

ESSAY

**THE MEMOGATE PAPERS: THE POLITICS, ETHICS, AND
LAW OF A REPUBLICAN SURRENDER**

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* This article addresses the politics, ethics, and law of the Memogate controversy. A good deal of the information is derived from first-hand knowledge, though I have tried to indicate third-party sources where possible. Thanks to Adam Augustine Carter for all his support as a friend and clear-headed criminal lawyer, and special thanks to Arthur D. McKey, Esq., *see infra* note 189, who helped with the First Amendment section and whose joint expertise in First Amendment and Cyber Law has been invaluable, together with his friendship. Many thanks also to all those across the country who have expressed their support to me and my family, especially the judicial nominees, who I treated as people and not as a number on the Senate calendar. Finally, thanks to syndicated columnist Robert Novak for his kind words and inspiration for part of this article’s title. *See* Robert Novak, *A Republican Surrender*, Townhall.com, Feb. 9, 2004, *available at* <http://www.townhall.com/columnists/robertnovak/printn20040209.shtml>.

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I. INTRODUCTION

On November 14, 2003, just as the United States Senate was ending its historic forty-hour grand debate on filibustered judicial nominations, the *Wall Street Journal* published an editorial containing excerpts from memoranda and talking points prepared for Senators Edward Kennedy and Richard Durbin concerning Democratic strategies for blocking the confirmation of judicial nominations by the Senate Judiciary Committee (the “Committee”).¹ This began the controversy known as “Memogate.”²

Among other things, the Memogate papers that were initially published would prove what Republicans had long been saying: that Democrats in the Senate were getting their marching orders from special interest groups and that they had denied confirmation to the lawyer Miguel Estrada because “he is Latino.”³ But there was much more in the other memos, and everyone knew it, including Senate Democrats, liberal editorialists, liberal law professors, and liberal special interest leaders.

As it would turn out, these and many more that have not been published (the “Memogate papers”) had been readily discovered and viewed on the Committee’s single computer network database—one shared by both Democrat and Republican staff (the “Shared Network”)—and were accessible without restriction through “open permissions” by all authorized users of the Shared Network and freely obtainable from the Shared Network server (the “Server”).

On that Friday, I was Counsel to Majority Leader Bill Frist and had been responsible chiefly for judicial nominations and for organizing the forty-hour floor debate. A year earlier I had been Senior Nominations Counsel to Senator Orrin Hatch on the Senate Judiciary Committee.

1. Editorial, *‘He Is Latino’*, WALL ST. J., Nov. 14, 2003, at A12.

2. The originals of these papers were soon posted, and remain posted, at Coalition for a Fair Judiciary, http://fairjudiciary.com/cfj_contents/press/collusionmemos.shtml (last visited Dec. 27, 2004) [hereinafter Memos].

3. *‘He is Latino’*, *supra* note 1.

Within days of the Memos' publication, another Hatch staffer and I informed our chiefs of staff that Democratic papers had been freely accessible for some time on the Shared Network.⁴ Nevertheless, at the agitated insistence of Democratic senators, and under protest from some Republican senators and most every conservative leader and editorialist, Judiciary Committee Chairman Hatch directed William Pickle, the Senate Sergeant at Arms and Doorkeeper, to conduct a Senate internal inquiry (the "Inquiry") to determine whether any crime had been committed, how the Memogate papers had been obtained, and how they had made it to the press. The Inquiry lasted for the next four months and ended with the issuing of the "Pickle Report."⁵

4. Although the Pickle Report went far out of its way to gloss over this, much to the delight of liberal editorialists, my friend and I differed substantially in what we knew. He was aware of the availability of Democrat papers for many months before he made me aware. He copied thousands into a diskette, although he had only read a small number himself. I had read an even smaller number than that and was not aware that he had made copies of thousands. As I discuss *infra*, the distinction was of no legal or ethical significance. He was guilty only of having more curiosity and time than did I.

5. Sergeant at Arms, U.S. Senate, Report on the Investigation Into Improper Access to the Senate Judiciary Committee's Computer System: Testimony before the United States Senate Committee on the Judiciary (Mar. 4, 2004), available at <http://news.findlaw.com/hdocs/docs/senate/pickle30404rpt1.html> [hereinafter Pickle Report]. From the outset, many, including myself, expressed strong opposition to the Pickle Inquiry and the manner in which it was conducted. Principally, our objection focused on the fact that it was a distraction from the true wrongdoing evidenced by the Memogate papers. In addition, the Pickle Inquiry was conducted to determine whether a crime had been committed and had no legislative purpose—a violation of the Constitution and the case law of congressional abuse of power. See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927) (questioning whether a congressionally-instigated investigation was done for a legislative purpose); *Watkins v. United States*, 354 U.S. 178, 185–87 (1957) (congressional investigations conducted to punish those investigated are indefensible); *id.* at 198 (refusing to accept that "every congressional investigation is justified by a public need that overbalances any private rights affected"). The Inquiry also intruded on First Amendment protected activity. See, e.g., *United States v. Rumely*, 345 U.S. 41 (1953) (Congressional committee was without power to exact information sought in violation of First Amendment); *Rumely v. United States*, 197 F.2d 166 (1952) (Congress had no power to influence public opinion by interfering with First Amendment activity).

The Supreme Court has stated repeatedly that Congress is not invested with a "general power to inquire into private affairs," such as First Amendment activity. *McGrain*, 273 U.S. at 173. The subject of any inquiry must always be one "in which legislation could be had." *Id.* at 177. It has been long established that not all investigations and inquiries by Congress are either constitutional or proper. See *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (holding that Congress does not have power to exercise the judicial function except for cases specifically provided for in the Constitution). This is particularly true when they amount to a criminal investigation that Congress has no authority to conduct. *Id.*; *Hutcheson v. United States*, 369 U.S. 599, 614–21 (1962). See *Sinclair v. United States*, 279 U.S. 263, 295 (1929) (stating that a

For several days before the appointment of Mr. Pickle's Inquiry, the staffs of Democratic senators Kennedy, Leahy, and Durbin had set the table. After private conversations with Pickle and his staff on and off the Senate floor, Democrats selected Pickle to direct the Inquiry, even though Pickle's office, by his own admission in the Pickle Report, had never before conducted anything similar and such inquiries are commonly assigned to the Senate Ethics Committee or other Congressional agencies.⁶

Once Pickle was on board, Democrats began to besiege Orrin Hatch to authorize an investigation. Predictably, Hatch quickly surrendered.⁷

At its conclusion, the Pickle Inquiry (through the "Pickle Report") confirmed in greater detail what the Hatch staffers who knew about the access had only a hint at: the Shared

congressional inquiry may not be conducted for the sole purpose of laying the groundwork for the prosecution of pending suits).

In addition, the Pickle Inquiry was not an investigation "with a legislative intent." In fact, it was the start a fruitless, politicized process aimed at "exposure for exposure's sake." See *Kilbourn*, 103 U.S. at 195 ("By 'fruitless' we mean that it could result in no valid legislation on the subject to which the inquiry referred."). See also *Doe v. McMillan*, 412 U.S. 306, 329 (1973) ("We should all be painfully aware of the potentially devastating effects of congressional accusations. There are great stakes involved when officials condemn individuals by name.") (Douglas, J., concurring); *Hentoff v. Ichord*, 318 F. Supp. 1175, 1182 (D.D.C. 1970) ("If a Report has no relationship to any existing or future proper legislative purpose and is issued solely for the sake of exposure or intimidation, then it exceeds the legislative function of Congress.").

6. Prior to becoming Sergeant at Arms and Doorkeeper, William Pickle had served as the Secret Service detail head for Vice President Al Gore. Reportedly a Democrat, Mr. Pickle had been slated to lead the Secret Service had Gore won the 2000 election. Hired by Majority Leader Bill Frist as a sign of bipartisanship, his job interview had been initiated by Senate Democrat Leader Tom Daschle during the Jeffords interregnum while Daschle was majority leader. The Sergeant at Arms website describes Pickle as the Senate's "chief law enforcement officer." United States Senate, *Office of the Sergeant at Arms and Doorkeeper*, at http://www.senate.gov/reference/office/sergeant_at_arms.htm (last visited Dec. 27, 2004). A thorough review of the *Senate Manual* containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate (including the U.S. Constitution) (the "Senate Manual") suggests that this term is more rhetorical than true. UNITED STATES SENATE, SENATE MANUAL (2002). According to various provisions, the Sergeant at Arms and Doorkeeper is, among other things, the chief enforcer of the Senate's parliamentary laws at the direction of the Senate's presiding officer; the chief enforcer of the Senate's catering and other services and facilities, at the direction of the Senate Rules Committee; and as the Doorkeeper, ensures the security of the Senate mostly through his role on the board that supervises the U.S. Capitol Police. *Id.*

7. As former Senate Majority Leader Bob Dole famously said, "Don't count on Hatch before he chickens." See Timothy Carney, *Rolling Over On Judges: The Hatch Problem*, NAT'L REV. ONLINE, Jan. 23, 2004, at <http://nationalreview.com/comment/carney200401230902.asp>.

Network and the Server were largely “open,” with eighty percent of its stored papers unprotected and accessible by all authorized users, and that, through evident gross negligence in training and supervision, the Shared Network lacked even the most fundamental security precautions.⁸

Notably, according to a letter to Senator Orrin Hatch dated November 19, 2003, and signed by Committee members Senators Leahy, Kennedy, and Durbin, the “security deficiencies of the [Shared Network] have long been known”⁹ Apparently, neither Senators Leahy nor Hatch did anything about this known security problem when they each controlled the budget and administration of the Committee as chairmen.

It was later revealed that knowledge of the open Shared Network was had by others as well.¹⁰ Likewise, according to the Pickle Report, Pickle’s office had ample reason to know of the negligent administration of the Network.¹¹

My original and principal interest in reading the Democrats’ documents was to learn the scheduling of nominations hearings. At the time, the Committee was under Democrat control and Democrat staff freely informed and consulted with left-wing special interests as to the scheduling of Committee hearings, even allowing outside groups to vote on what nominee would be allowed a hearing, but would let Republican staff know their intentions sometimes just a week before a hearing would be scheduled.

8. See Pickle Report, *supra* note 5. Except for the conclusions of the technical forensics professionals, the Pickle Report was highly flawed. In brief, it contained 9 unsupported conclusions of law or fact; 20 instances of bias; 22 instances of false inferences; 15 examples of preferences; 14 incorrect facts; 15 embarrassingly negligent statements; 10 examples of internal contradictions; 23 instances of major omissions; and 14 half-truths. See Letter from Adam Augustine Carter, Esq., to Republican Members, Committee on the Judiciary, United States Senate, Re: Factual Response to the Pickle Report (Mar. 10, 2004), available at <http://committeeforjustice.org/contents/reading/carter.pdf>.

9. Letter from Senators Patrick Leahy, Edward Kennedy, and Richard Durbin to Senator Orrin Hatch (Nov. 19, 2003) (on file with author).

10. See Jeff Johnson, *Intern Backs Miranda, Says Senate Computers Were Not Hacked*, CNSNEWS.COM, Mar. 4, 2004, at <http://www.cnsnews.com/Politics/Archive/200403/POL20040304a.html>.

11. In addition, according to *Reuters*, Senate Minority Leader Tom Daschle admitted during the pendency of the Pickle Inquiry that similar systems security failures had been discovered in four other Senate committees. See Joanne Kenan, *Senate Democrats Fear Computer File Case “Criminal”*, REUTERS, Feb. 10, 2004 (on file with author).

While some of the published Memogate papers were scandalous for scurrilous references to Bush judicial nominees—such as one paper of Senator Richard Durbin’s staff calling nominees “nazis”¹²—the bulk were substantively significant.¹³

The published and still unpublished Memogate papers¹⁴ showed, among other things, that:

- senators used their power to obstruct judicial confirmations in conjunction with promises of campaign funding and election support in 2002;
- senators may have used Senate staff and resources to raise campaign funds for themselves and used their rejection of judicial nominees as fund raising inducements;
- senators coordinated with parties to guarantee results in pending litigation;
- senators and staff kept detailed lists of the ideological make-up of federal circuit courts with an eye to influencing the outcome of pending litigation;
- senators placed circuit-wide holds on confirmation of 6th circuit judges in order to influence the outcome of pending litigation;
- senators effected a grave deception on the American people by pre-determining confirmation outcomes in collusion with special interest groups for purely political reasons, even allowing liberal special interests to vote on which nominees would be permitted a hearing;

12. See Notes by Durbin counsel Christopher Rhee, Nov. 7, 2001, posted at Coalition for a Fair Judiciary, *supra* note 2 (“most of Clinton’s nominees were impeachable . . . most of Bush’s nominees are nazis [sic].”).

13. See Jeff Johnson, *Former GOP Staff Attorney Says ‘Profit Motive’ Drives Judiciary Battles*, CNSNEWS.COM, Feb. 20, 2004, at <http://www.cnsnews.com/Politics/Archive/200402/POL20040220a.html>; Jeff Johnson, *Ex-GOP Lawyer Wants Judiciary Probe Focused On Democrat ‘Corruption’*, CNSNEWS.COM, Feb. 23, 2004, at <http://www.cnsnews.com/Politics/Archive/200402/POL20040223b.html>; Jeff Johnson, *Miranda Feels Disappointment’ in Lack of GOP Support*, CNSNEWS.COM, Feb. 24, 2004, at <http://www.cnsnews.com/Politics/Archive/200402/POL20040224c.html>; Charles Hurt, *Legal Scholars Troubled Over Democrats’ Memo*, WASH. TIMES, Mar. 19, 2004, at A3; Robert Bluey, *Ex-GOP Aide Sees Trouble Ahead for Dems on Memogate*, CNSNEWS.COM, Apr. 21, 2004, at <http://www.cnsnews.com/Politics/archive/2004023>.

14. See Memos, *supra* note 2.

- senators picked what judicial nominees would be rejected well in advance of any hearing and allowed special interests actually to determine what nominees would get hearings and votes; and
- senators had a different standard for Hispanic judicial nominees eligible for elevation to the Supreme Court and an improper design to block Miguel Estrada in particular because he was a Latino who could someday be elevated to higher service.

For example, one unpublished Memogate paper evidenced that one Democrat may have used his Committee staff and Senate resources to raise political funds. One published document showed an effort to block confirmations to the Sixth Circuit, in relation to the then-pending University of Michigan affirmative action case.¹⁵

In the fall of 2002, the most striking corruption evidenced by unpublished Memogate papers was the otherwise unexplained delay of Judge Dennis Shedd's confirmation apparently to satisfy contributors who did not want to see him elevated, so as not to throw a wet blanket on election efforts by Democratic grassroots allies in North Carolina and Louisiana.¹⁶

The Memogate papers also showed that the opposition to the confirmation of Texas Supreme Court Justice Priscilla Owen to the 5th Circuit was led, not by the abortion rights lobby but by the abortion clinics industry, solely because Justice Owen was perceived as being an obstacle to easily obtained and paid-for abortions for minor girls without any parental notification.¹⁷

Despite all this, beginning with the distraction of the Pickle Inquiry, Democratic senators successfully used all their official power and their influence over the press to disguise their own wrongdoing by systematically accusing the Hatch staffers of engaging in escalating degrees of criminal activity.

Republican senators, in the meantime, were forced to support Chairman Hatch's early verdict that the reading of the Memogate papers was unethical and wrong. With few exceptions

15. See Memos, *supra* note 2, *supra*. See also Charles Hurt, *The Case Was Fixed*, WASH. TIMES, Nov. 18, 2003, at A1.

16. See Senate Floor Statement of Orrin Hatch, Nomination of Dennis Shedd to the 4th Circuit Court of Appeals, 107th Cong., Nov. 18, 2002.

