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## SPEECH

### THE BRENNAN LECTURE: THE SEPARATION OF POWERS AND THE PUBLIC

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It is, of course, a standard trope of named lectures to begin by tying one's topic to the lecture's namesake. Fortunately, you've given me a lot to work with: In his nearly thirty-four years on the United States Supreme Court, William Brennan authored 1,360 total opinions (majority, concurring, and dissenting), second only to William O. Douglas's 1,628.<sup>1</sup> Although Brennan is primarily known for his liberal decisions on civil rights and civil liberties<sup>2</sup> and his interest in the use of state constitutional law to protect individual rights,<sup>3</sup> his prodigious output means that there's

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1. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, at 127 (5th rev. ed. 2008).

2. See, e.g., SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 21 (2010).

3. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

something in his oeuvre for just about everyone—even those of us who focus on constitutional structure more than rights and on Congress more than the courts.

When I think of William Brennan, the opinion that comes to mind is his dissent in the 1972 case *Gravel v. United States*,<sup>4</sup> which raises deep and (to my mind, at least) interesting questions about the relationship between the separation of powers and the American political public.

### I. GRAVEL

First, some background on the *Gravel* case itself. It arose out of the Vietnam War, and in particular out of the preparation and leak of the *Pentagon Papers*. The *Pentagon Papers* is the name by which history knows the top secret Pentagon study prepared between 1967 and 1969 and officially titled “History of U.S. Decision Making Process on Vietnam Policy.” The complete study was 2.5 million words long and was bound in forty-seven volumes.<sup>5</sup> Beginning in June 1971, the *New York Times* and *Washington Post* began running a series of stories based on the *Papers*, portions of which had been leaked to them by Daniel Ellsberg, a RAND Corporation analyst who had been one of the researchers working on them. The revelations were eye-opening, to say the least, disclosing a long pattern of deception as to both the level of American engagement in Indochina and the success (or lack thereof) of that engagement. As one recent historical treatment put it, “[T]he Pentagon Papers revelation ‘lent credibility to and finally crystallized the growing consensus that the Vietnam War was wrong and legitimized the radical critique of the war.’ The leak also began a period of militancy on the part of the press.”<sup>6</sup>

This potential impact of the *Papers* was not lost on the Nixon administration, which immediately went to court in both New York and Washington to attempt to put a stop to their publication. After a flurried two weeks of litigation, the Supreme Court held in *New York Times v. United States*<sup>7</sup> that the newspapers could continue printing excerpts of the

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4. 408 U.S. 606, 648 (1972) (Brennan, J., dissenting).

5. See DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* 2, 27 (1996); Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, at A1.

6. *INSIDE THE PENTAGON PAPERS* 183 (John Prados & Margaret Pratt Porter eds., 2004).

7. 403 U.S. 713 (1971) (per curiam).

*Pentagon Papers*.<sup>8</sup> (Justice Brennan, I should note, filed a concurring opinion arguing for a free speech absolutist position.<sup>9</sup>) When lawyers talk about the “Pentagon Papers case,” they invariably mean to refer to *New York Times v. United States*—and it’s easy to see why. It’s a story about the heroism of the courts, and therefore about the heroism of lawyers. The newspapers (represented by a titan of constitutional scholarship, Yale Law Professor Alexander Bickel) stood up to the Nixon administration over a matter that the administration had argued implicated national security concerns, and the Court sided with the press.<sup>10</sup> It doesn’t hurt, of course, that we all know what happened next: Watergate took down the Nixon presidency; the Vietnam War came to be widely, if not universally, regarded as a mistake; and the publication of the *Pentagon Papers* did not in fact have any of the dreadful consequences that the Nixon administration prophesied.<sup>11</sup>

But I’m not here today to talk about *New York Times v. United States*. Instead, I want to talk about the *other* Pentagon Papers case. You see, the night before the Supreme Court ruled in the *New York Times* case, and while both newspapers were still holding in abeyance their article series based on the *Papers*, in obedience to lower court orders, a very strange Senate subcommittee hearing was held. After a Republican senator used a procedural mechanism to keep him from taking the Senate floor, Mike Gravel, a first-term Democratic senator from Alaska, convened a 9:45 p.m. meeting of the Environment and Public Works Committee’s Subcommittee on Buildings and Grounds.<sup>12</sup> Gravel chaired the subcommittee, and Senate rules allowed him to call a hearing at any time,

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8. *Id.* at 714. The series of lower-court decisions leading up to the Supreme Court’s decision is traced in Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 746 (2012).

9. *New York Times*, 403 U.S. at 724–25 (Brennan, J., concurring) (“[T]he First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.”).

10. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 974 n.43 (1998) (listing *New York Times v. United States* as one of only eighteen “truly canonical” American constitutional law cases).

11. Indeed, Nixon’s Solicitor General, Erwin Griswold, would later admit this last point. See, e.g., Erwin N. Griswold, *No Harm Was Done*, N.Y. TIMES, June 30, 1991, at E15 (“In hindsight, it is clear to me that no harm was done by publication of the Pentagon Papers.”); Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25 (“I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat.”).

12. MIKE GRAVEL & JOE LAURIA, *A POLITICAL ODYSSEY* 27–30 (2008).

so long as the other subcommittee members were notified.<sup>13</sup> Gravel “notified” the other members by slipping notes under their office doors less than an hour before the hearing began.<sup>14</sup> Unsurprisingly, he was the only member of the subcommittee who showed up to the hearing; he brought Representative John Goodchild Dow of New York, an anti-war Democrat, as the “witness” whose testimony occasioned the hearing.<sup>15</sup> As Gravel later reported, the hearing played out as follows:

“Congressman Dow,” I said, “great to have you here, appreciate hearing your views. What is it you want? What is it you need?”

Dow said, “I’d like a federal building in my district.”

