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Kenneth W. Graham Jr.

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GOVERNMENT PRIVILEGE: A CAUTIONARY TALE FOR CODIFIERS

*Kenneth W. Graham, Jr.**

“Who-so-ever in writing a moderne Historie, shall follow truth too neare the heeles, it may happily strike out his teethe.”

Sir Walter Raleigh¹

Some scholars want to codify the law of privileges.² Even sober members of the Advisory Committee on Federal Rules of Evidence now toy with the idea.³ Most readers will weigh such proposals in light of what they know (or think they know) about familiar privileges such as those for attorney-client or doctor-patient communications. But perhaps weighing the arguments for codification in light of some unfamiliar privileges will prove more illuminating.

That, at any rate, is why I invite you to trek into the jungle of government privileges—to see how the strange beasts there evolved in ways that differ from the more domesticated species. Converting common law privileges to statutory form seems a kind of “genetic modification” whose dangers may best be seen in animals other than the dog by the fireplace.

* A.B., J.D., University of Michigan. The author thanks Professor Gael Graham of Western Carolina University and Steven Gilbert, Esq., for reading and commenting upon a draft of this article.

1. SIR WALTER RALEIGH, THE HISTORY OF THE WORLD 144 (C.A. Patrides ed., Temple Univ. Press 1971) (1652), *quoted in* Jonathan Spence, *The Whole World in Their Hands*, N.Y. REV. BOOKS, Oct. 9, 2003, at 37.

2. *See, e.g.*, Timothy Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 60 n.1 (2002).

3. *See* Meeting Minutes, Advisory Committee on Evidence Rules, at Washington, D.C., at 11 (Apr. 19, 2002), at <http://www.uscourts.gov/rules/Minutes/402EVMin.pdf>.

Few readers may realize that the government enjoys more privileges than any other litigant. In addition to privileges available to ordinary citizens and organizations, such as the attorney-client privilege,⁴ the government can claim many privileges available to no other litigant.⁵ Readers may know of the privileges for secrets of state, official information, and the identity of informers, but probably have not heard of the mental processes, bank examiner, or police surveillance location privileges.⁶

Even readers familiar with the major government privileges may not appreciate how they were shaped by ambitious bureaucrats, craven judges, and corrupt legislators—the people who will have more to say about privilege codification than law review writers. So when we savor the rosy pictures painted by the writers, we ought to at least glance at the picture by Dorian Gray.

Like all horror pictures, this one begins placidly.

I. THE GARDEN OF CONVENTIONAL WISDOM⁷

The dominant evidentiary ideology—the so-called “Progressive Procedural Paradigm”⁸—dictates several tenets of privilege policy widely accepted by scholars and relevant here:

4. See 24 CHARLES WRIGHT & KENNETH GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5475 (1986). Though the government attorney-client privilege will not be discussed here, readers should recall that atrocities similar to those that will be discussed have been perpetrated under cover of the attorney-client privilege. An example is the torture of prisoners in violation of international law. See Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, at 4.

5. For a more or less complete bestiary, see WRIGHT & GRAHAM, *supra* note 4, § 5664 (state secrets privilege); 26 *id.* § 5672 (classified information privilege); 26A *id.* § 5673 (executive privilege); 26A *id.* § 5674 (judicial privilege); 26A *id.* § 5675 (legislative privilege); 26A *id.* § 5680 (deliberative process privilege); 26A *id.* § 5681 (investigative files privilege); 26A *id.* § 5682 (housekeeping privilege); 26A *id.* § 5703 (1992) (informer privilege).

6. The mental processes privilege is described in 26A *id.* § 5680 (Supp. 2004). The other oddball privileges are collected in 23 *id.* § 5431. For an example of the “spy nest privilege,” see *Johnson v. State*, 811 A.2d 898, 900 (Md. Ct. Spec. App. 2002) (collecting similar state and federal cases).

7. Readers already familiar with the writer’s ideological biases can safely skip this Part. Others do so at their peril.

8. For more on the Progressive Paradigm, see Kenneth W. Graham, “*There’ll Always Be An England*”: *The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1228–31 (1987).

- Courts need all the evidence they can get to rationally decide the questions of fact that determine the proper application of the substantive law.⁹
- Courts impose on every person a duty to provide that evidence.¹⁰
- Courts reluctantly create those exceptions to the duty to provide evidence that we call “evidentiary privileges.”
- Courts justify evidentiary privileges instrumentally; that is, judges recognize a privilege only when the loss of evidence resulting from exercise of the privilege costs less than the benefits of encouraging desirable behavior by those who hold the privilege.
- To encourage such desirable behavior, courts must construct (and apply) privileges so that the privilege holder can predict the outcome of a privilege claim at the time she engages in the privileged behavior.
- People can predict how courts will apply the privilege if the privilege rule states with tolerable certainty just how judges are likely to apply it (scholars call this feature of privileges “uniformity”).
- To reduce the cost of privileges, most of them do not permit withholding of personal knowledge by witnesses but only suppress the communication of that knowledge within some privileged relationship.
- Though scholars seldom say this, they assume that in creating and applying privileges, judges only consider the public interest in rational fact-finding and beneficial behavior—not their own economic, political, or bureaucratic interests.

A. Progressive History

In addition to adopting the Progressive privilege tenets, many evidence scholars believe the Progressive account of the history of privileges. The Cliffs Notes version goes something like this:¹¹

9. See 23 WRIGHT & GRAHAM, *supra* note 4, § 5422 (1980).

10. Anyone who dips into the privilege literature will encounter Wigmore’s vociferous statement of this point: “For more than three centuries it has now been recognized as a fundamental maxim, that the public . . . has a right to every man’s evidence.” 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2192, at 70 (John T. McNaughton rev. 1961).

- A few privileges, notably those for communications between lawyer and client and husband and wife, came over on The Mayflower as part of the English common law the Pilgrims held dear.
- During the Nineteenth Century, democratic (big “D” and small “d”) state legislators created many previously unknown privileges in response to the demands of politically powerful groups such as bloodletting surgeons and Romish priests.
- In the early twentieth Century, Dean Wigmore, the leading evidence writer of his time, led an intrepid band of scholars in a movement to reform the law of privileges by uprooting all the newfangled privileges, pruning back the excessive growth of ancient privileges, and neutering legislators to prevent them from molesting judicially created privileges.¹²
- This Progressive reform movement crested in 1970 when the apolitical Advisory Committee on Rules of Evidence proposed that federal courts reject common law privileges and state privilege statutes in favor of a few simple, predictable, and justifiable federal set of privileges.
- Progressive procedural reform failed when Congress—in a frenzy of outrage fueled by Richard Nixon’s Watergate crimes, Lyndon Johnson’s Viet Nam deceptions, and Earl Warren’s jail-emptying constitutional law decisions—forced courts to retreat to common law privilege practices.¹³

Those who wish to codify privileges also believe that in the twenty-five years since the defeat of Progressive reform of privileges, federal judges and state legislators have failed to create privilege rules adequate to the needs of the “The New Economy.” If that is true, to whom should we turn for a remedy?

II. THE LEGITIMATE LOCUS OF PRIVILEGE POWER

If it did nothing else, Congressional intervention in the rulemaking process and its rejection of the Advisory Committee’s proposed privileges revived interest in a question that had dropped off the scholarly radar after the Supreme Court first exercised

11. For a different account, see 21 WRIGHT & GRAHAM, *supra* note 4, §§ 5001–5007 (forthcoming 2005).

12. For a general history of evidence reform, see 21 *id.* § 5005 (1977).

13. See 23 *id.* § 5421 (1980).

rulemaking power in 1938; that is, which branch of government can legitimately control the creation of privileges?¹⁴ Both Congress and the courts have strengths and weaknesses that bear on the answer to that question.

A. The Courts

Courts might claim the power to control privileges by virtue of historical primacy; so far as we can tell the English common law courts preceded Parliament in the creation of privileges. In addition, courts on this side of the Atlantic have had greater experience than Congress in the creation and management of privileges. While federal judges played only a minor role in the creation of privileges prior to 1975, they could draw on the experience of state judges recorded in more than a century of reported privilege cases. Moreover, judicial creation of privileges can be legitimated by the supposed virtues of the common law system of lawmaking; i.e., that courts can proceed by increments on concrete facts rather than having to predict in advance every problem a new privilege may present in practice. Such case law tinkering takes fewer tax dollars than statutory amendment.

On the other hand, since a privilege diminishes the power of courts to force people to talk and surrender papers, courts tend to be biased against both the creation and expansion of privileges. They yield power reluctantly and only in the face of countervailing power. The resultant of these forces appears in the traditional privileges available to lawyers, clergy, spouses, and the government.¹⁵ In the case of governmental power, judges not only share that power, but as the most secretive branch of government, cannot credibly criticize the claims of secrecy made on behalf of the other branches.¹⁶

14. See 23 *id.* § 5422, at 679.

15. Keep in mind that in a male-dominated society, lawyers, judges, clergy, and government officials have much to fear from subordinate women, hence the power to suppress spousal testimony.

16. See Joe Stephens, *U.S. Judges Getting Disclosure Data Deleted*, WASH. POST, Aug. 5, 2004, at A4 (asserting that judges gut the statute by allowing their brethren to withhold financial data from reports required by Ethics in Government Act that might reveal conflicts of interest); see also Jeff Chorney, *Chip Subpoena Has Hidden Appeal*, THE RECORDER, June 18, 2004, at 1 (discussing how Ninth Circuit sealed the record and closed the courtroom during arguments for one case).

B. The Congress

Since the recognition of privileges is “political” in the sense that it allocates government power, Congress can claim that as the political branch of government, it should hold the power to create privileges.¹⁷ Moreover, since the instrumental rationale for privilege presupposes that we know how people behave with and without a privilege, Congress has the tools and the time to engage in empirical research on this question. Furthermore, Congress can respond to potential problems without waiting for some case in which the question is raised.

On the other hand, Congress shares some of the same biases as the judiciary regarding governmental secrecy; i.e., legislators don’t want to have their inquisitorial powers shorn but they want to be able to keep their own secrecy. Moreover, under the system of “Dollar Democracy” that grew up in the latter half of the twentieth Century, Congress may be more vulnerable to corporations and individuals who can provide thinly disguised bribes—or what the press likes to call “campaign contributions.” Finally, since conducting a hearing into the way the corporate-attorney privilege affects the conduct of corporate officers promises little publicity payoff, Congress has few other incentives to use its investigative power to question the empirical bases for privileges.

In recent times, the executive branch can practice a form of subtle blackmail with judges ambitious for promotion; since the Justice Department plays a major role in screening judicial appointees for the President, they can cover up warts of favored judges and search for skeletons in the closets of judges who do not toe the line. J. Edgar Hoover was the master of this game, but there is no reason to suppose that the practice of keeping files on judges ended with his death. See 26 WRIGHT & GRAHAM, *supra* note 4, § 5663, at 582–83 (1992).

17. The allocation of privileges requires value choices; e.g., does the privacy of marital communications weigh higher on the public scale of values than the public interest in prosecution of folks who use drugs? Members of Congress can claim to be more in touch with popular values than federal judges who lead comparatively isolated lives.

III. THE POLITICAL ECONOMY OF SECRECY

To understand governmental privilege, we will find it helpful to have a model of the governmental system of secrecy. This section sketches the elements of one such model.¹⁸

Assume a society in which an individualist ethos leads people to value secrecy because it increases liberty by freeing people from surveillance.¹⁹ Such a society might even create a right to secrecy as part of a broader “right of privacy.” Certain postulates follow from the axioms of privacy.

*A. Principles Derived from the Notion of Privacy*1. Secrets give their possessors advantages.²⁰

A person who has a secret has information not available to others. By standard economic assumptions, secrets have value. Secrets, like any other kind of information can enhance the decisions of the possessor while impairing the decisions of others who lack the secret.

Secrets can be traded for other things of value. Sometimes secrets are traded for other secrets; as the song says, “you tell me your dream and I’ll tell you mine.”²¹ Movie stars trade secrets for publicity; informers trade secrets for immunity from prosecution.

