do not normally expect a legislature to have that much authority over the coordinate branches of government. And indeed, the purpose of this conference is to define that authority, because in most cases, the written Constitution and not the legislative body makes the rules for the other branches. The other branches then enforce or apply those rules that are made by the legislature for persons outside the government.

To a great extent, that is how our Constitution operates in most cases. And it is the Constitution, then, that determines how the President is chosen, how long he or she serves, and what the powers are. It is the Constitution and not Congress, for example, that determines the tenure of judges or the cases to which judicial power applies. These are rules that cannot be changed easily, but can only be changed by the people themselves—the ultimate repository of governmental authority in a republic or a democracy—through the amending power of the Constitution under article V.

But today we are discussing the two possible exceptions to the principle that it is the Constitution that provides the rules for the executive and judicial branches. Those exceptions are: first, the explicit grant to Congress of the power to make laws to carry out the powers of the other two branches in the necessary and proper clause; and second, the implicit grant to Congress of the power over federal money, the appropriations power or the spending power.

As a practical matter, those of us who follow interbranch politics, and I must say as Judge Bell intimated in his remarks, the 72nd Attorney General, the 75th Attorney General, and the 76th, who was here yesterday, have a more close, personal involvement on a day-to-day basis with interbranch politics. It is nice to be able to watch this as a casual observer from the outside. For those of us familiar with Congress' use, or as some suggested earlier this morning, misuse of power, the appropriations power deserves a great deal of study, as I am sure it will receive this morning. We are going to be talking about ways in which that power is properly—or perhaps, improperly—used. But there is no question that it

2. U.S. CONST. art. I, § 8, cl. 18.

is a constitutional power. The distinctions become much more exact and precise than some of the things we talked about earlier, when authority and power appear, at least in some instances, to be created out of the Oval Office.

The Boland Amendment,³ which was referred to in passing this morning, is probably one of the best known examples of how the appropriations power is used by Congress and by writers or researchers on appropriations. Yesterday, Attorney General Thornburgh talked about other ways in which it is used and that discussion came up again this morning. But these are merely the latest in a long series of funding restrictions.

The use of the necessary and proper clause is less frequently debated. It seldom comes up, at least in the daily papers. But it is the power that enables Congress to create the executive departments and to prescribe, to a certain extent, its several procedures. It is this power, for example, that underlies most of the rules of governmental administration that are set forth in the statute under the Freedom of Information Act⁴ or the Advisory Committees Act.⁵

The importance of such rules of administration and its impact or influence on the conduct of the executive branch and of the courts, should be fairly obvious, once you think about it. We will be discussing, this morning, the extent to which Congress may properly use these grants of authority to impress its will, not merely upon the substance of the law as it applies to persons outside of government, but upon the rest of government as it enforces those laws, applies those laws, and interprets those laws.

We have four panelists of distinguished backgrounds and experience. The first person has to deal on a daily basis with the questions to which I referred: Bill Barr.

3. The Boland Amendment, passed December 21, 1982, prohibited aid "to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua." Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982). The Boland compromise, passed December 8, 1983, limited financial support for the contras to \$24 million. Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (1983). The Boland cutoff, passed October 12, 1984, provided that no funds made available to the intelligence agencies and the Department of Defense could be used to support the Contras during fiscal year 1985, but permitted Congress to provide up to \$14 million in such aid after February 28, 1985, if the President requested it. Continuing Appropriations Act for the Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-37 (1984).

4. 5 U.S.C. § 552 (1988).

5. 5 U.S.C. app. §§ 1-15 (1988).

WILLIAM BARR*

It is the beginning of wisdom to have knowledge of your own ignorance; and if that is true, then thinking about Congress' use of the appropriations power to control the activities of the other coordinate branches of government is a way to make yourself very wise indeed. It is a very difficult issue. The more I have thought about it, the more I come to appreciate its complexities. I have reached no firm conclusions myself and have no comprehensive theory to espouse today. But I have concluded that the easy answer is probably not a correct answer.

The easy answer—at least one we hear advanced most often these days—is that the appropriations power is a big power indeed; that it is essentially a freestanding power to allocate and control all the public resources that the government has at its disposal. It is a power that has almost magical qualities. Congress can do all sorts of things with this power of the purse that it cannot do directly under its enumerated powers. There is an implication that as long as Congress takes action in the form of an appropriations bill, Congress is somehow immunized from other constitutional constraints; or at least, by using its appropriations power, Congress can trump other constitutional constraints; or at a minimum, by invoking the appropriations clause, Congress can add greater weight to its claim that it has power over the other coordinate branches of government.

The premise is that, because Congress can decide to make no appropriations at all, when it does make appropriations, it can impose any control or restriction it wants on how money is spent. The argument is as follows: Congress does not have to fund the Department of Justice, but if it does create a Department of Justice, and it does appropriate money to the Department of Justice, then it can control all the activities of the Department of Justice. So, for example, Congress can tell the Solicitor General, "You may not use appropriated funds to argue a particular position in the Supreme Court." If Congress can do this then one would think it could also command its corollary: "These funds must be spent to present the Supreme Court with the following argument" Now I do not think this position is tenable.

Just because Congress is acting as the appropriator of funds does not mean that it is immune from other constitutional rules or that it can

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trump them or even give greater weight to its claims. First, let us consider the application of spending decisions to the constitutional rules that deal with individual rights. Suppose Congress appropriates money for a program that gives funds to hospitals. Let us think of some of the various restrictions—the “usual suspects” of restrictions and conditions that Congress often tries to use in appropriations legislation. First, the direct restriction: “We hereby appropriate X funds for hospitals, provided however, that no funds can go to a Catholic hospital.” I think that would be unconstitutional. Now let us look at a condition on spending: “Money may be provided to Catholic hospitals only if they abandon their religious affiliation.” That seems to me to be an unconstitutional condition, and I suspect it would be unconstitutional. Now let us look at another device, most subtle of them all—Congress casts its action as a refusal to fund: “Money shall be spent as follows . . .” and then Congress lists all the hospitals, and the Catholic hospitals are not on the list. The use of impermissible criteria to select which hospitals are on the list and which are not is inadmissible under the Constitution. The fact that the action is cast as a refusal to spend is not sufficient to validate it.

Should this not also be the case when we encounter the rules that are set forth in the Constitution that deal with separation of powers? Consider the original jurisdiction of the Supreme Court, which is vested in the Court by the Constitution. The original jurisdiction extends to suits in which a state is a party. Now let us review the kind of appropriations conditions and restrictions that we commonly see. First, a Congress can place a direct restriction on appropriated funds: In a judiciary appropriations bill, Congress says, “You cannot use any funds to decide cases involving the state as a party.” Congress can cast it as a condition: “Funds can only be used if the Court refrains from deciding cases involving states as a party;” or “Only if the Court decides this particular case this way, will the funds be available for expenditure by the Court.” Let us add another one here when we talk about separation of powers—that is Congress’ use of restrictions to muscle in on the decision making process of the other branches: “Funds can only be spent to decide cases in which the Court has first cleared the decision with one of the judiciary committees.” And finally, the fourth kind of restriction, the most slippery kind of restriction, is the breakdown of the object of expenditure into separate categories of activity and then the selective funding of those subsets. For example, Congress passes an appropriations bill with line items for each area of the Court’s jurisdiction. When it comes to those

involving states as a party, it lists forty-nine states—and lo and behold, Rhode Island is not on it. I would suggest the criteria by which the list was drawn up is impermissible. It encroaches on judicial power. That kind of device of selective funding is unconstitutional.

It seems to me this analysis also applies to the constitutional powers of the President. Let us look at the pardon power. I will briefly run through the same four examples of appropriations restrictions: (1) "Provided, however, that no money for pardons may be spent for anyone who has committed the crime of lying to Congress." (2) "Money for the executive, except the President's salary, is appropriated only if the President refrains from pardoning someone who has lied to Congress." (3) "Money can only be spent for pardons if the pardon had been previously reviewed and cleared by one of the judiciary committees." And finally, (4) "You can list as line items all the crimes for which you can pardon people." And lo and behold a crime is left off, and there is no money appropriated for pardoning persons who have committed the crime of lying to Congress. From this, I conclude that Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control.