And I said, “Let me stop you right there. I certainly believe that is a worthy desire for you to have for your constituency, but I gotta tell you we got no money. And the reason we don’t have any money is because of what is happening in Vietnam. What is happening in Vietnam is a mistake and I’ve got a few comments to make about how we got into that mistake.”<sup>16</sup>

Gravel then read aloud from the *Pentagon Papers* for over three hours, until he broke down in tears a little after 1:00 a.m. while reading about the effects of the war on both Vietnamese civilians and American soldiers.<sup>17</sup> He entered thousands of remaining pages into the subcommittee record; his staff stayed up until the wee hours of the morning photocopying the “subcommittee record” and handing it to reporters.<sup>18</sup> The Court ruled in the *New York Times* case about twelve hours later, but by that point the cat was irretrievably out of the bag.

But even after the Court’s ruling the next day, the saga wasn’t quite over. It is little remembered that the *New York Times* case left open the possibility of post hoc criminal prosecution. Two justices in the majority—Justices Stewart and White—wrote separately to note that, in White’s words, “failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by

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13. *Id.* at 30.

14. *Id.* at 30.

15. *Id.*

16. *Id.*

17. *Id.* at 36.

18. *Id.* at 38.

injunction does not mean that it could not successfully proceed in another way.”<sup>19</sup> Three other justices—Chief Justice Burger and Justices Harlan and Blackmun—dissented, arguing that the lower court injunctions against publication should have been upheld.<sup>20</sup> Add those together, and that’s five justices open to the possibility of criminalizing the disclosure of the *Pentagon Papers*. And, indeed, the Nixon administration did prosecute Daniel Ellsberg, who had leaked the *Papers* to both Gravel and the media, and Anthony Russo, who had helped Ellsberg copy the *Papers*.<sup>21</sup> Those charges were ultimately dismissed, not because of any free press concerns but because of government misconduct in the investigation.<sup>22</sup>

Senator Gravel soon became convinced that fear of prosecution and press timidity resulted in too little of the *Papers* being published.<sup>23</sup> So he arranged to publish them himself—technically, to publish “the 4,100-page subcommittee record”—with Beacon Press.<sup>24</sup> In the course of the subsequent grand jury investigation into the leaking of the *Papers*, Gravel’s aide Leonard Rodberg was subpoenaed, as was the director of another press with which Gravel had tried to publish the *Papers*. Gravel intervened with a motion to quash the subpoenas on Speech or Debate Clause grounds, and the case eventually worked its way up to the Supreme Court.<sup>25</sup>

The Court, per Justice White, issued two central holdings. First, it was “incontrovertible” that Senator Gravel himself would be “protect[ed] . . . from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing.”<sup>26</sup> And, crucially, Gravel’s immunity under the Speech or Debate Clause must extend to Rodberg, too:

[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in

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19. *New York Times Co. v. United States*, 403 U.S. 713, 733 (White, J., joined by Stewart, J., concurring); *id.* at 730 (Stewart, J., joined by White, J., concurring).

20. *Id.* at 748 (Burger, C.J., dissenting); *id.* at 752 (Harlan, J., joined by Burger, C.J., and Blackmun, J., dissenting).

21. See RUDENSTINE, *supra* note 5, at 341–43.

22. See *id.* at 342–43.

23. GRAVEL & LAURIA, *supra* note 12, at 49–50.

24. *Id.* at 50–51; see also 5 THE PENTAGON PAPERS: THE SENATOR GRAVEL EDITION 314–15 (1972) (describing the text of the Gravel edition).

25. JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 216 (2017).

26. *Gravel v. United States*, 408 U.S. 606, 615 (1972).

session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and . . . if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.<sup>27</sup>

This holding, that a senator's aide shares his boss's immunity from being forced to testify about core legislative activity, was unanimous.<sup>28</sup>

The Court's second holding in *Gravel*, however, was more contentious. While the "events occurring at the subcommittee hearing" were privileged,<sup>29</sup> the arrangements to have the *Papers* published were not. This was because, in White's view,

private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings; the record and any report that was forthcoming were available both to his committee and the Senate. . . . We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.<sup>30</sup>

In other words, in the Court's view, the "legislative process" was limited to legislators' interactions with one another; their interactions in the broader public sphere<sup>31</sup> were something different.

It was on this point that three justices dissented.<sup>32</sup> Writing for those

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27. *Id.* at 616–17 (citation omitted).

28. *See id.* at 629–33 (Stewart, J., dissenting in part); *id.* at 633 (Douglas, J., dissenting); *id.* at 648 (Brennan, J., dissenting).

29. *Id.* at 615 (majority opinion).

30. *Id.* at 625–26.

31. On the concept of the public sphere in the separation of powers, see CHAFETZ, *supra* note 255, at 15–26.

32. *Gravel*, 408 U.S. at 633 (Douglas, J., dissenting); *id.* at 648–49 (Brennan, J., joined by Douglas & Marshall, JJ., dissenting).

three, Justice Brennan insisted that the majority had “so restrict[ed] the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system.”<sup>33</sup> In particular, he chastised the majority for “exclud[ing] from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator’s duty to inform the public about matters affecting the administration of government.”<sup>34</sup> He noted that congressional hearings “are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern.”<sup>35</sup> Neither “history” nor “reason,” he concluded, supported the Court’s conclusion that “the informing function is not privileged merely because it is not necessary to the internal deliberations of Congress.”<sup>36</sup> And for Brennan, this failure on the Court’s part implicated the nation’s deepest democratic values:

What is at stake is the right of an elected representative to inform, and the public to be informed, about matters relating directly to the workings of our Government. The dialogue between Congress and people has been recognized, from the days of our founding, as one of the necessary elements of a representative system. We should not retreat from that view merely because, in the course of that dialogue, information may be revealed that is embarrassing to the other branches of government or violates their notions of necessary secrecy. A Member of Congress who exceeds the bounds of propriety in performing this official task may be called to answer by the other Members of his chamber.<sup>37</sup>

For Brennan, then, interacting with the people was not peripheral to a legislator’s job; it was central to it, and therefore deserving of the highest protections.