18. Readers should understand that this is not a concise version of the history of governmental secrecy nor is it a sociological study of the present system of governmental secrecy. Rather, it imitates the econometric modeling beloved of New Age legal scholars. Evidence scholars who insist that models have some empirical basis will find some evidence for this one collected in 26 WRIGHT & GRAHAM, *supra* note 4, § 5663 (1992).

19. I do not assume that government surveillance is the only or even the most important form of surveillance. The government may not care about many actions of ordinary people, so the most important constraints on freedom come from surveillance by parents, neighbors, employers, or private organizations. Anyone who ever read forbidden books under the covers at night will appreciate this point.

20. I say “possessors” rather than “owners” because it makes no difference whether the secret is “yours” or “mine.” If I know you have some bizarre sexual fantasy, that information has value to me even though it is not “my” secret.

21. CHARLES N. DANIELS ET AL., *You Tell Me Your Dream, I’ll Tell You Mine* (Kansas City, Mo., W. Music Publ’g Co. 1899). Sharing secrets can enhance trust, not only between lovers but also between reporters and government officials.

Businesses have been built by trading in secrets—credit rating agencies, for example.

2. Secrets expose their possessors to potential harms.

The secret can fall into the hands of others who can use the secret against the original possessor. Blackmailers may come to mind first, but as readers who belong to terrorist groups²² will understand, governments can use secrets with even more deadly consequences.

The possessor of the secret must expend effort to maintain secrecy. Keeping secrets may have opportunity costs as well—or to put the point in plain English, knowing a secret can restrict freedom. For example, someone who desires to make a modest claim for personal injury may have second thoughts when he learns he will have to undergo a physical examination that will reveal his drug use or deformed genitals.

The use of a secret against others, or even a negligent failure to preserve the secret, may impair the possessors' relations with others. Those who "kiss and tell" may find that others become reluctant to kiss or tell. Police departments that negligently leak the identity of an informer to those with cause to resent the informer's betrayal may find it more difficult to recruit others to replace the deceased informer.

3. Sharing secrets with others increases both the advantages and disadvantages of secrecy.

The defendant who tells his lawyer that he "did the deed" may get better legal services, but "knowing" the client's guilt may put the lawyer under ethical restrictions that hinder effective legal representation. One who shares a secret with a confidant increases the risk of exposure but may also find that the confidant feels a moral obligation not to reveal the secret that might not arise if the confidant discovered the secret on her own. Possessors may find it easier to justify refusal to reveal a secret to third persons where "ownership" of the secret is shared with another.

22. This includes, according to the current administration, teachers' unions or the ACLU.

4. Secret knowledge can change one emotionally and psychologically.

From Faust to Harry Potter, people with secret knowledge have been associated with superior power that inspires fear.²³ If I know something you don't know, I may think I am a better person even if you have a higher L.S.A.T. score. By sharing secret knowledge with you, I initiate you into the Circle of the Superior, incur your gratitude, and cement an alliance that increases both our senses of superiority.

B. Government Secrets Present Special Problems

Government secrets share some of the advantages and disadvantages of other kinds of "group secrets."²⁴ But for present purposes, we must emphasize the features of government secrets that make them, if not unique, at least more troubling for public policy than those of other groups or individuals.

1. Government secrecy can impair "democratic" government.²⁵

Citizens cannot rate the acts of elected officials if those officials claim their decisions rest on secrets that cannot be shared with the voters. To cite a recent example, readers may recall that at the time Congress voted to make war on Iraq, a common response of legislators to constituents who opposed that decision was "if you knew what I knew, you would agree with my vote." Apparently many Americans found that response reasonable at the time. Only subsequent circumstances not normally present when the government acts on secret information allowed voters to see those "secrets" Congress found so persuasive.²⁶

23. I suspect that the nature of the secret affects the degree, not the kind, of psychological response. Sharing gossip about senior partners around the water cooler may not gain much clout with peers but can nonetheless foster a sense of superiority over those outside the firm who do not know and (may not care) that elite lawyers have feet of clay.

24. We shall not explore "group secrets" here because we are more concerned with how government secrets differ from family secrets, the secrets of conspirators, or corporate secrets.

25. I place "democratic" in quotation marks because some readers will not think our government is "democratic" as they define the term; for example, some people think ours is a "republican" (small "r") form of government.

26. For the benefit of readers to whom this example will be history, the special circumstances included the failure of the war to achieve its stated goals,

2. Government has more power than citizens to get the secrets of others and keep its own.

Governments hire lots of people to learn the secrets of others; e.g., informers, spies, police officers, and judges.²⁷ Government clothes such people with authority to snoop normally not available to nose individuals. This authority includes the use of and the budget for technological means for extracting secrets not available or even legal for private persons; think of wiretapping equipment, polygraph machines, and computer programs that allow quick searches of the enormous product of this technological capability.²⁸

On the other hand, the Government has powers to protect its secrets not available to private persons. These range from unbreakable codes to laws that protect government secrecy by punishing those who reveal them.²⁹ Indeed, one can gauge the movement from a more to a less "democratic" government by noting the increasing toleration of Congress and the courts to something like the once intolerable English Official Secrets Act (which imposes draconian penalties on those who "leak" government secrets).

3. Government secrets do not belong to their possessors.

While a private person can justly think of certain secrets as "mine," such claims can rarely be made for government secrets. At the very least, one who creates a government secret does so at the expense of the taxpayers. At the other extreme, many government secrets originated as private secrets which were then expropriated by the government, e.g., by a wiretap or coercion of a possessor with

the government's release of some of the secrets to justify its acts to foreign governments, the ability of outsiders to prove that the secret information was false, and leaks from all sides in the bureaucratic battle to shift the blame for military and political failure elsewhere.

27. Of course, these folks serve other functions not directly relevant to the present inquiry.

28. See JAMES BAMFORD, *BODY OF SECRETS: ANATOMY OF THE ULTRA-SECRET NATIONAL SECURITY AGENCY* 578–613 (2001), for discussion of the way the National Security Agency deals with billions of intercepted messages (not all of them "secrets" by any means).

29. For a recent compilation of some of these laws, see NATHAN BROOKS, *CONG. RESEARCH SERV., THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK*, ORDER CODE RS21900, Aug. 5, 2004.

only a questionable claim to ownership.³⁰ However, when the Fourth Circuit³¹ created something like an Official Secrets Act by holding that one who leaks government secrets can be charged with theft of government property, it assumed a proprietary interest.³²

Congress once tried to reassert public ownership of government secrets by passing a statute to prevent President Nixon from taking (and perhaps destroying) the infamous “Watergate Tapes” and other documents that might reveal more of the corruption of his administration to historians. That effort did not change the mindset of government officials as shown by the continued survival of the so-called “Old Boy’s Rule,” which allows high ranking federal officials to take and use classified information in writing their memoirs.³³

4. Government secrets can invert the bureaucratic hierarchy.

In the traditional picture, the government appears as a pyramid with power and responsibility concentrated at the top.³⁴ In theory, information is gathered at one level, evaluated at a higher level, and the “best” of it distilled and passed to those at the top. But, in practice, lower level bureaucrats can subvert those at the top by withholding information (and thus making it “their secret”) or by keeping “secret” their true opinion of its value and telling their superiors what they want them to hear.³⁵

30. An example is an informant who reveals the secret in order to escape prosecution for some crime.

31. Because CIA headquarters in Virginia are within the territorial jurisdiction of this Circuit and because the judges who serve it have been unusually hospitable to claims of government secrecy, the Fourth Circuit has been called “The CIA Circuit.”

32. See *infra* text accompanying notes 169–71.

33. See 26 WRIGHT & GRAHAM, *supra* note 4, § 5669, at 693–94 (1992). The “rule” may be weakening because both a former Clinton administration official and the former Secretary of Treasury in the Bush administration were targets of investigations for removing their files. See Scot Paltrow, *Berger Cleared of Withholding Material from 9/11 Commission*, WALL ST. J., July 30, 2004, at A6.

34. However, as readers who have worked in a bureaucracy may recall, by one of the maxims of practice, when things go wrong (and here we paraphrase) “blame flows downhill” from the most to the least responsible person.

35. Usually, what the inferior wants the superior to hear is “good news” so their desires match. “Bad news” creates problems for the superior, which thus creates problems for lower level bureaucrats.

Sometimes this practice benefits the superior, e.g., by creating “deniability”—the capacity for escaping responsibility by claiming ignorance of the facts that make decisions look bad. But in other cases the information intercepted on its way to the top can be withheld for use in exercising power over a lower bureaucrat’s supposed superiors.

The exemplar for this misuse of government secrecy remains J. Edgar Hoover, who used his power over dangerous secrets to stay at the head of the Federal Bureau of Investigation long after Presidents of both parties thought of replacing him.³⁶ Hoover leaked information to fawning reporters, Congressional allies, gossip columnists, and private vigilante groups in order to curry favor and smear critics of the Bureau.³⁷ Since Hoover enlisted many F.B.I. agents in illegally gathering evidence to be used for his political benefit, he had to make sure only he could use these secrets.³⁸ So he created “Do-Not-File” files kept in a safe in his office to which only he had access.³⁹

5. Government can justify its secrets with powerful arguments.

The instrumental arguments advanced to support private privileges pale compared to those that statisticians can flaunt on behalf of government secrecy and privileges. Despite its vagueness, “national security” sends pulses pounding far more than “privacy of marital communications.” Moreover, while many people have some sense of pillow talk, very few have ever known “national security” secrets.⁴⁰ Hence, critics find the instrumental arguments that support

36. See ATHAN THEOHARIS & JOHN COX, *THE BOSS: J. EDGAR HOOVER AND THE GREAT AMERICAN INQUISITION* (1988) for a complete account of Hoover’s regime drawn from primary sources.

37. See 26 WRIGHT & GRAHAM, *supra* note 4, § 5663, at 532–33 (1992).

38. See 26 *id.* at 533. The people Hoover kept files on constituted a modest Who’s Who of the middle half of the 20th Century—Supreme Court Justices, presidential candidates, intellectuals, rock stars, and scholars. See 26 *id.* For an account of the government’s efforts to continue covering up Hoover’s abuses long after his death, see JOHN WIENER, *GIMME SOME TRUTH: THE JOHN LENNON FBI FILES* (1999) (describing how and what a historian was able to uncover about the surveillance of one of The Beatles—a popular rock-and-roll band of the early 1960s).

39. THEOHARIS & COX, *supra* note 36, at 9–12.

40. Readers as old as the writer may have touched the security apparatus during mandatory military service. Alas, despite a “top secret” clearance, the

the government privileges even more difficult to evaluate than those that support the traditional privileges.⁴¹

6. Judges favor government privileges over those held by individuals.

Despite their much-vaunted “independence,” judges serve, psychologically if not financially, as part of the government “team”; they want to see “our side” win over “their side.”⁴² Despite the presumed transparency of appellate opinions, judges share the same penchant for secrecy as bureaucrats; like the Wizard of Oz, they appear from behind the velvet curtain only to bellow their ukases to judicial underlings.⁴³ The procedure that surrounds adjudication of government privilege claims gives judges the psychological and emotional mindset of the “secret sharer.”⁴⁴ Judges who prove trustworthy get junkets to Washington and indoctrination into the ideology of secrecy when they are assigned to serve on the secret courts that lend a patina of judicial approval to government acts that

writer was never privy to any sensitive “national security” information—unless the incompetence of some Regular Army officers counts as such.

41. Consider the “mosaic theory” that government regularly invokes in privilege cases. The theory posits that the courts should not require the disclosure of even apparently innocuous information because it might be the final piece in the puzzle that would enable a foreign enemy to piece together vital national secrets. See 26 WRIGHT & GRAHAM, *supra* note 4 § 5666, at 630–32 (1992). The nonsensical nature of the theory became readily apparent when the press reported how intelligence officials with their vast resources were unable to “piece together” the plan for the attacks on New York and Washington on September 11, 2001. See 26 *id.* (Supp. 2004).