The last type of restriction in each of these three sets of hypotheticals is the most difficult: it is the method of taking an overall object of public expenditure, breaking it down into separate categories of activity, and then making deliberate decisions of funding some of the subsets, but not all of them. Sometimes when Congress does this kind of thing, it looks okay. Congress can say, "We are going to spend a million dollars on building post offices; five hundred thousand has to be spent in Walla Walla, and five hundred thousand has to be spent in Dubuque. We want two post offices." Now that looks okay. On the other hand, you can do this sort of thing, and it does not appear right, such as in the three earlier examples that I gave about this kind of restriction.

How do you tell the difference? What is the principle by which you can distinguish between when it is a guise to control executive or judicial activity, and when it is really a legitimate funding decision by Congress? Well, could it be an "intent" test? What is Congress' purpose in subdividing the objects of expenditure, and then selectively funding them? Is it trying to control the exercise of constitutional power by the executive or the judiciary? Or is it simply making a bona fide funding decision for resource reasons?

Once you get beyond an "intent test," it seems to me that you are

drawn in either of two directions. The logic of each leads to some fairly drastic conclusions. One approach is the familiar one—the appropriations clause gives Congress unfettered discretion to break down and define all areas of government activity and to determine how much to spend on each activity, including those involving the enumerated powers of the other branches. It is permissible for Congress to say, “We want 3,000 people to negotiate treaties this year with the Soviet Union and no one to help the President make pardon decisions.” That is fine. Congress can define the object of expenditure. Carrying this to its logical conclusion, I believe, would eviscerate completely the principle of separation of powers in the Constitution.

The other approach, it seems to me, is a less familiar one, but there is something to be said for it. It goes something like this: The appropriations clause is not an independent “power” of Congress, an independent source of congressional power. It is not a power clause. It does not confer a free-standing power to control the allocation of government resources. The appropriations clause is simply a procedural provision—a requirement that Congress pass a law before it can take money out of the Treasury. The only power logically implied by that procedural requirement is that Congress can control the overall amount of public funds that are drawn from the Treasury. The appropriations clause provides on its face that in order to get money out of the Treasury and get it to a place where you can spend it, you need a law.

The power to set, define, and subdivide objects of public expenditure and to restrict funds only to those specified objects does not come out of the appropriations clause. Any such power that Congress has must come from one of Congress’ enumerated substantive powers, which are set forth in article I, section 8. So if Congress says that there is going to be an army, and that army is going to consist of one rifle company and fifteen F-16 fighters, then the only thing the appropriations clause does is to say that to get money from the public Treasury to support the army, you need an appropriations bill, the act of giving out the money. The power to dictate the scope of the activity—one rifle company and fifteen aircraft—must come from one of the substantive enumerated powers. If Congress has that power, then it is probably under the power to raise and support armies and make rules for the armies in article I, section 8. But it does not come from the appropriations clause.

Let me illustrate this by another example. Suppose in the early days of the Republic all we could afford was one employee in the State Depart-

ment, the Secretary of State, and there are three countries with which we are conducting negotiations. Congress, appropriating money for the Secretary of State's operations, says, "For negotiations with France—\$50,000; for negotiations with the United Kingdom—\$1.00; and for negotiations with Spain—zero." Under each of those line items it says that these funds can only be spent for this activity. Now Congress may have legitimate reasons for doing this. They may feel relations with France are a higher priority than relations with the United Kingdom or Spain. They might want to make sure there are sufficient resources to handle the delicate relations with France, and there is always someone available to answer the mail from Paris. Because Spain is not a high priority, we can save money in that area by simply providing a zero amount. All the Secretary can do, except for one dollar of activity, is handle relations with France. Congress may have good or bad policy reasons for doing this. It may be that the appropriations clause does not empower Congress to segment the object of negotiating treaties into three separate and different subsets and then selectively fund them. The appropriations clause means that the only way the Secretary of State can get money is by an act of Congress. But the appropriations clause does not provide any power to define the President's treaty-making powers under the Constitution. If Congress has that power, it has to come out of its enumerated powers—principally article I, section 8. I would not think there is such an enumerated power.

The choices that Congress effectively makes when it attempts to categorize all the different permutations of Presidential treaty-making activity and then selectively fund them—those decisions: "How important are our relations to France?"—are decisions which the Constitution vests in the President. Under this approach, when we hear discussions about Congress' weighty role in various areas of shared power, such as the foreign relations power, and Congress adverts to "the power of the purse," it does not make sense. Congress still has to point to a substantive power. The power of the purse under this approach is only procedural.

That is not to say that Congress does not have substantial power to allocate resources. There is a lot of power under article I, section 8. Congress can dictate real results in the real world. Congress may even, in carrying out its enumerated powers, define the output it wants the government to produce in the way of goods or services. It can do so with great specificity. It can say, "We want a post office in Walla Walla, Washington. And we want to spend a million dollars on that post of-

fice.” The reason Congress can direct that is not because of the appropriations clause; the reason is because Congress has the specific power to provide for post offices. Perhaps the reason it can say, “I do not care if you can build it for \$900,000; I want you to build it for a million,” lies in the commerce clause. It wants to pump a million dollars into Washington State.

The logic of this approach tends to lead to the conclusion that when Congress appropriates money for the constitutional activities of the President or the judiciary—in the President’s case, it includes the power to execute the laws and the power to supervise and manage the executive branch—it ultimately only has the power to provide a lump sum for those constitutional activities.

Let me just close by suggesting a metaphor: the difference between a master-servant relationship and the independent contractor. Did the framers really believe that the appropriations clause transformed the relationship between Congress and the other coordinate branches into a relationship of master-servant, that the congressional master directs the activities of the Presidential or judicial servant simply because the money passes from hand-to-hand? In both kinds of relationships, Party One gives money to Party Two to get results, and Party One specifies the results. In one relationship, it is an employment contract, and Party One can control every jot and tittle of what that Party Two does, because the money passes hands within the employment relationship. Ultimate responsibility lies only with Party One. In the independent contractor model, Party One also gives the independent contractor the money to produce results, but the independent contractor is ultimately responsible for producing those results. There are limits on the extent to which Party One may direct and control the activities of Party Two. And Party Two is separately responsible for producing results, as the President is separately responsible to the American people under the Constitution.

LOUIS FISHER*

I will start with a very familiar executive-legislative clash over appropriations. It is one you should have no problem identifying. The Chief Executive wants to pursue certain objectives, but is denied funds by the legislative body. To circumvent the legislature, the Chief Executive turns to foreign governments and private citizens for financial contributions. What conflict are you thinking of? President Reagan wanting to assist the Contras, being blocked by the Boland Amendment, and then going to Saudi Arabia and other sources for financial assistance?

The example I have in mind is much earlier. It takes place in the 1600s, and leads to civil war in England and a loss by Charles I of two assets: his office and his head.⁶ Some historians say the latter was not much of an asset. The framers, being good historians, were aware of the danger of placing in one branch the power to go to war and the power to fund it. Although they did not adopt a separation of powers in a narrow, pure sense, they did very much provide for separation of the purse and the sword. If the framers feared one threat to individual liberties, it would be the union of the sword and the purse. We are familiar in the Constitution with the different parts of the power of the purse granted to Congress: the power over appropriations, to raise revenues, to borrow money, coin money, and regulate the value thereof.⁷

The framers provided not so much for separation of powers, but for overlapping, for checks and balances. After the draft constitution came out of Philadelphia in 1787, some states and some delegates were very alarmed by the mixing of the branches and powers. Three states asked Congress to add to the Constitution an amendment on separation of powers. Seventeen amendments were considered; twelve went out to the states, and of course ten were ratified for the Bill of Rights.

One of the amendments that never got out of Congress, because it lacked merit, was the separation of power amendment, which was taken from the Constitution of Massachusetts. It basically said that a legislative body shall never exercise executive and judicial power; the President shall never exercise legislative and judicial power; and the Court shall

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6. P. EINZIG, *THE CONTROL OF THE PURSE* 57-62, 100-06 (1959). For further details on the spending power, see Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758 (1989).

7. U.S. CONST. art. I, § 9, cl. 7 and art. I, § 8.

never exercise legislative and executive power.⁸ The framers knew that that kind of crisp separation, which comes fairly close to what Montesquieu had in mind, was not acceptable from their own experiences. They knew that pure separation was not a device to protect liberty; instead, it jeopardized liberty.⁹ To make government workable and to permit the branches to protect their prerogatives, there had to be a power of self-defense. That requires overlapping, not separation.