17. See Senate Floor Statement of Orrin Hatch, Nomination of Priscilla R. Owen to the 5th Circuit Court of Appeals, 107th Cong., Sept. 04, 2003.

they failed to address the evident misconduct of their Democratic colleagues, appearing more interested in avoiding criticism of themselves. To spare himself criticism from colleagues and the public, Orrin Hatch even spread false rumors that there had been a “hacking,” instructing other Republican senators to make that false representation to conservative leaders. These entreaties to hold back criticism of Hatch only inflamed conservative opposition further.¹⁸

In sum, Democratic senators intentionally misused their power and the resources of the United States to deflect attention from their own wrongdoing, while Republican senators let them. Declaring that the documents were “confidential” and that their disclosure constituted criminal activity, senators endeavored to chill the press and senate staff using the Senate Sergeant at Arms and Doorkeeper as their tool—an incident not unique in the history of Congress.¹⁹

But most importantly, Democratic senators used the threat of an ominous Senate investigation to intimidate my former Hatch staff colleague into handing over the electronic copies of the thousands of telling Memogate papers that he had stored, which Pickle accepted. The Democrats, and their allies, could then go about the business of chilling any scrutiny of themselves.²⁰

In February 2004, I resigned. I did so to spare Leader Frist damage, to refocus attention on the substance of the Democrat memos, and because I was promised that my resignation would end my jeopardy. The latter two promises came from Orrin Hatch directly to me. None of those things came to pass.

18. See Alexander Bolton, *GOP Senators Circle Wagons Round Hatch: Top Conservatives Tell Ideological Allies To Hold Fire*, THE HILL, Feb. 18, 2004, at 1.

19. See *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (holding that legislators are immune for unconstitutional acts against individual, but House of Representatives Sergeant at Arms may be held liable for the abuse of power that legislators had authorized); *Marshall v. Gordon*, 243 U.S. 521 (1917) (House Sergeant at Arms without power to arrest U.S. Attorney for the Southern District of New York as ordered by legislators).

20. The chilling effect of the Pickle Inquiry and the well-coordinated Democrat spin was most starkly demonstrated in the comment by Law Professor Cass Sunstein—a regular contributor to Senate Democrats’ judicial ideology strategies. When asked by a reporter to comment on the substance of the Memogate papers just two weeks after the Pickle Report had concluded that the papers had been easily readable, Professor Sunstein told the seasoned news man: “I don’t want to comment on stolen materials. Even if there was something bad in there, *it would be improper of me—and possibly of you—to comment on them.*” Charles Hurt, *Legal Scholars Troubled Over Democrats’ Memos*, WASH. TIMES, Mar. 19, 2004, at A3 (emphasis added).

II. THE POLITICS OF PERSONALITY

When asked to write this article, I was invited to give a “full throated response” to Memogate, as it had played out in the Senate and the press. I would not have accepted simply to defend our reading or using of the information obtained. Rather, Memogate speaks to greater things—issues concerning the Secrecy Clause, the First Amendment, the free flow of political information, public duty, government intimidation, and the case law that restricts Congress from abusing power. Concern for these issues frames the “full-throated” voice in this article.

The politics of Memogate can be understood in three parts: the Democrats, the Republicans, and the media. Of course, the media was plainly manipulated by Democrats to disguise the substance of the Memogate papers. But their greater failure was not to discern their interests, whether in protecting the free flow of information (and potential sources) or the First Amendment. Many chose instead to pursue a cheap “leak” and “dirty tricks” story. Those interests are fully addressed for the responsible journalist in the legal part of this article, and not here.

A. *The Democrats*

There is not much to say about the Democrats’ political play in Memogate. Their corrupt practices and public fraud were exposed, and with the possibility that more could come out, they responded effectively. Using their Senate-paid staffs and Senate resources, Democrat senators immediately went into an offensive mode to distract from the scandalous substance of their papers. But more serious from a non-partisan perspective was that they were successful.

Contrary to case law and Senate rules, Democrats employed the vast power of the United States Senate to pound on individuals, and by name. The Pickle Report was nothing if not a Bill of Attainder.²¹ The Pickle Inquiry was exactly what courts

21. A Bill of Attainder is a Congressional action, “no matter what the form,” that names an individual, alleges a crime, and inflicts punishment. *See* *United States v. Lovett*, 328 U.S. 303 (1946). *See also* U.S. CONST. art. I, § 9, cl. 3. There can be no doubt that hundreds of articles, editorials, and bold commentaries that responded to the Democrats spin constituted a cruel punishment for an adjudicated crime—the blast of media and internet “pillory,” a punishment with which the framers were well familiar when they forbade the Bill of Attainder.

have held to be an unconstitutional abuse of power.²² And Republicans and the press cooperated in the abuse and misuse of public resources.

Politically, to distract from the substance of the Memogate papers, Democrats had to raise a massive snow front to chill all press scrutiny and any high-ground response from Republicans. It was perfectly understandable. It was also true to form.

In July 2003, after having leaked national security information to the media, and after having been threatened with a criminal probe and with being thrown off the Senate Intelligence Committee, Senator Dick Durbin of Illinois took to the Senate floor, and staring eerily into C-Span cameras, accused the White House of a smear campaign of intimidation against him.²³ Credible colleagues like Hillary Clinton of New York rallied around him. The tactic worked. Durbin's wrongdoing dimmed.²⁴ Durbin was never prosecuted. By contrast, Durbin's Memogate co-conspirator Patrick Leahy of Vermont, a.k.a. "Leaky Leahy," did not escape reprimand. In January 1987, Leahy was forced to resign the Senate Intelligence Committee for leaking a draft staff report on the panel's 1986 Iran-Contra investigation.²⁵ Leahy was also never prosecuted.²⁶

22. See *supra* note 5 and accompanying text. Democrat abuse of power did not end with the Pickle Inquiry. Democrat staff has even called potential employers and threatened them with the obstruction of major legislation in which they had an interest if they hired me. That story remains to be written.

23. See Lynn Sweet, *Durbin Says White House Trying to Smear Him*, CHI. SUN-TIMES, July 23, 2003, at 6.

24. See Mark Preston, *Durbin Accuses White House of Intimidation*, ROLL CALL, July 23, 2003. Contrast Senator Durbin's approach with that of Senator Hatch: when Senator Orrin Hatch was investigated by the F.B.I. for leaking nationally classified information and refused to take a lie detector test, he downplayed the matter. That tactic also worked. Hatch was also never prosecuted or reprimanded. Hatch had gone on television and leaked life-or-death information about how U.S. intelligence was intercepting Al-Qaeda terrorist communications. See Editorial, *Rumsfeld on the Warpath*, THE POST AND COURIER (Charleston, SC), July 24, 2002, at 10A; *Utah Senator Says No to FBI Lie-Detector Tests*, ASSOCIATED PRESS, Aug. 6, 2002. Hatch's leak prompted President George W. Bush to threaten Congressional leaders with cutting off intelligence to Congress. See *Congress: Leaky Wheel Gets the Grease*, THE HOTLINE, Oct. 11, 2001.

25. See Larry Margasak, *Leahy Regrets Leak, Colleague Sees Committee Resignation As Warning*, ASSOCIATED PRESS, July, 29, 1987.

26. At the time of his humiliation, Leahy was already a serial leaker of classified information. In 1985, he gained notoriety when he was charged with revealing classified information during the Achille Lauro terrorist incident, outraging Reagan administration officials. Leahy revealed what the CIA knew on national television only minutes after being privy to a classified briefing. See Jay Nordlinger, *The 'Nastiest' Democrat: Sen. Patrick Leahy, Republican Nightmare*, NAT'L REV., July, 9 2001; United Press

So it was certainly ironic that men who were notorious for violating federal law by leaking sensitive, classified national security information, including Orrin Hatch,²⁷ were accusing us in Memogate of criminal activity or unethical conduct in reading or leaking merely partisan, unprotected information.

It was no less ironic to have Democrats complain about “leaks” and the “confidentiality” of their partisan papers. In 2003, an anonymous staffer in the Justice Department leaked the eighty-six-page draft of Attorney General John Ashcroft’s proposed USA PATRIOT Act II. Three days after the leak, Senator Leahy praised the leaker, just as he has applauded each time a federal employee has disclosed information embarrassing to the Bush administration.²⁸

B. *The Republicans*

For Republicans, the politics of Memogate was more intricate. Republicans paid a high price for their *surrender*, and not for the impugnation of “dirty tricks,” because most anyone who uses a desktop merely rolled their eyes at the Memogate histrionics. Senate Republicans earned the criticism and disgust of their political base, and their surrender did real harm to the message of Democrat obstruction of judicial nominations that some Republicans had strained to develop against the tide of Washington wisdom, even that of senators.²⁹ After my resignation, and during an election year, the Senate spent

International (untitled wire report), Oct. 30, 1986, *available at* LEXIS, News Library, UPI File.

27. *See supra* note 24.

28. *See* Nat Hentoff, Editorial, *Hush-Hush At The Justice Department*, WASH. TIMES, Feb. 5, 2003, at A17.

29. Before Democrats’ rejection in Committee of Fifth Circuit Court nominee Charles Pickering, Sr., Washington wisdom said that the issue of judicial nomination rated below campaign finance reform on issues that mattered to voters, i.e. little if at all. Republican polling showed that this changed after Democrats rejected Pickering in March 2002. The 2002 and 2004 elections buried the wisdom. In 2002, the issue represented the margin of victory in three Senate elections that returned Senate majority control to Republicans, and affected two others. *See also* Gary J. Andres & Michael McKenna, *Judging the Bench*, WASH. TIMES, Dec. 15, 2003, at A23 (describing polls showing that Republican efforts to communicate judicial nomination obstruction had significantly grown public support for Republicans while adding to the negative image of Democrats as obstructionists, and that “a determined effort on the part of congressional leadership can shape public opinion” and that it was “possible for the Republicans to use the permanently stalled, half-dozen judicial nominations to impress voters that Democrats are, at best, interested mostly in obstructing and, at worst, not very interested in fair play”)

almost no time debating judicial nominees on the Senate floor and Republicans organized no related activity off the floor. In 2004, GOP staff coordination meetings on the issue called by leadership were barely attended.

Luckily, given the result of the 2004 election, our prior work had a shelf life. Seven victorious new Republican senate candidates all used the obstruction message and reminded voters of Democrat filibusters and the fight for the judiciary.³⁰ Nowhere was the result more acute than in South Dakota where Republican John Thune defeated Democrat Leader Tom Daschle, the leading target of our obstruction message.

Politics aside, however, Republicans did great wrong. The abdication of their public duty was perhaps even greater than that reflected in the Memogate papers. If the Memogate papers reflected a cynical and insipid abuse of the public trust by Democrats, how much more cynical and insipid were Republican senators who failed to act on the opportunity for statecraft that they were afforded by the plain examples of ethical misconduct inside the Memogate papers. One accepts the reality that no punishment for Democrats was in the cards, yet in a legislative body heavy with arcane ethics guidelines, where are the draft rules framed to prevent (for either political party) the real abuse illustrated in the Memogate papers? In an institution that calls itself the greatest deliberative body in the world, where was the deliberation on matters of substance over the corruption of the Senate's duty of Advice and Consent?

1. Mr. Hatch's Reputation

But why did Republicans surrender? As an undergraduate at Georgetown University many years ago, I took a course with Ambassador Jeanne Kirkpatrick called "Personality in Politics." The thrust of it was that history is shaped not but by anything grandiose, but simply by the personalities of the men and women involved; their strengths and weaknesses.

In Memogate, history was determined by the personality of Judiciary Committee Chairman Orrin Hatch of Utah. But anyone who has worked for Hatch, as I have, knows that the

30. See, e.g., Richard Simon, *Close Contests in GOP Bastions Stoke Democrats' Senate Hopes*, L.A. TIMES, Oct. 31, 2004, at A30 (describing how South Dakota Republican Senate candidate John Thune labeled incumbent Tom Daschle "ringleader of Democratic obstructionists" in his successful campaign to unseat him).

Senator is obsessed with the desire to defend his record, his public image, and with his place in history. As one colleague put it: “the man has two vanity biographies already!” Hatch also has a creative staff. There are few high job openings in Washington for which Hatch is not rumored to be a possible replacement. Most recently, it was rumored in Utah that Hatch was considered to replace John Ashcroft as Attorney General.³¹ When Saddam Hussein was toppled, Senate staff joked that Hatch’s name was on the short list to replace him. The short of it is that unlike most senators who look in the mirror and merely see a future president, Orrin Hatch has seen a president, a Supreme Court justice, and the bare thread upon which the American Constitution itself hangs—and that makes for a very large self-image indeed.

While others could be faulted, the Republican surrender in Memogate was due almost entirely to Hatch’s personality and desire to protect his reputation; no matter what the cost to others, to public duty, or to the Republican cause.³² After a nationwide conservative reaction to Hatch took shape, Hatch added to the mischief, attempting to stop criticism of him by falsely telling senators and conservative leaders to hold their fire

31. See Jerry Spangler, *Heard the Rumor? Hatch is going to be the next . . .*, DESERET MORNING NEWS (Salt Lake City), Nov. 10, 2004, at A1.

32. Secondary to this, Hatch’s early surrender also revealed a division among Senate Republicans. Notwithstanding enormously talented individuals on the Hatch staff who might have wanted things to be different, the Hatch staff was notorious in the Senate for not being team players. Other Republican components of the Senate had to organize around this reality, especially in the area of communications where the Hatch staff was uncooperative to the point of incompetence. As a result, and because the Democrat filibusters of judicial nominees had taken the fight out of the Judiciary Committee and placed it on the Senate floor, leadership over the judicial nominations fight had drifted out of Hatch’s control and into the hands of other GOP leaders.

Behind the scenes, therefore, Hatch’s and his staff’s efforts to obtain my resignation were in part motivated by the desire to regain control of the judge issue from Republican leadership, especially Majority Leader Bill Frist and Conference Chairman Rick Santorum. It was also motivated by the desire to shift criticism from himself to Frist, something that I did not allow to happen. In addition, with the departure in the summer of 2003 of Committee Chief Counsel Makan Delrahim, someone extraordinarily talented, the Judiciary Committee agenda fell under the control of Hatch’s socially liberal chief of staff, Patricia Knight, who had long struggled against Hatch’s more conservative Committee staffers.

In effect, when Memogate began, Hatch was being managed by staff more in tune with Democrats than conservatives, who saw judicial nominations as mere bargaining chips to promote Hatch’s legislative agenda, especially in health care and stem cell research. See Alexander Bolton, *GOP Split On Memo*, THE HILL, Jan. 28, 2004, at 1.

because there was evidence of a “hacking.”³³ Hatch’s attempt to have Republican Senators Jon Kyl (R-Ariz.) and Jeff Sessions (R-Ala.) corral conservative leaders to stop criticizing him or defending me backfired, causing an even larger backlash.³⁴

2. Lessons from Great Men

But if great men are those who consider right and wrong in terms of harm done to others, while the petty politician considers only his interests, then the politics of Memogate, and the conservative anger with Senate Republicans it caused, is best understood by answering Senator Hatch’s very important question. In private meetings with key conservative leaders who had defended me, Hatch’s most effective defense of himself for surrendering to Democrats was to ask “who would have done any differently?” To answer in that context would have been to lecture an elder man. But the question can be answered by anyone who has studied leadership and knows right from wrong—that it is not about somebody’s subjective “high standards” but about objective moral standards.