42. The “national security” rationale functions, in part, to make it appear that “their side” consists of foreign foes, not the public or the domestic political opposition.

43. Older readers may remember the flap over books like BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* (1979) or EDWARD LAZURUS, *CLOSED CHAMBERS* (1998), in which ex-Supreme Court clerks purported to “tell all” that went on behind the velvet curtain; younger readers will see a later example in Justice Scalia’s insistence that reporters be banned from his audiences.

44. Who wouldn’t feel their importance puffed up when some James Bond type tells them that the secret they are about to be told in chambers could bring down the republic if it ever got out? The regular procedures for adjudicating state secrets are bad enough. See 26 WRIGHT & GRAHAM, *supra* note 4, § 5671 (1992). Those required under the Classified Information Procedures Act and the Chief Justice’s regulations thereunder resist easy characterization—or parody. See 26 *id.* § 5672.

would otherwise be illegal.⁴⁵ Ambitious judges who consider denying government claims of privilege must ponder the fact that their advancement up the judicial hierarchy lies largely in the hands of the Justice Department.⁴⁶

C. *Our Socio-Political System Breeds Government Secrecy*

To understand why we have so much government secrecy, we must step back and look at some features of our society that are not secret—though we sometimes behave as if they were.

1. Capitalism thrives by despoiling the world and its inhabitants

From its rise down to the present day, corporate capitalism thrived by exploiting the New World; think of the passenger pigeon, the buffalo, the forests and iron deposits of Wisconsin and Michigan in the “good old days,”⁴⁷ and more recently the oil beneath the Alaskan tundra, the parts of Nevada assigned to be a “national

45. If recent newspaper accounts can be believed, judges on the secret courts created under the Foreign Intelligence Surveillance Act apparently rubber stamp government applications for wiretaps and “black bag jobs” even when sought for domestic law enforcement purposes in violation of FISA. See James Risen, *Bid to Ease Spying Curbs in Terrorism*, N.Y. TIMES, Aug. 1, 2002, at A20; Vanessa Blum, *Spy Court Steps Into Foreign Soil*, LEGAL TIMES, Sept. 2, 2002, at 1. According to press reports, when this secret was leaked, judges on the Foreign Intelligence Surveillance Court accused the Justice Department of lying to the Court. See Eric Lichtblau & Josh Meyer, *Terror Probe Feuds Revealed By Secret Court*, L.A. TIMES, Aug. 23, 2002, at A1; See also Philip Shenon, *Secret Court Says F.B.I. Aides Misled Judges in 75 Cases*, N.Y. TIMES, Aug. 23, 2002, at A1.

46. See 26 WRIGHT & GRAHAM, *supra* note 4, § 5663, at 582–83, for J. Edgar Hoover’s working of this game. In 2003, following the insertion of a stealth provision in a statute supposed to prevent child sexual abuse, the Department of Justice issued reporting regulations. See 18 U.S.C. A § 3553(b)(2) (West Supp. 2004); *Departmental Guidance on Sentencing Recommendations and Appeals*, Memorandum from Guy A. Lewis, Director, U.S. Department of Justice, to all United States Attorneys et al. 4 (Jul. 28, 2003), [http://www.nacdl.org/public.nsf/legislation/ci_03_32/\\$file/ag_guidance_stcg_recs.pdf](http://www.nacdl.org/public.nsf/legislation/ci_03_32/$file/ag_guidance_stcg_recs.pdf). On July 28, 2003, the DOJ sent an e-mail memo to all federal prosecutors requiring them to “promptly” report “any adverse sentencing decision.” *Id.* While the directive purports to support “consistency” in sentencing, judges who recall the Hoover era might well have seen a desire to intimidate judges not subservient to the Department’s ideological agenda.

47. See CURTIS NETTELS, *THE EMERGENCE OF A NATIONAL ECONOMY, 1775–1815*, at 215–21 (1962) (fur trade, fisheries, and whaling).

sacrifice area” for the storage of nuclear wastes, and the plains of Texas used as garbage dumps for New York.⁴⁸ Capitalism also benefited from the excess populations of other parts of the world: slaves from Africa; laborers from China, Eastern Europe and Ireland; and intellectual workers from the tyrannies of England, France, and Nazi Germany.⁴⁹ Today, excess populations remain in place where tyranny can continue and jobs are shipped to them; think of sweatshop workers in Indonesia, women in the cross-border assembly plants in Mexico, telephone solicitors in Haiti, and computer programmers in India.⁵⁰

48. See Ashley Shelby, *Caught in a Net: Fifteen Years After Exxon Valdez, Alaskan Fishermen Are Still Waiting for a Settlement*, E. ENVTL. MAG., July/Aug. 2004, at 32 (describing ruined lives and environment after oil tanker with drunken captain despoiled 1,200 miles of coastline); See also David Hechler, *A Fen-Phen Deluge Hits Courts: Seven Years After the Diet Drug is Pulled from the Market, Lots of Trial Seen*, NAT’L L.J., Aug. 9, 2004, at 5 (discussing litigation fallout from over-promoted diet drug); Rebecca Solnit, *The Silver State Has a Scary Future*, at <http://www.alternet.org/story/19519/> (Aug. 11, 2004); Greenpeace, *Southeast Asian Nations Are Becoming Dumping Ground for Toxic Waste*, at http://www.globalecho.org/view_article.php?aid=588 (June 11, 2004).

49. HAROLD FAULKNER, *THE DECLINE OF LAISSEZ FAIRE, 1897–1917*, at 92–115 (1951).

50. See Gunjan Sinha, *Outsourcing Drug Work: Pharmaceuticals Ship R&D and Clinical Trials to India*, SCI. AM., Aug. 2004, at 24 (drug companies are now testing drugs on Indians rather than Westerners because finding volunteers is easier and costs less than half what it does in the U.S. or Europe); see also Steve Lohr, *High-Skill Work Is Not Immune to Outsourcing, Contracts Show*, N.Y. TIMES, June 16, 2004, at C1 (reporting that Bill Gates is shipping high tech jobs abroad); Jim Lobe, *Coke Benefiting from Child Labor in Sugar Cane Fields*, at <http://us.oneworld.net/article/view/87896/1/> (June 10, 2004) (reporting that soft drink manufacturer is using sugar harvested by child labor in El Salvador); Anthony Lin, *Joint Venture Could Give Rise to Outsourcing by Law Firms*, N.Y. L.J., June 7, 2004, at 1 (reporting that corporate law firms are shipping secretarial jobs to India); Larry Rohter, *Tracking the Sale of a Kidney on a Path of Poverty and Hope*, N.Y. TIMES, May 23, 2004, at S1 (reporting that Israeli companies are buying body parts from impoverished citizens of third world country to sell to wealthy Westerners). For an early critique, see Ad Hoc Committee on Catholic Social Teaching and the U.S. Economy, National Conference of Catholic Bishops, *Pastoral Letter on Catholic Social Teaching and The U.S. Economy*, NAT’L CATHOLIC REP, Nov. 23, 1984, at 8, 18–19, paras. 130–37 [hereinafter *Bishops’ Pastoral Letter*].

2. Corporate capitalism depends on governments

Government creates corporations and provides legal support for their activities ranging from judges to enforce property rights to police to put down resistance from unhappy workers.⁵¹ Despite the rhetoric of the “free market,” government has long subsidized the rise of corporate capitalism through tariffs, immigration policies, and gifts of the public domain—from the alternate quarter-sections given to railroad builders to the right to graze, mine, and drill in national forests.⁵²

3. Corporate capitalism produces economic and political inequality

One need not accept Marxist analysis to recognize the inequalities brought about by corporate capitalism.⁵³ Corporations

51. GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION, 1815–60*, at 352–83 (1951).

52. See Charles V. Bagli, *City Report Differs with Jets on Gains from Stadium*, N.Y. TIMES, July 2, 2004, at B3 (reporting that taxpayers are footing the bill for the stadium for the National Football League team and skyboxes for corporate executives); Abigail Goldman, *Study Cites Social Costs of Wal-Mart*, L.A. TIMES, Aug. 3, 2004, at C2 (reporting on a study that found that California pays \$86 million per year in social costs of the giant retailer paying poverty-level wages); Michael Powell & Michelle Garcia, *Ground Zero Funds Often Drifted Uptown*, WASH. POST, May 22, 2004, at A1 (reporting that money appropriated to rebuild apartments for impoverished New Yorkers left homeless by 9/11 attacks went to developers of luxury apartments for the wealthy); Matthew Daly, *Administration Proposal Would Open More National Forest Land to Logging*, SFGATE, July 2, 2004, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2004/07/01/state/1843EDT7476.DTL>; David Sirota, et al., *Wal-Mart Welfare*, Center for American Progress, at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=81668#2> (May 24, 2004) (noting that the Arkansas multinational corporation collected more than \$1 billion in direct subsidies for destroying local retailers).

53. See Leigh Strobe, *Gap Between Rich and Poor Widening in Troubled Economy*, at <http://www.commondreams.org/headlines04/0817-02.htm> (Aug. 17, 2004).

We believe that the level of inequality in income and wealth in our society and even more, the inequality on the world scale today, must be judged morally unacceptable . . . This concentration of economic privilege derives in large part from institutional relationships which enable certain persons and groups to participate more actively and powerfully in economic life.

Bishops' Pastoral Letter, *supra* note 50, at 16–17, para. 100.

are organized hierarchically so power over work is distributed unequally.⁵⁴ To procure worker acceptance of these power inequalities, wages and salaries are kept unequal.⁵⁵ To keep those at the bottom subservient without the need to call in the police, corporations must have a large pool of unemployed eager to take the jobs of those who dare to demand more.⁵⁶

4. Corporate capitalism subverts democracy

Since corporadoes depend on the government, they cannot allow the government to fall into the hands of those who might oppose them.⁵⁷ Since periodically the number of those who think they do not benefit from corporate capitalism exceeds those who think they do, elections (at least as depicted in high school civics classes) ought to produce hostile governments.⁵⁸ To reduce this danger, Jeffersonian democracy morphed into our present system of “Dollar Democracy” in which elections turn more on how much money candidates can raise than on how many voters support their policies.⁵⁹ Thus we see the economic inequality of the workplace

54. TAYLOR, *supra* note 51, at 250–69 (1951).

55. See GEORGE HENRY SOULE, *PROSPERITY DECADE: FROM WAR TO DEPRESSION: 1917–1929*, at 64–76 (1947); Tony Czuczka, *Daimler Bosses May Give Up Pay if Workers Agree to Cuts*, WASH. POST, July 19, 2004, 2004 WL 82770301.

56. To see this, just read the business pages and notice the rejoicing and the rise in stock prices that usually accompany an increase in the unemployment rate. Compare Eduardo Porter, *Hourly Pay in U.S. Not Keeping Pace with Price Rises*, N.Y. TIMES, July 18, 2004, at S1 (reporting that low hourly pay and an increase in the unemployment rate is preventing the lower echelon from competing with rising prices).

57. Jonathan Weisman, *Business Groups Greet Selection with Hostility*, WASH. POST, July 7, 2004, at A11 (reporting that business groups oppose Democratic Vice Presidential candidate who was a personal injury lawyer and who made speeches attacking business hegemony).

58. One could write a whole article on how the electoral system is structured or manipulated to produce results that one might not anticipate based on a high school civics class, e.g., exclusion of candidates and parties from the ballot, single member districts, winner-take-all voting systems, and the like.

59. An important, but probably not decisive, step in this process was the Supreme Court’s holding that money not only “talks” but has First Amendment rights. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

reproduced in electoral inequality on the hustings.⁶⁰ And unlike casting a ballot, voting with money allows the “voter” to influence the candidates after they take office by converting “campaign contributions” into a kind of “legalized bribery.”⁶¹

5. As the bill for the “Great Experiment” comes due, corporations want someone else to pick up the tab

Humans have long been perpetrators of, and involuntary research subjects in, a “Great Experiment” to determine how many toxins and pollutants the planet and its inhabitants can endure without wiping out life as we know it.⁶² As the major profiteers from messing with nature, corporations do not wish to see the “Great Experiment” regulated to reduce its harm nor do they want to pay their share of the costs imposed on humans and the environment.⁶³ So as the costs of the “Great Experiment” become clearer, the calls for “deregulation” and “tort reform” become louder.⁶⁴ When the

60. See Amy Chasanov, *Minimum Wage Can Stand Some Maximizing*, HILL, July 14, 2004, at http://www.thehill.com/daily_features/071404.aspx (pointing out that although seventy-seven percent of the voters support increasing the minimum wage, Congress does nothing while increasing its own pay six times in seven years).