Peter Strauss very clearly pointed out one of the anomalies in the Constitution. The framers wanted the President to have unity and responsibility. That is very, very important. But the Constitution also gives to Congress the power to create the executive branch, to create the departments and the agencies, and make them creatures of Congress. What you have is the capacity of Congress, if it wants to, to place certain powers in executive officials who are not controlled by the President. The framers knew that could be a result. You may object to it on policy grounds, but it derives from the necessary and proper clause¹⁰ as a potential power of Congress.

Early in the nineteenth century, by the 1820s, we started to get opinions from the Attorney General in which the President asked: "Is it okay if I go into certain departments or certain agencies and reverse what an agent has decided about a claim or pension? May I do that?" Consistently, from the 1820s on, the Attorney General would tell the President, "No, you have no legal or constitutional right to interfere with an executive judgment placed by Congress in a particular official. Not only do you have no legal or constitutional right, it is politically imprudent to involve yourself in such matters. You have no business doing that; you have other, much more important responsibilities, such as Commander-in-Chief."¹¹

In 1789, in the great debate in the House of Representatives on the removal power, James Madison spoke very, very strongly and eloquently

8. E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 174-75, 183, 199 (1957); 1 *ANNALS OF CONG.* 453-54 (D. Appleton & Co. June 8, 1789) and 789-90 (Aug. 18, 1789); 1 *U.S. SENATE, JOURNALS*, 1789-94, 64, 73-74 (1820).

9. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 176-211 (1967); J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 396 (5th ed. 1905).

10. U.S. CONST. art. I, § 8, cl. 18.

11. *E.g.*, 1 Op. Att'y Gen. 624 (1823); 1 Op. Att'y Gen. 636 (1824); 1 Op. Att'y Gen. 678 (1824); 1 Op. Att'y Gen. 705 (1825); 2 Op. Att'y Gen. 480 (1831); 2 Op. Att'y Gen. 507 (1832); 4 Op. Att'y Gen. 515 (1846). *See* L. FISHER, *AMERICAN CONSTITUTIONAL LAW* 222-23, 251-53 (1990).

about the need to make the President personally accountable. To protect that value, the President had to have the power to remove executive officials.¹² But Madison, understanding what had happened in the Continental Congress, recognized that there might be some officials in the executive branch—the person he identified was the Comptroller in the Treasury Department—who required independence from the President. Although the Comptroller was an executive official, Madison said he exercised quasi-judicial powers and should not serve at the pleasure of the President.¹³ So you see from the start there has been a tension: on the one hand, wanting the President to have unity and responsibility, and on the other hand, wanting a certain amount of independence for some executive officials. Those values are balanced by Congress through the statutory process.

In contrast to the uncertain separation between executive and legislative powers and branches, the separation between the purse and the sword is quite crisp. In *Federalist No. 69*, Alexander Hamilton argued that the American President was far less threatening than the King of England. Hamilton explained that the power of the King “extends to the declaring of war, and to the raising and regulating of fleets and armies.”¹⁴ The Constitution, as Hamilton pointed out, gave those powers expressly to Congress. Jefferson praised the transfer of the war power “from the executive to the legislative body, from those who are to spend to those who are to pay.”¹⁵ Madison warned against concentrating in the Commander-in-Chief the power to go to war and to fund it:

Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges of whether *a war ought* to be *commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.¹⁶

At the Philadelphia convention in 1787, George Mason told his colleagues that the “purse & the sword ought never to get into the same hands, whether legislative or executive.”¹⁷

12. L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 61-63 (1985).

13. *Id.* at 66.

14. THE FEDERALIST NO. 69, at 465 (A. Hamilton) (J. Cooke ed. 1961).

15. 5 THE WRITINGS OF THOMAS JEFFERSON 123 (P. Ford ed. 1895).

16. 6 THE WRITINGS OF JAMES MADISON 148 (G. Hunt ed. 1906).

17. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139-40 (M. Farrand ed. 1937).

Bill Barr has pointed, appropriately, to a number of restrictions on the appropriations power. It can be abused, and has been abused. Congress cannot use an appropriations bill, as it once tried to do, to prohibit certain executive officials from receiving their salaries; that was a bill of attainder and was struck down by the Supreme Court.¹⁸ Congress cannot use an appropriations bill to create a national church.¹⁹ It cannot use the funding power to interfere with the President's pardon power,²⁰ nor is it permissible under the Constitution to diminish the salaries of the President or federal judges.²¹ There are many restrictions on what Congress may do. My remarks are aimed particularly at the dangers of a President's wanting to conduct military operations as Commander-in-Chief, being denied funds, and attempting to carry out operations by going to sources outside of Congress. This leads us to the Boland Amendment.

You can object to the Boland Amendment, if you like, on policy grounds. However, I think the Boland Amendment was a legitimate constitutional constraint on the President. If the executive branch felt it was not legitimate, not constitutional, then it had several obligations to maintain accountability. One was to warn Congress that if you pass the Boland Amendment—I am talking particularly about the October 1984 version, which stayed in effect until October 1986—I will veto it. That is generally a sufficient threat. Because it is so difficult for Congress to override a veto, it will often delete a provision that is objectionable to the President. If Congress took the dare and kept the Boland Amendment in, then the duty of the President was to veto the bill.

You might say: "Well, he cannot veto the bill because the Amendment is only a small part of a massive continuing resolution." Well, he can. Reagan vetoed omnibus bills, including appropriations bills, supplemental bills, and continuing resolutions. The advantage in such a situation is clearly with the President. Generally, Congress will be unable to override a veto of an omnibus bill.

Finally, if the President decides to let the bill become law, he could, in his signing statement, say, "I am signing this bill into law, but I want to indicate that part of it, the Boland Amendment, is unconstitutional and interferes with my executive duties." That was not done either. So no-

18. *United States v. Lovett*, 328 U.S. 303 (1946).

19. *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968).

20. *Hart v. United States*, 118 U.S. 62 (1886); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

21. U.S. CONST. art. II, § 1, cl. 7 and art. III, § 1; *United States v. Will*, 449 U.S. 200 (1980).

where from the executive branch was there any suggestion of unconstitutionality about the Boland Amendment. There was never a word from the White House, the Justice Department, the Attorney General or the Office of Legal Counsel that the Boland Amendment was unconstitutional.

I think if President Reagan had defied the Boland Amendment by seeking financial or other assistance from foreign governments or private individuals, at a minimum this would have put the United States in a position of ridicule. The President would basically say: "I have some foreign policy objectives. Congress will not give me the money. I have to go out with a tin cup and get whatever I can from whatever nation is willing to chip in." You remember that part of the implementation of United States foreign policy in Central America depended on a \$10 million contribution from the Sultan of Brunei.

Last night, Richard Epstein was trying to figure out what might be a low point in government. Here is my candidate. Congress, in an ill-advised statute passed in August 1985, gave the State Department authority to solicit humanitarian assistance for the Contras.²² It was on the basis of that statutory authority that someone using the pseudonym "Mr. Kenilworth" (actually assistant Secretary of State Elliott Abrams) met in a park in London to solicit a contribution from Brunei.²³ This is the sorry way we conducted foreign policy. Other than the statutory source for Brunei, had the President decided to circumvent the restriction in Boland, I think he would have committed an impeachable offense. He would have taken a step, the most ominous step of all, in exercising both the power of the sword and the power of the purse.

The dispute in Iran-Contra leads to the whole question of quid pro quo, which some people call leveraging: namely, for the executive branch to tell foreign governments, such as Saudi Arabia, "Please give us money for the Contras, and you will get your arms sales in return." This is an open invitation to corruption in foreign and economic assistance.

Congress has attempted to place some restrictions on that practice. I think what we have seen the last couple of years is a fair amount of

22. Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 105(b)(2), 99 Stat. 1002, 1003 (1985).