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33. *Id.* at 648 (Brennan, J., dissenting).

34. *Id.* at 649.

35. *Id.* at 650.

36. *Id.* at 652.

37. *Id.* at 661–62.

## II. BRINGING THE PUBLIC INTO THE SEPARATION OF POWERS

It is this divergence between Brennan and his colleagues in the majority that I would like to spend the rest of my time exploring. For the majority, the separation of powers is all about how officials embedded within the governing structure interact with one another. The Speech or Debate Clause, on this view, protects core legislative activities from interference by the other branches—even when those activities are carried out by an aide, rather than by the legislator herself. But, crucially, for the majority, core legislative activities are limited to activities in which legislators (or their aides) interact with other legislators (or their aides). The majority is focused on inward-facing legislative behavior;<sup>38</sup> outward-facing activity, like talking to members of the public, is “not part and parcel of the legislative process.”<sup>39</sup> For Brennan, this is upside down: Representative democracy requires a free-flowing exchange of information between legislators and the public. Interference with this information flow, just as much as interference with the information flow within legislative institutions, undermines core constitutional values.

Brennan’s point is not necessarily the most intuitive one. Today, we tend to think about so-called structural constitutionalism—that is, federalism and the separation of powers—as being about the interactions between large, impersonal governing institutions. Interactions between agents of the state and the public seem to fall into the domain of rights-based constitutionalism. And when we talk, teach, and write about the Constitution, we tend to keep those two things separate<sup>40</sup>—indeed, at some law schools, they’re taught in different classes. But from our republic’s earliest days, we’ve also understood that the two cannot be so neatly separated. The Declaration of Independence drew this connection explicitly in its preamble: After asserting that “all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness,” it went on to translate this claim of natural right into one of institutional design.

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38. Elsewhere, I have referred to this as a “geographical” conception of the scope of the privilege—that is, one that “focuses on absolutely protecting from interference by any outside power actions that take place within the physical confines of [a legislative house].” JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 5 (2007).

39. *Gravel*, 408 U.S. at 626.

40. There are, of course, exceptions. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

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[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. [And] whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it; and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>41</sup>

In this short passage, we have a mashup of three distinct concepts: liberal rights (life, liberty, and the pursuit of happiness), republican freedom (the right of the people to alter, abolish, and reinstitute their government), and institutional design (restructuring the government according to such principles as shall seem best to the people). For Jefferson, the three were inseparable—although we certainly should not pass this by without pausing to note that these three principles appeared to Jefferson and his colleagues to sit more harmoniously precisely because of the exclusion of most persons from the political people.<sup>42</sup>

A little over a decade after Independence, Publius picked up on this theme, explaining how institutional mechanics, the stuff of structural constitutionalism, might be harnessed in the service of rights protection. In *Federalist 28*, Alexander Hamilton explored this connection in the context of federalism:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.<sup>43</sup>

In other words, federalism functions as a safeguard of individual rights by creating distinct power centers, competing for the affections of the people.

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41. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

42. Aziz Rana has written eloquently about the ways in which republican self-rule in the early republic was predicated upon the subordination and exclusion from the political people of members of marginalized groups. See generally AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 1–175 (2010).

43. THE FEDERALIST NO. 28, at 176–77 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 2003) (1961).

If one level of government becomes oppressive, on this view, the other will have an incentive to check it, thereby becoming the people's hero and winning more power vis-à-vis the other level of government in the long run.<sup>44</sup> James Madison made a similar point in the separation-of-powers context in *Federalist 51*: After explaining that the system was designed so as to encourage “[a]mbition . . . to counteract ambition,” he told his readers why this was important: “[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.”<sup>45</sup> Again, structural design is presented as protecting the rights of the public.

Unfortunately, in present-day discussions of the separation of powers, we seem to have lost this sense of what the powers are separated *for*. We generally talk about them as if they only regulate the dealings of powerful governing institutions with one another—the federal government with the states, in the context of federalism, and the branches of the federal government with one another, in the context of the separation of powers. By contrast, Jefferson, Hamilton, and Madison understood these structural provisions to be public-facing. They were there precisely to protect the rights and interests of the broader political community.

I propose that we take our cue from Justice Brennan and try to bring the public back in to our structural constitutional analysis. In what remains of my time, I will offer snapshots of a couple of areas in which thinking about separation of powers in terms of the institutions' interactions with the public would give us a different take on important constitutional issues.

#### A. *Speech or Debate*

To begin, let's stick with the constitutional provision that was at issue in *Gravel*, the Speech or Debate Clause. Perhaps not surprisingly, given his authorship of the Declaration of Independence, Thomas Jefferson, the great parliamentarian of the early republic, shared Brennan's expansive

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44. I've analyzed this dynamic in the federalism context in Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1092–98 (2011).

45. THE FEDERALIST NO. 51, *supra* note 43, at 319 (James Madison). Daryl Levinson and Rick Pildes have influentially insisted that the development of political parties in the early republic rendered this Madisonian conception of the separation of powers almost immediately obsolete. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). For my response to their argument, see CHAFETZ, *supra* note 255, at 28–35.

reading of the speech or debate privilege. Consider the Cabell affair. In 1797, a federal grand jury sitting in Richmond issued a presentment against Samuel J. Cabell, a Republican who represented Virginia in the House of Representatives.<sup>46</sup> Cabell had written a circular letter to his constituents that pulled no punches in attacking the foreign policy of the late Washington administration, policy largely continued by the new Adams administration, and the presentment charged Cabell with common law seditious libel.<sup>47</sup> In other words, the grand jury sought to initiate criminal proceedings against a member of the U.S. House of Representatives based on the content of a letter that he sent to his constituents.