Just as this article goes to press, it came to light that in 1996 a mirror image of Memogate occurred in the House Committee on International Relations.³⁵ There Republicans discovered that the staff of Ranking Member Lee Hamilton (D-Ohio) had learned that they could “peruse” the automatically-saved back-up copies of all Committee staff documents.³⁶ This was known by

33. Private conversation with a Republican Senator, Feb. 12, 2004 (“Hatch is telling us to keep our powder dry because there was a hacking.”). Hatch was uniquely able to appear to know something that other GOP senators did not, and felt free to abuse that power.

34. See Quin Hillyer, *Conservatives Vent*, NAT’L REV. ONLINE, Feb. 17, 2004, at <http://www.nationalreview.com/comment/hillyer200402170902.asp> (“‘Orrin Hatch is driving the vehicle,’ said Paul Weyrich, ‘Everybody is afraid to cross him.’”); Bolton, *supra* note 18. Senators Kyl and Sessions addressed about twenty conservative leaders and tried to get them to “lay off” Senator Hatch. *Id.* According to several leaders in attendance, Senator Rick Santorum of Pennsylvania noticeably left the meeting in disgust.

35. See Editorial, *Memogate Prequel: The Right Way to Handle a Pseudo-Scandal*, WALL ST. J., Jan. 25, 2005, at A16 [hereinafter *Memogate Prequel*] (“In short, Messrs. Gilman and Hamilton took the political and moral high road . . . because standing by their staff was the right thing to do. As someone who was there tells us, the Congressmen didn’t want to ‘ruin’ anyone’s career. It’s too bad Senators Frist and Hatch had no such compunctions.”); Letter from Benjamin A. Gilman, Chairman of the U.S. House Committee on International Relations, to Lee Hamilton, Ranking Minority Member (Feb. 20, 1996), available at <http://www.mirandafund.com/LetterfromGilman.pdf> [hereinafter Gilman Letter].

36. Gillman Letter, *supra* note 35, at para. 3.

the entire Hamilton staff including his chief of staff. It went on for one year. Hamilton's staff protected their own staff documents but chose to tell neither Republicans nor their own Democratic colleagues of the open access, suggesting, as Gilman does, that Democrat was reading their own colleagues files.

Not only did Hamilton staff "peruse" Republican documents, they shared them with the Clinton State Department, if not others, in subversion of the Committee's oversight functions.³⁷ As in Memogate, the access was negligently caused by the systems administrator, who worked in that case for the Republican chairman.

So what were the differences with Memogate? Notably, House Republicans appeared not to have anything to hide. The affair never became public. Unlike Hatch and Pickle, Chairman Ben Gilman conducted a quiet internal investigation. The Gilman report recorded the name of one Hamilton staffer but suggested that many more had "perused" the back up files.

In his collegial letter to Hamilton, Gilman asked Hamilton how he thought that Democrat staff should be disciplined.³⁸ According to Gilman staffers, Hamilton's response was to say that there should be no discipline and that he did not want to harm his staff's careers. Hamilton told Gilman that the access to documents on the shared network was the fault of Gilman's systems administrator and that the Hamilton staff had violated no House ethics rule and no law.³⁹ The House investigation never became a circus and never resulted in a Bill of Attainder. The named staffer was never harmed by public pillory. The matter never became public, until now.⁴⁰

This example answers Hatch's seemingly disarming question. Unlike Hatch, Leahy, and Pickle, Gilman and Hamilton showed politicians acting as great men, rather than politicians acting as sociopaths – without any regard for others. The House example also addresses directly the concern of conservative leaders who reacted to Hatch with disgust, that only Republicans would allow harm to come to their staff for doing what Hatch staff had done.

37. *Id.* at para. 9, 10.

38. *Id.* at 4.

39. *Memogate Prequel*, *supra* note 35. See also Jeff Johnson, 'Memogate' Uproar Starkly Contrasts With Clinton-Era Episode, CNSNEWS.COM, Jan. 27, 2005, at <http://www.cnsnews.com/ViewPolitics.asp?Page=Politics\archive\200501POL20050127a.html>.

40. See *Memogate Prequel*, *supra* note 35.

The lesson of Lee Hamilton's⁴¹ response and Gilman's honorable conduct is one most of us learn early in life and one understood by true leaders. In his book, *Leadership*, Rudolph Giuliani has a chapter called "Loyalty; the Vital Virtue"⁴² with a subpart entitled "Embrace Those Who Are Attacked."⁴³ It caught my eye.⁴⁴ America's Mayor writes:

When someone around me is unfairly attacked, I go out of my way to make that person more important. . . .

Just consider the alternative, a leader who distances himself from his staff at the first sign of trouble might save a few popularity points, but it's shortsighted. Eventually, no one [talented] wants to work for someone like that. . . . knowing that should trouble arrive, they'll be left twisting in the wind. And those already on board don't feel the courage to act boldly . . . lest they earn the cold shoulder of a boss who cares more about the public opinion of outsiders than about his staff.⁴⁵

The presumption of innocence, however, was not just something my employees were entitled to—it was critical to morale. And it was critical to the enterprise, too.⁴⁶

Giuliani's chapter on loyalty is not self-serving gibberish about having a high standard—it reflects a moral standard. It is not just school boy rhetoric; he gives several examples where he stood by real people, risking clients, his career, and, always, his reputation. One such example was Jason Turner, who served as

41. Hamilton was appointed by President George W. Bush to serve as co-chairman of the 9/11 Commission and has often been considered by Democrats as a potential vice-presidential candidate due to his reputation as a statesman.

42. RUDOLPH GIULIANI, *LEADERSHIP* 228 (2002).

43. *Id.* at 234.

44. Giuliani begins by lauding Ronald Reagan, whom he served while at the Justice Department. Giuliani remembers thinking at the time, "He'll take political heat for us, so we'll take political heat for him." *Id.* at 235. Says Giuliani, "Reagan would risk his popularity because of his personal loyalty for people who had stood by him, helped elect him, worked for him. You cannot believe what that did to boost the morale of his organization." *Id.*

45. *Id.* at 235. Giuliani explained his practical considerations:

Embracing those who are attacked serves two functions. First, it reassures those who work for you and those you want to recruit to work for you. You won't abandon them. You won't betray them at the first sign of trouble. Second, by showing the world that you will hug a vilified employee that much closer, you remove the incentive to attack.

Id. at 237.

46. *Id.* at 241.

New York City's commissioner for human resources.⁴⁷ Turner went from the Reagan administration to spearhead the city's welfare reform program, including the privatization of city jobs. Naturally, he made enemies. Giuliani stood by Turner through a series of legal and ethical charges, one of which was dismissed on appeal. The Mayor not only supported Turner, he personally mastered the brief on every allegation "to determine whether there was any truth to them, while at the same time not betraying someone [he] knew was doing a great job."⁴⁸

In one of the allegations against Turner, Giuliani found that he had violated an ethics law. Writes Giuliani:

You have to make your own judgment, about situations and not react on the perceptions of the media or your rivals. I decided that Jason had done nothing essentially wrong. However I didn't simply tell him that and send him quietly on his way. I held a press conference and specifically detailed the capricious nature of some of the [ethics] rules. Not only did Jason feel supported, but those who hounded him with the hope I'd fire him or censure him saw that their hectoring had not worked.⁴⁹

The comparison to what Republicans did in Memogate is very sadly stark. As Giuliani writes:

My policy is that the people who work for me deserve the benefit of a doubt. If it turns out they're guilty, there will be time to hold them accountable. But if you abandon them at the first accusation and they're later exonerated, you'll never wash away the smell of betrayal.⁵⁰

These are not views obtained through staff advice, an exploratory committee, or a poll. They mark the difference between petty politicians and great leaders. Perhaps it marks even the difference between someone who thinks he could be a U.S. president and someone who millions of Americans think could be a U.S. president.

47. *Id.* at 235–37.

48. GIULIANI, *supra* note 42, at 236.

49. *Id.* at 237.

50. *Id.* at 239.

3. Mr. Frist's Redemption

Readers might well ask, what about Majority Leader Bill Frist? I worked for him at the time of my resignation. It is a fair question and one that has clouded my days.⁵¹ Even reporters noted that Frist had gotten a pass from my conservative supporters.⁵² In fact, I defended Frist.

I had resigned to spare Leader Frist any distraction. My chief of staff, Lee Rawls, had put to me the question, "why should Frist have to spend time defending you?" As it turned out he would spend weeks having to defend himself before conservative gatherings, and I would spend months defending him.⁵³ Oddly, I take some pride in still being introduced as the fellow "who fell on his sword" or "took a bullet" for the Majority Leader.

In retrospect, however, we made a mistake. I sensed it at the time. In the end, I think Frist was greatly harmed politically, second- far second only to me. (By contrast Hatch could not do much to diminish his reputation with conservative leaders and, unlike Frist, Hatch has no future.) I sat at dinner one night with an influential editor of a prominent publication, a Republican senator, and a small group of leading conservative leaders. The editor asked the senator: "Does Frist know that people in DC won't forget what he did to Manny." I politely tried to change the topic.

But concern for me was not the key criticism of Frist. I told a chief of staff for another Republican senator with over three decades of experience on Capitol Hill the question that Lee Rawls had put to me, "why should Frist have to spend time defending you?" His answer was immediate. "He's right. Frist should not have spent one second defending you," he said. "He should have called Hatch and Daschle into a corner and warned them not even to think of harming his staffer. That Hatch and the Democrats did what they did to you says everything about Frist." A high-level operative at the Republican National Committee

51. It is not a question I have skirted. See Manuel Miranda, *Lessons of Memogate: The Senate Republicans' Tin Ear*, CNSNews.com, May 07, 2004, at <http://www.cnsnews.com/ViewCommentary.asp?Page=%5CCommentary%5Carchive%5C200405%5CCOM20040507d.html>.

52. See Helen Dewar, *Hatch vs. . . . Conservatives?*, WASH. POST, Feb. 12, 2004, at A35.

53. See Alexander Bolton, *ACU Calls For Rehire of Miranda*, THE HILL, Apr. 14, 2004, at 1 ("Frist has supported Miranda since he left the Senate At a recent gathering of conservatives . . . Frist praised Miranda effusively. '[Frist] said he had great respect for him and loved him . . .' said Weyrich.")

put it more bluntly. “This wasn’t about you,” he told me, “it was about Frist being unable to control Republicans, let alone Democrats.”

Unfortunately, what happened to Frist is what happens to many senators who look in the mirror and see a future president, they make the mistake of taking advice from men who look in the mirror and see a permanent Hill staffer. The advice Frist received also reflected the low esteem that some Frist staff had for the judicial nominations issue, a view that Frist himself did not share. This low esteem is a perspective now modified given the unexpected polling results in the 2004 election, which showed judiciary related issues to be determinative to the largest segment of GOP voters. It is now evident that ending judicial filibusters will cement Frist’s image with the Republican base should he make a bid for the White House more than any other issue, and Leader Frist knows it.

I do give Frist a pass. Frist also relied on Orrin Hatch’s counsel. He was duped. Unlike Hatch who, like many errant men in history, speaks of “high standards,” Frist has moral standards. And unlike Hatch, a few weeks after the Pickle Report was published, Frist took an opportunity to show decency and guts to me directly—an opportunity for dignity his staff also had denied him.

History grants men who would be great time for redemption. So have I. I still consider myself loyal to Frist because he is a good man motivated by a genuine desire to serve (and not just to serve his ambitions or reputation). If Frist ends the current Democratic filibusters of Bush judicial nominees, as he has said he would, I will be proud to have helped the cause—on his staff and off of it—to defend the Constitution and to put a large dent in Washington’s lucrative politics of personal destruction.⁵⁴ If Frist asked me on board again, and that too would be the sign of a great man, I would not turn him down.

III. THE ETHICS OF READING POLITICAL PAPERS

54. While MoveOn.org has incorrectly described me as the “architect” of the so-called nuclear option to end Senate filibusters of judicial nominees, I continue to be its chief contractor. What the Supreme Court wrote in *Gravel v. United States* is very much true, a Senate aide becomes a Senator’s “alter ego.” 408 U.S. 606 (1972).

A. *Countervailing Ethics*

Democratic media spin effectively raised the cloud of “improper” conduct over the reading of the discovered and unprotected Memogate papers, and even, astonishingly, over their dissemination to the media and the public. But what exactly made reading political documents—documents left unprotected on an open shared network, which, as later discussed, were not “classified” or even “private” under federal law and not “confidential” under the Senate’s own rules—in any sense wrong? But for the lack of statutory protection for congressional staff—protection enjoyed by Executive Branch employees—what made the Hatch staff’s actions any different from any other whistleblower situation where one happens upon something not intended for his eyes?⁵⁵ What were the countervailing ethics of the story?

For many observers, Memogate was not about reading political papers; it was about the ethics of Republican senators showing no loyalty down.⁵⁶ If the greatest and perhaps oldest ethic is “do no harm,” how ethical were those who placed subordinates needlessly in jeopardy or on the pillory? As in all things, the powerful and rich are judged by how they treat those much less so. What ethical judgment can be made of those who chose expediency over fairness and loyalty to their loyal staff?⁵⁷

And with few exceptions, the Democrats were successful, aided by Republican surrender and the bias of the press, at shielding themselves from examination of the unethical and corrupt practices evidenced by their Memogate papers.⁵⁸

55. See generally Whistleblowerlaws.com, <http://www.whistleblowerlaws.com/index.htm> (last visited Dec. 27, 2004).

56. See Byron York, *In the Memos Case, the Democrats Are Looking For a Scalp*, THE HILL, Jan. 28, 2004, at 18; Editorial, *Senate Inquisition*, WALL ST. J., Jan. 29, 2004, at A18 (“Mr. Hatch has a long history of dancing to Democratic demands. But his fellow Senate Republicans might keep in mind the message they’ll be sending to their own staff if Mr. Miranda’s scalp gets pinned to the wall for the sake of phony political appearances.”); Alexander Bolton, *Leak Staffer Ousted; Frist Aide Forced Out In An Effort To Assuage Dems*, THE HILL, Feb. 5, 2004, at 11 (“‘Right now I think that was pretty unfair,’ Senator Trent Lott said . . . ‘I would not be a friend in firing a highly qualified staffer.’”); Robert Novak, *Making Frist’s Lawyer A Scapegoat Confirms Democratic Success at Hijacking the Confirmation Process*, CHI. SUN-TIMES, Feb. 9, 2004, available at 2004 WL 63129484; John M. Powers, *Hatch and Frist Fire Whistleblower*, INSIGHT ON THE NEWS, Apr., 13, 2004, at 24.

57. See GIULIANI, *supra* notes 43–50, and accompanying text.

58. See Kelley Beaucar Vlahos, *Former Aide in Memo Leak Seeks Probe of Dems*, FOX NEWS, Feb. 12, 2004, available at <http://www.foxnews.com/story/0,2933,111286,00.html>; Charles Hurt, *Conservatives Call for Probe*, WASH. TIMES, Feb. 12, 2004, at A11;

But what about the reading of documents? For Vermont Senator Patrick Leahy (D), it was necessarily criminal. But years spent prosecuting cow-tippers in Vermont do not exactly train the finest legal mind. Orrin Hatch has said consistently that reading the documents was not criminal and that no prosecutor “worth his salt” would bring a case. That may relieve his guilt, but it doesn’t give much comfort. No Republican senator has sponsored more laws later held unconstitutional than Hatch. But here, I believe, Hatch is right.⁵⁹

B. Mr. Hatch’s Ethics

If not unlawful, what about ethics then? Acting, no doubt, ethically, Doorkeeper Pickle told the Associated Press, before his inquiry was even complete, that reading the Memogate papers was “improper.”⁶⁰ Although a lawyer, Hatch issued the verdict that it was “unethical” before the Pickle Inquiry even began.⁶¹ But under what code? Under what theory?