23. Iran-Contra Affair, H.R. REP. NO. 433 and S. REP. NO. 216, 100th Cong., 1st Sess. 71, 148-49 (1987); *Iran-Contra Investigation, Joint Hearings before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. to Investigate Covert Arms Transactions with Iran* (Vol. 5), 100th Cong., 1st Sess. 48-49 (1987).

cooperation and a good understanding by President Bush that there is a legitimate principle at stake. This past year, 1989, language was added to the Foreign Assistance Appropriations Act to restrict quid pro quos. The bill was vetoed by President Bush, who had some concerns about how it would affect the ability of the President and executive officials to communicate with other nations.

But Bush's veto message said: "I am sensitive to the concerns that have prompted the adoption of Section 582."²⁴ After further negotiation, a compromise was reached. The public law signed November 21, 1989, the Foreign Operations Appropriations Bill, with an eye toward future Iran-Contras, provides:

None of the funds appropriated by this Act may be provided to any foreign government (including any instrumentality or agency thereof), foreign person, or United States person in exchange for that foreign government or person undertaking any action which is, if carried out by the United States Government, a United States official or employee, expressly prohibited by a provision of United States law.²⁵

If Congress prohibits something by law, such as with Boland, there would be restrictions in the future about efforts to circumvent it.

There is other language in this new section 582, which Bush signed into law, to respect prerogatives he has in communicating with other nations. This is an effort by President Bush and Congress to identify constitutional principles and design language to reconcile the competing needs of both branches. In signing the bill, President Bush said he agreed with the view expressed during the House and Senate debates that the language in the statute would prohibit quid pro quo transactions, which he understood to mean "transactions in which U.S. funds are provided to a foreign nation on the express condition that the foreign nation provide specific assistance to a third country, which assistance U.S. officials are expressly prohibited from providing by U.S. law."²⁶

Yesterday, Defense Secretary Cheney talked about the dispute over covert operations. Congress wanted to be notified within forty-eight hours of any covert action. I think another constructive compromise was hammered out between President Bush and Congress. There is a letter from President Bush, read yesterday by Secretary Cheney, saying that in "almost all instances" he would notify the Intelligence Committee ahead

24. 25 WEEKLY COMP. PRES. DOC. 1784 (Nov. 19, 1989).

25. 103 Stat. 1251, § 582(a) (1989).

26. 25 WEEKLY COMP. PRES. DOC. 1811 (Nov. 21, 1989).

of time of any covert operation. The letter goes on to say that in "rare instances" he would provide notification "within a few days" after the operation took place. Then he said—which I think is very constructive—that there might be incidents in which he does not notify Congress, but in such instances he would be operating solely on his constitutional powers, not on statutory authority.²⁷

Some executive officials had argued that the Intelligence Oversight Act of 1980 allowed the executive branch not to notify Congress at all, although the statute required the President to inform the Intelligence Committee "in a timely fashion" of covert operations.²⁸ Ten months went by before Congress learned about the shipment of arms to Iran, and then only after a newspaper in Lebanon revealed the operation. Was ten months, through a third party, timely fashion? As the letter from President Bush makes clear, such an interpretation of the statute is impermissible. The statute intends prior notice or notice within a few days. Anything beyond that, the President is operating under his reading of the Constitution of his prerogative powers.

I will close with what was talked about yesterday—the so-called CICA (Competition in Contracting Act) case that came up in 1984. President Reagan signed it and indicated that a provision giving the Comptroller General certain powers was unconstitutional.²⁹ You heard details yesterday that the Justice Department wrote a memo explaining why it was unconstitutional; Office of Management and Budget (OMB) Director Stockman told the agencies not to comply with that provision. Yesterday Ted Olson said that when the case reached the Supreme Court it was tossed out on procedural grounds. It is true that Congress had, that year, made a change in CICA, removing some of the objections raised by the Justice Department. I think it is also true, in addition to mootness, that the Justice Department was getting a beating in the Third and the Ninth Circuits. After two district court opinions upholding the statute, the Third Circuit affirmed.³⁰ Because of the Supreme Court's decision in *Bowsher v. Synar*,³¹ the Third Circuit felt it had an obligation to rehear

27. Letter from President George Bush to Hon. David L. Boren (Oct. 30, 1989).

28. Intelligence Authorization Act, Pub. L. No. 96-450, § 501(b), 94 Stat. 1975, 1982 (1980) (codified at 50 U.S.C. § 413(b) (1982)).

29. 2 PUB. PAPERS, 1984, at 1053.

30. *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875 (3d Cir. 1986); *Ameron, Inc. v. United States Army Corps of Engineers*, 610 F. Supp. 750 (D.N.J. 1985); *Ameron, Inc. v. United States Army Corps of Engineers*, 607 F. Supp. 962 (D.N.J. 1985).

31. 478 U.S. 714 (1986).

the case. It affirmed again.³² The Ninth Circuit later, in a similar case, came up with even tougher language sustaining the statute, warning the President that he does not have the power to “item veto” particular provisions he regards as unconstitutional.³³

I think that the Justice Department looked at those decisions and one other ingredient: *Morrison v. Olson*,³⁴ which repudiated the various strict, pure separation of powers doctrines from *Chadha*³⁵ to *Bowsher*. I believe the Justice Department felt it was going to lose overwhelmingly in the Supreme Court and asked the Court to dismiss the case, which it did.

One final note. Attorney General Meese said that at times there are things called “coercive aspects” in relations between Congress and the President. The picture I have in mind is Macduff, coming back for revenge and facing Macbeth with their swords drawn. They exchange a few words, but this is not the time for conversation. Soon there comes the phrase: “Lay on, Macduff!” The battle is about to start.

The stage of “Lay on, Macduff” was reached in the CICA case after the Administration said it was not going to implement part of the statute. The Justice Department indicated they would not implement it either, even if the district judge upheld the constitutionality of the statute. Congressman Jack Brooks—a very subtle guy, as you know—resorted to a “coercive aspect.” He was successful in having adopted, as an amendment to the authorization bill of the Justice Department, language that deleted all funds for the Office of Attorney General.³⁶ At that point, the Justice Department announced its intention to implement the disputed section in CICA.

32. *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986).

33. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1121-24 (9th Cir. 1988).

34. 487 U.S. 654 (1988).

35. *INS v. Chadha*, 462 U.S. 919 (1983).

36. H. REP. NO. 113, 99th Cong., 1st Sess. 11 (1985).

GEOFFREY MILLER*

The scenario driving this session is the appropriations measure of the sort: "No money appropriated by this provision shall be used to log contacts with members of Congress;" a measure which, in other words, prohibits the executive branch from doing something which it firmly believes it has the constitutional power to do.

In the interest of efficiency, I have boiled my thoughts on the subject down to three propositions: First, Congress has no more authority to control the executive branch by means of the appropriations power than it would have to control the executive branch under other provisions of the Constitution. Second, aside from matters such as appointments and impeachments, whatever Congress can do under other provisions of the Constitution to control the executive branch, it can also do under the appropriations power. Third, Congress may not use the appropriations power to circumvent other provisions of the Constitution.

Take the first thesis: Congress has no more authority to control the executive branch through appropriations than it would under other provisions of the Constitution. The obvious difficulty with this thesis is that there *is* an appropriations provision in the Constitution. Congress is given the authority to appropriate funds, and at least implicitly, the President and the executive branch cannot spend funds in the absence of an appropriation. What does this mean if not that Congress has some type of permission to control the executive branch through the appropriations power that is broader than Congress' authority to control the executive branch under other provisions of the Constitution?

I suggest that the appropriations clause serves four functions that do not involve a roving commission to control the executive branch. First, the framers had to allocate the appropriations authority to someone in order to avoid the danger of constitutional controversy and breakdown of relations between the branches of government. One could easily see that if the power had not been exclusively granted to Congress, it is quite possible that the President would assert inherent authority to draw on general revenue from the Treasury in order to carry out the President's powers under the Constitution or a statute. The framers foresaw this danger and dealt with it by granting the appropriations power exclusively to Congress.

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Second, the appropriations power serves as a mechanism for regular congressional oversight of the executive branch. Because the executive cannot spend funds that have not been appropriated, executive branch officials have to go back to Congress repeatedly to get more money. In that context, I think it is appropriate for members of Congress to ask, "What did you do with the money we gave you before?" That is oversight. The framers wisely created a mechanism for such oversight in the appropriations clause.