In an anonymously authored petition to the Virginia House of Delegates, Jefferson—who was Adams’s vice president, Cabell’s constituent, and the leader of Cabell’s party—wrote that

in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, . . . their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive; and . . . their communications with their constituents should of right, as of duty also, be free, full, and unawed by any.<sup>48</sup>

But the presentment threatened that free intercourse between representative and constituent, because it threatened to interpose the judiciary. This, Jefferson noted, would “put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong.”<sup>49</sup> In short, it would “put the legislative department under the feet of the Judiciary, [leaving] us, indeed, the shadow, but [taking] away the substance of representation.”<sup>50</sup>

Jefferson’s initial recommendation was that the Virginia House of Delegates impeach and punish the offending grand jurors, but the final

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46. CHAFETZ, *supra* note 255, at 211–12.

47. *See id.* at 212.

48. THOMAS JEFFERSON, *Petition to Virginia House of Delegates (Aug. 1797)*, in 8 THE WORKS OF THOMAS JEFFERSON 322, 322 (Paul Leicester Ford ed., 1904).

49. *Id.* at 326.

50. *Id.*

petition presented in the House of Delegates toned the request down somewhat.<sup>51</sup> Still, the House ordered a thousand copies of the petition to be printed and distributed, and it resolved that the presentment was “a violation of the fundamental principles of representation, incompatible with that independence between the co-ordinate branches of government, meditated both by the general and state constitutions.”<sup>52</sup> Cabell was never prosecuted on the presentment.<sup>53</sup>

One might think of the Cabell affair as prefiguring Republican reactions to the Alien and Sedition Acts, which became law about half a year after the Virginia House of Delegates’ resolution.<sup>54</sup> The chief reactions to those acts, too, came in the form of resolutions passed by state legislatures: the Kentucky and Virginia Resolutions of 1798 and 1799, secretly authored by Jefferson and Madison, respectively.<sup>55</sup> One reason (among many) that it made sense to have state legislatures take the lead in protesting the Alien and Sedition Acts was the long history of free legislative speech and debate. It is true that the federal Constitution’s Speech or Debate Clause did not apply to state legislatures, but the privilege had a long pedigree in Anglo-American constitutionalism,<sup>56</sup> and it would have been politically treacherous, to say the least, to federally prosecute state legislators for introducing or voting on these resolutions. By contrast, protesting those laws in other venues—say, in the press or in open public meetings—might well have led to prosecution under the Sedition Act itself.<sup>57</sup> And the Kentucky and Virginia Resolutions were, of course, intended for public consumption: As one leading historical treatment puts it, they “served as efficient rallying devices for Republicans from Vermont to Georgia,”<sup>58</sup> and “were an integral part of the Republican national campaign” in 1800.<sup>59</sup> We remember that election as the “Republican Revolution” of 1800 because of the success with which Jefferson, Madison, and their compatriots rallied public support.<sup>60</sup>

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51. CHAFETZ, *supra* note 255, at 212.

52. *Quoted in id.* at 213.

53. *Id.*

54. *See id.*

55. *Id.*; Chafetz, *supra* note 444, at 1107–11.

56. That pedigree is traced in CHAFETZ, *supra* note 255, at 201–15.

57. *See id.* at 213.

58. Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties*, 5 WM. & MARY Q. (3d ser.) 145, 176 (1948).

59. *Id.* at 170.

60. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV.

Notice that in the Cabell affair, like in the *Gravel* case, what was at issue was what we might anachronistically (at least for Cabell) call the right of members of Congress candidly to discuss matters of national security with their constituents. For the Adams administration, Cabell was interfering with the conduct of international diplomacy at a time when the United States needed carefully to navigate between the competing demands of Old World powers. For the Nixon administration, Gravel was interfering with the conduct of a war at a time of conflict between the two great superpowers, one of which was the United States. In both cases, the executive branch was asserting unilateral authority to determine the interests of the American state and to threaten criminal sanction against other officeholders who offered a competing account.

It is important to understand these conflicts in precisely those terms: as conflicts over who gets to construct, define, and delimit American national interests. All too often, we talk in terms of whether or not “secrets” are “leaked.” This treats the secrecy of secrets as something that somehow inheres in the information itself—it is either secret information or it isn’t. But secrecy isn’t a natural category; it’s a political one.<sup>61</sup> Information gets coded as “secret” because some political actor has chosen to so code it. That choice is made in the context of some particular construction of the national interest, and it is generally made in furtherance of that construction. To accept that coding is thus to buy into that construction—or, at the very least, to deny others the resources necessary to challenge that construction.

Already in the early 1970s, there were significant concerns about overclassification—indeed, it was a theme of Justice Douglas’s dissent in *Gravel*.<sup>62</sup> But if overclassification was worth worrying about in the early 1970s,<sup>63</sup> it was nothing compared to today. As Steven Aftergood wrote in 2009,

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L. REV. 885, 934 (1985) (“[T]he Resolutions were triumphantly vindicated, at least in Republican eyes, by the results of the election of 1800, in which the Republicans seized control of both Congress and the Presidency from the Federalists.”).

61. I’ve made this point before. See CHAFETZ, *supra* note 255, at 224; Josh Chafetz, *Whose Secrets?*, 127 HARV. L. REV. F. 86, 86 (2013).

62. *Gravel v. United States*, 408 U.S. 606, 637–40 (1972) (Douglas, J., dissenting).

63. Indeed, some were worrying about it as early as the 1950s. See Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399, 400 (2009) (quoting a 1956 Defense Department report claiming that “overclassification has reached serious proportions”).