Ethics is not a dullard’s etiquette. It is defined as the science of duty,⁶² and as with all science, there is a method.⁶³ Norms are either encoded or may be discerned generally under two theories: duty and consequence.⁶⁴ The first asks: is there a duty and to whom is it owed?

The second theory, consequence theory, queries: is someone harmed or benefited? Under consequence theory, an action is ethical if its consequence is more favorable than unfavorable. Such harm/benefit analysis in Congress must be weighed in the context of the people’s interest, as legislators (like Patrick

Joseph D’Agostino, *Santorum Wants Senate to Investigate Democratic Nominations Memoranda*, HUMAN EVENTS, Feb. 22, 2004, at 1; Robert Bluey, *Kennedy Dodges Questions on Judicial Memogate*, CNSNEWS.COM, at <http://www.cnsnews.com/Politics/Archive/200404/POL20040407c.html>; Charles Hurt, *Ex-Kennedy Staffer Faces Ethics Charge*, WASH. TIMES, Apr. 13, 2004, at A6; Editorial, *Ethics In Government II*, WALL ST. J., Apr. 14, 2004, at A14; Robert Novak, *Judicial Tinkering Swept Under Rug*, CHI. SUN-TIMES, May 17, 2004, at 45.

59. See *infra* Part IV.

60. See Robert Gerhke, *Sergeant-at-Arms Defends Investigation Involving Judiciary Memos*, ASSOCIATED PRESS, Feb. 11, 2004 (on file with author).

61. See Charles Hurt, *Battle Rages Over Judges Memos*, WASH. TIMES, Nov. 26, 2003, at A4.

62. See Brainy Dictionary, *Ethics*, at <http://www.brainydictionary.com/words/et/ethics161764.html> (last visited Dec. 27, 2004).

63. See, e.g., Tad Dunne, *Method in Ethics*, at <http://www.wideopenwest.com/~tdunne5273/Mth-Eth.htm> (last visited Dec. 27, 2004).

64. See James Fieser, *Ethics*, The Internet Encyclopedia of Philosophy, at <http://www.iep.utm.edu/e/ethics.htm> (last visited Dec. 27, 2004).

Leahy) ostensibly do when they enhance whistleblower laws or applaud whistleblowers in Republican administrations.⁶⁵

The public harm and benefit of reviewing and making use of political information—whether of little importance or evidencing corrupt practices, as the Memogate papers do—is plain. But was there an applicable Senate rule violated? No. Senator Hatch told me that he knew that no Senate rule was violated when I requested that the matter simply go to the Senate Ethics Committee for review. Pickle’s young counsel confirmed this to me when we first met before the Pickle Inquiry officially began. More importantly, I knew it.

If not a Senate rule, what then? Not a legal ethic. Only a great public interest can overcome the ethical obligation lawyers have to be “zealous” in their cause within the bounds of the law.⁶⁶

As for duty theory, the Code of Ethics for Government Service states that government employees owe no duty to persons or parties.⁶⁷ Congressional staff works for the American people and for Congress. Certainly, Republican staff owed no duty to Democrat senators, particularly those on the Senate Judiciary Committee engaged in a great public fraud. In fact, the Code imposes a duty to disclose evidence of corruption “wherever discovered.”⁶⁸ Congress may have no whistleblower protection, but it maintains a whistleblower duty.

In final conversations, Orrin Hatch also agreed with me that no legal ethics rules were violated in reading the Memogate papers but fell back on something about “Hatch ethics.”

Yet remarkably, in two conversations, Hatch told me that he hoped I had more Democrat documents that I could disclose to

65. See Hentoff, *supra* note 28 (“[A]n understandably anonymous whistleblower in the Justice Department leaked the 86-page draft of Attorney General John Ashcroft’s proposed USA Patriot Act II.”). Three days after the leak, Sen. Patrick Leahy of Vermont praised the leaker. *Id.*

66. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980). As discussed *infra* in Part III, such countervailing public interests, such as the duty to maintain a client’s private confidences and secrets, are entirely inapplicable to public service. In Congress, there is no attorney-client confidentiality.

67. See H.R. Con. Res. 175, 85th Cong., 72 Stat. B12 (1958). The Code of Ethics is discussed in greater detail *infra* note 109.

68. *Id.*

the press, even while accusing us (while in front of the cameras) of unethical conduct for reading such papers.⁶⁹

But let's assume *arguendo* that Orrin Hatch is not a hypocrite. In time, he came to state two norms worthy of some consideration. First, he reminded reporters of Henry Stimson's ill-fated quote that "gentlemen do not read other gentlemen's mail"⁷⁰ an Edwardian rule of etiquette, which in the context of the vicious and deceptive practices used by Democrats and left-wing special interest groups against Bush judicial nominees, assumes a fact that is not in evidence. Given the reality of the case, even the liberal editor of Capitol Hill's *Roll Call*, Morton Kondracke, promptly dubbed Hatch's view "antiquarian."⁷¹

The second "Hatch ethic" was even more misguided, but also more revealing. In Judiciary Committee meetings, Hatch restated the New Testament's golden rule: we should do to others what we would want others to do to us. I knew, upon hearing this, the solipsistic quality of Senator Hatch's thinking. The golden rule is indeed a great religious and moral ethic to guide our private relations, especially in charity to the poor and poor in heart, but one that *cannot* guide those charged with a public duty.⁷² No Republican, including me, would have the right to expect protection from scrutiny of their Advise and Consent duty because of the manner their wrongdoing was discovered. In fact, one can only imagine the hilarity at the *Washington Post* if a Republican argued the golden rule, but not so if a Democrat.

69. Private conversations with Chairman Orrin Hatch, Jan. 30, 2004 and Feb. 3, 2004. Senator Hatch told other staff members the same thing. *Compare* Transcripts of Executive Sessions, Senate Judiciary Committee, 108th Cong., 2d Sess., Feb. 12–Mar. 11, 2004.

70. Stimson uttered this in 1929 as Secretary of State when he shut down America's intelligence service, MI-8, which had been successful in monitoring Japanese military build up in the Pacific and breaking Japanese codes. Stimson ate his words after Pearl Harbor when, as Secretary of War, he oversaw the formation of the O.S.S., the indirect precursor to C.I.A., a fact that suggests the limits of etiquette and of shallow Utah ethics. See Editorial, *Each Others Mail*, SALT LAKE TRIB., Feb. 17, 2004, at A10 (quoting Henry L. Stimson).

71. Dave Brody, *Memo Disclosures Have Democrats Alleging Foul Play*, CBN NEWS, Feb. 16, 2004, at <http://cbn.org/CBNNews/News/040216a.asp> (last visited Dec. 27, 2004).

72. See generally Whistleblowerlaws.com, <http://www.whistleblowerlaws.com/index.htm> (last visited Dec. 27, 2004).

C. Reason Wins Over Politics

Just as unfairly as he indicted his own staff with the charge of unethical conduct, Senator Hatch then worked to deny us a fair hearing before the Senate Ethics Committee by pressing for my resignation. While Pickle ham-fistedly recommended that the Judiciary Committee consider a complaint with a Bar disciplinary committee for the Hatch staff's presumably improper actions, the senators deftly chose not to create a new small cottage industry of ethics complaints against themselves and their staffs. Thus a fair opportunity to defend myself was willfully denied me.

Fortunately, a Democrat front group called Citizens for Responsibility and Ethics in Washington (CREW) filed an ethics complaint against me with the disciplinary committee of the New York Bar.⁷³ CREW's complaint tracked very well all the Democrats' best arguments (as well as Hatch and Pickle's poor assumptions) against the Hatch staff for reading the unprotected Memogate papers, both ethical and legal. Gladly, I responded in a very brief letter with the most basic ethical and legal reasoning, which is addressed more amply in this article.

The Bar Committee promptly disregarded CREW's ethical charges.⁷⁴ In effect, the Committee found no merit to the ethical charges made by Orrin Hatch, Pickle, or Democrat senators seeking to cover up their own wrongdoing.

CREW's allegations relied mostly on misapplication of New York's Lawyer's Code of Professional Responsibility⁷⁵ (the "Lawyer's Code") and particular Bar ethical rulings. Most significantly, CREW argued that the discovered Memogate papers were private and confidential, just as Democrats and liberal editorialists had.⁷⁶

73. See Memo to New York Bar Disciplinary Committee, Complaint against Attorney Manuel A. Miranda, at <http://www.citizensforethics.org/activities/20040212/letter.php> (last visited Dec. 27, 2004) [hereinafter CREW Memo].

74. According to CREW's surprised executive director, Melanie Sloan, the matter was "closed" in record time. See Alexander Bolton, *GOP Groups Press Dems on Memo*, THE HILL, Jan. 26, 2005, at 4.

75. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY (2002). See also MODEL CODE OF PROF'L RESPONSIBILITY (1980).

76. See Editorial, *Memo Theft*, WASH. POST, Feb. 16, 2004, at A26. Notably, leading newspapers expressing greatest umbrage at the reading of the Memogate papers were the ones who regularly receive and publish stolen and classified documents, especially those unfavorable to Republicans, such as the Pentagon Papers or the Anita Hill documents attacking Supreme Court nominee Clarence Thomas.

But the Lawyer's Code defines "confidential" as "information protected by the attorney-client privilege under applicable law."⁷⁷ This underpinning and their public interest considerations are entirely inapplicable to government. Elected officials are not the beneficiaries of a private attorney-client privilege in relation to their counsel, or to other senators' counsels. As discussed below in greater detail, even under the Senate's own rules, the Memogate papers are neither "confidential" nor "private."⁷⁸

CREW also relied on cases involving inadvertent disclosures of client confidences. But again, the underlying reasoning and public interest in these cases is in the protection of confidences protected by the attorney client privilege. These are also inapplicable to government.⁷⁹

CREW also took issue with my public statement made at the time of my resignation that "in law the duty falls on the other party to protect their documents."⁸⁰ My statement was correct.⁸¹

77. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 4-101 (2002). The definition of a client's "secrets" is likewise dependent on a relationship with a client. *Id.*

78. See *Pearson v. Dodd*, 410 F.2d 701, 706 n.23 (D.C. Cir. 1969) (quoted *infra* note 117). As C. Boyden Gray, the White House counsel at the time of the expansion of Senate Rule 29.5 (discussed *infra* Part III.C.2), wrote in the *Wall Street Journal* in relation to this very matter:

[T]he Senate no-leak rules, created after the Thomas nomination, are designed to prevent disclosure only of Senate "business or proceedings," such as official committee business or FBI files, not staff memos about outside special interest lobbying requests. The only way these rules apply is if the special interest groups are to be treated as important, relevant and official as the FBI—something I doubt [any] Democrat would admit or the public tolerate.

C. Boyden Gray, Letter to the Editor, *Faulty Judiciary Network: Let's Establish the Facts*, WALL ST. J., Dec. 23, 2003, at A15.

79. See CREW Memo, *supra* note 73. In fact, CREW's arguments in relation to the Memogate papers would impact all government whistleblowers by imposing not only a chilling effect on review and release of information that may even be confidential or classified (not the case in Memogate), but also to punish public servants who make themselves vulnerable to political retaliation as whistleblowers. After all, it is always the case that whistleblowers come to the evidence they discover through the inadvertence or incorrect assumptions of someone else, as with the technical gross negligence in Memogate.

80. Departure Statement of Manuel Miranda, in Primary Document, *Back to the Memos*, NAT'L REV. ONLINE, Feb. 9, 2004, at <http://www.nationalreview.com/document/miranda200402091056.asp>.

81. For example, the Economic Espionage Act requires that information be protected to the same extent that one seeks to classify it as a secret, or claim legal protection. If information is left as unprotected in public companies or in healthcare related businesses as it was by Democrats on the Judiciary Committee, corporate executives could be heavily fined or go to jail under HIPAA (Health Insurance

Although Congress has not, typically, extended to itself laws it has imposed on the private sector, Congress' normative intent is clear and pervasive.⁸²

As the technical sections of the Pickle Report starkly disclosed, there were no precautions taken to protect the Democrat documents.⁸³ The negligence of Chairman Leahy's systems administrator, and of Doorkeeper Pickle, who was responsible for his training and supervision, was gross by any reckoning.

CREW also took issue with my public statement: "in legal ethics there is no absolute prohibition on reading opposition documents inadvertently disclosed."⁸⁴ Again, my statement was correct.⁸⁵ Ironically, the ethical rulings that CREW cited made my point that there is no *absolute* prohibition, but rather that each case must be casuistically determined.⁸⁶ Courts and disciplinary committees consider factors including, among others, the reasonableness of the precautions taken to prevent disclosure, the relative importance of the material, and the public interest as weighed against the duty of Canon 7 of the *Model Code of Professional Responsibility*.⁸⁷

Notably, CREW's complaint omitted the key statement that ended that sentence: "... and that [these legal ethics

Portability and Accountability Act), Sarbanes-Oxley, or GLBA (Gramm-Leach-Bliley Act) regulations. Ira Winkler, *Memo Gateless*, NAT'L REV. ONLINE, Mar. 4, 2004, at <http://www.nationalreview.com/comment/winkler200403041011.asp>.

82. See *infra* notes 197, 198 and accompanying text.

83. Pickle Report, *supra* note 5, at IX.D.

84. Public Statement of Manuel Miranda, Feb. 9, 2004, *quoted in* CREW Memo, *supra* note 73.

85. Even under the American Bar Association's Model Rules of Professional Conduct, there would be *no bar* to an attorney using documents, even if they were confidential documents, inadvertently disclosed during litigation. The Model Rules require that a lawyer, receiving documents (subject to an attorney-client privilege) that the lawyer knows or should know were inadvertently sent, is merely required to notify the sender. See MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2003).

86. A leading case in the analogous but inapplicable area of inadvertent disclosure of documents exposing attorney-client confidences confirms this. In *Allread v. City of Grenada*, the court held that while some courts find that any disclosure amounts to a waiver of the privilege, "[t]he majority of courts . . . have opted instead for an approach which takes into account the facts surrounding a particular disclosure." 988 F.2d 1425, 1434 (5th Cir. 1993). If we assume *arguendo* that attorney-client considerations applied to Memogate, all factors indicate that any privilege that could be claimed was waived.

87. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980). See, e.g., *Myers v. City of Highland Village*, 212 F.R.D. 324, 327 (E.D. Tex. 2003); *Scott v. Glickman*, 199 F.R.D. 174, 178 (E.D.N.C. 2001); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 328-31 (N.D. Cal. 1985). See also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, § 79, cmt. h (2000) (discussing inadvertent disclosure of confidential information).

guidelines] are stricter than our situation in government service.” This too was correct, but omitted by CREW for obvious reasons. Legal ethics guidelines on inadvertent disclosures are “stricter” in no small part because they involve client confidences; two clients and countervailing interests.

In government service there is only one client and one public interest. But moreover, the Hatch staff was not subject to Bar ethics rules protecting client confidences. We were, however, subject to the Code of Ethics for Government Service,⁸⁸ with which Citizens for Responsibility and Ethics in Washington appears not to be familiar, or at least not when they shill for Democrats seeking to distract from their corrupt practices.⁸⁹

Notably, partisan strategy documents like the Memogate papers were not viewed as “confidential” even by Democrats themselves. Among the very first Democrat documents shown to me by my Hatch staff colleague was one written by a counsel to Senator Edward Kennedy in “talking points” she wrote for Senator Kennedy after she obtained and disseminated a Republican strategy memo obtained through the negligence of Republican staff.⁹⁰ In preparing Senator Kennedy for anticipated Republican objections, she wrote: “There was no impropriety, as the information was *not confidential or privileged information . . .*”⁹¹ In effect, Senator Kennedy’s counsel admitted that there is no impropriety in disclosing “non-confidential” political information obtained through the opposition’s negligence.⁹² I agreed.