Third, the appropriations clause gives Congress a power to control—at least roughly—the level of executive branch enforcement or execution of the law. Say, for example, Congress prohibits insider trading in the stock market. In fact, it has done so. Now Congress wants to control, in a rough sense, how vigorously the prohibition of insider trading is enforced. It can do so by appropriating more or less funds to the relevant agency for the purpose of enforcing the prohibition. It can then effectively set the thermostat that controls the heat, as it were, of executive prosecutorial zeal.

Fourth, and most important, the appropriations clause is, I believe, a tool for fiscal responsibility. How is the appropriations power used to accomplish fiscal responsibility? The clause requires Congress to review programs on a regular basis in order to see if they are working, to evaluate whether the level of funding is appropriate, and to compare funding for one program with that of other programs. It is no accident that the appropriations clause is in the same sentence of the Constitution as the statement of accounts clause, which requires regular publication of the government's fiscal books. Obviously, the latter clause is intended to produce fiscal responsibility. I think the appropriations clause was also so intended.

These are four good functions that the appropriations clause fills. Does the clause also provide Congress with a roving commission to control the actions of the executive branch? It does not. Such a roving commission would be entirely inconsistent with the scheme of the Constitution. We should never forget that article I of the Constitution begins with the statement: "All legislative Powers herein granted shall be vested in a Congress. . . ."³⁷ Compare that with article II: "The executive Power shall be vested in a President . . .,"³⁸ not "all executive pow-

37. U.S. CONST. art. I, § 1.

38. U.S. CONST. art. II, § 1.

ers *herein granted* shall be vested in the President.” I think the language is significant, because it implies that the framers intended Congress to have *only* those powers set forth in article I of the Constitution and not other powers. The obvious reason for so limiting congressional power is the concern expressed by the framers and the authors of *The Federalist Papers* about congressional domination of the government. One way to control congressional overreaching is to narrowly limit and circumscribe the powers that Congress can exercise—only those in article I and not others.

A general appropriations authority to control the executive branch would circumvent, undermine, indeed vitiate that careful allocation, that laundry list of powers given to Congress. For this reason, the scheme of the Constitution does not permit an interpretation in which Congress can exercise a roving mandate under the appropriations clause.

There is a connection between this view of the appropriations power and the necessary and proper clause. Why is there a necessary and proper clause with respect to Congress, and not with respect to the executive branch? It is because the framers understood that Congress had only those authorities set forth explicitly in article I. Therefore, the framers were worried that the Constitution might be too restrictive and gave a little bit of an out in the necessary and proper clause. Such a device was not necessary for the executive branch, because the executive branch has a reservoir of inherent authority to take actions not specifically mentioned in the Constitution. The necessary and proper clause should be understood in that way: not as a massive grant of power to Congress, but as an attempt to prevent the possibility that the powers specified in article I would be read in an overly restrictive fashion.

I want to turn to the second part of my thesis, which is that Congress can use the appropriations power to control the executive branch to the same extent that it can control such actions through other provisions in the Constitution. All executive action involves the expenditure of time by some executive official. Time is compensated by salary. Salaries are paid pursuant to appropriated funds. Thus, as a general proposition, the appropriations power gives Congress the authority to control the executive branch—subject to the limitations I discuss elsewhere in this paper.

Finally, consider the third proposition, namely, that Congress may not use the appropriations power to circumvent other provisions of the Constitution. This is not a controversial position, but it may be worth cate-

gorizing the substantive limits on the appropriations power somewhat differently than has been done before. Four points are worth noting.

First, Congress cannot use an appropriations measure to *prohibit* the President from doing something that he or she is constitutionally *required* to do. For example, in the event that an administrative agency is found to have engaged in intentional discrimination in hiring on the basis of race, I believe the President and his or her subordinates would have an obligation to correct that situation. And if Congress, for some strange reason, were to pass an appropriations measure denying funds to remedy the situation, that statute would be unconstitutional. The President could take corrective action and could freely ignore the unconstitutional statute.

Second, Congress cannot use the appropriations power to *deny* the President the power to do something that the President has the constitutional discretion to do. For example, Congress passes an appropriations measure: "No funds shall be used for the purpose of pardoning or granting clemency to any individual in connection with crimes committed in aid of the Nicaraguan Contras." That is an unconstitutional intrusion on the pardon power, and the President does not have to follow the measure.

Third, Congress cannot use the appropriations power to *force* the executive branch to do something that it is constitutionally *prohibited* from doing. Congress cannot pass a statute appropriating funds for the construction of Presbyterian churches. The President does not have to carry out that appropriations measure if one is passed.

Finally, Congress cannot use the appropriations power to *require* the President to do something the President has the discretion, or an inherent authority, *not* to do. For example, if Congress passed a statute appropriating money for the purpose of the President signing legislation establishing federal funding for abortions, I do not think there is anybody who would say that such a statute would be constitutional.

These examples are pretty uncontroversial, and they illustrate the fact that the dispute here is not so much over the scope of the *appropriations power*, as over the scope of *inherent executive authority*. Most people would agree that the appropriations power cannot be used to circumvent or intrude on the President's inherent authority. The question is, what is the scope of that inherent authority? A few years ago, I had the privilege

of addressing the Federalist Society on the War Powers Resolution.³⁹ I suggested that the sixty day sunset provision in that statute was unconstitutional because it intruded on the President's inherent authority to commit troops to hostilities in foreign countries short of war. That sunset provision would be equally unconstitutional if framed as an appropriations measure. But its validity does not have to do with whether it is an appropriations measure or a substantive measure; it has to do with the scope of the President's inherent authority.

I conclude by reminding you of Madison's famous statement in *Federalist No. 48*: "[t]he legislative department is every where extending the sphere of its activity, and drawing all power to its impetuous vortex."⁴⁰ Madison understood that the legislature, while a magnificent and necessary institution, also poses the danger of accumulating too much power. I would ask, given that understanding of the dangers of legislative supremacy—an understanding still appropriate today—whether it is really sensible to think that the appropriations power gives Congress a roving mandate to control the executive branch in ways that would be unavailable to Congress under other provisions of the Constitution? I think not.

KATE STITH*

We have been told that the prevailing interpretation of the appropriations clause⁴¹ on Capitol Hill is that "it gives Congress an omnipresent veto over every conceivable action of the President through the ability to withhold funding."⁴² I do not know who has this view. To recognize that Congress has exclusive control over the purse-strings of the federal

39. See *The President's Powers as Commander-in-Chief versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 31 (1988).

40. THE FEDERALIST NO. 48, at 250-51 (J. Madison) (G. Wills ed., 1982).

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41. U.S. CONST. art. I, § 9, cl. 7: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."

42. Sidak, *Spending Riders Would Unhobble the Executive*, Wall St. J., Nov. 2, 1989, at A18, col. 3 [hereinafter, Sidak, *Spending Riders*]. Mr. Sidak's argument that the appropriations clause and other constitutional provisions do not vest Congress with exclusive control over the fisc is presented in Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 [hereinafter, "Sidak, *President's Power*"]; that article is presented as a response to my earlier article, Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

government⁴³ is a far cry from concluding that Congress may attach any conceivable condition or limitation on federal funding.⁴⁴ I, for one, agree that when the Constitution confers the President exclusive, enumerated authority, Congress may not assume that authority as its own by the simple expedient of cutting off or conditioning appropriations.⁴⁵

I have heard little disagreement this morning about the reach of the Constitution's appropriations clause. Rather, we seem to disagree about the reach of the necessary and proper clause. Stated another way, we disagree on the scope of the Presidential power on which the legislature cannot intrude, by appropriations limitations or any other means.

We also disagree, I think, on the appropriate fora and mechanisms for determining which Presidential powers are subject to legislative regulation. I submit that the courts play a critical role here.

Finally, we disagree on how important Congress' appropriations power is. I believe Congress' exercise of its power over the purse is essential to defining the separation of powers, not because the power of the purse greatly expands legislative power, but because it is the clearest, purest assertion of legislative power.