By 2008, classification activity had increased to a total of more than 23 million classification actions per year. The most recent reported cost of protecting classified information in government and industry was a record annual high of \$9.9 billion in 2007. Untold billions of pages of government records, some dating back to World War I, have remained inaccessible to the public on asserted national security grounds, and fateful government deliberations on questions of war and peace, human rights, and domestic surveillance have increasingly moved beyond public ken.<sup>64</sup>

Moreover, as David Pozen noted in a groundbreaking 2013 article, massive overclassification is combined with a regime in which executive-branch actors routinely leak such information to advance their own agendas, without fear of prosecution, because, after all, it is the executive branch that prosecutes.<sup>65</sup> However, when leaks that are not in the interests of the executive branch occur, the government has a wide array of draconian penalties with which to go after the leakers<sup>66</sup>—just ask Chelsea Manning. Moreover, as Pozen noted, “[n]o court has ever accepted a defense of improper classification” in an Espionage Act prosecution.<sup>67</sup> In short, the executive branch fosters a culture of massive overclassification, combined with a permissive attitude toward leaks that promote executive-branch interests and a harshly punitive attitude toward leaks that do not. This, of course, is a recipe for a public political discourse that is systematically skewed toward the executive branch’s position.

A speech or debate privilege that focuses only on the interactions among members of Congress and their staffs does something to combat this—but not much. If members of Congress can talk only to one another about what they know, then they have little hope of shifting views in the public at large—and it is through such *public* contestation that the branches gain or lose power vis-à-vis one another.<sup>68</sup> Moreover, if members of Congress are unable to go public with what they know for fear of being haled before a court, then insiders with access to information—people like

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64. *Id.* at 402 (footnotes omitted).

65. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

66. *See id.* at 522–27.

67. *Id.* at 523.

68. This is a major theme of CHAFETZ, *supra* note 255. *See especially id.* at 15–26.

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Daniel Ellsberg—have less of a reason to give that information to members of Congress in the first place.

By contrast, a speech or debate privilege that robustly protects members' communication with the public goes a lot further toward contesting the executive branch's attempt at monopolizing the construction of the national interest. Consider, in this regard, that it was agitation by Republicans like Cabell, Jefferson, and Madison during the Adams administration that contributed to the public's turn against the Federalists, leading to the Republican Revolution of 1800. And the release of the *Pentagon Papers*, among other things, contributed to the public's turn against the Vietnam War in the 1970s. In each case, legislators used their privileged positions to influence public discourse in such a way as to contest the construction of American national interests being put forward by the executive. When Justice Brennan insisted that the "dialogue between Congress and people" must be protected, even—or perhaps especially—when "in the course of that dialogue, information may be revealed that is embarrassing to the other branches of government or violates their notions of necessary secrecy,"<sup>69</sup> he was insisting on the availability of a counternarrative.

Of course, Justice Brennan dissented in *Gravel*. The Court's majority continued pressing in the opposite direction: Seven years later, in *Hutchinson v. Proxmire*,<sup>70</sup> it held that a senator could be sued for defamation for the contents of a press release, constituent newsletter, and television interview, all of which referred to material he had discussed in a floor speech. (Justice Brennan wrote a three-sentence dissent, simply citing to his *Gravel* dissent.<sup>71</sup>) Nevertheless, two factors have combined to make the majority opinions in *Gravel* and *Hutchinson* largely untenable. First, as a result of both congressional choices and changes in technology, congressional materials are far more widely and easily available today than they were in 1971. C-SPAN now broadcasts floor proceedings in both chambers as well as a great many committee meetings. Nearly all open committee meetings are also broadcast live over the internet. C-SPAN's entire video archive is available for free online, as are recent volumes of the *Congressional Record*. Many congressional committees also post online the text of testimony and reports. Put simply—and with the important but quite limited exception of closed committee hearings—the

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69. *Gravel v. United States*, 408 U.S. 606, 661–62 (1972) (Brennan, J., dissenting).

70. 443 U.S. 111 (1979).

71. *Id.* at 136 (Brennan, J., dissenting).

line between something that is internal to Congress and something that is public has significantly eroded. The second major development is that a certain kind of free speech absolutism has become the norm among both liberals and conservatives.<sup>72</sup> This can be seen in the present-day lionization of *New York Times v. United States*—which, recall, was a 6–3 decision when it came down. But it is hard to imagine any judge in 2017 voting in favor of prior restraint. As a result, media outlets feel perfectly free to take this increasingly available congressional material and run with it.

Consider the case of Henry Gonzalez, a Democrat from Texas who served in the House of Representatives from the early 1960s through the late 1990s. In 1992, he read aloud from classified documents on the floor of the House and placed a number of those documents into the legislative record. Those documents indicated that, contrary to the George H.W. Bush administration’s claims, senior administration officials had been cozying up to Saddam Hussein’s regime as late as a few months before Iraq’s 1990 invasion of Kuwait.<sup>73</sup> After a couple of months of such disclosures, the press finally took notice and began reporting on Gonzalez’s information.<sup>74</sup> A Republican resolution requesting that the Ethics Committee investigate Gonzalez failed on a party line vote,<sup>75</sup> there was no serious talk of prosecuting either him or the newspapers that ran with his revelations.

More recently still, consider the roles played by Senators Jay Rockefeller, Ron Wyden, and Mark Udall, all Democrats who served on the Intelligence Committee, in disclosing information about the operations of the national security apparatus under the Bush II and Obama administrations.<sup>76</sup> In 2004, Rockefeller and Wyden announced on the floor that they were opposing the conference report on the intelligence authorization bill based on an objection to one unnamed acquisitions program.<sup>77</sup> They urged their colleagues to come in for a closed briefing on the program.<sup>78</sup> But by making their initial plea in open session, they set into motion what Seth Kreimer has termed the “ecology of

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72. For a discussion of how this came about, see STEVEN H. SHIFFRIN, *WHAT’S WRONG WITH THE FIRST AMENDMENT?* 159–83 (2016).

73. CHAFETZ, *supra* note 25, at 219–20.

74. See, e.g., George Lardner Jr., *Gonzalez’s Iraq Exposé: Hill Chairman Details U.S. Prewar Courtship*, WASH. POST, Mar. 22, 1992, at A1; William Safire, *Opinion, Bush’s Lavoro Scandal*, N.Y. TIMES, Apr. 27, 1992, at A17.

