

Political Science and Political Weapons

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Most citizens believe that criminals and others with serious ethical shortcomings should be excluded from public office. Most citizens also believe that minor indiscretions and false charges of serious wrongdoing should not be used to hound people out of public life. These common sense attitudes are challenged by Ginsberg and Shefter, who contend that ethics probes are actually a device by which political elites avoid "having their disputes settled by the political mobilization of groups beneath them on the social scale."¹ If the analysis presented in the paper distributed for this symposium is correct, the attitude of the ordinary citizen is that of a chump, whose rightful share in democratic governance has been stolen away by cynical political manipulators anxious only to assure their own ascendance.

Fortunately for those of us who share the naïve attitudes of these putative chumps, Ginsberg and Shefter's thesis is based on some highly questionable political science. Beginning with the indubitable proposition that the use of ethics investigations in political combat has increased since Watergate, the authors argue that these probes have become a technique for "winning power and influencing public policy" that has left government largely incapable of "contending with the nation's long term problems." In fact, however, the authors do not support this claim with the requisite evidence. Although they manage to mention most of the major ethics brouhahas of the past few years, they never show that any of these events, or the cumulative weight of all of them together, has seriously undermined the functioning of any major governmental institution.

Consider Ginsberg and Shefter's analysis of Iran-Contra. They assert that "[t]hrough the Iran-Contra investigation, for example, Ronald Reagan's congressional opponents were able to cripple his

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¹ All quoted materials refer to the Ginsburg and Shefter essay printed earlier in this issue.

administration during the president's last two years in office." The authors never stop to consider whether the Republicans' loss of the Senate in 1986 (in which Iran-Contra played no role) had anything to do with Reagan's subsequently weakened position. And they certainly never explain why we should believe that the loss of the Senate was a trivial factor compared with Iran-Contra, rather than vice versa. The authors also ignore another obvious fact that undermines their analysis. The Bush administration—which confronted a Democratic Congress closely resembling the one Reagan faced during his last two years—had as little success as its predecessor in pursuing its agenda, despite the fact that the Bush administration did not suffer a single major ethics scandal. Ginsberg and Shefter go on to assert that congressional investigations of George Bush and his sons "contributed to Bill Clinton's victory in the 1992 presidential election." But this is no more plausible than Tony Coelho's speculation that the Republican victories in 1994 were caused by public sympathy generated by the announcement that Ronald Reagan was suffering from Alzheimer's disease.²

Ginsberg and Shefter might respond that the ethics wars of the past two decades have undermined the political system in more subtle ways, by fostering public cynicism and a sense of hopelessness. Indeed, after noting that criminal indictments of public officials have increased dramatically in recent years, the authors say: "At the same time, however, that judicial participation in the political process has expanded, voter participation in American politics has remained abysmally low—59 per cent in the 1992 presidential election and 38 percent in the 1994 congressional races." This is a very odd statement in a scientific paper, because it is obvious that an increase in one variable combined with another variable's remaining at its previous level does not even suggest that the first variable has an important causal relationship to the second. But perhaps even odder is the authors' assumption that these voting rates are "abysmally" low. What is the "right" level of voting participation, and where do Ginsberg and Shefter get the normative standard that they implicitly employ?

This is an important question because the authors assume, without ever demonstrating, that "low" voting rates are caused by voter cynicism arising from an increase in ethics investigations. But there is a much more obvious explanation for people's decision not to vote.

² Edward Walsh & Charles R. Babcock, *It Was Reagan After All*, *Wash. Post*, Dec. 25, 1994, at A4.

Given the infrequency with which popular elections are decided by one vote margins, the chances are negligible that any voter's decision to go to the polls will make a difference in the election. Every individual's decision to vote is therefore a decision to spend time and energy doing something that cannot affect the outcome. In light of this fact, voting rates of forty to sixty percent do not evince mass cynicism so much as mass sentimentality.