Congress' power to appropriate originates, not in the appropriations

43. See Stith, *supra* note 42, at 1348-52 (Congress has exclusive constitutional power to authorize expenditure of federal funds); H.R. REP. NO. 433, S. REP. 216, 100th Cong., 1st Sess. 412 (1987) ("Iran-Contra Report") ("The appropriations clause was intended to give Congress exclusive control of funds spent by the Government, and . . . an absolute check on Executive action requiring expenditure of funds."); Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758, 761-65 (1989). Mr. Sidak apparently is referring to these sources in purporting to characterize the "prevailing" congressional understanding of the power of the purse. See Sidak, *President's Power*, *supra* note 42, at 1168-69. The understanding that Congress has exclusive control over the purse strings of the federal government is indeed widely shared. Consider, for example, the statement of then-Secretary of State George Shultz at the Iran-Contra hearings: "You cannot spend funds that the Congress doesn't either authorize you to obtain or appropriate. That is what the Constitution says, and we have to stick to it." *Iran-Contra Report*, *supra* at 412; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 96 (1972); Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFF. 284, 297 (1989) ("The significance of Congress' power of the purse should not be misconceived. Under the Constitution the president cannot spend a dollar unless Congress has authorized and appropriated the money.").

44. See *Iran-Contra Report*, *supra* note 43, at 406; L. Henkin, *supra* note 43, at 113 (discussing unconstitutional conditions on appropriations); Henkin, *supra* note 43, at 297 ("But where the President has independent constitutional authority to act, Congress, I believe, is constitutionally bound to implement his actions, notably by appropriating the necessary funds . . ."); Fisher, *supra* note 43, at 762 ("The congressional power of the purse is not unlimited. Congress cannot use appropriations bills to enact bills of attainder, to restrict the President's pardon power or to establish a national religion.").

45. See Stith, *supra* note 42, at 1351 ("Although Congress holds the purse-strings, it may not exercise this power in a manner inconsistent with the direct commands of the Constitution.").

clause, but in the necessary and proper clause of article I, section 8. The concept of "necessary and proper" legislation to carry out "all . . . Powers vested by this Constitution in the Government of the United States" includes the power to spend public funds in ways that do not transgress the Constitution. The appropriations clause then imposes a limitation *on the executive branch*: The President and other offices of the federal government may not spend money without legislative permission.⁴⁶

If we do not agree that the appropriations clause prohibits unauthorized augmentation of appropriations, then I do not know where our conversation can begin. The appropriations requirement would be superfluous if the executive branch could avoid appropriations limitations by transferring funds among appropriations accounts, by selling government assets and services, or by independently financing executive activities with private funds.⁴⁷

The power to appropriate rests, therefore, *exclusively* in Congress. But it is *not* a *plenary* power—Congress' exclusive power of appropriation does not trump the rest of the Constitution.⁴⁸ For instance, the first amendment imposes a limitation upon the exercise of all government powers,⁴⁹ including Congress' power under the necessary and proper clause to appropriate public funds. Similarly, the legislative veto violates separation of powers principles, whether the veto is explicit as in *Chadha*⁵⁰ or is accomplished indirectly, by conditioning appropriations.⁵¹ Nor may Congress use funding legislation to deny or direct the

46. Because "no Money" may be withdrawn from the treasury without legislative appropriations, the executive branch cannot spend tax funds or other federal government resources without advance legislative permission to do so. Elsewhere I derive two principles which delineate the appropriation power. First, the Principle of the Public Fisc: All funds belonging to the United States—received from whatever source, however obtained, and in whatever form—are public monies subject to public control and accountability. Second, the Principle of Appropriations Control: All expenditures from the public fisc must be made pursuant to constitutional "Appropriations made by law." See *id.* at 1356-60.

47. Of course, the idea of independent financing with private funds is attractive in an age of chronic deficits. I once gave a talk (at Valparaiso Law School, in October 1987) about executive solicitation of funds which I entitled "Government Spending Without Taxes or Deficits."

48. See, e.g., *United States v. Lovett*, 328 U.S. 303 (1946) (Congress may not use appropriation power to effect a bill of attainder, in contravention of United States Constitution Art. I, § 9, cl. 3); *United States v. Will*, 449 U.S. 200 (1980).

49. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (Congress may not exercise its legislative authority in a manner that offends other provisions of the Constitution).

50. *INS v. Chadha*, 462 U.S. 919 (1983).

51. See, e.g., Pub. L. No. 101-136 § 610, 103 Stat. 783, 819 (1989) (appropriation bill providing that "None of the funds made available pursuant to the provisions of this Act shall be used to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolu-

pardon power⁵² or any other exclusive constitutional power of the President.⁵³

But what *are* these areas of exclusive Presidential power? I believe *this* is where the disagreement on this panel begins. In several areas where Congress has sought to affect executive behavior through limitations or conditions on appropriations, it is claimed that Congress has exceeded its power of the purse. But the real issue is not the scope or reach of Congress' power of the purse; the real issue is the scope and reach of the necessary and proper clause.

Among the questions we must face are these: Does the President have sole constitutional authority to decide what arguments "the United States" shall make to the Supreme Court?⁵⁴ Does the President have sole constitutional authority to determine the process of inter-agency review preceding promulgation of regulations?⁵⁵ Does the President have sole constitutional authority to decide whether to stop all U.S. aid to a particular government or insurgency?⁵⁶ In my view, in each of these areas the

tion of disapproval duly adopted in accordance with the applicable law of the United States."'). This mischievous provision appears to provide for funding cutoff in the event of a two-house legislative veto. See Sidak, *President's Power*, *supra* note 42, at 1213-14.

52. See U.S. CONST., art. II, § 2, cl. 1.; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871).

53. For instance, the President's exclusive power to receive ambassadors, U.S. CONST., art. II, § 3.

54. See Pub. L. No. 98-166, 97 Stat. 1071, 1102 (1983) (provision in appropriations act for, inter alia, the Department of Justice, proscribing use of funds for "any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance. . ."). The Reagan Administration narrowly interpreted this provision to proscribe "attempts to seek a reversal of the [judicial] holdings of a certain line of previously decided cases" and expressed the view that even as thus narrowly interpreted the provision might be unconstitutional. Statement on Signing H.R. 3222 Into Law, 19 WEEKLY COMP. PRES. DOC. 1619 (Nov. 28, 1983).

55. See, e.g., Pub. L. No. 101-136, 103 Stat. 783, 792-93 (1989) (providing that "none of the funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders. . . ." pursuant to Executive Order 12,291 (1981)). The executive order in question provides that OMB shall undertake cost-benefit analysis of a variety of proposed administrative regulations. Gregory Sidak argues that such legislative interference with OMB unconstitutionally limits the President's constitutional authority under the "recommendation clause," U.S. CONST. art. II, § 3. See Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2122 (1989). Yet the appropriation rider at issue does not purport to limit the President's authority to propose legislation, nor even to undertake analysis in anticipation of legislative recommendations. Rather, in providing that agricultural marketing orders should not be subjected to cost-benefit analysis by OMB, Congress is structuring the manner in which particular agricultural legislation is implemented.

56. I refer here, of course, to the so-called "Boland" Amendments, in particular, to Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (1984) ("Boland II"), which prohibited the CIA, the Department of Defense "or any other agency or entity of the United States involved in intelligence activities"

Executive has important constitutional powers, but pursuant to constitutional grants of legislative power,⁵⁷ Congress does too. Most of the disagreements discussed at this conference involve the President's prerogatives in foreign affairs, not an area of my immediate concern. Hence, I will leave it to others to pursue these issues.

Let me instead discuss two arguable difficulties with the concept of an appropriations power that is at once *exclusive* but not *plenary*. One difficulty with this understanding of Congress' power of the purse is that it permits constitutional deadlock. I have asserted that only Congress *may* appropriate. But I also recognize that sometimes Congress *must* appropriate (or at least may not attach certain conditions to its appropriations).

What happens if Congress imposes a spending limitation or condition that unconstitutionally interferes with an exclusive Presidential power? This is the separation-of-powers version of the hypothetical immovable object meeting an irresistible force. What "gives"—Congress' exclusive power over the purse, or the President's exclusive power in the area of dispute?