75. CHAFETZ, *supra* note 255, at 220.

76. See *id.* at 220–22.

77. *Id.* at 220.

78. *Id.*

transparency”<sup>79</sup>: within a week, the *New York Times* reported on what the program was, and within a few years, the program was quietly terminated.<sup>80</sup> Similarly, in 2011, Wyden and Udall announced on the Senate floor that the Obama administration had adopted secret expansive interpretations of portions of the PATRIOT Act dealing with domestic surveillance.<sup>81</sup> That prompted the ACLU and the *New York Times* to file FOIA requests, which led to some disclosure by the government, but not enough in their view.<sup>82</sup> In an attempt to pry more information loose, the ACLU and the *Times* filed suit; when the government moved to dismiss the suits, Senators Wyden and Udall released an open letter to Attorney General Holder laying out their concerns about the secret interpretation—and, in the process, dropping a few more tantalizing hints about the surveillance program that was running pursuant to that interpretation.<sup>83</sup> In 2013, the Snowden revelations made the details of the surveillance operation clear, and the ACLU again filed suit.<sup>84</sup> In 2015, the Second Circuit held that the surveillance program was illegal.<sup>85</sup> The following month the relevant provision of the PATRIOT Act was allowed to sunset; when it was subsequently renewed, it came with much tighter limitations on the NSA’s surveillance authority.<sup>86</sup> Once again, a revelation by members of Congress, under the protection of the speech or debate privilege, set the ecology of transparency in motion, resulting in a more robust public discourse that challenged the ways in which the executive was constructing and pursuing the national interest. These challenges ultimately resulted in deviations from the executive’s preferred policy—and this all occurred in realms conventionally coded as “national security,” where the executive’s claim to unfettered authority is often thought to be at an apex.

Nor is freedom of speech or debate the only context in which bringing the public back in might give us a different view of separation-of-powers

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79. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011 (2008); Seth F. Kreimer, *The Ecology of Transparency Reloaded*, in *TROUBLING TRANSPARENCY: THE FREEDOM OF INFORMATION ACT AND BEYOND* (David Pozen & Michael Schudson eds., forthcoming 2018).

80. CHAFETZ, *supra* note 255, at 220–21.

81. *Id.* at 221.

82. *Id.*

83. *Id.*

84. *Id.*

85. *ACLU v. Clapper*, 785 F.3d 787, 826 (2d Cir. 2015).

86. CHAFETZ, *supra* note 255, at 221–22.

controversies. Consider congressional oversight hearings.

### B. Hearings

With oversight, too, we tend to speak as if the only relevant relationship is that between governing institutions—here, between the overseer (a congressional committee) and the overseen entity (generally some organ of the executive branch). Did the inquiry turn up new facts? Did it lead to the enactment of new legislation or other concrete actions by Congress in response to the facts discovered? Those things, we frequently hear, characterize *real* oversight—anything else is just a political circus. But recall again Justice Brennan’s insistence in *Gravel* that congressional hearings “are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern.”<sup>87</sup> Hearings are a mechanism for discovering facts, developing legislative proposals, considering the suitability of nominees, etc. But they are also a form of political theater and a means of communicating with the public—and these are functions to be encouraged, not lamented.

Consider the Senate munitions inquiry of the mid-1930s, led by Senator Gerald Nye, a Republican from North Dakota. The Nye Committee conducted nearly a hundred hearings and interviewed more than two hundred witnesses in its investigation into the links between the munitions industry (the so-called “merchants of death”) and the American entry into World War I.<sup>88</sup> Although the Senate committee never demonstrated its original hypothesis—that the munitions manufacturers had deliberately maneuvered the United States into war—it did begin to develop a substantial critique of what would later be called the military-industrial complex.<sup>89</sup> That critique was instrumental in mobilizing an isolationist bloc that significantly complicated Roosevelt’s attempts to bring the United States into World War II.<sup>90</sup> As political scientist John C. Donovan noted shortly after the Second World War, the munitions inquiry both sprang from and fed into a “popular disillusionment concerning

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87. *Gravel v. United States*, 408 U.S. 606, 650 (1972) (Brennan, J., dissenting).

88. RICHARD A. BAKER, 200 NOTABLE DAYS: SENATE STORIES, 1787 to 2002, at 141 (2006).

89. MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 185, 190, 207 (2013).

90. *See id.* at 185, 211, 250.

American participation in the First World War.”<sup>91</sup> As a consequence, “the isolationist groups, within and outside Congress, were strong enough and clever enough and were in a sufficiently strategic position to win substantial concessions from the administration from 1935 through 1939,”<sup>92</sup> including of course the Neutrality Acts of 1935 and 1937. Only after war broke out in Europe was FDR able to get out from under neutrality legislation; even then, Congress insisted on the “cash-and-carry” requirement for arms shipments.<sup>93</sup> And even when lend-lease replaced cash-and-carry in 1941, Roosevelt perceived the need to justify it to Congress in language sounding in neutrality, as Mariah Zeisberg has shown.<sup>94</sup> None of these policies were fully effective in constraining Roosevelt,<sup>95</sup> but neither were they mere parchment barriers—there is, after all, only so much that a president can do surreptitiously—and the munitions inquiry played a significant role in developing the political circumstances that led to the isolationist pressure in Congress and in the public at large.

Some of what the Nye Committee accomplished sprang from what it found, of course, but note that it did not actually succeed in turning up a smoking gun—it found no direct evidence that the munitions industry had pushed the United States into war. Nevertheless, it managed to make a compelling argument to much of the public that World War I had been something other than a glorious fight to make the world safe for democracy, and that public persuasion had real political consequences, making it harder for Roosevelt to move the United States toward entry into World War II.