IV. THE LAW OF THE MEMOGATE PAPERS

88. H.R. Con. Res. 175, 85th Cong., 72 Stat. B12 (1958). *See infra* note 109.

89. CREW’s Executive Director, Melanie Sloan, who signed the CREW complaint against me, is a former Democrat staff member of the Senate Judiciary Committee. CREW’s countless ethics complaints are almost entirely aimed at Republicans.

90. *See* Olatunde Johnson, Memo, Talking Points on Misdirected Email, *available at* http://www.nationalreview.com/york/york_20040304_talking_points.pdf (last visited Dec. 27, 2004)

91. *Id.* at para. 3 (emphasis added).

92. *See* Byron York, *Two New Democratic Memos*, NAT’L REV. ONLINE, Mar. 4, 2004, *at* <http://www.nationalreview.com/york/york200403041443.asp>.

A. *The Hatch Staff Was Lawfully Entitled To Read the Memogate Papers*

From the outset, Democrat senators and their staffs petrified Republican counterparts with talk of a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2)(B) (the “CFAA” or “statute”).⁹³ The CFAA sanctions “whoever intentionally accesses a computer without authorization *or exceeds authorized access*, and thereby *obtains information* from any department or agency of the United States”⁹⁴ As Senator Frist’s Chief of Staff put it, as if nothing more could be said: “They’re citing a law.”⁹⁵

The law the Democrats cited, however, is not ambiguous, and it was clear from the start that the Hatch staff had authorized access to their own desktops and the Judiciary Committee’s Shared Network where the Memogate papers were found. Significantly, the Judiciary Committee staff had no workplace restrictions for Shared Network use. Every Judiciary Committee Shared Network user had, as the Pickle Report would put it, “open permissions.”⁹⁶ In other words, the Hatch staff and about 150 others had full, unrestricted authorization to read anything on their desktops that their mouse could reach.

Democratic demagoguery and Republican confusion came to rest on the broadest term in the CFAA: “exceeds authorized access.”⁹⁷ The CFAA defines “exceeds authorized access” to mean: “to access a computer with authorization and to use such access *to obtain or alter information* in the computer that the accessor is not *entitled* so to obtain or alter.”⁹⁸

The Department of Justice’s legislative analysis of the statute, promulgated to the public on its website, makes clear that the CFAA “does *not* punish the *mere* acquisition of information

93. 18 U.S.C. § 1030(a)(2)(B) (2000).

94. *Id.* (emphasis added).

95. Conversation with Senator Bill Frist’s Chief of Staff, Lee Rawls, on or about Nov. 19, 2003.

96. See Pickle Report, *supra* note 5, at VI.B.

97. 18 U.S.C. § 1030(a)(2) (2000).

98. 18 U.S.C. § 1030(e)(6) (2000) (emphasis added). See generally Orin S. Kerr, *Cybercrime’s Scope: Interpreting “Access” and “Authorization” in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596 (2003) (noting that all the cases involving government employees taking information or misusing a government computer involve facts of serious misuse for entirely personal reasons). In most cases, employees exceeded the authority they were explicitly granted by workplace policies. *Id.* at 1632–37. They did not exceed authority where, as in Memogate, there was no explicit stated policy. *Id.*

(which might unduly impede the free flow of ideas)”⁹⁹ As the Justice Department puts it, “it is important to remember that the elements of the offense include not just taking the information, but abusing one’s computer authorization to do so,” or as they describe it, there is no violation without a “hacking.”¹⁰⁰

Republicans nevertheless allowed Democrats to make this into a murky issue. Simply, the Hatch staff was entitled to read discovered, unprotected papers for a number of reasons well beyond the constitutional entitlements of the Secrecy Clause¹⁰¹ or First Amendment,¹⁰² as discussed below.¹⁰³

1. The Hatch Staffers Were Entitled to Access The Memogate Papers as a Matter of Fact

While many horse and buggy analogies were used by Democrats and liberal editorialists to describe the access to the Judiciary Committee’s Shared Network in Memogate, there are three correct ways of understanding, from a technological perspective, how the discovered, unprotected Democratic papers were accessed. Each explanation has a significantly higher degree of sophistication.

The simplest explanation is to say that electronically-stored papers easily accessible on one’s office desk top are virtually the same as papers left on one’s desk. A second explanation is that

99. The Computer Crime and Intellectual Property Section, United States Department of Justice, *The National Information Infrastructure Protection Act of 1996: Legislative Analysis* Part III.B, at www.usdoj.gov/criminal/cybercrime/1030_anal.html (last visited Dec. 27, 2004) (emphasis added).

100. *Id.*

101. U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy”) [hereinafter Secrecy Clause]. See *infra* Part IV.C.

102. U.S. CONST. amend. I. See *infra* Part IV.D.

103. There appears to be only one published decision of a prosecution brought under the CFAA subsection alone, *United States v. Harris*, 302 F.3d 72 (2nd Cir. 2002), and only a few others where it is pleaded as a lesser included offense together with more serious § 1030 infractions. But *Harris* presents facts vastly distinct from Memogate. *Harris* involved an employee who accessed information—not on a Network, but on her employer’s computer—to retrieve Social Security numbers of individuals who were to be targets of a credit card fraud scheme. *Id.* at 74. See also *United States v. Jordan*, 316 F.3d 1215 (11th Cir. 2003) (sheriff challenging election he lost misused NCIC and ACJIS law enforcement databases to identify felons on voter rolls, in violation of explicit user regulations); *United States v. Smith*, 235 F. Supp. 2d 418 (E.D. Pa. 2002) (IRS employee retrieving information on individuals against IRS workplace restrictions and for criminal purpose); *United States v. Gray*, 78 F. Supp. 2d 524 (E.D. Va. 1999) (outside individual hacked into a government computer).

once left on a Shared Network, without protection, such papers were as if left in a “common area” accessible to all authorized users.¹⁰⁴

These descriptive analogies view a Shared Network as a ‘place’, and so the natural legal assumption is to legislate in terms of “trespass.” But a Network Server is not a place, it is best understood as an automated ‘servant’ that functions as the alter ego of the Network systems administrator (and of his supervisors) who controls it.¹⁰⁵ An authorized user makes requests of the Server. The Server then checks whether the user has been authorized. If she has, the Server gives over the information the user requests from the Shared Network. When a user logs on, she identifies herself, and the Network at that moment determines what she is authorized to read and what she is not.

In short, however viewed, Hatch staff obtained information without exceeding authorized access. We were “entitled” as a common sense matter under the Shared Network’s architecture of “open permissions.”¹⁰⁶

2. The Hatch Staff Was “Entitled” to Read Non-Classified Information as a Matter of Law

Taking the Democratic allegations seriously, the “exceeds authorized access” element of the CFAA presents a simple question of law. The Pickle Report established that Hatch staffers had authorized access to the Shared Network with

104. See Ira Winkler, *Memo Gateless*, NAT’L REV. ONLINE, Mar. 4, 2004, at <http://www.nationalreview.com/comment/winkler200403041011.asp>. According to Mr. Winkler, a nationally-recognized cyber security expert, the papers were available as if left “in the Capitol rotunda.” *Id.*

105. This was explained by former U.S. Senate systems administrator, Anthony Rickey (now at Columbia Law School) on his blog: *Three Years of Hell*. See <http://www.threeyearsofhell.com> (last visited Dec. 27, 2004). According to Rickey, the Network systems administrator is most responsible for the “disclosure” of material available on a Network to authorized users. Anthony Rickey, *Ignorance is Bliss, and Apparently Not Criminal*, THREE YEARS OF HELL, Mar. 5, 2003, at www.threeyearsofhell.com/archive/000520.php#more. But disclosure was actually made by the chairman of the Committee for whom he was the agent:

[T]he [Committee Network systems administrator’s] role is key. He’s the agent to whom the owner or operator of the Network (in this case Leahy) gave the responsibility of assigning permission. He’s the man who grants access, and if access is improperly granted, it’s *on his head*, not the users [sic]. . . . Simply put, *Miranda didn’t steal any files because Senator Leahy gave them to him.*

Id.

106. See *supra* note 96 and accompanying text.

unrestricted “permissions.”¹⁰⁷ The question then is, assuming that the CFAA applies to non-confidential congressional documents at all, were Hatch staffers “entitled” to read the Memogate papers as a matter of law?¹⁰⁸ The answer is yes.

The Hatch staff was entitled to read non-classified government-related information pursuant to the whistleblower provision of the Code of Ethics for Government Service (the “Code”).¹⁰⁹ To conclude otherwise, the Code—and particularly its Article 9, which provides that “any person in Government service should expose corruption wherever discovered”¹¹⁰—would be left with no force.¹¹¹

The Code was argued and noted without decision in *Pearson v Dodd*,¹¹² a case where Senate staff aides had taken files “without authorization” from the office of Democrat Senator Thomas Dodd of Connecticut, a good man and a patriot who the Senate and voters would later punish for serious breach of ethics. In an age before electronic storage, Dodd aides gave the senator’s

107. Pickle Report, *supra* note 5, Part VI.B.

108. In *EF Cultural Travel v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001), a civil action for damages and injunctive relief, the court held that defendants had likely exceeded authorized access pursuant to §1030(a)(4) and (e)(6) where they violated the express provisions of a confidentiality agreement.

109. See H.R. Con. Res. 175, 85th Cong., 72 Stat. B12 (1958) [hereinafter Code of Ethics]; S. Res. 338, 88th Cong., 2d Sess. (1964); Pub. L. No. 96-303 (July 3, 1980), Section 3, 94 Stat. 855 (uncodified) (requiring display in all federal buildings). The Code of Ethics provides:

Any person in Government service should: 1. Put loyalty to the highest moral principals and to country above loyalty to Government persons, party, or department. 2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion. . . . 8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit. 9. *Expose corruption wherever discovered.* 10. Uphold these principles, ever conscious that public office is a public trust.

H.R. Con. Res. 175, 85th Cong., 72 Stat. B12 (1958) (emphasis added).

110. *Id.*

111. See *Mazaleski v. Treusdell*, 562 F. 2d 701, 716 (D.C. Cir. 1977) (terminated government employee’s argument that challenged termination would have “a chilling effect on others who take their Oath of Office and the ‘Code of Ethics for Government Service’ seriously” sufficient to deny summary judgment); *Fiorillo v. Department of Justice*, 795 F. 2d. 1544, 1561 (Fed. Cir. 1986) (citing the Code and noting that Congress has prohibited penalties to whistleblowers who inform the public on matters of general concern).

112. 410 F.2d 701, 705 n.19 (D.C. Cir. 1969). As I informed Senator Hatch, *Pearson* is taught in law schools; something that makes even more remarkable the Republican surrender to Democrat tantrums about “stolen” documents. See Emanuel, Steven, *Emanuel Law Outline: Torts*, 52-53 (5th ed., keyed to Prosser/Wade/Schwartz, 10th ed., Aspen L. & Bus. (2002)).

papers to news men to be copied overnight, and then returned the originals to their files.¹¹³

The senator sued the news men for the torts of intrusion, invasion of privacy, and conversion of property. The D.C. Circuit Court of Appeals held against the senator. First, the court ruled that the question of whether information is “private or is of public interest should not turn on the manner in which it has been obtained.”¹¹⁴ Second, the court affirmed the well-established rule that invasion of privacy fails where the information obtained is a matter of general public interest.¹¹⁵ The court found that the exposed evidence of Senator Dodd’s ethical troubles was certainly of such interest.¹¹⁶

In determining whether the news men, and by extension the aides who had taken the papers, were guilty of conversion of the Senator’s property, the Court of Appeals noted in dicta:

Those files, themselves paid for by the United States, are maintained in an office owned by the United States, by employees of the United States. They are meant to contribute to the work of [the Senator] as an officer of the United States. *The question thus is not entirely free from doubt whether [the Senator] has title to the contents of the files or has a right of exclusive possession of those contents, or is a bailee, or even a mere custodian of those contents.*¹¹⁷

The Code of Ethics provides that a government employee has a permissive duty (“should”) to disclose any evidence of “corruption wherever discovered.”¹¹⁸ As argued in *Pearson*, that duty carries with it an agency authority.¹¹⁹

While the Code of Ethics fails to define “corruption,” the term was amply discussed and defined for purposes pertaining to a government employee by the D.C. Circuit in *United States v. Poindexter* as “abandonment of public responsibilities to private interests.”¹²⁰

113. *Id.* at 703.

114. *Id.* at 705.

115. *Id.* at 703.

116. *Id.* at 706.

117. *Id.* at 706 n.23 (emphasis added).

118. Code of Ethics, *supra* note 109, para. 9.

119. *Pearson*, 410 F.2d at 705 n.19 (noted but not decided).

120. 951 F. 2d 369, 378–79 (D.C. Cir. 1991) (quoting *Columbia v. Omni Outdoor Adver.*, 499 U.S. 365 (1991) (defining governmental corruption)).

There is no doubt that the Democratic senators' discovered, unprotected documents, whether those published or those others described above, present at least colorable evidence of "abandonment of public responsibilities to private interests."

Pursuant to the canon of statutory interpretation, the Code's other key term "wherever" must also be given its "ordinary meaning" and "full effect."¹²¹ Under the antiquated concept of cyberspace as a place, the word "wherever" has an especially plain meaning, one without frontiers. For the Hatch staff, "wherever" was on our desk top computer and reached by a few clicks of a mouse.

As with the Memogate papers, it will always be the case that a discovery of corruption or possible corruption by a government employee will invariably result from the negligence, inadvertence, or false assumptions of another.

In addition, the legal maxim *expressio unius est exclusio alterius* is well established. Senate Rule 29.5,¹²² which restricts what the Senate considers secret and confidential business (as explained by its legislative history: national security matters, senate legislative investigations, and internal inquiries),¹²³ does not describe political activities of individual senators or of either party in Congress to be in any sense protected.

In Memogate, therefore, absent express prohibition by any rule of the Senate or workplace restriction to the contrary, the Hatch staff was entitled to obtain information of public importance from the Judiciary Committee Server and did not "exceed authorized access" to the Shared Network as a matter of law.

Contrary to the successful distraction by Democratic senators, enabled by Orrin Hatch, a government employee who makes a discovery of information of public importance that may evidence corruption or at least a public fraud, as in Memogate, should not self-censor for fear of either a politically-infused scandal or

121. See *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995) (citing *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1342 (D.C. Cir. 1983)).

122. Standing Rules of the United States Senate, Rule XXIX, in CONGRESSIONAL QUARTERLY GUIDE TO CONGRESS 1068 (5th ed. 2000).

123. For legislative history see Senate Floor Statement of Majority Leader George Mitchell on Amendment to Senate Rule XXIX, S. Res.363, 102nd Cong, 138 CONG. REC. 34,242 et seq. (1992), discussed *supra* at Part III.C.2.

prosecution. Neither should he fear that he is not “*entitled*” to discover and expose possible evidence of corruption.

B. *The Hatch Staff Did Not “Steal,” “Burgle,” “Purloin,” “Pilfer,” or “Convert” . . . Anything*¹²⁴

The more shrill language coming from Democrat senators and their sound machine was aimed at convincing the press and media that their documents were not only “confidential,” but that they were also “stolen.” The ever-effective Senator Edward Kennedy blew the hardest and even compared the Hatch staff to the Watergate burglars.