61. See Sheryl Gay Stolberg, *Complaint Against DeLay Ruptures 7-Year Truce in House*, N.Y. TIMES, June 16, 2004, at A14 (describing how a departing member of Congress defied the agreement not to raise ethical questions by charging the House majority leader with “bribery, extortion, fraud, money laundering, and the abuse of power”).

62. See Reuters, *Lead Exposure Still Poses Health Hazard*, at http://www.ucsfhealth.org/childrens/health_library/reuters/2004/07/20040709elin006.html (July 9, 2004) (discussing how, years after lead was supposedly phased out of gasoline, the EPA reports it still shows up in human blood); Tom Schoenberg, *Vets Search for Nuclear Secrets*, LEGAL TIMES, Aug. 16, 2004, at 1 (reporting that soldiers used as guinea pigs in tests of nuclear weapons were finally allowed to sue after years of government stalling and cover-up).

63. See H. Jasef Hebert, *Trial Begins over Government's Nuclear Waste Costs*, BOSTONHERALD.COM, July 13, 2004, at <http://news.bostonherald.com/localRegional/view.bg?articleid=35393&format> (arguing that energy companies sue to stick taxpayers with costs of disposing of nuclear waste).

64. See Richard C. Lewis, *Northeast Attorneys General Sue over EPA's Clean Water Rules*, BOSTONHERALD.COM, July 27, 2004, at <http://news.bostonherald.com/localRegional/view.bg?articleid=37283&format=> (reporting that the EPA relaxed regulations so energy companies did not have to buy new nonpolluting equipment); Jill Duman, *Cash Pours in for 17200 Fight; Businesses Cough up \$7.6 Million*, RECORDER, June 17, 2004, at 1

price of the “Great Experiment” cannot be paid out of the hides of its human subjects, corporations want governments to pick up the tab.⁶⁵

6. Since satisfying the corporate agenda cannot be done openly, much governing must be done secretly

Like all human institutions, “Dollar Democracy” does not work perfectly. Newspapers sometimes expose corporate wrongdoing, citizens organize for political action outside the electoral arena, and judges occasionally dig in their heels when faced with institutionalized injustice.⁶⁶ Since much of what corporations want government to do is unjust, it must be done secretly.⁶⁷ If open “deregulation” will stir up too much public clamor, then government resorts to “stealth deregulation”—killing regulations with undermining “interpretations,”⁶⁸ underfunding enforcement to make it lax,⁶⁹ or corporate bribing of regulators with job offers.⁷⁰ If

(reporting that automakers donated over \$7 million for a “tort reform” initiative to limit suits for defective products).

65. See John Heilprin, *Costs Top \$8 Billion for Restoring Florida Everglades*, Florida Museum of Natural History, at <http://www.flmnh.ufl.edu/fish/southflorida/news/costs2004.html> (July 23, 2004) (discussing the projected costs on government to restore Florida Everglades); Alan Farago, *Everglades ‘Restoration’: A Work in Progress?*, ORLANDO SENTINEL, Nov. 3, 2004, at A21 (discussing how government hopes to have taxpayers pick up tab for sugar industry and pesticide manufacturers’ toxic runoff); Jeremy Wallace, *Harris Rides Huge Lead in Money Race*, SARASOTA HERALD-TRIB., Oct. 31, 2004, at BS1 (discussing how environmentalists accuse the sugar industry of polluting the Florida Everglades and refuse to pay its share to clean up).

66. Linda Greenhouse, *Human Rights Abuses Worldwide Are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 30, 2004, at A19 (reporting that lower courts allow victims to sue corporations that use foreign dictatorships to protect their interests and that business interests went bananas over a Supreme Court decision that seemed to approve such rulings).

67. See Daniel Wise, *American May View CIA Data to Help His Defense*, N.Y. L.J., July 7, 2004, at 1 (reporting that government classified data that might show that big oil companies were bribing foreign officials to allow them to loot natural resources in former Soviet Union but made the mistake of prosecuting the bag man for stealing from those companies).

68. See Juliet Eilperin, *Report Says U.S. Is Draining Wetlands*, WASH. POST, Aug. 12, 2004, at A21 (reporting that the EPA and Corps of Engineers interpret Supreme Court decision as barring regulation of wetlands and allow developers to move in on habitats at risk).

69. See *ATF Fails to Check Most Gun Dealers*, at http://www.capitolhill.com/artman/publish/article_4868.shtml (July 20, 2004)

repealing the law of torts cannot be done wholesale, corporations use procedure to kill it with a “death of a thousand cuts” that passes under the radar of public attention.⁷¹

IV. THE “QUACKGATE” CASE: A STUDY IN SECRECY AND CRONYISM

On January 29, 2001, ten days after taking office, President George W. Bush established the National Energy Policy Development Group (NEPDG) in the office of Vice President Richard Cheney.⁷² The Vice President seemed like the right person to head the NEPDG because he came to the White House from the Chief Executive Offices of Halliburton, a company with one foot in

(arguing that, while the Justice Department spends millions to lock up gun users, it says it can only afford to inspect gun dealers every twenty-two years).

70. Kathleen Day, *Treasury Dept. Probing Former Riggs Examiner*, WASH. POST, June 17, 2004, at E2 (reporting that bank examiner ended up as vice president of bank he audited while it was laundering money for suspected terrorists).

71. See Anne-Marie Cusac, *Fire Hazard: Bush Leaves Nuclear Plants at Risk*, PROGRESSIVE, Aug. 2004, <http://www.progressive.org/august04/cusac0804.html> (reporting that, upon finding that most nuclear power plants violate regulations that would limit damage from terrorist attacks on the plants, the Nuclear Regulatory Agency simply changed the regulations to match the shoddy practices of the industry); Amy Goldstein & Sarah Cohen, *Bush Forces a Shift in Regulatory Thrust: OSHA Made More Business-Friendly*, WASH. POST, Aug. 15, 2004, at A1 (reporting that the Occupational Safety and Health Administration gutted regulations designed to protect worker health and safety in order to save corporate donors cost of compliance but at risk of triggering a new epidemic of tuberculosis predicted to produce 25,000 infections and 135 deaths per year). The best known example of judicial “stealth deregulation” is in the infamous *Daubert* decisions that bar any testimony that challenges corporate science’s view that products don’t cause harm. See 22 WRIGHT & GRAHAM, *supra* note 4, § 5168.1 (Supp. 2004).

72. Associated Press, *GAO: Cheney Hindered Probe*, at <http://www.cbsnews.com/stories/2003/09/12/politics/main572904.shtml> (Aug. 26, 2003). The President and Vice President received a minority of the popular vote in the 2000 election and took office after the Supreme Court intervened to stop a recount of the vote in Florida that might have altered the Electoral College vote to match the popular vote. See *Bush v. Gore*, 531 U.S. 98 (2000). Two votes in the 5–4 decision came from Justices Scalia and Thomas, stalwarts of the business-funded Federalist Society—an organization of judges, lawyers, and law students dedicated to the ideology of “business libertarianism.” See Tim Grieve, *Antonin Scalia, Self-Made Martyr*, at <http://archive.salon.com/news/feature/2004/04/02/scalia> (Apr. 2, 2004).

the energy business and the other in defense contracting.⁷³ The NEPDG was charged with compiling a policy wish list from the energy companies to serve as the template for the administration's program.⁷⁴ The administration must have attached great importance to the NEPDG because that group met ten times during 2001 while the Anti-Terrorism Task Force, also chaired by Vice President Cheney, held no meetings.⁷⁵

While the formal members of the NEPDG were all government officials, critics charged that oil company executives and energy company lobbyists sat in on the meetings.⁷⁶ The secrecy that surrounded the work of the NEPDG made it impossible to confirm the denials of these allegations, but the Vice President later conceded that he met with Kenneth Lay, the CEO of the soon-to-be infamous Enron Corporation and a major Presidential campaign contributor.⁷⁷ Enron was then busily scamming California consumers as its part in the so-called "energy crisis" in the Golden State⁷⁸—a crisis reportedly discussed at nearly all meetings of the NEPDG.⁷⁹

The activities of the NEPDG drew the attention of Representative Henry Waxman, a liberal Democrat from Congress and ranking minority member of the House Committee on Government Reform, who asked the Vice President for information about the NEPDG's secret meetings. When the Vice President

73. Susan Cornwell, *Judge Scolds Cheney Lawyers in Energy Case Appeal*, at <http://cameraplanetnews.blogspot.com/cheney.htm> (Apr. 17, 2003).

74. U.S. GEN. ACCOUNTING OFFICE, *ENERGY TASK FORCE: PROCESS USED TO DEVELOP THE NATIONAL ENERGY POLICY*, GAO-03-894 (2003) [hereinafter GAO REPORT]. California endured a similar process (but with the beneficiaries being Silicon Valley) under Governor Schwarzenegger's so-called "California Performance Review." See David Streitfeld, *Mixed Reviews on Tax Cut Plan*, L.A. TIMES, Aug. 13, 2004, at C1.

75. See GAO REPORT, *supra* note 74, at 10, 11; David J. Sirota et al., *Condi Gets a Reality Check*, at <http://www.alternet.org/story/18368> (Apr. 8, 2004).

76. See GAO REPORT, *supra* note 74, at 5, 16.

77. See *id.* at 16; Associated Press, *supra* note 72, at <http://www.cbsnews.com/stories/2003/09/12/politics/main572904.shtml>; Dale McFeatters, *Dick Cheney's Deceit*, at <http://www.capitolhillblue.com/cgi-bin/artman/exec/view.cgi?archive=20&num=2911> (Aug. 27, 2003).

78. *CBS Airs Tapes of Enron Traders Scheming and Gloating*, USA TODAY, June 2, 2004, <http://www.commondreams.org/headlines04/0602-04.htm> (reporting that the Justice Department had audio tapes of Enron operators "scheming to manipulate California's energy market").

79. GAO REPORT, *supra* note 74, at 10.

declined the request, Congressman Waxman, joined by John Dingell, the ranking Minority Member of the House Committee on Energy and Commerce, asked the Government Accounting Office to investigate the process by which the NEPDG Report on National Energy Policy was developed.⁸⁰ When that Report was published on May 16, 2001, it urged further deregulation of the energy business, subsidies to resurrect nuclear power, and further gifts of the public domain to oil companies.⁸¹ As our model of government secrecy suggests, in order to sell these policies, the administration could not reveal the links between its big campaign contributors and the policy being peddled.⁸²

But rather than assert one of the many privileges arguably available to cover the deliberations and membership of NEPDG, the Vice President chose to argue that the General Accounting Office lacked jurisdiction.⁸³ Faced with this unprecedented stonewalling of its investigative authority, the GAO took the equally unprecedented step of suing to enforce its mandate.⁸⁴ However, the District Court judge, a Bush appointee, agreed with the Vice President's standing and separation of powers argument and dismissed the suit.⁸⁵ The GAO decided not to appeal after the Republican leadership in Congress reportedly threatened to cut off the agency's funding unless the action was discontinued.⁸⁶

80. *Id.* at 1 n.3 (reporting that Democratic Senators Joseph Lieberman, Earnest Hollings, Carl M. Levin, and Byron Dorgan, chairs of relevant Senatorial committees or subcommittees, submitted a similar request).

81. NAT'L ENERGY POLICY DEV. GROUP, NAT'L ENERGY POLICY (2001). The NEPDG had previously made an interim report to the President on the California "energy crisis." GAO REPORT, *supra* note 74, at 18.