Once high-profile hearings began to be televised, their use as tools of communicating with, and attempting to influence, the public became even more pronounced. As a result, the way in which hearings were staged became ever more important. Consider the rise and fall of Joseph McCarthy. McCarthy’s rise to national prominence was solidly aided by

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91. John C. Donovan, *Congressional Isolationists and the Roosevelt Foreign Policy*, 3 *WORLD POL.* 299, 300 (1951).

92. *Id.* at 303.

93. *Id.* at 305. See also OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 177 (2017).

94. See ZEISBERG, *supra* note 89, at 85–87; HATHAWAY & SHAPIRO, *supra* note 93, at 179.

95. See ZEISBERG, *supra* note 89, at 62–63 (listing actions FDR took between 1938 and 1941 that were aimed at advancing U.S. intervention in the war).

his chairmanship of the Senate Permanent Subcommittee on Investigations in 1953 and 1954. He used this perch to make increasingly dramatic, and largely unfounded, accusations of Communist subversion within groups ranging from the Bureau of Internal Revenue and the Federal Communications Commission<sup>96</sup> to the Voice of America<sup>97</sup> to the CIA and the Atomic Energy Commission.<sup>98</sup> Shortly after McCarthy took over the Investigations Subcommittee, conservative Democrat Allen Ellender of Louisiana complained, “He wants to televise all these hearings . . . . He is trying to overdo this.”<sup>99</sup> McCarthy’s strategy paid off handsomely for him: By the middle of 1953, some observers considered him the most powerful man in the Senate, despite the fact that he had only been there for six years.<sup>100</sup>

But then McCarthy overreached: He went after the army. He didn’t turn up much, but the army punched back, making it known that Roy Cohn, the subcommittee’s chief counsel, had repeatedly used his (and implicitly his boss’s) influence to attempt to get special treatment for G. David Schine, a consultant to the subcommittee who had been drafted into the army.<sup>101</sup> The subcommittee determined that hearings on the matter were called for, and South Dakota Republican Senator Karl Mundt took over chairing the subcommittee for the purposes of what came to be known as the Army–McCarthy Hearings.<sup>102</sup> The hearings lasted for just over two months, with a total of thirty-six sessions.<sup>103</sup> ABC and the DuMont network covered the proceedings live throughout the two-month period; NBC and CBS offered daily forty-five-minute summaries of the hearings.<sup>104</sup> The climactic moment came on June 9, 1954, after the nation had already been treated to weeks of televised depictions of McCarthy “dominat[ing] the proceedings, producing doctored evidence to indict his foes, interrupting to raise a ‘point of order,’ giving lectures, and making crude, personal attacks upon the participants,”<sup>105</sup> in the words of one

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96. See THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY* 466–67 (1982).

97. See *id.* at 476–91.

98. See *id.* at 505.

99. *Id.* at 466.

100. See *id.* at 493.

101. See *id.* at 536–37.

102. See *id.* at 579.

103. Michael Gauger, *Flickering Images: Live Television Coverage and Viewership of the Army–McCarthy Hearings*, 67 *HISTORIAN* 678, 681 (2005).

104. *Id.*

105. *Id.* at 678.

historian. Joseph Welch of the law firm Hale and Dorr (now WilmerHale) had been hired as outside counsel by the army; violating an agreement that Cohn and Welch had struck, McCarthy publicly attacked a junior lawyer at Hale and Dorr—one who was not involved with the Senate hearings at all—for his past membership in a Communist-linked group.<sup>106</sup> Appearing close to tears at the attack on his young associate, Welch demanded of McCarthy, “Have you no sense of decency, sir, at long last? Have you left no sense of decency?”<sup>107</sup> A shocked silence was followed by applause; in most historical accounts, this widely viewed exchange marked a pivotal moment in the decline of McCarthy and McCarthyism more generally.<sup>108</sup>

Less than two months later, Vermont Republican Senator Ralph Flanders introduced a censure resolution against McCarthy.<sup>109</sup> The Senate impaneled a special, six-member committee, consisting of three senior Democrats and three senior Republicans and chaired by Utah Republican Arthur Watkins.<sup>110</sup> After numerous hearings and taking substantial amounts of testimony, the Watkins Committee reported mere days after the 1954 elections, which swung both houses of Congress to the Democrats—at least partially in reaction against McCarthyism.<sup>111</sup> The report recommended censure across two broad categories of McCarthy’s conduct; on the Senate floor, one of those categories was dropped but replaced with another charge—that of McCarthy’s abuse of the Watkins Committee itself.<sup>112</sup> The Senate voted to censure McCarthy by a vote of 67–22.<sup>113</sup> The censure was heavily covered in the press, with the *New York Times* editorializing that the Senate had “done much to redeem itself in the eyes of the American people and to give new assurance of its faithfulness to the principles of orderly democratic government and individual liberty under law,” and the *Washington Post* asserting that the censure was “a vindication of the Senate’s honor.”<sup>114</sup> The censure destroyed what was left of McCarthy’s political prominence and influence. Within three years, he

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106. *Id.* at 678, 679 & n.2.

107. *Id.* at 678.

108. *Id.* at 678–79. Gauger’s treatment is generally skeptical of the magnitude of the hearings’ impact, but even he recognizes that, for example, self-identified moderates’ support for McCarthy decreased as they watched more of the hearings. *See id.* at 683.

109. CHAFETZ, *supra* note 255, at 264–65.

110. *Id.* at 265.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* (first quoting Editorial, *Censure*, N.Y. TIMES, Dec. 3, 1954, at 26; then quoting Editorial, *Judgment of the Senate*, WASH. POST, Dec. 3, 1954, at 20).