Political reporters and editorialists at the *Boston Globe*,¹²⁵ *Washington Post*,¹²⁶ and the *New York Times*¹²⁷ were especially irresponsible in soaking up the latest colorful description. William Pickle, not a lawyer, played his hand-picked part and ham-fistedly suggested that theft may have occurred under 18 U.S.C. § 641.¹²⁸

This taint of “stolen goods” was an important platform as Democrats overreached after their good luck with Hatch’s early surrender by trying to embroil others off Capitol Hill. Democrats and their special interest allies soon began asking who may have read their Memogate papers at the White House, at the Justice Department, among Republican special interest leaders, and even among judicial nominees. This practice of wanting an arm when given a hand was to be expected given the Judiciary Committee’s long history of Hatch surrenders.¹²⁹

124. All of these words were used by the press or by Democrats in hundreds of news stories and television interviews.

125. The lead article that inflamed the controversy was the *Boston Globe*’s. Charlie Savage, *Infiltration of Files Seen as Extensive*, BOSTON GLOBE, Jan. 22, 2004, at A1. Weeks before the Pickle Inquiry was concluded, the story was fed by information leaked to the press in violation of Senate rules by “Senate officials.” Private conversations with reporters confirm that it was the Hatch staff who leaked the story to the *Boston Globe* after trying to place the story with several reporters who did not bite. This is a classic political communications maneuver: to “hang a lantern” on a story that a politician believes will embarrass him, a politician will try to place a story before opponents break it, and often with a newspaper likely to overheat the story in its earliest stages. *See also* Jack Shafer, *Globe Too Hot; Times Too Cold*, SLATE.COM, Jan. 23, 2004, at <http://slate.msn.com/id/2094333>.

126. *See* Editorial, *Memo Theft*, WASH. POST, Feb. 16, 2004, at A26.

127. *See* Editorial, *Computer Hackers in the Senate*, N.Y. TIMES, Feb. 9, 2004, at A20.

128. *See* Pickle Report, *supra* note 5, at X.A.3.

129. *See* Editorial, *Senate Inquisition*, WALL ST. J., Jan. 29, 2004, at A18 (“Mr. Hatch has a long history of dancing to Democratic demands.”); Timothy Carney, *Rolling Over On*

Democratic hubris and Hatch's weakness reached new extremes when, at his nominations hearing, Hatch and Democrats asked White House Staff Secretary Brett Kavanaugh, nominated to the D.C. Circuit Court of Appeals, if he had ever received any Memogate papers—as if it would be a great wrong for a political operative to receive political information, as if he were receiving stolen goods.¹³⁰ Senator Patrick Leahy repeated the defensive maneuver when he questioned Alberto Gonzales on Memogate at Judge Gonzales' nominations hearing for Attorney General, trying further to implicate the White House in a non-crime.¹³¹

But contrary to the Democratic press spin, the Hatch staff did not steal, burgle, purloin, pilfer, convert, or otherwise violate 18 U.S.C. § 641, upon its plain language, under a well established body of case law, and as common sense dictates.¹³² We did not even take anything.¹³³ Any use or dissemination of the Memogate papers was no less lawful.

By merely reading unprotected documents of a political nature, the Hatch staff did not deprive anyone of possession to property, cause damage or harm to any property, or act for personal gain. Compare this with the leading government computer case *United States v. Czubinski*,¹³⁴ a case addressing statutes analogous to Section 641. In *Czubinski*, an IRS employee used an IRS computer to view the tax returns of social acquaintances, political enemies, and government officials. The trial court convicted, finding that Czubinski had accessed files

Judges: The Hatch Problem, NAT'L REV. ONLINE, Jan. 23, 2004, at <http://nationalreview.com/comment/carney200401230902.asp>; Helen Dewar, *Hatch vs. . . . Conservatives?*, WASH. POST, Feb. 12, 2004, at A35; Alexander Bolton, *GOP Senators Circle Wagons Round Hatch*, THE HILL, Feb. 18, 2004, at 1; Paul Weyrich, *Senator Hatch: Provoking A Split Within Conservatism . . . Again*, Free Congress Foundation, at <http://www.freecongress.org/commentaries/040405pw.asp> (last visited Dec. 27, 2004).

130. See Testimony of Brett Kavanaugh, Senate Judiciary Committee Hearing, 108th Cong., 2d Sess., Apr. 27, 2004.

131. See Testimony of Alberto Gonzales, Senate Judiciary Committee Hearing, 109th Cong., 1st Sess., Jan. 6, 2005.

132. 18 U.S.C. § 641 (2000). See also *Pearson v. Dodd*, 410 F.2d 701, 706 n.23 (D.C. Cir. 1969) (expressing doubt that a U.S. senator who claimed confidentiality of documents taken by staff from his office files had any private entitlement or right of exclusive possession, and that the senator was possibly a bailee or mere custodian).

133. See generally *Morrisette v. United States*, 342 U.S. 246 (1952) (leading case of Section 641 interpretation).

134. 106 F.3d 1069 (1st Cir. 1997).

for entirely personal reasons¹³⁵ in express violation of a stated workplace policy.¹³⁶

But, even so, the First Circuit reversed and concluded: “to ‘deprive’ a person of their intangible property interest . . . , either some articulable harm must befall the holder of the information as a result of [reading of documents], or some gainful use must be intended by the person accessing the information”¹³⁷ The court concluded that there had been no deprivation of property.¹³⁸

In fact, in cases of computer misuse alleging “theft,” the appellate courts have affirmed all cases to the extent there was an appreciable harm and reversed all cases where there was none.¹³⁹

Likewise, and specifically addressing Section 641 in *United States v. Collins*,¹⁴⁰ the D.C. Circuit overturned the conviction of conversion because the Government had failed to show that Collins, a government employee at the Defense Intelligence Agency, had exercised control over government property in such a manner so that “*serious interference* with ownership rights” occurred.¹⁴¹ Quite unlike Memogate, Collins had misused his government computer to promote amateur ballroom dancing.¹⁴²

In Memogate, the Hatch staff obtained information that did not gainfully inure to their personal benefit. Their reading or other use of information did not deprive anyone of their intangible property interest. All papers were left where they were on the Shared Network.

There was no interference, let alone serious interference, with ownership rights. Of course, this assumes that any ownership rights existed in the discovered, unprotected papers that could overcome the public interest—something not conceded.¹⁴³ In

135. *Id.* at 1071 n.1.

136. *Id.* at 1072–73.

137. *Id.* at 1074.

138. *Id.* at 1076.

139. See Kerr, *supra* note 98, at 1613.

140. 56 F.3d 1416 (D.C. Cir. 1995).

141. *Id.* at 1420. The Court went on to quote from the Restatement (Second) of Torts: “[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby *seriously violated*.” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 228 (1965) (emphasis added by court)).

142. *Id.* at 1417.

143. See *supra* text accompanying notes 112–17.

any case, for purposes of Section 641 any such property interest would have to belong to the national government—the United States—and certainly not to the senators or staff that claimed it in Memogate. It is certainly the case that political documents of the sort involved, which show the pursuit of private arrangements over a public duty, have increased value to the American people when exposed rather than when kept secret.

Notably, the Code of Ethics provides that “Any person in government service should: . . . 6. Make no private promises of any kind binding upon the duties of office, since a government employee has no private word which can be binding on public duty.”¹⁴⁴ Claims of private property interests must similarly give way to the public’s interest.

C. As Democrat Senators Would Apply It, the CFAA Violates the Secrecy Clause

The CFAA, upon which Democratic charges of criminality in Memogate mostly relied, purports to criminalize “obtaining information” from congressional computers by government employees with some level of authorized access.¹⁴⁵ Democrats, enabled by Orrin Hatch, used the statute to allege criminal acts with the intent of chilling access to and the free flow of information of public importance, and to protect themselves from public scrutiny of their embarrassing collusion with special interests.

As discussed above, the Hatch staff did not violate the CFAA by exceeding their authorization because they did not read anything that they were not “entitled” to read.¹⁴⁶ The broad language of the statute’s key element—“obtains information”—may, however, violate the limitations of the Secrecy Clause of the U.S. Constitution by purporting to criminally sanction indiscriminately the mere reading or disclosure of all matters found on a Congress-based computer.

In effect, by applying the CFAA to itself, Congress may have done indirectly what it could not do directly pursuant to the Constitution’s limits on Congress’ ability to cloak itself. Such misapplication of the CFAA would make the statute

144. Code of Ethics, *supra* note 109, at para. 6.

145. 18 U.S.C. § 1030(a)(2)(B) (2000).

146. *See supra* Part IV.B.

unconstitutional *ab initio*.¹⁴⁷ The constitutionality of this statute in light of Article I limitations on Congressional secrecy would be a question of first impression for any court. And courts have not shrunk from the task of answering novel questions of Article I limitations on Congress in the past.¹⁴⁸

As Justice Potter Stewart wrote in his concurrence in *New York Times v. United States* (the Pentagon Papers Case):

Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. . . . [I]t will be the responsibility of the courts to decide the applicability of the criminal law Moreover, if Congress should pass a specific law . . . *the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.*¹⁴⁹

Addressing the constitutional mandate of the Executive to declare and protect national defense secrets, Justice Stewart noted:

It is an awesome responsibility, requiring judgment and wisdom of a high order. *I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.* I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible

147. Under the Constitution's Secrecy Clause, U.S. CONST., art. I, § 5, cl. 2, Senate Rule 29.5 identifies the very few areas that the Senate seeks to protect as "secret" and "confidential." See Standing Rules of the Senate, *supra* note 122. But to the extent that 18 U.S.C. § 1030(a)(2)(B) aims to criminalize the violation of that Legislative Branch rule or to criminalize the obtaining of information from the Congress of a political nature and of public importance, the statute may also violate the Separation of Powers Doctrine by enlisting the other two branches to penalize violations of its rules. See Gravel v. United States, 408 U.S. 606, 637–39 (1972) (Douglas, J., dissenting) (explaining how the Speech and Debate Clause, U.S. CONST. art I, § 6, cl. 2, protects the legislature from an overzealous executive or judiciary).

148. See *Powell v. McCormack*, 395 F.2d 577, 603 (D.C. Cir. 1968) ("there is no line to be drawn once the legislature is allowed to cross the constitutional limits") *rev'd on other grounds*, 395 U.S. 486 (1969).

149. *New York Times v. United States*, 403 U.S. 713, 730 (1971) (per curiam) (Stewart & White, JJ., concurring) (emphasis added).

disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.¹⁵⁰

These considerations are no less true in adjudging the more exact limits and the narrower berth that the Constitution has given the Congress when it aims to keep secrets from the American people.¹⁵¹

1. The Plain Language and Legislative History of the Secrecy Clause

The Constitution, Article I, Section 5, Clause 3 provides that each House of Congress “shall keep a Journal of its Proceedings, and shall from time to time publish the same, *excepting such Parts as may in their Judgment require Secrecy . . .*”¹⁵² The Secrecy Clause mandates that those specific matters that the Congress desires to protect as confidential be declared so by the whole of each body after deliberation. It excludes the possibility that Congress could make all Congressional documents confidential with a single vote, or that individual members or groups of Members could do so arbitrarily.

As noted in James Madison’s Annals of the Constitutional Convention, the Framers (Dr. James Wilson) declared their purpose well: “The people have a right to know what their

150. *Id.* at 729 (emphasis added). See also *Gravel*, 408 U.S. at 637–39 (Douglas, J., dissenting).

The secrecy of documents in the Executive Department has been a bone of contention between it and Congress from the beginning. Most discussions have centered on the scope of the executive privilege in stamping documents as “secret,” “top secret,” “confidential,” and so on, *thus withholding them from the eyes of Congress and the press*. The practice has reached large proportions, it being estimated that over 30,000 people in the Executive Branch have the power to wield the classification stamp. . . . *The problem looms large as one of separation of powers. . . . Classification of documents is a concern of the Congress. It is, however, no concern of the courts, as I see it, how a document is stamped in an Executive Department or whether a committee of Congress can obtain the use of it.* The federal courts do not sit as an ombudsman refereeing the disputes between the other two branches.

Id. (emphasis added).

151. See also Code of Ethics, *supra* note 109. Applicable to members of the Senate, the Code provides that “any person in government service should make no private promises of any kind binding upon the duties of office, since a government employee has no private word which can be binding on public duty.” *Id.*

152. U.S. CONST. art. I, § 5, cl. 3 (emphasis added).

Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings.”¹⁵³

As the Supreme Court has noted, quoting Justice Story’s commentary on the Constitution:

*the object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism and integrity and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts So long as known and open responsibility is valuable as a check or as an incentive among representatives of a free people*¹⁵⁴

No statement could more aptly apply to Memogate—a case involving senators eager to hide their actions from the “disinfectant sunshine,” by arbitrary and ex post facto misuse of the label “confidential” in an attempt to chill both government employees and the press. No set of facts other than those presented in Memogate could better illustrate the failure of senators to remember that they are “agents” with no rights independent of their responsibilities to constituents.

2. Application of the Secrecy Clause by the Senate

The Framers’ intent, and Justice Story’s interpretation of it is not modernly disputed. In then Senate Majority Leader George Mitchell’s 1992 resolution amending Senate Standing Rule 29.5, the Senate recognized that “it is the fundamental policy of the Senate to favor openness and public access to information.”¹⁵⁵

But as noted in James Madison’s *Annals of the Constitutional Convention*, the Framers (Roger Sherman) noted specifically that the determination of Congressional secrecy was a matter to

153. James Wilson, statement on Aug. 11, 1787, in JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787*, available at <http://www.yale.edu/lawweb/avalon/debates/811.htm> (last visited Dec. 27, 2004).

154. *Field v. Clark*, 143 U.S. 649, 670–71 (1892) (quoting STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 840, 841 (1833)) (emphasis added).

155. 138 CONG. REC. 34,242 (1992) (text of S. Res. 363, 102nd Cong. (1992)) (emphasis added).

be entrusted to the entire body of each House.¹⁵⁶ Over the centuries, the Senate has, in fact, carved out those few matters that in their collective judgment require secrecy through its adoption and careful amendment of Senate Standing Rule 29 (and especially Rule 29.5). The Standing Rule identifies those areas that the Senate has determined shall be kept secret by the neutral classification of the entire body, before the fact, and not by individual senators arbitrarily and after the fact.¹⁵⁷

In *Gravel v. United States*, the Supreme Court recognized that the Secrecy Clause mandates a determination by the entire body when it chooses to publish information¹⁵⁸ and another federal court has noted that senators, acting without the approval of the entire body, cannot make use of the first part of the Secrecy Clause and publish information for their own improper purposes.¹⁵⁹ This reasoning can be no less applicable to the

156. Roger Sherman, statement on Aug. 11, 1787, in JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, available at <http://www.yale.edu/lawweb/avalon/debates/811.htm> (last visited Dec. 27, 2004).

157. Specifically, Senate Rule 29.5 (the no leak rule) provides:

Any Senator, officer, or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees, and offices of the Senate, shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.

Standing Rules of the United States Senate, Rule XXIX, in CONGRESSIONAL QUARTERLY GUIDE TO CONGRESS 1068 (5th ed. 2000).

In sum, as its legislative history and text, *supra* notes 123 and 157 make clear, Rule 29.5 does *not* apply to papers: (1) that do *not* record the business or proceedings of the Senate or any committee, subcommittee, or office of the Senate, such as partisan meetings and business of particular Senators or party caucuses; (2) that do *not* record the *confidential* information intended to be protected by the Rule; and (3) that do *not* protect a special relationship of confidentiality between the discloser and the material being disclosed. Presumably, the Senate rule does not contradict the obligations of the U.S. Constitution, the Senate's policy of open access to information, or the Code of Ethics for Government Service that urges disclosures of wrongdoing "wherever discovered."