82. Non-lawyers, and even lawyers who have never studied the law of politics, might see the "campaign contributions" as "bribes"—the quid pro quo being a voice in shaping the energy program.

83. *See* GAO REPORT, *supra* note 74, at 2.

84. *See* Peter Brand & Alexander Bolton, *GOP Threats Halted GAO Cheney Suit*, HILL, Feb. 19, 2003, at <http://www.thehill.com/news/021903/cheneys.aspx>.

85. *See* Walker v. Cheney, 230 F. Supp. 2d 51 (D.D.C. 2002); *see also*, Brand & Bolton, *supra* note 84 (reporting judge's partisan affiliations); Associated Press, *supra* note 72 (describing the predictable responses of the Democratic legislators who initiated the GAO inquiry).

86. Brand & Bolton, *supra* note 84; McFeatters, *supra* note 77 (referring only to unspecified GOP "pressure" on the GAO).

In the meantime, several environmental groups and the conservative political group, Judicial Watch, filed lawsuits seeking similar disclosure of the personnel and actions of the NEPDG.⁸⁷ The Judicial Watch suit was consolidated with one filed by the Sierra Club, producing some “strange bedfellows” remarks in the press but little of substantive consequence.⁸⁸ The district court denied motions to dismiss and approved a discovery plan proposed by the plaintiffs which, if complied with, would have disclosed the information the administration wanted to keep secret.⁸⁹ When the judge denied a request for a protective order, the Vice President filed an emergency motion for a writ of mandamus seeking to keep the operation of the NEPDG secret.⁹⁰

On the merits of its mandamus action, the White House argued that the Federal Advisory Committee Act (on which the suit for disclosure of the NEPDG was based) exempts advisory committees whose members are all federal officers and employees.⁹¹ But in a prior case in which Republicans wanted to use the FACA to pry open evidence of similar shenanigans involving Clinton Administration campaign contributors and an ill-fated and insurer-friendly “health care reform” package, the Court of Appeals had held that the exception did not apply where outsiders were “de facto” members of

87. See GAO REPORT, *supra* note 74, at 3 n.7. In its complaint, Judicial Watch described itself as seeking to “promote and protect the public interest in matters of public concern.” *In re Cheney*, 334 F.3d 1096, 1099 (D.C. Cir. 2003). Its website, however, it says it “was established in 1994 to serve as an ethical and legal ‘watchdog’ over our government, legal, and judicial systems and to promote a return to ethics and morality in our nation’s public life.” *About Judicial Watch*, <http://www.judicialwatch.org/about.shtml> (Oct. 17, 2004).

88. *Cheney*, 334 F.3d at 1100. The Natural Resources Defense Council filed a Freedom of Information Act suit that produced a few revelations from outside the White House that the GAO used in its Report. GAO REPORT, *supra* note 74, at 4 n.8.

89. *Cheney*, 334 F.3d at 1101.

90. The Vice President had earlier sought an interlocutory appeal of the denial of the motion to dismiss but the Court of Appeals turned him down on July 8, 2003. GAO REPORT, *supra* note 74, at 4 n.8; Henry E. Cauvin, *Cheney Loses Ruling on Energy Panel Records*, WASH. POST, July 9, 2003, at A2.

91. Federal Advisory Committee Act, 5 U.S.C. app. 2, § 3(2)(iii) (2000) (exempting committees “composed wholly of full-time officers, or employees of the Federal Government”).

the committee.⁹² The two Democratic appointees on the present panel adhered to that case.⁹³ They also rejected the position of the Vice President and the Republican dissenter that the White House had a constitutional right not to be put to the bother of asserting “executive privilege” in response to the plaintiff’s discovery motions.⁹⁴ The resulting dismissal of the petition for mandamus received more press attention than was customary for such an arcane ruling.⁹⁵

The press also noted the denial of an en banc hearing by the Court of Appeals.⁹⁶ When the GAO issued its report detailing in detached bureaucratic prose how the White House had stifled its inquiry and revealing tantalizing hints of the secrets that might have been exposed had the probe continued, the press coverage again kept the issue of administration stonewalling in the public eye.⁹⁷ This may explain why the Supreme Court decided to grant the Vice President further review of his claims.⁹⁸

Normally we would expect this obscure, highly technical dispute to drop below the radar of public attention—at least until the case was argued or decided. But the month after the Court decided to

92. *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

93. *Id.* 334 F.3d at 1103 (Tatel, J.). The concurring opinion by Judge Edwards and the dissenting opinion of Judge Randolph both agree that the *American Physicians* case is good law, but the latter argues that the decision was unconstitutional, relying on a law review article by the author of the infamous “torture memo.” *Id.* at 1110 (Edwards, J., concurring); *id.* at 1113 (Randolph, J., dissenting).

94. *Id.* at 1105; *id.* at 1116–17 (Randolph, J., dissenting).

95. *See, e.g.,* Cauvin, *supra* note 90 (reporting on the federal appeals court’s rejection of vice president Cheney’s petition).

96. Carol D. Leonnig, *Energy Task Force Appeal Refused*, WASH. POST, Sept. 12, 2003, at A5.

97. Peter Kaplan, *Cheney Stifled Energy Probe, GAO Investigators Say*, at <http://www.bluefish.org/stifled.htm> (Aug. 26, 2003); Associated Press, *supra* note 72.

98. To one with only a Federal Courts class understanding of the process, the case did not seem like an attractive one for Supreme Court review—no circuit splits, no recurring problem of judicial administration, and a seldom-invoked statute. Politically, one might think that with all the other “hot button” cases involving Bush administration pressure to expand the powers of the “Imperial Presidency” the Court did not need another one. Perhaps some Justices thought this case offered an opportunity to balance the rulings the Court might reach in the more important cases on Presidential power.

review the case, Justice Scalia accepted an invitation from an oil company executive (a likely beneficiary of the NEPDG recommendations) to go duck hunting in Louisiana.⁹⁹ The Justice decided to invite his good buddy, the Vice President, along for the hunt. Mr. Cheney accepted—and invited Justice Scalia to jet down with him on the Vice Presidential plane.¹⁰⁰ When a report of this expedition by a small Louisiana newspaper was picked up by the Los Angeles Times, the Vice President's case got a new name on the late-night comedy shows.¹⁰¹ Soon Justice Scalia was advised by editorial writers to recuse himself from the "Quackgate case."¹⁰²

Justice Scalia did no such thing. Instead he published a blistering memo defending both his conduct and his right to sit on the case.¹⁰³ The memo revealed details about the hunting trip that the newspapers had missed, provided some new evidence of how deeply the judiciary is enmeshed in the interconnecting web of political and social relationships that make up the system of "Dollar Democracy," and collected accounts of similar conduct by former Justices. It also brought the Quackgate case a new round of publicity.¹⁰⁴ Several of Justice Scalia's Federalist Society allies told the press that the case was not about law but about politics—a true but not necessarily helpful observation.¹⁰⁵

99. Tony Mauro, *Scalia Stands Firm on Cheney Recusal*, LEGAL TIMES, Mar. 19, 2004, at <http://www.law.com/jsp/article.jsp?id=1079640437129>.

100. See Grieve, *supra* note 72; Mauro, *supra* note 99; Michael Janofsky, *Scalia Refusing to Take Himself off Cheney Case*, N.Y. TIMES, Mar. 19, 2004, at A1.

101. See David G. Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES, Jan. 17, 2004, at A1.

102. See Robert P. Lawry, *Duck and Cover*, at <http://www.alternet.org/story/18219> (Mar. 24, 2004) (reporting that eight of the ten newspapers with the largest circulation, fourteen of the top twenty, and twenty of the biggest thirty called for the Justice to recuse himself).

103. *Cheney v. United States Dist. Court*, 124 S. Ct. 1391 (2004).

104. See Joan Biskupic, *Scalia Scoffs at Notion that He's Biased Toward Cheney*, USA TODAY, Apr. 25, 2004, at http://www.usatoday.com/news/Washington/2004-04-25-Scalia_x.htm; Amanda Griscom, *Duck Blind*, GRIST MAG., Mar. 23, 2004, at <http://www.grist.org/news/muck/2004/03/23/griscom-scalia/index.html>; Lawry, *supra* note 102, <http://www.alternet.org/story/18219>.

105. See Anne Gearan, *Politics, Not Law, Dominates Cheney Dispute*, at http://www.capitolhillblue.com/artman/publish/article_4445.shtml (Apr. 25, 2004).

Then shortly before arguments in the Quackgate case, Justice Scalia reminded us that the case was also about government secrecy.¹⁰⁶ At a speech at a Christian school in Mississippi (pursuant to Justice Scalia's policy of not allowing press coverage of his public appearances), U.S. marshals seized and erased tapes that had captured part of the Justice's remarks.¹⁰⁷ Since one of the tapes belonged to a reporter for the Associated Press, the story quickly made more headlines for Justice Scalia.¹⁰⁸

Perhaps as a result of the controversy surrounding Justice Scalia, newspapers gave arguments in the Quackgate case extensive coverage.¹⁰⁹ Many stories noted that Justice Scalia's questions and remarks during argument suggested that he favored the Vice President's position.¹¹⁰ Political commentators then began comparing Justice Scalia to such icons of a politicized judiciary as Justice Fortas—and worse yet, to political reprobates like former President Clinton.¹¹¹

106. Justice Scalia's penchant for secrecy, which may or may not be more extreme than most judges', co-exists paradoxically with a desire for publicity. See Griscom, *supra* note 104, <http://www.grist.org/news/muck/2004/03/23/griscom-scalia/index.html> (noting the attention the case received in both the lower courts and the media).

107. Denise Grones, *Two Reporters Ordered to Erase Tapes While Covering Scalia Speech*, SFGATE, Apr. 7, 2004, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2004/04/07/national1952EDT0758.DTL>.

108. See Charles Lane, *Marshal Orders Tapes of Scalia Talk Erased*, WASH. POST, Apr. 9, 2004, at A2.

109. See Linda Greenhouse, *Justices Hear Arguments in Energy Task Force Case*, N.Y. TIMES, Apr. 28, 2004, at A12; see Charles Lane, *High Court Hears Case on Cheney Energy Panel*, WASH. POST, Apr. 28, 2004, at A1; Andrew Cohen, *White House Waste of Energy*, at <http://www.cbsnews.com/stories/2004/04/26/opinion/courtwatch/printable613877.shtml> (Apr. 26, 2004); James Vicini, *Bush Administration Tells U.S. Court Cheney Papers Must be Secret*, at <http://forests.org/articles/reader.asp?linkid=31236> (Apr. 28, 2004).

110. In fairness to Justice Scalia, the better stories noted that other Justices who would join the majority opinion also revealed their positions during argument. See, e.g., Greenhouse, *supra* note 109.

111. Adam Liptak, *In re Scalia the Outspoken v. Scalia the Reserved*, N.Y. TIMES, May 2, 2004, at A1 (reporting that some have compared Scalia's conduct to Justice Abe Fortas's conduct); Griscom, *supra* note 104, <http://www.grist.org/news/muck/2004/03/23/griscom-scalia/index.html> (comparing Scalia's twenty-one page written denial to Clinton's "I didn't inhale" and "I never had sexual relations with that woman" statements).

In an anticlimactic conclusion, the Supreme Court in a 5-4 decision gave the Vice President pretty much what he wanted.¹¹² The majority opinion concluded that the Court of Appeals majority “labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.”¹¹³ However, instead of ordering the Court of Appeals to dismiss the action outright as the Vice President (and Justices Scalia and Thomas) wanted, the majority ordered the court to reconsider the writ in light of the Supreme Court’s opinion.¹¹⁴

The press reported this as a political, if not a legal, victory for the Bush Administration.¹¹⁵ Whatever the Court of Appeals decided on remand, by that time the election would be over and the ruling would make no difference.¹¹⁶ Some reporters contrasted the Quackgate majority’s view that forcing the Vice President to assert executive privilege would distract from the functioning of the executive branch with the Court’s unanimous view in the Paula Jones case that allowing a civil suit to proceed against President Clinton would not interfere with his running the country.¹¹⁷

112. See *Cheney v. United States Dist. Court*, 124 S. Ct. 2576, 2580 (2004). Justice Kennedy’s majority opinion was joined by the Chief Justice and Justices Stevens, O’Connor, and Breyer. Justice Stevens also wrote a concurring opinion. Justices Scalia and Thomas would have ordered the action dismissed outright as the Vice President asked. Justices Ginsberg and Souter dissented. See *id.*

113. *Id.* at 2593.