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had drunk himself to death.<sup>115</sup>

With McCarthy, we can see the importance of the public nature of committee hearings throughout. It was largely through the publicity he garnered for his subcommittee hearings that McCarthy gained prominence and influence in the first place. But it was also through a skillful performance at the Army–McCarthy Hearings that Joseph Welch was able to begin to turn the tide, to show that it was possible to stand up to McCarthy and survive. This in turn emboldened other opponents of McCarthy to step forward—people like Ralph Flanders, who introduced the censure resolution. And the skillful management of the public image of the resulting Watkins Committee—including the fact of its bipartisan composition, its almost ostentatiously careful and thorough fact-finding procedures, and its exhaustive final report—allowed it to be held up in the press as providing a good reason for public confidence in the Senate’s censure of McCarthy. As anti-McCarthyite journalist Alan Barth put it in 1955, the Watkins Committee hearings were “in almost every important respect the antithesis of the procedure followed” by the McCarthy-led Permanent Subcommittee on Investigations.<sup>116</sup> Again, bringing the public in is central to understanding how these hearings did the work that they did.

Finally, consider another set of hearings that captivated the public: the hearings on Ronald Reagan’s nomination of Robert Bork to the Supreme Court in 1987. A young University of Chicago law professor named Elena Kagan would later write that the Bork hearings “captivated and involved [the] citizenry in a way that, given the often arcane nature of the subject matter, could not have been predicted.”<sup>117</sup> But the “captivating” nature of the Bork hearings wasn’t just something that unexpectedly arose: It was a result of conscious political choices to engage and involve the citizenry. Put simply, the Democratic-controlled Senate Judiciary Committee did a masterful job of staging these hearings so as to make the case for Bork’s unfitness to serve on the Court. But before we even get to the hearings, we have to bring the public in—you see, Democrats were only running the hearings because they had triumphed in the 1986 midterm elections, picking up a net of eight Senate seats and taking control of the chamber

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115. *Id.* at 266.

116. ALAN BARTH, GOVERNMENT BY INVESTIGATION 210 (1955).

117. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 940 (1995).

for the first time in the Reagan presidency.<sup>118</sup> And by the time of the Bork hearings, the Iran–Contra affair was a full-blown scandal—indeed, the Bork hearings began shortly after the Iran–Contra hearings wrapped up—and Reagan’s approval ratings were accordingly suffering.<sup>119</sup> This set the stage for Democratic pushback against Reagan’s nominee. In polling taken before, during, and after the confirmation hearings, one can see both familiarity with Bork and opposition to him steadily increasing.<sup>120</sup>

A lot went in to this change: First, Senate Democrats and outside allied groups “had to accurately ascertain that there was a public willingness to endure a protracted fight over Bork’s nomination.”<sup>121</sup> Reagan’s low popularity was undoubtedly one factor that convinced them that there was. Then they had to construct the hearings so as to take advantage of that willingness—so as to actually convince the public that Bork was unfit. At the same time, the administration, congressional Republican leadership, and outside supporters were engaged in attempting to construct a counternarrative—one that showed Bork as a suitable justice. The more intense this fight got, the more it signaled to the media that it should pay close attention, and more media attention signaled to the public that this was a high-stakes fight, one worth following.<sup>122</sup> With the audience in place and the stakes signaled, the Democrats then used their control over the structure of the hearings to successfully paint Bork as an out-of-touch, extremist ideologue. With the public’s decisive turn against Bork, it became highly unlikely that he would be confirmed by a Democratic Senate, and indeed his nomination failed—first in committee by a vote of 9–5, and then on the floor by a vote of 58–42.<sup>123</sup> This is in stark contrast to the *unanimous* confirmation of Bork’s fellow originalist, Antonin Scalia, only a year earlier.<sup>124</sup> While there are other differences between the Bork and Scalia nominations, one central one is that Republicans still controlled the Senate when Scalia was nominated, which denied

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118. CHAFETZ, *supra* note 255, at 23; see also Josh Chafetz, *The Supreme Court, 2016 Term—Essay: Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 126 (2017).

119. CHAFETZ, *supra* note 255, at 23.

120. *Id.*

121. *Id.*

122. *Id.*

123. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 318 (2009).

124. See Chafetz, *supra* note 118, at 126.

Democrats any opportunity to structure the hearings so as to dent Scalia's public standing.<sup>125</sup> Once again, if we leave the public out, we miss a lot of what was really going on.

Of course, none of this is to suggest that any particular congressional hearing will be *well*-structured so as to win over the public. For one thing, the public might simply not care, and the members running the hearings may be unable to convince it to sit up and pay attention. For another thing, if the public is watching, those running the hearing might flub it: McCarthy obviously flubbed the Army–McCarthy hearings; on at least some accounts, the Iran–Contra hearings were mismanaged; and more recently the Benghazi hearings did not seem to have the impact on Hillary Clinton's public standing that House Republicans had hoped for. But all of these hearings were clearly aimed, in large part, at swaying public opinion, just as were other, more successful uses of the tool. To overlook or downplay this function of congressional hearings is to overlook or downplay much of how American policy is made.

### III. CONCLUSION

We're now in a position to see, I think, that Justice Brennan's concern about "exclud[ing]" "the legislator's duty to inform the public about matters affecting the administration of government" "from the sphere of protected legislative activity"<sup>126</sup> was not simply an abstract theoretical one. Brennan was working with a much more sophisticated understanding of the actual workings of American politics than were his colleagues in the majority in the *Gravel* case. Brennan understood, as they did not, that the allocation of constitutional power as between institutions is fundamentally inseparable from the interactions that those institutions have with their broader publics. He understood, as they did not, that structuring its interactions with the public is an essential function of each of those institutions, and therefore that interference by one with the manner in which another interacts with the public is every bit as detrimental to the American system of separated powers as interference in the so-called "internal" workings of that other institution. And in looking closely at the ways in which members of Congress have revealed the executive branch's secrets to the public, or the ways in which they have structured their investigations and hearings so as to win over the public (or many other

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125. *See id.*

126. *Gravel v. United States*, 408 U.S. 606, 649 (1972) (Brennan, J., dissenting).

public-facing mechanisms that time constraints prevent me from discussing here<sup>127</sup>), we can see that Brennan was right.

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127. I have discussed a number of them in some detail in CHAFETZ, *supra* note 255, at 45–301.