Significantly, Rule 29.5 prohibits "disclosures" and does not speak of "leaks" to the press or even disclosures to the public. The "disclosure" of the Democratic papers in Memogate occurred, therefore, when they were disclosed on an unsecured Network, not when they were merely read by those who discovered them, and not when they were published by the press.

158. 408 U.S. 606, 626 n.16 (1972) (publication of report by one senator is not a legislative act protected by Speech and Debate clause where whole Senate had not ordered it as required by Secrecy Clause).

159. *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1975) (holding that congressional inquiry had no legislative purpose and was pursued solely for exposure and intimidation, issuing injunction). Members of Congress cannot, "by the mere process of filing a report

second part of the Secrecy Clause when members of Congress claim the authority to determine for themselves what is and is not “confidential.”

This conclusion finds support in the D.C. Circuit Court of Appeals’ rejection in *Pearson v. Dodd* of Senator Thomas Dodd’s claims that his papers, removed by his own aides from his office and leaked to the press, were “private,” or his claim that they had been improperly obtained and “converted.”¹⁶⁰

If a senator or her staff does not “own” their papers, as in the truly egregious facts in *Pearson*, much less can they arbitrarily declare their political papers “secret” or “confidential” under any enforceable rule of the Senate or a criminal statute, especially when attempted, as in Memogate, after the fact.

Dr. Wilson’s comment at the Constitutional Convention shows that the Framers were suspicious of Congress’ wanting to conceal its business from the people.¹⁶¹ Little could the Framers have imagined that Congress would someday purport to criminalize the reading of Congress-based information such as the Memogate papers—information about partisan meetings and secret arrangements with special interests—that is arbitrarily and ex post facto deemed by individual senators to be “sensitive” or “confidential.”

Yet, as the plain language of the statute (“obtain information”) and the legislative history show,¹⁶² this is exactly what senators may have done when they adopted the statute, and certainly what exposed Democrat senators have attempted to do in seeking to apply the CFAA to their Memogate papers.

3. As Applied to Memogate, the Statute Violates the Secrecy Clause

devoid of legislative purpose, transform [their] views into official action by the Congress and have them published and widely distributed at public expense.” *Id.* at 1182.

160. *See supra* dicta quoted at note 117. 410 F.2d 701, 706 n.23 (D.C. Cir. 1969).

161. *See supra* text accompanying note 153.

162. *See* Wilson, *supra* note 153.

The legislative history of 18 U.S.C. § 1030(a)(2)(B)¹⁶³ to some extent indicates that in extending application of the law to itself, Congress may have intended to criminalize “obtaining information” from Congressional offices—information that can be deemed by some unstated person using an unstated arbitrary and possibly self-serving criterion to be “sensitive and confidential”—even *after* the information is obtained.¹⁶⁴ This, Congress cannot do.

This conclusion is even more easily reached if one borrows from First Amendment jurisprudence. As with the Secrecy Clause, Justice Black noted in *New York Times*:

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of

163. S. REP. No. 104-357, at 3–5 (1996). The 1996 legislative history provides in relevant part as follows:

The Computer Fraud and Abuse Act was originally enacted in 1984 to provide a clear statement of proscribed activity concerning computers

In succeeding years, the statute has been significantly amended only twice, in 1986 and 1994. In its current form, this statute generally prohibits the unauthorized use of computers to obtain classified or private financial record information, to trespass in Federal Government computers, to commit frauds, or to transmit harmful computer viruses. It also prohibits fraudulent trafficking in computer access passwords.

Gaps in coverage remain under this statutory scheme

The privacy protection coverage of the statute has two significant gaps. First, omitted from the statute’s coverage is information on any civilian or State and local government computers, since the prohibition on unauthorized computer access to obtain nonclassified information extends only to computers used by financial institutions or by the Federal Government when the perpetrator is an outsider. *The second gap is the significant limitation on the privacy protection given to information held on Federal Government computers.* Specifically, [prior to the 1996 amendment] the prohibition only applies to outsiders who gain unauthorized access to Federal Government computers, and not to Government employees who abuse their computer access privileges to obtain Government *information that may be sensitive and confidential.*

Id. at 3–4 (emphasis added).

164. This raises serious Fifth Amendment infirmities. Contrast the wording of the CFAA with the precise language that Congress has given and the courts have demanded for sanctions against obtaining national defense information. In *Gorin v. United States*, 312 U.S. 19 (1941), the words “national defense” were held by a unanimous Court to have “a well understood connotation”—a “generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness”—and to be “sufficiently definite to apprise the public of prohibited activities” and to be “consonant with due process.” *Id.* at 28. Nothing of the sort can be said of the statute as applied to Memogate or any comparable facts.

the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. . . .
*Secrecy in government is fundamentally anti-democratic . . .*¹⁶⁵

In *New York Times*, the several concurring justices did not leave to the imagination their sense of the Constitution's repugnance for an excessive and unnecessary number of government secrets kept from the American people; a repugnance that they repeated a year later in the related Pentagon Papers case of *Gravel v. United States*,¹⁶⁶ and again in 1980 addressing secrecy sanctioned by the Judiciary.¹⁶⁷

In both *New York Times* and *Gravel*, the Court was asked by the Government to uphold the power of the Executive, who is constitutionally empowered to hold specified secrets with few restrictions on his discretion. The Court chose not to in both instances.

As the Secrecy Clause and Senate Standing Rule 29 make clear, no similarly wide discretion to declare secrets is held by Congress or individual Members of Congress as is held by the Executive. If it can be said, as Justice Black did in *New York Times*, that “[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic,”¹⁶⁸ it should take little hesitation to conclude that it would be unconstitutional for the CFAA to contradict the words of the Constitution itself and be used by politicians to disguise private arrangements contrary to their public duty.

To do otherwise would be to allow Members of Congress to threaten congressional staff aides and members of the media with criminal sanctions or termination for disclosure of even the most venal information that the Members arbitrarily declare “sensitive and confidential.”

This application not only contradicts the *Code of Ethics for Government Service*, which calls on all government employees to

165. See *New York Times v. United States*, 403 U.S. 713, 723–24 (1971) (per curiam) (Black, J. concurring) (citations omitted) (emphasis added). See also *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978) (legislative process in democracy has only “limited toleration for secrecy” (citing the Secrecy Clause, U.S. CONST. art. I, § 5, cl. 3)).

166. 408 U.S. 606, 637–39 (1972) (Douglas, J., dissenting).

167. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 595 (1980) (“secrecy is inimical to the demonstrative purpose of the trial process.”) (Brennan, J. and Marshall, J., concurring); *In re Oliver*, 333 U.S. 257, 270 (1948).

168. *New York Times*, 403 U.S. at 719.

“disclose” evidence of corruption “wherever discovered,”¹⁶⁹ it is an alteration of the Constitution and a transmogrification of the Senate’s own rules that would have chilling consequences too great to fathom or ignore.

D. *Reading or Publishing of Memogate Papers Protected by First Amendment*

The CFAA punishes “whoever intentionally accesses a computer without authorization or exceeds authorized access, and thereby *obtains information* from any department or agency of the United States”¹⁷⁰ This prohibition presents several possible First Amendment violations, including its failure to protect a compelling state interest of the highest order or to use the least restrictive means. These are discussed below.¹⁷¹ The First Amendment thus further overcomes any arguable flaw in the Hatch staff’s entitlement to read the Memogate papers.¹⁷²

This conclusion is in keeping with the analysis of the statute published by the Department of Justice:

Certainly not all misuse warrants federal criminal sanctions. The problem is that no litmus test can accurately segregate important from unimportant information, and any legislation may therefore be under-inclusive or over-inclusive. . . . Even so, it is important to remember that the elements of the offense include not just taking the information, but abusing one’s computer authorization to do so.

. . . .

Clearly, the government should be able to prosecute individuals who obtain government information by misusing

169. Code of Ethics, *supra* note 109, para. 9.

170. 18 U.S.C. § 1030(a)(2)(B) (2000) (emphasis added). The statute is neither one of general applicability nor is it content neutral. The plain language captures government employees and government-centered information; information at the core of First Amendment rights. *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002) (holding that Minnesota Supreme Court’s canon of judicial conduct, which prohibited candidates for judicial election from announcing their views on disputed legal issues, violated candidates’ First Amendment rights).

171. In addition, the statute is also challengeable for being vague, arbitrary and over-inclusive in identifying the information it intends to protect; it may also be under-inclusive with regard to the class it intends to penalize: government employees, and it may violate the First Amendment under the *Florida Star v. B.J.F.* line of cases, 491 U.S. 524 (1989), for sanctioning the publishing of truthful information lawfully obtained. These infirmities will not be addressed in this article.

172. While criminalizing the use or mere reading of such information may violate the First Amendment, the discussion of the Secrecy Clause, *supra* Part III.C, argues that such blanket protection of Congress-based information is unconstitutional *ab initio*.

computers, importantly, 18 U.S.C. 1030(a)(2), as amended, *does not punish the mere acquisition of information (which might unduly impede the free flow of information)*, but prohibits intentionally accessing a computer without or in excess of authority and then obtaining such information.¹⁷³

In effect, as Democrats would apply the CFAA to Memogate, the statute would violate the Hatch staff's (or any congressional staff's or media reporter's) First Amendment right: (1) to obtain information of public importance, and (2) to publish or otherwise disclose the information obtained without restriction, intimidation, or self-censorship.¹⁷⁴

1. The Right to Receive Information and the Right to Read

The U.S. Supreme Court has long viewed the First Amendment as including the “right to receive” information. In *Martin v. Struthers*, the Court noted that the First Amendment has “a broad scope . . . and necessarily protects the right to receive [information].”¹⁷⁵ In *Griswold v. Connecticut*, the Supreme Court listed the right to receive information as falling within the protections of the First Amendment freedoms.¹⁷⁶ Justice Douglas, writing for the Court in *Griswold*, discussed the recognized rights that surround the explicit terms of the First Amendment: “The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive, the right to read* and freedom of inquiry, [and] freedom of thought”¹⁷⁷

173. See Department of Justice, *The National Information Infrastructure Protection Act of 1996: Legislative Analysis*, *supra* note 99, Part III.B.

174. The most elemental protection against arbitrary and oppressive exercise of the powers delegated to our federal and state governments lies in the First Amendment freedoms of speech and press. The freedom of speech permits the unfettered communication of political discourse and grievances. In addition, it forecloses governmental control or manipulation of the sentiments uttered by and for the public and, by protecting our right to full information concerning the doings or misdoings of governmental officials and institutions, whether they be judicial, legislative or executive, it guards against the maladministration of government. Thus, the right of the public to speak and the press to publish is unfulfilled without a correlative public right to receive information. See generally, Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 6–7 (1976); David Mitchell Ivester, Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L. Q. 109 (1977).

175. 319 U.S. 141, 143 (1943) (discussing right of individual to distribute religious leaflets door to door).

176. 381 U.S. 479, 482 (1965).

177. *Id.* at 482 (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)) (emphasis added).

This view is well grounded in popular culture. Americans believe they have an unfettered right to read, to know, and to acquire unclassified information about their government.¹⁷⁸ In fact, we do.¹⁷⁹

This right becomes one of agency for someone with the constitutional duty of a Congressional employee.¹⁸⁰ The Hatch staff had not only a right to know, read, and receive information as ordinary citizens; we had the right and duty to obtain information in the inarguably competitive and adversarial environment of the Senate Judiciary Committee.¹⁸¹

Moreover, the political information that the Hatch staff read was not the “sensitive and confidential” material meriting “privacy protection” that the 1996 CFAA drafters likely contemplated, as discussed below.¹⁸²

2. The Statute Fails To Meet Strict Scrutiny

A statute that, on its face, prescribes and criminally punishes the acquisition, discussion and dissemination of “information,” is subject to strict scrutiny under the First Amendment. The test

178. The foundations of this trust in First Amendment rights were well illustrated by the concurring opinions in the per curiam Supreme Court decision in *New York Times*, 403 U.S. 713 (allowing publication of national security classified information). Justice Black’s concurring opinion is particularly applicable to Memogate. He wrote: “The dominant purpose of the First Amendment was to prohibit the widespread practice of government suppression of embarrassing information. . . . Secrecy in government is fundamentally anti-democratic” 403 U.S. at 723–24 (emphasis added).

179. Memogate involves all of the First Amendment freedoms set forth above, including:

- (1) The right of Hatch staff to receive and read information readily available on the Committee Network;
- (2) The right of Hatch staff to discuss or publish such information;
- (3) The right of senators and Senate aides to receive and read such information;
- (4) The right of senators and Senate aides to debate or publish such information to constituents or the press;
- (5) The right of the press to receive and publish the information,
- (6) The right of the people to receive such information about their Government.

180. See Code of Ethics, *supra* note 109; *Pearson v. Dodd*, 410 F.2d 701, 705 n.19 (D.C. Cir. 1969) (describing public policy in favor of government agents exposing wrongdoing).

181. *Pickering v. Board of Education*, 391 U.S. 563 (1968) (public employees retain First Amendment rights).

182. In another branch of government an employee would be protected by whistleblower laws. While Congress has noticeably not extended whistleblower protection to its aides, the *Code of Ethics for Government Service* and the Constitution of the United States imposes a whistleblower duty on congressional aides. See *supra* Part III.A.2; *Pearson*, 410 F.2d at 705 n.19.

to be applied is well established: to be constitutional, such a statute must protect a “state interest of the highest order” and must do so using the “least restrictive means.”¹⁸³

a. *The CFAA Fails To Require the Least Restrictive Means*

A criminal statute violates the First Amendment when it sanctions a First Amendment activity without requiring the state to use the least restrictive means to protect its interest.

Even while Memogate was unfolding, in June 2004, the U.S. Supreme Court significantly extended First Amendment jurisprudence into the area of computer-based information in its landmark First Amendment decision in *Ashcroft v. A.C.L.U.*¹⁸⁴ The Supreme Court struck down the “Child Online Protection Act” on the grounds that the statute violated the First Amendment because it was not narrowly tailored to protect a compelling state interest and because less restrictive alternatives were available.¹⁸⁵ Importantly, the Court pointed out that a speech-restrictive statute must reflect current technology in order to satisfy the least restrictive means requirement.¹⁸⁶

Specifically, the Court found that “blocking or filtering software” would constitute a far less restrictive alternative way of blocking access to information than the imposition of severe criminal penalties.¹⁸⁷

As with the law restricting receipt of computer-based information in *Ashcroft*, the CFAA may be unconstitutional for failure to require the use of least restrictive means than the blunt device of criminal sanction, such as the use of cheaply available computer security technology or the competent training and oversight of systems administrators.

The principle that *Ashcroft* affirms with regard to technology-based restrictions on the First Amendment is well established. It

183. See *Ashcroft v. A.C.L.U.*, 124 S. Ct. 2783, 2791 (2004) (test’s purpose is to ensure that First Amendment right is “restricted no further than necessary to achieve [Congress’s] goal”); *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002) (respondents have burden to prove that First Amendment restrictive statute is narrowly tailored to serve a compelling state interest); *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (statute affecting First Amendment right must further substantial interest and restriction must be no greater than is essential).

184. 124 S. Ct. 2783 (2004).

185. *Id.* at 2794–95.

186. *Id.* at 2793.