114. *Id.*

115. See Linda Greenhouse, *Justices’ Ruling Postpones Resolution of Cheney Case*, N.Y. TIMES, June 25, 2004, at A19; See Charles Lane, *High Court Backs Vice President*, WASH. POST, June 25, 2004, at A1; Tony Mauro, *Cheney Task Force Papers Stay Under Wraps*, at <http://www.law.com/jsp/asticle.jsp?id=1087855524599> (June 25, 2004); James Vicini, *US Court Won’t Make Cheney Energy Papers Public*, at <http://www.bluefish.org/cheneypa.htm> (June 25, 2004).

116. If the court ordered discovery to proceed, by the time the secrets were revealed they could no longer harm the President’s re-election bid. If the court ordered the suit dismissed and the Democrats won, they could presumably disclose the secrets if they thought it politically advantageous to do so. See Editorial, *A Loss for Open Government*, N.Y. TIMES, June 25, 2004, at A24.

117. See, e.g., Lane, *supra* note 115; see also *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (holding that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office).

For our purposes, the moral of the Quackgate case is this: government privilege does less for executive secrecy than political power.¹¹⁸ Richard Nixon lost his power with the electorate (and the judiciary), so executive privilege did him no good.¹¹⁹ Richard Cheney still had the political support of the Dollar Democrats so he got to keep his secrets even without asserting any privilege.¹²⁰

V. GRIM TALES OF GOVERNMENT PRIVILEGE

Though the Quackgate case may be unique, that does not mean it is aberrant. Consider the following tales of other governmental privileges.

A. *The state secrets privilege; born with a lie on its lips*

Though government lawyers (and some scholars) tried to give it an ancient pedigree, U.S. courts did not adopt the privilege for secrets of state until the Cold War.¹²¹ In 1953, in *United States v. Reynolds*,¹²² the Supreme Court gave the privilege its imprimatur for the first time in an opinion that justified the craven response of lower courts to executive claims of secrecy that has marred the administration of the privilege ever since.¹²³ *Reynolds* was an action under the Federal Tort Claims Act arising from the death of three

118. To some degree all privileges depend on the political power of the holder, e.g., the attorney-client privilege for corporations is not the same as the attorney-client privilege afforded criminal defendants.

119. The mythology of Watergate conceals this. But as politically sophisticated readers who lived through the period (or read the history carefully) will recall, most of the people outraged by the Watergate revelations did not vote for Mr. Nixon. Those who did could (and did) take comfort in the fact that he was no worse than his predecessor when it came to "dirty tricks" and "coverups." What cost Mr. Nixon support among his political base were the revelations of corruption in his administration and tax returns that showed he had enriched himself from public service. He fell from power, less because of the words on the Watergate tapes, and more because he had to go before a group of supporters and proclaim "I'm no crook." See also *Cheney*, at 124 S. Ct. at 2588-90 (distinguishing the *Nixon* case).

120. The way in which power affects the success or failure of claims of executive privilege is documented in Brian D. Smith, *A Proposal to Codify Executive Privilege*, 70 GEO. WASH. L. REV. 570, 578-600 (2002).

121. 26 WRIGHT & GRAHAM, *supra* note 4, § 5663, at 505-06 (1992).

122. 345 U.S. 1 (1953).

123. 26 WRIGHT & GRAHAM, *supra* note 4, § 5671 (1992).

R.C.A. engineers in the crash of a B-29 in Wayland, Georgia.¹²⁴ On a motion to produce accident reports, the government explicitly disclaimed any reliance on the secrets of state privilege, asserting instead the so-called “housekeeping privilege.”¹²⁵ When the judge overruled the claim of privilege, the government refused to produce the reports, so the court entered a default judgment for the plaintiffs.¹²⁶

Later, at a hearing specially convened in Washington, D.C., the government made a belated claim of privilege, filing affidavits that “specifically stated that the investigation board report and survivors’ statements could not be furnished without seriously hampering national security, flying safety, and the development of highly technical and secret military equipment.”¹²⁷ When the trial judge asked to see this material in an *ex parte*, in camera hearing to determine if the plane was in fact “testing . . . secret electronics equipment,” the government lawyers refused on the ground that the government’s assertion of the state secrets privilege was “wholly beyond judicial review.”¹²⁸

The trial judge rejected this claim and entered the default judgment. On appeal, the government, while continuing to rely “primarily” on the “housekeeping privilege,” also advanced its belated state secrets claim.¹²⁹ When the government repeated the argument that courts must accept claims of state secret privilege without checking to see if they had any basis in fact, the Court of Appeals shot back:

[T]o hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government’s claim of privilege is to abdicate the judicial function and permit the

124. *Brauner v. United States*, 10 F.R.D. 468 (E.D. Pa. 1950).

125. *Id.* at 471–72.

126. *Id.* at 472.

127. *Reynolds v. United States*, 192 F.2d 987, 990 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953).

128. *Id.* at 989, 992. It was later disclosed that the plane crashed before any testing began and the “secret electronic equipment” was a radio controlled drone that had been written up in newspapers well before the privilege claim. See Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES, Apr. 19, 2004, at A1.

129. *Reynolds*, 192 F.2d at 992, 994.

executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.¹³⁰

Though the Supreme Court in reversing the Court of Appeals struggled to find procedural mechanisms somewhere between “deference” and “abdication,”¹³¹ the lower courts have since abdicated any significant role in reviewing claims of the state secrets privilege.¹³²

But fifty years later, the daughter of one of the engineers discovered during an Internet search that the government had declassified its “secret” reports, turned them over to a private company, and that for \$63 she could learn how her father died.¹³³ When the documents arrived, she discovered that the government had lied; the “secret of state” was that B-29s were badly engineered.¹³⁴ The one that had killed her father had a history of mishaps; the Air Force had never made changes suggested by the manufacturer to prevent the engines from “flaming out” (as happened on the fatal flight) and the plane had supposedly been grounded as unsafe to fly.¹³⁵ In short, revealing the reports would not have brought down the Republic but it would have sunk the government’s defense in the *Reynolds* action.¹³⁶

When the daughter brought her evidence of the government’s lies to the firm that had represented the families in the original

130. *Id.* at 997.

131. *Reynolds*, 345 U.S. at 9. On remand, the government settled the case at a savings of \$55,000—nearly a half-million 2004 dollars. Barry Siegel, *How the Death of Judy’s Father Made America More Secretive*, L.A. TIMES, Apr. 18, 2004, at A1.

132. See the discussion of this and a depressing collection of cases in 26 WRIGHT & GRAHAM, *supra* note 4, § 5671.

133. Siegel, *supra* note 128. When members of other families involved in the *Reynolds* litigation had filed Freedom of Information Act requests for the same documents, the government gave them only blacked-out photocopies. *Id.*

134. *Id.* This was no secret to anyone even moderately interested in aviation in 1953; jokes about B-29s were common wherever flyers gathered—even the small town airports where this writer heard them as a teenager.

135. *Id.*

136. In a sense then, the government’s conduct in *Reynolds* was a kind of “double-lie.” The government lied about what the documents contained and about its motives for invoking the privilege. The government’s willingness to take a default judgment was not an expensive stand on principle; the government was going to lose regardless of the outcome of its privilege claims.

lawsuit, the lawyers supposed that the Supreme Court would be glad to rectify this ancient wrong; they sought a writ of error coram nobis from the Court.¹³⁷ After first refusing to allow the petition for the writ to be filed, the Court invited the Solicitor General to respond; rather than repenting the sins of his predecessors, the Solicitor General reprised them.¹³⁸ To the surprise of few, the Supreme Court denied the petition for the writ—saving the government more than \$1 million.¹³⁹

*B. The “Housekeeping Privilege”: “Everybody Ought to Have A Maid”*¹⁴⁰

In 1789, the First Congress adopted the so-called “Housekeeping Act” giving Department heads the power to make regulations “not inconsistent with the law” for, inter alia, “the custody, use, and preservation of its records, papers, and property” of the Departments.¹⁴¹ The statute remained dormant until 1900 when the Supreme Court decided a case that government lawyers interpreted as giving bureaucrats the power to create evidentiary privileges by regulations issued under the Housekeeping Act.¹⁴² While Wigmore and other writers questioned this reading, the “housekeeping privilege” played only a minor role in safeguarding government secrecy until the Federal Rules of Civil Procedure gave opponents the discovery devices to uncover government secrets.¹⁴³

In 1951, in a colorful case arising from the kidnapping of the infamous John “Jake, The Barber” Factor, the Supreme Court issued

137. Siegel, *supra* note 131.

138. Siegel, *supra* note 128. The Solicitor General claimed that the government in *Reynolds* had never said that “the particular accident reports or witness statements in this case in fact contained military or state secrets.” *Id.* This would have come as some surprise to the judges who heard the government’s claim of privilege in 1953.

139. *Id.*

140. STEPHEN SONDEHEIM, *Everybody Ought to Have a Maid* (New York, N.Y., Angel Records 1993).

141. The current version appears in 5 U.S.C. § 301 (2000). For the tangled history of earlier versions, see Rex J. Zedalis, *Resurrection of Reynolds: 1974 Amendment to National Defense and Foreign Policy Exemption*, 4 PEPP. L. REV. 81, 82–85 (1977).

142. *Boske v. Comingore*, 177 U.S. 459 (1900).

143. See 26A WRIGHT & GRAHAM, *supra* note 4, § 5682, at 190–92 (1992).

another enigmatic opinion under the Housekeeping Act.¹⁴⁴ Courts and writers were still gnawing on this bone when, in 1958, Congress amended the Housekeeping Act to “return [it] [to] . . . the original purpose for which it was enacted in 1789.”¹⁴⁵ The amendment added a single sentence: “This section does not authorize withholding information from the public or limiting the availability of records to the public.”¹⁴⁶

The bureaucrats opposed this amendment down to the day when President Eisenhower reluctantly signed it with the prescient statement that it did not change the power of the executive branch to keep its secrets.¹⁴⁷ To show other departments how to make this dream come true, the Justice Department simply struck the citation to the Housekeeping Act from its regulations (so as not to alert opposing lawyers to the amendment), then cited the old cases in support of its claims of the “housekeeping privilege.”¹⁴⁸ The claim that the privilege survived its congressional termination took another blow when, in adopting Evidence Rule 501, Congress amended the Rules Enabling Act to bar the Supreme Court from adopting rules of privilege without affirmative approval from Congress.¹⁴⁹ Congress could hardly have intended to give every two-bit bureaucrat power that it denied to the Supreme Court.¹⁵⁰

144. *Touhy v. Ragen*, 340 U.S. 462 (1951).

145. H.R. REP. NO. 85-1461, at 1 (1958).

146. 5 U.S.C. § 301.

147. See 26A WRIGHT & GRAHAM, *supra* note 4, § 5682, at 203 (1992). Since this was before the Freedom of Information Act, the arguments of a minority of the writers that it did not repeal the “housekeeping privilege” are difficult to fathom. Since litigants could presumably get the documents from the Justice Department for the asking, it seems bizarre to suggest they could not get them with a subpoena but would have to use a writ of mandamus instead. See 26 *id.* at 204–05.

148. Other agencies followed suit. See *id.* § 5682, at 203 (1992).

149. See 28 U.S.C. § 2074(b) (2000). For the history of this provision, see 23 WRIGHT & GRAHAM, *supra* note 4, § 5422, at 689 (1980).

150. Though the Supreme Court and its rulemaking establishment could hardly be said to be unbiased when it comes to limiting the power of the judiciary, they come across as paragons of neutrality compared to the Department heads—political hacks hoping to cover their tracks while they pay off old debts to those who have financed their campaigns for office. See, e.g., Stephen Labaton, *A Texas Race for the House or the F.C.C.?*, N.Y. TIMES, Aug. 17, 2004, at A1 (reporting that media corporations poured money into the campaign of a candidate with no chance of winning a Texas election because of rumors that she would be appointed to the FCC after the election).