Gregory Sidak has proposed that there is a Presidential power of "excision" over unconstitutional appropriations provisions.⁵⁸ This is a fancy term that appears to mean the President should ignore a spending limitation he finds constitutionally offensive. The idea is that the President openly and clearly proclaims to Congress and the American people his intention to ignore or violate the ostensibly unconstitutional statutory provision: "This spending condition is unconstitutional, and therefore, I am going to ignore it." Even under this theory, unarticulated or secret

from spending "funds available" in support of the armed Nicaraguan opposition to the Sandinista regime. The theory of Congress' power of the purse set forth in Stith, *supra* note 42, only once in the text (with accompanying footnotes) referred to the Boland Amendment controversy. *Id.* at 1360-61 and nn. 80, 81, 86, 89. This brief discussion was critical of Boland II for its ambiguity and even left open the possibility that under some interpretations, Boland II might be unconstitutional. *See id.* at 1362, n.89. I was thus quite surprised to learn that my article had "repeatedly refer[red] . . . [to] the private funding of the Contras," that the Iran-Contra controversy was the "starting point" for my theory, and (alas) that my theory of Congress' preeminence over the power of the purse might be "result-oriented." *See Sidak, President's Power, supra* note 42, at 1223-24.

57. In addition to the powers provided in article I, see also U.S. CONST. art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States."

58. *See Sidak, Spending Riders, supra* note 42. This theory is presented at greater length in Sidak & Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 85 NW. U.L. REV. 701 (1990).

excisions could have no pretense of lawfulness.⁵⁹

I can see the short-term advantage of this idea to the Executive. As Mr. Sidak tells us, the President cannot lose. If the dispute gets to the courts, the courts may rule against the President—but in that event the President is in no worse a position than he would have been if he had originally abided by the spending. And maybe, we are informed, doctrines of judicial restraint will lead the courts to avoid deciding the conflict between the two political branches of government.⁶⁰

There is a great disadvantage to this idea. The President can and should resist legislative encroachment in areas of exclusive executive authority. But his initial response should not be to create a constitutional crisis by ignoring or violating statutory law. The President's *first* weapon against unconstitutional legislation should be the major legislative weapon in his constitutional arsenal, his veto.

And when that preferred weapon is just too expensive or too cumbersome—because, for instance, the offending provisions are buried in omnibus spending bills—the President's *second* response should be recourse to the courts.⁶¹ If the President believes that a funding provision is unconstitutional, why should he not simply seek declaratory and injunctive relief? There may arise the extraordinary case in which the President believes that fealty to fundamental constitutional values requires immediate spending in violation of conditions on appropriations. But even in these extraordinary cases, the President can and should quickly seek judicial resolution of the underlying constitutional dispute. What kind of message would a President be sending to the country by violating the terms of a statute and simultaneously arguing that no court may review his actions?

To be sure, the courts have increasingly invoked doctrines of nonjusticiability in refusing to review challenges to Presidential action, including allegations that the executive branch has failed to abide by funding limi-

59. Cf. *Iran-Contra Report*, *supra* note 43, at 406 (accusing the Reagan Administration of waiting until years after the President had signed legislation containing the "Boland II" provision to assert that the provision exceeded Congress' authority and thus could be disregarded).

60. See Sidak, *Spending Riders*, *supra* note 42.

61. Cf. Presidential Statement on Signing H.J. Res. 372 Into Law, 21 WEEKLY COMP. PRES. DOC. 1490-91 (Dec. 12, 1985) (in signing Gramm-Rudman-Hollings balanced budget legislation, President Reagan noted "serious constitutional questions" raised by, *inter alia*, its assignment of role to Comptroller General and expressed his expectation that these "constitutional problems will be promptly resolved" in court).

tations.⁶² When members of Congress or others *have* been able to bring the President to court, the courts have seldom held that the President acted extra-constitutionally. Instead, the courts have tended to find implicit legislative delegation or approval or acquiescence in the disputed Presidential action.⁶³ Especially when the President's disputed actions involve national security or foreign affairs, there is an understandable reluctance to hold that the President violated the law.⁶⁴

The reluctance of the courts to subject some species of executive action to thorough constitutional review is hardly justification for the President paying heed only to his own vision of the Constitution, waiting for someone to stop him, knowing that probably no one can. Indeed, it is arguably an invitation to the Executive to place more, rather than less, faith in the courts. Judicial deference to the President in the area of foreign affairs means that the President bears a special responsibility to avoid a constitutional crisis—a special responsibility *not* to spend in violation of a statute, with only his own interpretation of the Constitution as authority. When a purportedly immovable object (an offensive funding condition) is in the President's path, he should *not* respond with irresistible force (acting in violation of the funding statute). Whenever possible, the President should appeal to the courts to resolve this constitutional impasse.

Let me acknowledge one other difficulty with the idea of an exclusive, but limited, appropriations power. If I am right that Congress' power of the purse is not itself a source of legislative power, then why all the limitations on appropriations? Why, especially in recent years, does Congress so often resort to conditions on appropriations instead of direct prohibitions or prescriptions as a way of limiting executive action?

The partial answer is that as long as the President does not have line item veto power, appropriation limitations in massive spending bills, or even in critical authorization statutes, may be nearly veto-proof.

62. For a comprehensive discussion of Supreme Court and lower court decisions in the area of foreign affairs that invoke nonjusticiability doctrines (including ripeness, mootness, and standing) in response to challenges to Presidential authority, see H. KOH, *A POWER SHARED: THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 137-148 (1990).

63. See, e.g., *Japan Whaling Ass'n. v. American Cetacean Soc'y*, 478 U.S. 221 (1986); *Department of Navy v. Egan*, 484 U.S. 518 (1988); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Regan v. Wald*, 468 U.S. 222 (1984).

64. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (holding that challenge to Presidential treaty-making is nonjusticiable); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding seizure of property pursuant to Presidential hostage-release agreement).

But there is more to it than legislative politics. Money is the essential oil of government. If you cannot spend money on it, you cannot do it. Hence, when Congress withholds money, neither the President nor the courts can readily claim legislative acquiescence, implicit approval, a lack of preemption, or effective delegation of authority. Congress uses appropriations limitations because they are red lights. In most instances, it is hard to say you did not see them or that you thought they were green.

I readily agree that on occasion appropriation conditions are less than clear and determinative. The Boland Amendments, I submit, were unclear,⁶⁵ and their ambiguity is at least partly to blame for the ensuing constitutional crisis.

Unlike the vulnerable “partisans of congressional power”⁶⁶ to whom Gregory Sidak has responded, I do not believe that Congress is the only interpreter of its power of the purse. There are constitutional limits on appropriations conditions, and the President has an important constitutional role in ensuring that these limits are not transgressed.

But there are not *many* areas in which the President has exclusive power under our constitution; if there were—if Congress often had to defer to the President on how and where to spend money—it would make little sense to place the power of the purse, as the Constitution does, in the legislative branch.

Finally, just as Congress is not the sole interpreter of its own powers, the President is not the sole interpreter of his powers. Nor should he try to be.

QUESTIONS AND ANSWERS

GREG SIDAK:* I would like to ask a two-part question. I would like to address the first part to Professor Stith and Dr. Fisher, and the second part to Professor Miller and Assistant Attorney General Barr.

It has been asserted that no one is claiming that the appropriations power is an omnipresent legislative veto on the President. I do not agree, and I quote from the Iran-Contra Report, to which, I might add, Dr. Fisher made a contribution to drafting: “The appropriations clause was

65. See Stith, *supra* note 42, at 1361 n.86.

66. See Sidak, *Spending Riders*, *supra* note 42.

* Covington & Burling, Washington, D.C., A.B. 1977, A.M., J.D. 1981, Stanford University.

intended to give Congress exclusive control of funds spent by the Government, and to give the democratically elected representatives of the people an absolute check on executive action requiring expenditure of funds."⁶⁷ Now, I consider that language to be fairly clear—that this is a very sweeping assertion of power by Congress.

With that premise, let me ask: If we are talking about a sweeping grant of power to Congress—one, as Dr. Fisher suggests, that could even lead to the impeachment of the President if it were breached—should we not be able to find more substantial support in the text of the Constitution, the debates of the Convention, and the history of the period during which the Constitution was drafted? In particular, I am troubled by Dr. Fisher's reliance and emphasis on George Mason's comment about the purse and sword, because if you look at the sentence immediately preceding that one in the records of the Constitutional Convention, you will find that Mason was actually warning about usurpations by the Legislature on the Executive.⁶⁸ So usurpation in this respect is certainly a two-way street. I would like, therefore, to ask Professor Stith and Dr. Fisher to tell us how their interpretation of the appropriations clause can be grounded in the text, history, and structure of the Constitution, so that it is a theory based on something more than just contemporary political thought.