187. *Id.*

has been expressed, for example, in the Supreme Court's opinion in *Florida Star v. B.J.F.*:

To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.¹⁸⁸

In fact, all of the factors identified in *Florida Star* and *Ashcroft* are present in the Memogate case. The Hatch staff was entitled to rely upon the unrestricted availability of the discovered, unprotected papers. We accessed the Memogate papers as a result of the gross negligence of the Network administrator, hired and supervised by the Democratic committee chairman, Senator Leahy, and by the failure of training and oversight by the Sergeant at Arms, William Pickle.

The Committee's issuance of affirmative permissions, without qualification, can only convey to authorized users that the Committee considered the reading and use of the information at the very least lawful. If, in fact, the Committee (under Democrat administration) wanted to protect the privacy of its own papers, it could easily have done so by simply requiring password protection for files and documents it wished to protect, as is routinely done throughout the federal government and the private sector.

When 18 U.S.C. § 1030(a)(2)(B) was adopted in 1996, computer network security was primitive and the commercial Internet was in its infancy. Today, millions of financial transactions and secure communications occur over the Internet as well as within secure financial internal networks (intranets), including stock markets and electronic commerce exchanges. Since 1996, computer and Internet security has become a billion-dollar industry.¹⁸⁹ Every major software company in the

188. 491 U.S. 524, 534 (1989).

189. Interview with Arthur D. McKey, Esq., former Senior Trial Attorney, U.S. Department of Justice, Antitrust Division, in sections on computers, Internet and

U.S. has a computer and Internet security division.¹⁹⁰ Inexpensive network security systems exist throughout the private sector and in every agency of the Federal Government—except apparently in the United States Senate.

The Judiciary Committee Shared Network, as it was configured until recently, had no security at all. It was a dinosaur in a land that time forgot. The Shared Network did not even have warning screens, workplace instructions, or restrictions. These security technologies, and the measures admitted in the Pickle Report as completely lacking, constitute overwhelming evidence of means available to the Congress to protect the “privacy” of internal papers less restrictive than criminal penalties.¹⁹¹

b. *The Statute Does Not Protect an Interest of the Highest Order*

The legislative history of the statute shows that the state interest that Congress intended to protect with the 1996 amendment of the CFAA was “privacy.”¹⁹² But the U.S. Supreme Court has long held such an interest *not* compelling enough to justify the criminal sanction of First Amendment activity.

For example, in *Florida Star*, the challenged statute sought to protect the identity of a rape victim.¹⁹³ Yet that privacy interest was held to be insufficient to meet the First Amendment standard, even though as Justice White pointed out, the plaintiff in *Florida Star* was the victim of a traumatic and violent crime.

communications enforcement and the civil litigation task force, and since 1996, counsel to Network Solutions, Inc., the sole Internet domain name registry for the entire world, and for the American Registry for Internet Numbers, Inc., the sole organization charged by the U.S. Department of Commerce with the allocation of Internet protocol numbers (IP numbers) for Internet services providers in the United States and other countries; since 1999, General Counsel to Internet Security Advisors Group, Ltd., whose president, Ira Winkler, is the nation’s leading computer security and espionage expert. Mr. McKey brought the first civil case under the Computer Fraud and Abuse Act. *See* Network Solutions Inc. v. Kashpureff, No. C.A. 97-1147-A (E.D. Va. 1998).

190. Interview with Arthur D. McKey, *supra* note 189.

191. Moreover, it is far easier to protect a local area network (LAN) like the Judiciary Committee’s Network than to prevent access to pornographic websites using “blocking software,” which the Supreme Court found sufficient as a less restrictive means in *Ashcroft*. 124 S. Ct. 2783 (2004).

192. *See* S. REP. No. 104-357, *supra* note 163, at 3–4. *See also* Floor Statement of Senator Patrick Leahy, 142 CONG. REC. 23,784 (1996). Made on the day the 1996 amendment to the CFAA was adopted, Senator Leahy said, “I am very concerned about continuing reports of unauthorized access to highly personal and sensitive government information about individual Americans, such as NCIC data.” *Id.*

193. 491 U.S. 524 (1989).

Following the publication of her name, she received “harassing phone calls, required mental health counseling, was forced to move from her home and was even threatened with being raped again.”¹⁹⁴

By contrast, the purported privacy interest in Memogate, or indeed in any imaginable Congress-based information (not “classified” by the Executive), presents a far less compelling interest. Democratic senators’ so-called “confidential” documents are far less worthy of protection than the plaintiff in *Florida Star*, a highly vulnerable victim of a crime, who suffered actual damages as a consequence of her loss of privacy protection.¹⁹⁵

Far from being innocent victims, the complaining Democratic senators in Memogate were engaged in the unconstitutional blocking of Advice and Consent votes on judicial nominations and other political schemes in collusion with the special interest organizations that fund and staff their electoral campaigns.

Any privacy interest sought to be protected in information such as the discovered, unprotected Democratic papers, or any Congress-based information found on an open Shared Network without workplace restrictions, is far less compelling an interest than the protection of true individual privacy interests. It is unlikely, save for that material that Congress holds in secrecy for the Executive—such as treaty, national security information, or FBI and otherwise classified files—that Congress would be able to show an interest of the highest order in criminalizing the reading of any Congress-based information by a Congressional employee.

Even if so, with the 1996 amendment to the CFAA, Congress wrote an over-inclusive statute that Democrats at least have now argued penalizes the reading of “information” far beyond the intended protection of individual privacy. They may have even

194. 419 U.S. at 542–43 (White, J., dissenting). *See also* *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975) (privacy protection interest of deceased rape victim insufficient against First Amendment right); *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977) (privacy protection interest of child involved in juvenile proceeding not sufficient against First Amendment right); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (privacy protection interest of confidential state judicial review insufficient against First Amendment right); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979) (privacy protection interest of youthful offender insufficient against First Amendment right).

195. *Florida Star*, 491 U.S. at 529.

intended to criminally sanction the reading of an over-inclusive and arbitrarily-determined content: government-related information that any self-interested legislator might choose to describe as “sensitive and confidential,” and to do so *ex post facto*. If so, or if so applied, the statute must surely fall.

In other words, through the adoption of the 1996 amendments to the CFAA, Congress may not only have “classified” in one fell swoop arguably all information of the three branches that a government employee with access discovers and reads, it may also have criminally sanctioned the reading of information at the very “core of our First Amendment freedoms.”¹⁹⁶ This too Congress cannot do.

Finally, notwithstanding the *ex post facto* pronouncements of exposed Democratic senators to the contrary, the discovered, unprotected papers were on their face neither the “sensitive or confidential” nor “private” material that Congress sought to protect.

As the Pickle Report established, as a result of gross negligence and failure in supervision, the Shared Network had an architecture of “open permissions” and lacked any security protocols. It is axiomatic that none of the information contained there was therefore “confidential.”¹⁹⁷ It is unacceptable to suggest an injury by a breach of secrecy when it was one’s own gross negligence, reckless indifference, and mismanagement that caused the breach, as is the case here. This is what Congress and the courts have determined for the private sector.¹⁹⁸

196. See *Republican Party of Minnesota*, 536 U.S. 765 (2002). Cf. *New York Times*, 403 U.S. at 729 (1971) (per curiam) (Stewart, J., concurring).

197. In the analogous area of trade secrets, both Congress and the courts have been precise about where responsibility lies. See *e.g.* Federal Industrial Espionage Act, 18 U.S.C. § 1832(a) (2000), *et seq.*; § 1839(3)(A) (2000) (defining trade secrets to require that “the owner thereof has taken reasonable measures to keep such information secret”). In order to prevail in an action for appropriation of trade secrets, the owner must take measures to prevent unauthorized access to the trade secret. One of the critical elements in determining whether a trade secret exists at all is whether the alleged secret was intentionally kept secret by the person seeking to assert a trade secret protection. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474–75 (1974) (upholding Ohio trade secret definition adopted from Restatement of Torts § 757, cmt. B (1939), and describing secrecy as to subject of trade secret as “necessary element”). See also 18 U.S.C. § 1832(a) & (b) (2000) (criminalizing theft of trade secrets in the Industrial Espionage Act); 18 U.S.C. § 1839(3)(A) (2000) (defining term “trade secret” to require that owner thereof “has taken reasonable measures to keep such information secret.”).

198. See Winkler, *supra* note 104.

In sum, the mere reading, using, or publishing of unprotected information cannot be viewed as a substantial intrusion into the privacy of senators who are afforded no more privacy than their public duty permits.¹⁹⁹ The protection of privacy in this context cannot be deemed a compelling “state interest of the highest order.”

3. The State’s Interest in Protecting Information Must Give Way to Public Interest in Matters of Public Importance

The *Florida Star* line of cases were more recently endorsed by the U.S. Supreme Court in *Bartnicki v. Vopper*²⁰⁰ where the Court held that the First Amendment protects even speech that discloses the contents of *illegally* intercepted cellular phone communications.²⁰¹

In *Bartnicki*, a radio commentator played a portion of an admittedly illegally intercepted cell phone conversation in which negotiators for the Pennsylvania State Teachers Association, representing teachers at a local high school, discussed tactics for intimidating school board members.²⁰² The tape was played following the settlement of the negotiations. The labor negotiator brought a civil action under federal and state wiretapping statutes. The Supreme Court held that the First Amendment prohibited the imposition of civil liability against

The Economic Espionage Act requires information to be protected to the same extent that one seeks to classify it as a secret or claim legal protection. Given the outrage expressed by some Senators, it is clear they wanted the information to be secret. But if information is left as unprotected in public or healthcare-related businesses as it was by the [Committee] staff, corporate executives could be heavily fined or go to jail under HIPAA (Health Insurance Portability and Accountability Act), Sarbanes-Oxley, or GLBA (Gramm-Leach-Bliley Act) regulations.

Id.

199. See *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969).

200. 532 U.S. 514 (2001).

201. *Id.* at 534–35. The Court in *Bartnicki* reached its conclusion even though the federal and state statutes prohibiting intercepted wire communications were deemed to be “content neutral law[s] of general applicability,” designed to protect the privacy of wire and oral communications regardless of the subject matter of the recorded conversation. *Id.* at 526. By contrast, the statute in *Memogate* is content-restrictive and criminally punishes the receipt and dissemination of arbitrarily determined “sensitive and confidential” information from congressional computers obtained by congressional employees with some level of authorized access.

202. *Id.* at 518.

the commentator in part because the broadcast concerned “matters of public importance.”²⁰³

If labor negotiations involving a single public high school are worthy of First Amendment protection for being of public importance, then surely the process of Senate confirmation of federal judges appointed for life is a matter of the highest public importance.

In finding that the reach of even a content-neutral statute violated the First Amendment, the *Bartnicki* Court held:

In this case, *privacy concerns give way when balanced against the interest in publishing matters of public importance*. As Warren and Brandeis stated in their classic law review article: “The right of privacy does not prohibit any publication of matter which is of public or general interest.” *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890). One of the costs associated with participation in public affairs is an attendant loss of privacy.

“Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. ‘Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.’”²⁰⁴

Similar considerations prevailed in *Cox Broadcasting Corp. v. Cohen* in which Justice White recognized that considerations of privacy are greatly diminished once information is disclosed even through inadvertence.²⁰⁵ The Court further reasoned that making information available, while punishing dissemination would invite “self censorship and very likely lead to the suppression of many items that . . . should be made available to the public.”²⁰⁶

The *Cox* Court rightly warned against the “timidity and self-censorship” that may result from allowing a government employee to be punished for reading, using or disclosing truthful information discovered through the inadvertence or

203. *Id.* at 534.

204. *Id.* at 534 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940))).

205. 420 U.S. 469, 494–95 (1995)

206. *Id.* at 496.

negligence of another.²⁰⁷ Criminal sanctioning in such a case, if not counter to whistleblower laws, certainly contradicts the obligation of the Code of Ethics for Government Service and the long history of First Amendment jurisprudence, both of which emphasize the importance of uninhibited debate of matters of national public importance.

V. CONCLUSION

On the day before this conclusion was written two things occurred. First, CREW, the left-wing group that had filed an ethics complaint against me decided that it was a good day to remove the complaint from their website. The day before, they had learned that the disciplinary committee had closed the matter four months earlier.²⁰⁸ When they filed I had welcomed it, and expressed my hope that they would similarly welcome a libel suit. Second, I contacted Senator Hatch to give him an opportunity to comment on the key constitutional, legal, and ethical issues that are addressed in this article. I put my questions in the light of the recent revelation of what had occurred in the House International Relations Committee in 1996.²⁰⁹ Through his spokesman, Senator Hatch chose to retreat from his earlier self-serving statements and to comment instead on his “high standards.”²¹⁰ This solipsistic response proved my point about the politics of Memogate. That it really was all about one man’s ego. And let’s recall the high standards of those snappy dressers in the last century who made the trains run on time. Even in the face of Ben Gilman and Lee Hamilton’s example in decency and loyalty, Hatch was still self-absorbed.

Memogate was much more than the pseudo-scandal it appeared to be. It ended up being about the abuse of congressional investigatory power, about the abuse of individuals using Senate microphones and Senate-paid press staff, and about intimidation of Senate staff and media persons off Capitol Hill, in an effort to hide the wrongdoing of Democrat senators. Far more serious than the reading of unprotected documents, Memogate was about the abdication by senators of their public

207. *Id.*

208. *See* Bolton, *supra* note 74.

209. *See supra* notes 35–41 and accompanying text.

210. E-mail Letter of Adam Elggren, spokesman for Orrin Hatch, Jan. 27, 2005.

duty; about senators turning a blind eye and missing an opportunity for statecraft.

Memogate was also about the abandonment by the press of their stewardship of the First Amendment, and their interest to defend the free flow of political information and their potential sources. It is irrational to protect and laud the *Washington Post* when they expose corruption or even a matter of public importance, however their information is obtained, but not a government employee who comes by information of public interest.

Often enough I have asked myself whether I would read the Memogate papers again if I could turn back the clock. Given the personal tragedy my wife and I have experienced, the answer is always no. But it should not be. It is “no” because of Republican politicians who failed to see their duty, and Democrats who know no limits to their abuse of power. No public employee should have to choose not to discover proof of wrongdoing because the politician he works for may fail him.

As George W. Bush once said to me (and several million CNN viewers), “a political setback certainly doesn’t mean life comes to an end.” At the end, I had the high privilege to work in the U.S. Capitol for one year, and the work we did and the message of obstructionism I took part in shaping helped to gain for Republicans five more Senate seats in the 2004 election, and brought down Minority Leader Tom Daschle. Perhaps even the unprecedented and unconstitutional filibuster of judicial nominees will end and the politics of personal destruction will suffer a dent because of my work to bring the issue of judicial nominations to greater prominence than when I found it.

I do regret that some of my colleagues and friends were inconvenienced or made uncomfortable. But that was not entirely my fault. As Lee Hamilton and Rudolph Giuliani showed, and actually as the Memogate Democrats showed plainly, the outcome of a pseudo-scandal is determined by the *cojones* of politicians and the talent of their staff. The lesson of Memogate is not: he should not have read the memos. The lesson is: Republicans should not have surrendered the field. This is clear if one believes as I do that the nature of the fight for the independence of the judiciary and the reputations of unfairly-treated judicial nominees is not business as usual or a game of paddy cake. This, of course, has been the criticism

voiced about Republican leaders by conservatives. The same cannot be said of Democrats.

Of course, there are always the professional survivors and the bureaucrats, and also those who have never entered harm's way at all. For them a dose of Teddy Roosevelt is called for:

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, and comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows the great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.²¹¹

211. Theodore Roosevelt, Address at the Sorbonne, Paris (Apr. 23, 1910), *available at* <http://www.bartleby.com/56/4.html> (last visited Dec. 27, 2004).