But “a funny thing happened on the way to the forum.” Three decades after Congress dispatched the “housekeeping privilege” to the jurisprudential boneyard, some courts still permit the government to refuse to disclose information by invoking the supposedly defunct privilege.¹⁵¹

C. The state secrets privilege; free lunch at the courthouse

As we saw in our discussion of the *Reynolds* case, the common law rule required courts to penalize the government when its assertion of privilege in cases to which it was a party denied an adversary needed evidence.¹⁵² This doctrine survived until at least 1975, when it was incorporated into proposed Federal Rule of Evidence 509(e).¹⁵³ Since then it has all become an easy downhill run for government privilege claimants.¹⁵⁴

Some courts have simply found excuses for not imposing sanctions,¹⁵⁵ but one Court of Appeals held that “sovereign immunity” bars any evidentiary sanctions against the government.¹⁵⁶ Worse yet, many courts have turned the doctrine on its head to dismiss actions where the government claims it cannot try the case without revealing “state secrets.”¹⁵⁷ In some of these actions the

151. The cases are collected in 26A WRIGHT & GRAHAM, *supra* note 4, § 5682, at 206–07 nn.146, 148 & 150 (1992 & Supp. 2004).

152. *See* 26A *id.* § 5691, at 254 (1992).

153. FED. R. EVID. 509(e) (Revised Proposed Draft 1973), 56 F.R.D. 183, 252 (1973):

If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

This version was approved by the Supreme Court but never went into effect because Congress struck the Supreme Court’s privileges from the Rules before enacting them. 23 WRIGHT & GRAHAM, *supra* note 4, § 5421 (1980).

154. The cases are collected in 26A WRIGHT & GRAHAM, *supra* note 4, § 5691 (Supp. 2004).

155. *See, e.g.*, *United States v. Koreh*, 144 F.R.D. 218, 223 (D.N.J. 1992) (evaluating the concerns of defendant and the government’s interests).

156. *See In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989).

157. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (dismissing action by victims of toxic poisoning from a “secret base”); *see also Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (throwing out suit for harassment under Federal Tort Claims Act because the CIA could not defend

government intervened to prevent actions against defense contractors (and presumably big campaign contributors).¹⁵⁸ Indeed, in one of the better known cases, the government official who made the privilege claim was a former officer of the corporation being sued.¹⁵⁹

D. CIPA Cup-A-Privilege

In 1980 Congress enacted the Classified Information Procedures Act.¹⁶⁰ CIPA responded to the supposed problem of “graymail”—the threat by a rogue intelligence agent to reveal government secrets if prosecuted for some misdeed.¹⁶¹ Congress insisted that it did not intend that CIPA change the existing law of evidence¹⁶² and more particularly, that it did not create a new government privilege.¹⁶³ Or so they hoped. One court has held that CIPA creates a privilege for classified information.¹⁶⁴ Another court read CIPA to require a “more strict rule of admissibility” for classified information that amounted to a qualified privilege.¹⁶⁵ Similarly, CIPA has been read to do away with the procedural requirements for asserting the state

without admitting or denying that perpetrators were agency employees); *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991) (throwing out personal injury claim for injuries suffered when speeding State Department driver wrecked the car in which plaintiff was riding).

158. *See Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1145 (5th Cir. 1992) (barring claim that defense contractors fraudulently concealed defects in weapons that caused death of military personnel); *see also In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991) (dismissing litigant’s claim against “Star Wars” subcontractor).

159. *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991); *see* 26 WRIGHT & GRAHAM, *supra* note 4, § 5671, at 89–90 n.88.2 (Supp. 2004) (collecting other articles on improper influence charges involving official and contractor); *see also*, David Savage, *Court Dismisses Suit by Families of Stark’s Sailors*, L.A. TIMES, Apr. 20, 1993, at A19 (discussing the dismissal of a lawsuit filed against military contractors who invoked the “state secrets privilege” to prevent exposure of military secrets).

160. 18 U.S.C.A. app. 3 § 1 (1980).

161. S. REP. NO. 96-823, at 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4295.

162. H.R. REP. NO. 96-831, at 3 (1980).

163. *See Graymail: Hearing Before the Subcomm. on Criminal Justice of Senate Judiciary Comm.*, 96th Cong. 12 (1980) (statement of Philip B. Heymann, Criminal Division, Department of Justice).

164. *See United States v. Yunis*, 867 F.2d 617, 618, 622 (D.C. Cir. 1989).

165. *United States v. Smith*, 780 F.2d 1102, 1105, 1107 (4th Cir. 1985).

secrets privilege that the Supreme Court laid down in *Reynolds*.¹⁶⁶ Whether or not it has prevented much “graymail” may be debatable,¹⁶⁷ but CIPA has produced some interesting side effects such as censored opinions and secret law.¹⁶⁸

E. “Want an Official Secrets Act? You Got It!”

The British have long had an Official Secrets Act that makes it a crime to reveal government secrets.¹⁶⁹ Almost from the moment of its creation, the CIA has been pushing for an American version.¹⁷⁰ However, Congress has regularly refused to oblige, in part because of concerns about the constitutionality of punishing someone for speech.¹⁷¹ But in 1989 the Fourth Circuit gave the government what it wanted by interpreting a statute punishing theft of government property to cover those who “stole” government secrets.¹⁷²

166. See *United States v. Sarkissian*, 841 F.2d 959, 965–66 (9th Cir. 1988).

167. For evidence that there had never been much graymail to begin with, see 26 WRIGHT & GRAHAM, *supra* note 4, § 5672, at 743–45 (1992). In one of the Iran-Contra cases that reputedly would have shown the involvement of then Vice President Bush, the court was forced to dismiss the case when the government refused to disclose classified information to the Independent Prosecutor. *United States v. Fernandez*, 913 F.2d 148, 164 (4th Cir. 1990).

168. *United States v. Pappas*, 94 F.3d 795 (2d Cir. 1996) (judicial self-censorship); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1367 (11th Cir. 1994) (secret law); *United States v. Smith*, 706 F. Supp. 593, 595 (M.D. Tenn. 1989) (government lawyers cite secret opinion expanding scope of CIPA); *Bowers v. Dep’t of Justice*, 690 F. Supp. 1483 (W.D.N.C. 1987) (judge ordered to apply secret opinion extending CIPA to civil cases); *United States v. Smith*, 592 F. Supp. 424, 443, 445 (E.D. Va. 1984) (opinions censored by government).

169. See SUBCOMM. ON SECRECY AND DISCLOSURE OF S. SELECT COMM. ON INTELLIGENCE, 95TH CONG., REPORT ON NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE, at 48–51 (Comm. Print 1978) [hereinafter NATIONAL SECURITY SECRETS REPORTS].

170. See *The Use of Classified Information in Litigation: Hearings before the Subcomm. on Secrecy and Disclosure of S. Select Comm. on Intelligence*, 95th Cong. 107 (1978) (testimony of former CIA General Counsel Lawrence Houston).

171. See NATIONAL SECURITY SECRETS REPORTS, *supra* note 169, at 30 (“The committee is not prepared at this time to recommend a general recasting of the federal espionage statutes along the lines of the British Official Secrets Act.”) See *id.* at 17–19 for prior congressional refusals.

172. See *United States v. Zettl*, 889 F.2d 51 (4th Cir. 1989).

F. *Mission Implausible: "The Secretary Will Disavow Your Actions"*

Edwin P. Wilson served as a clandestine operative for the CIA until he quit the agency in 1971 to freelance, using his guise as an arms merchant to gather intelligence for the agency throughout the Middle East.¹⁷³ But in the early 1980s he became something of a CIPA "poster boy" when the government lured him back into this country and indicted him in a plot to ship arms to Libya.¹⁷⁴ When Wilson attempted to assert "the CIA defense," his efforts to produce evidence that the agency had approved his actions were blocked by the government's invocation of CIPA.¹⁷⁵

In support of its CIPA efforts, the government filed an affidavit of Charles Briggs claiming that after his retirement, Wilson "was not asked or requested, directly or indirectly, to perform or provide services, directly or indirectly, for CIA."¹⁷⁶ Not content with the two convictions for the Libyan plot, the government used two jailhouse informants to convict Wilson of conspiring to kill witnesses who had testified against him in the Libyan cases.¹⁷⁷

After serving twenty years, Wilson and his lawyer were able to convince a federal judge that the Briggs affidavit was, in the words of the judge, "nothing but a lie."¹⁷⁸ Indeed, CIA lawyers had tried to convince the Justice Department not to use the memo against Wilson but prosecutors did so anyway because it was "essential to win the case."¹⁷⁹ Apparently so; one holdout juror changed her vote after the affidavit was reread to the jury.¹⁸⁰ Worse yet, three days after the trial the CIA inspector general pointed out the lies in the affidavit in

173. Dana Priest, *False Evidence Cited in Overturning Arms Dealer's Case*, WASH. POST, Oct. 30, 2003, at A16.

174. *United States v. Wilson*, 571 F. Supp. 1422 (S.D.N.Y. 1983).

175. *United States v. Wilson*, 732 F.2d 404, 407 (5th Cir. 1984) (conspiracy to ship plastic explosives to Libya); *United States v. Wilson*, 721 F.2d 967, 975 (4th Cir. 1983) (conspiracy to ship arms to Libya without export license).

176. Priest, *supra* note 173.

177. The government denied that the informants had been planted to entrap Wilson, a denial apparently believed by both judge and jury. *See Wilson*, 571 F. Supp. at 1425.

178. *Arms Merchant May Be Freed*, at <http://www.informationclearinghouse.info/article5101.htm> (Oct. 28, 2003).

179. Priest, *supra* note 173.

180. *Arms Merchant May Be Freed*, *supra* note 178.

a memo forwarded to the Justice Department two days later.¹⁸¹ At the DOJ an underling's memo on the "Duty to Disclose Possibly False Testimony" produced nothing but twenty years of covering up the lie.¹⁸² When the judge excoriated the agencies for their misdeeds, all they could say was the lie made no difference because the defendant was guilty.¹⁸³ Apparently "national security" means "never having to say you're sorry."

VI. REFORM?: RUMINATIONS FROM THE RUINS

Some readers will have already decided that government privileges can tell us little about the desirability of codifying other privileges. For those whose minds remain open but who would like to connect the dots for themselves, here they are:

- The progressive ideology works better to justify privileges than to explain them. To understand how the Fourth Circuit can expand government privileges while rejecting the parent-child privilege we must go beyond the Wigmorean orthodoxy.¹⁸⁴
- Progressive ideology has proved more robust in resisting intellectual incursions like those from law-and-economics than in defeating political attack.¹⁸⁵ Just as the leader of The World's Last Remaining Superpower was sent diving into a hole by a ragtag bunch of political zealots, so the rulesmaking establishment capitulated to a couple of business-funded corporate libertarians marching under the banner of "junk science."¹⁸⁶
- To understand "reform" of the law of evidence we need to develop a political analysis that goes beyond how interest

181. Priest, *supra* note 173.

182. *Id.*

183. *Id.*

184. *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982).

185. The closest attempt at a successful invasion—Bayes' Theorem and the Blue Bus case—seems to have been successfully confined to the hinterlands of evidentiary thought. *See, e.g.*, EDWARD J. IMWINKELREID & GLEN WEISSENBERGER, *AN EVIDENCE ANTHOLOGY* 369-401 (1996).