Now for the question that I would like to direct to the other two panelists: If the appropriations clause is not an omnipresent legislative veto on the President—if it is something more like what Professor Miller has suggested, a duty on the part of Congress to engage in fiscal accountability and responsibility—then what happens when Congress refuses to appropriate money for the execution of an article II duty or the exercise of a prerogative textually assigned to the President? May the President spend in the absence of an appropriation, and if so, how much? What is the limiting principle on the President's ability to spend in the absence of appropriations?

FISHER: My remarks here and also in my writings are not based merely on contemporary political thought. They are based on what the

67. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 412 (1987).

68. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 81 (1840) (1966 ed.). See also Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1168-70.

framers said at the time, and what the framers understood about the history before them. I wrote a book in 1975 called *Presidential Spending Power*. It has been an interest of mine for a long time. I had never heard at any time the claim that was made in Iran-Contra, namely, that if Congress cuts off funds, no sweat; we can go off to foreign governments and private citizens and get whatever we want to accomplish Presidential objectives. I have never even heard of such a theory before, because it is a contemporary view, I think, an appalling view, one that would have shocked the framers. And I think they were very firm at the time of Madison that you could not allow the Commander-in-Chief both to direct the armed forces and fund them. That was totally obvious. It was very, very clear.

As for George Mason's warning that Congress might usurp executive power, that is true, and it was a concern of many framers. But there is nothing incompatible between Mason's warning and his insistence that the purse and the sword be kept separate.

STITH: Let me assure you that if my theory were based on contemporary political thought, or indeed on my own predilections in the recent areas of dispute, it would not have recognized Congress' exclusive power of the purse. As I make very clear in the *Yale Law Journal* article, Congress has hardly exercised that power with care and foresight. Yet, it is abundantly clear that the history, structure, and wording of the Constitution place the power of the purse in the legislative branch alone.

Hence I found the second part of Mr. Sidak's question more interesting: what does the President do when Congress fails to appropriate where it constitutionally must? What I have suggested today is that he should either veto or seek resolution in the courts. Except in some dire circumstance I cannot now foresee, he should *not*, as you propose, spend without appropriations and then argue that the courts should not review his action.

MILLER: I think, in answer to your question, you do have to go ahead and spend. The money is there if you take it. The President is constitutionally obligated to take it. I want to briefly express concern that the President not go too quickly to the courts because that would intrude the courts into the process of compromise and conciliation between Congress and the executive branch. The courts are necessary, but I think they are best reserved for situations when there is truly a constitutional breakdown between the two political branches of government.

BARR: I think there are two parts to the question. The real hard part is, what gives Congress the power to subdivide and selectively fund the spectrum of the President's constitutional powers, whatever they may be? We can argue all day about what is the President's constitutional power. But, once defined, what gives Congress the right to classify it, and then to restrict funds to specific classifications? Where does the power come from to say, "You can only spend this one million dollars on foreign relations, and cannot spend it on intelligence collection and on prosecuting criminals?" That is the real difficult question about the appropriations clause. The obvious restrictions and conditions are pretty easy to detect. But what gives Congress the power to put that kind of restriction on funds when you are talking about the President's constitutional powers.

Now the necessary and proper clause has been referred to, but I would suggest another reading of that clause: The clause empowers Congress to carry into execution the President's powers. Congress can create the Department of State because that carries the President's power into execution. But what is the source of the power to allocate only a set amount of money to the State Department and to restrict the money for that activity alone, prohibiting the President from using it to carry out some other constitutional power, say prosecuting criminals? That kind of restriction is not "necessary and proper" for carrying into execution the powers of the President of the United States. If that power is not under the necessary and proper clause, then Congress has to find some other source of power to impose such restrictions.

So there may be an argument that if the President finds no appropriated funds within a given category to conduct activity, but there is a lot of money sitting somewhere else in another category—and both categories are within his constitutional purview—he may be able to use those funds. There is an argument along those lines. The other part of the question really goes to the point made in Kate Stith's article. The argument is made that the appropriations clause really says, "Look, not only do we give you the money, and therefore, we can attach strings to it, i.e., the power to specify each object, in however great detail we want and restrict you to those categories, but you cannot get money anywhere else." It may be that the President cannot get money anywhere else. But the case has not been made for that here. That is not what the appropriations clause says.

The pivotal factor in the Constitution is that it gave to Congress the

power to tax—to coercively take money from the people. The appropriations clause makes sure the money taken from the people is going to be controlled by the conjunction of legislative and executive power that is involved in passing the law. But the appropriations clause does not say that the President cannot use other sources of funds. The President is not the King, and Congress is not the Parliament under the new order.

A case could be made that the President cannot go out and get money from other sources, but in my mind, it does not rest upon the appropriations clause. It seems to me someone might argue that the President cannot hold property except as property of the United States. And therefore, under Congress' power to control the disposition of property, it can require the President to put it into the Treasury, thus putting it under Congress' control. To me, that would be a better argument than trying to extract from the Constitution some general principle that only appropriated money can be spent.

AHKIL AMAR:* My question is mainly for Professor Barr. It is indeed a perplexing set of issues that the panel has brought to our attention, and I am not sure that I got to the bottom of them. But I am struck, nevertheless, with the unanimity of the panel on the basic irrelevance of this topic to the issue before us: that whatever limitations there are on the spending power they really flow from other parts of the Constitution; that the appropriations clause is somewhat formal. It simply cross-references us to other parts of the Constitution. The necessary and proper clause also cross-references us to other parts of article I, section 8.

An analogy to the tenth amendment comes to mind. It specifies that there are certain things the federal government may not do, but to define those limitations, we must look beyond the tenth amendment to article I, section 8 and other provisions of the Constitution.

Given that unanimity goes to what Congress cannot do directly, it is extremely problematic for Congress to do something indirectly by the appropriations power. It seems to me, that the example about lump sum versus more itemized appropriations is a little problematic. I am not sure that conclusion follows from the premises on which everyone seems to agree. What your hypothetical assumes is that Congress is doing something that is independently unconstitutional because it violates individual rights.

Let us take the establishment clause. Congress can violate the estab-

* Professor, Yale Law School.

ishment clause through itemized funding that denies appropriations to Catholic hospitals. But the same thing could happen systematically if there was a lump sum fund, and the President refused to allocate the fair share of money to Catholic hospitals. So I do not think that the lump sum versus itemized issue really follows, in any way, from the premise that elsewhere in the Constitution the limits are to be found.

Let us now move away from individual rights, which perhaps symmetrically constrain the President and the Legislature to separation of powers limitations, both articles II and III, to limitations on what Congress might be able to do. We mentioned original jurisdiction. It is not as clear as, perhaps, you think that Congress has the direct power to limit original jurisdiction over controversies in which states shall be a party. Let us talk about foreign affairs. If we are going to mark carefully the appropriations clause, if we are going to say that there is no congressional oversight, it is not clear that there is a foreign affairs power as such in article II. There is power to receive ambassadors, but that is capable of different readings. It could have a purely ministerial reading.

Finally, let us take the third hypothetical you offered about Congress using the appropriations power to enforce laws. If there is a problem about repealing a law, is it not because there are certain kinds of laws, perhaps, that Congress cannot repeal because they are afraid of vested rights?

BARR: In a way, the question goes to the last answer I gave. Again, the central problem in thinking about the appropriations clause is this: Where does Congress get the power to subdivide activity and restrict funds when the President is acting under constitutional powers? We could argue all day about what is, or is not, within the President's constitutional power. And that is why I tried to use examples in which most people would say the President's power is clear—to negotiate treaties or to pardon—because otherwise we would cloud up the issue. And a lot of your question had to do with arguing what is or is not Presidential power.

The reason Congress frequently tries to control the execution of the law, rather than the content or rule of law, is because it is attempting to avoid responsibility. One of the reasons we have separation of powers is to prevent that.

MEESE: I think you will agree that the panelists have demonstrated that we have indeed an issue in which the tensions that were referred to

earlier today continue. I think we have had an excellent presentation of the parameters of the debate, and the various points of view regarding these particular clauses.