186. 21 WRIGHT & GRAHAM, *supra* note 4, § 5168.1, at 92 (Supp. 2004). Evidence scholars not familiar with the funding and the ideology that produced *Daubert* should visit <http://www.manhattan-institute.org>, and poke around a bit.

group politics shaped the therapist privilege—one that incorporates insights about the operation of “Dollar Democracy” and the Warfare State.¹⁸⁷ If corporate libertarians could highjack the electoral process, they would hardly scruple at using the rulemaking process to turn codification of privileges to their own advantage.¹⁸⁸

- A new theory of evidence needs to take a global and holistic view of evidence law.¹⁸⁹ Few of the scores of articles about the *Daubert* doctrine discuss its link to “tort reform” and the desire of multinational corporations to avoid paying the tab for The Great Experiment.¹⁹⁰ We cannot afford “pack scholarship” while someone in the bowels of the Pentagon is figuring out how best to bring “Gitmo justice” back home.¹⁹¹

187. See 25 WRIGHT & GRAHAM, *supra* note 4, § 5222 (1978) (interest group politics and the therapist privilege). For a first effort at trying to tie evidentiary policy to the regime of “Dollar Democracy” and the rise of the Warfare State, see 21 *id.* § 5007 (forthcoming 2005).

188. This is not a slam at past, present, or future members of the Advisory Committee on the Federal Rules of Evidence. It merely recognizes that they do not have the last word on evidentiary policy. See, for example, the sad story of the “Clinton Sex Bill”. FED. R. EVID. 413–415; 23 WRIGHT & GRAHAM, *supra* note 4, § 5411 (Supp. 2004).

189. For a modest beginning, doctrinal scholars might occasionally remind their readers and students that part of the problem with the rules is that they have to be enforced by politicians-in-robcs.

190. For the rare exception, see Daniel P. Ryan, *Expert Opinion Testimony and Scientific Evidence: Does M.C.L. § 600.2955 “Assist” the Trial Judge in Michigan Tort Cases?*, 75 U. DET. MERCY L. REV. 263 (1998).

191. See Gina Holland, *Federal Judge Asked to Block Hearings at Guantanamo Bay*, at <http://www.law.com/jsp/article.jsp?id=1090180279401> (Aug. 3, 2004) (reporting that the “Combatant Status Review Tribunals” set up after Supreme Court held prisoners of war could not be locked up without a hearing was denounced as “a sham”); Josh White, *U.S. to Tell Detainees of Rights*, WASH. POST, July 10, 2004, at A7 (reporting that detainees will not get lawyers but military officers who must remain “neutral” because “speed is of the essence”); Michael Isikoff & Mark Hosenball, *New CIA Director Wants Power to Spy on, Arrest, U.S. Citizens*, at http://www.capitolhillblue.com/artman/publish/article_5040.shtml, (Aug. 16, 2004) (reporting that the legislation was introduced to reverse the ban on the use of the CIA inside the United States); Edward Alden, *Bush Team Accused of Backing Torture*, FIN. TIMES (London), June 9, 2004, at 1 (reporting that the Attorney-General defended Department of Justice and Defense Department memos advising intelligence interrogators how to torture prisoners without incurring criminal liability); Jess Bravin, *Pentagon Report Set Framework for Use of Torture*,

- The Warfare State has long defaulted on its promise to provide justice¹⁹² and so can no longer deliver security either.¹⁹³ Looking at what is happening in Baghdad allows us to see what the future holds for Peoria (remember that Timothy McVeigh was there before Osama bin Laden).¹⁹⁴
- We need to stop scoffing at “Truth, Justice, and The American Way” and begin to take them seriously.¹⁹⁵ “Truth” and “justice” are more than soundbites to sell an evidentiary outcome that has very little of either—they are widely held moral values that are needed to restrain our impulse for the merely efficient.¹⁹⁶

WALL ST. J., June 7, 2004, at A1 (summarizing 100 page DOD memo on how to commit war crimes and get away with it).

192. *Bishops' Pastoral Letter*, *supra* note 50, at 10 (“The distribution of income and wealth in the U.S. is so inequitable that it violates the minimum standards of distributive justice. In 1982, the richest 20 per cent of Americans received more income than the bottom 70 per cent combined. The disparities in the distribution of wealth are even more extreme.”).

193. See Elisabeth Bumiller, *Bush Cites Doubt America Can Win War on Terror*, N.Y. TIMES, Aug. 31, 2004, at A1 (reporting that the President admitted the “war on terror” cannot be won); Sara Goo, *Commercial Flights Susceptible to Bombers, Experts Say*, WASH. POST, Aug. 28, 2004, at E1 (reporting that the Transportation Security Administration admitted it cannot stop suicide bombers from boarding airplanes); William M. Arkin, *How to Pack for the Bunker*, L.A. TIMES, Aug. 1, 2004, at M1 (reporting that the government has a “Dr. Strangelove” bunker to protect bureaucrats from terrorist attacks); Walter Pincus, *CIA Analyst Assails War on Terrorism*, WASH. POST, June 26, 2004, at A13 (predicting that the U.S. can expect more terrorist attacks and is ill equipped to deal with them).

194. Fox Butterfield, *Justice Dept. Report Shows Trouble in Private U.S. Jails Preceded Job Fixing Iraq's*, N.Y. TIMES, June 6, 2004, at A22 (reporting that the man in charge of civilian torturers in Iraq came from private prison company with a record of abusing prisoners).

195. 1 STEVEN GOODE ET AL., GUIDE TO TEXAS RULES OF EVIDENCE § 102.1, at 12 (3d ed. 2002) (noting that Evidence Rule 102 resonates with “Superman’s credo”).

196. *Bishops' Pastoral Letter*, *supra* note 50, at 14 (“People are summoned to be ‘just,’ that is to be in a proper relation to God by observing God’s laws which form them into a faithful community. When a society is just, prosperity and blessing result. As Isaiah says: ‘Justice will bring peace; right will produce calm and security’ (32:17, New American Bible).”). Cf. THE HOLY QUR-ĀN (Maulan Muhammad Ali trans., 7th ed. 1985) 4:135 (“O ye who believe! Stand out firmly [f]or justice, as witnesses [t]o Allah, even as against [y]ourselves, or your parents, [o]r your kin, and whether [i]t be (against) rich or poor: [f]or Allah can best protect both. Follow not the lusts ([o]f your

- While evidence should remain a secular subject,¹⁹⁷ that does not mean it cannot learn anything from the religious sources that originally provided and still sustain its values.¹⁹⁸ For example, the authors of an amicus brief in the *Crawford* Confrontation Clause case might have gone beyond sterile instrumentalism had they stopped to ponder their own claim that confrontation has roots in the Tanakh and the New Testament.¹⁹⁹
- One useful concept from Christian theology, which probably has parallels in other religious traditions, is what Roman Catholics call “the preferential option for the poor.”²⁰⁰ One

hearts), lest ye [s]werve, and if ye [d]istort (justice) or decline [t]o do justice, verily Allah is well-acquainted [w]ith all that ye do.”).

197. At the risk of making an uncharacteristic understatement, the writer should add that some readers may misunderstand what follows in the text. The writer, as a member of the second largest religious group in the U.S. (lapsed Roman Catholics), knows that, like all human institutions, organized religion can oppress. But since secularists often disdain serious consideration of religion, they can easily be fooled or intimidated by the pious. Religion is no more monolithic than Republicanism. One can more easily understand Justice Scalia’s occasional straying from his accustomed statism if one is aware of his religious apostasy; e.g., on the death penalty. Cf. Linda Przybyszewski, *Judicial Conservatism and Protestant Faith: The Case of David Brewer*, 91 J. AM. HIST. 471 (2004) (discussing religious influence on another Supreme Court Justice). Moreover, without some understanding of the religious roots of popular political philosophy, evidence scholarship misses an important dimension of the subject. True, the Devil can quote scripture—but that does not make it any less useful for intellectual inquiry; judges do horrendous things with the Evidence Rules but no one suggests we should ignore them for that reason. Finally, understanding the power of religious thought can help explain why even those who know what is wrong with the Progressive Procedural Paradigm cannot shake its influence from their writing.

198. See 30 WRIGHT & GRAHAM, *supra* note 4, § 6343 (1997) (roots of right of confrontation in Puritan thought).

199. 30A WRIGHT & GRAHAM, *supra* note 4, § 6372.1 (Supp. 2005) (documenting this point); *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

200. *Bishops’ Pastoral Letter*, *supra* note 50, at 14 (“These biblical perspectives on wealth and poverty form the basis for what today is called ‘the preferential option for the poor.’ . . . In *Octogesima Adveniens*, Paul VI stated: ‘In teaching us charity, the Gospel instructs us in the preferential respect due the poor and the special situation they have in society: the more fortunate should renounce some of their rights so as to place their goods more generously at the service of others.’”). Cf. THE HOLY QUR’AN, *supra* note 195, at 107:1–7 (“Consider those who deny the last judgment. They are people who turn away orphans, and are indifferent to whether the poor are fed. They

way to evaluate rules of evidence is to ask, “does this rule favor the rich or the poor?”²⁰¹ If Americans had heeded Debs’s reminder that “while there is a soul in prison, I am not free,”²⁰² our leaders could not have claimed they were “shocked, shocked” by the torture of prisoners by soldiers only continuing what they had learned in their civilian occupations.²⁰³

- The specific content of rules of evidence matters less than the values that inform their application.²⁰⁴ As the “housekeeping privilege” story suggests, Congress can legislate against secrecy but statist judges can simply ignore the law.²⁰⁵

pray, but they never think about the meaning of their prayers. They make a grand display of their piety, but give nothing to the destitute. They are doomed.”).

201. In terms of government privilege, the vice of secrecy is in denying equal participation in government. “Stated positively, justice demands that social institutions be ordered in a way that guarantees all persons the ability to participate actively in the economic, political and cultural life of the community.” *Bishops’ Pastoral Letter*, *supra* note 50, at 16.

202. *Id.* at 9 (“The justice of a community is measured by its treatment of the poor and the powerless in society.”).

203. See Anne-Marie Cusac, *Abu Ghraib, U.S.A.*, PROGRESSIVE, July 6, 2004, <http://www.progressive.org/july04/cusac0704.html> (reporting that the torturers in Iraq came from jails and prisons in the U.S. with histories of abusing inmates).

204. Compare the attitude of Judge Kirkpatrick in the *Reynolds* case toward the extravagant claims for executive supremacy with those of almost any opinion on this issue from his successors. Judge Kirkpatrick, a Coolidge appointee who had served in the military obviously knew something of how bureaucracy operates. Not surprisingly, he took the same attitude toward corporate bureaucracies. See *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962) (rejecting extravagant claims for corporate attorney-client privilege readily accepted by better known judges). Many of the current crop of judges, despite anti-statist rhetoric in some of their speeches, were high level bureaucrats in their earlier years and still imagine bureaucracy follows the flow charts.

205. We should not overlook the way judges have become involved in an offshoot of “Dollar Democracy” in which corporations fund lavish junkets to ideological “summer camps” where they can be indoctrinated in the newest wrinkles in corporate libertarianism. See Carol D. Leonnig, *Judges Are Urged to Quit Board Positions*, WASH. POST, Mar. 23, 2004, at A2 (two federal judges serve on board of one such camp that provides \$10,000 worth of goodies to entice judges to attend seminars on, inter alia, “sound environmental policy”).

- Paradoxically, evidence law both does and does not “matter.” Evidence teachers waste their time on “reform” when many litigants would be happy just getting what the law supposedly gives them now. On the other hand, if we took some time from teaching hypnotically refreshed recollection to acquaint our students with the government privileges,²⁰⁶ we might teach them something about the perils of government secrecy and the politics of privilege that could inform the values they bring to practice and judging.²⁰⁷

Further deponent sayeth not.

206. The “we” is not rhetorical; the writer is guilty of this.

207. Readers who wish to explore government secrecy issues will find two helpful sources on the Web. The National Security Archive at George Washington University has an extensive collection of declassified government documents showing what the government has to hide. See *National Security Archive*, at <http://www.gwu.edu/~nsarchiv> (last visited Nov. 5, 2004). The Federation of American Scientists Project on Government Secrecy publishes a newsletter that will keep you current on the latest developments (subscribe by e-mail to secrecy_news-request@lists.fas.org with “subscribe” in the body of the message). See *Federation of American Scientists Project on Government Secrecy*, at <http://fas.org/sgp/> (last visited Nov. 5, 2004).