Although it is difficult to identify the driving force in Ginsberg and Shefter's paper, it may be related to their suggestion that higher voting rates would hurt Republicans and incumbent Democrats by causing the election of politicians with a "stable base of popular support," who would therefore be capable of "confronting vested interests and taking decisive action." This may explain the authors' evident delight with Franklin Roosevelt's "brilliant fireside chat" defending his decision to divert a U.S. warship to retrieve the President's pet dog after the puppy wandered off at an official conference. And it may explain their apparently approving reference to the political machine operated for so long by Chicago's Richard J. Daley. Those of us who harbor some doubts about the wisdom of President Roosevelt's domestic programs, or who were adversely affected by Mayor Daley's success at squashing his political opposition, will be able to resist regarding their administrations with nostalgia. Fortunately for us, though Ginsberg and Shefter are sure that neither Republicans nor Democrats are "fit to govern" these days, the authors offer no plausible prescription for reviving the kind of one-party dominance that once prevented ethics probes from being used successfully in political combat.

The lack of such a prescription would probably make their paper completely harmless were it not for the authors' relentless intimations that ethics probes have become too frequent and too efficacious. Perhaps there do need to be some new curbs on inappropriate ethics investigations. But in Ginsberg and Shefter's analysis, all ethical inquiries are treated alike, as though their only salient feature is the use to which they have been put as tools in partisan combat. This analysis ignores some rudimentary distinctions that most ordinary citizens would find quite important:

- Perhaps most obviously, investigations of well-founded allegations of serious misconduct seem rather different from the airing of scurrilous rumors that cannot be substantiated, as well as from distorted accounts of conduct that would seem quite innocent if it were truthfully and completely explained.

- Ethics investigations by the press, as dangerous as they can be to the reputations of innocent people, call for completely different kinds of controls than criminal prosecutions in which the enormous resources of government are used to go after an individual's honor, fortune, and liberty.

- Examinations of the substantive views of those being considered for public office, like the inquiries conducted about Robert Bork and Lani Guinier, are not the same as the investigations of moral fitness conducted in connection with individuals like Barney Frank and John Tower.

- Prosecutions for unambiguously criminal conduct, such as an attorney's theft of hundreds of thousands of dollars from his clients and partners, are easily distinguishable from indictments for previously unimagined crimes like failing to inform a congressional committee about facts that its members might have wanted to know but lacked the wit to ask about.

- Official inquiries about the private conduct of public officials, especially conduct that occurred in the distant past, might be appropriately limited to a greater degree than inquiries about the conduct in office of those same officials.

Most citizens will think such distinctions important even if they believe that partisan or political motivations often lead politicians, journalists, and pundits to blur them considerably. And most citizens probably also recognize that until angels govern men, political motivations are going to infect politics. A useful undertaking, in contradistinction to the lamentations with which the Ginsberg and Shefter paper concludes, would be to adjust the mechanisms of government in a way calculated to channel politically opportunistic motivations in a socially healthy direction.

Like most people, I doubt that any great harm results from harnessing political motivations in the service of removing thieves from public office. Or in the service of preventing political machines from stealing elections through vote fraud. Or in the service of embarrassing officeholders who conscript public employees to advance their private affairs. What debases the public business is not the pursuit of public malefactors, but the blurring of distinctions like those listed above. A beneficial program of reform would focus on creating incentives for ethics investigators to stick with the same common sense distinctions that normal citizens make all the time.

The worst abuses, at least in respect to their pervasiveness, are those

committed by the press. There is obviously very little that the government can do to discipline the press directly, and efforts to do more would probably be counterproductive. Ronald Reagan, who was hardly a darling of the media, understood this very well when he vetoed a proposed codification of the so-called "fairness doctrine" because he believed that the First Amendment gives the press even more protection than the Supreme Court has recognized. It is not so clear, however, that individual victims of journalistic irresponsibility should be deprived of legal recourse to quite the degree that they are by current judicial restrictions on actions for libel and related torts. Adjusting these restrictions might have useful effects.

The second most common forum for abuse is the legislative hearing. Well-settled doctrine under the Speech or Debate Clause severely limits the power of the executive and judiciary to punish irresponsible scandal-mongering by Members of Congress. The Constitution, however, does not prevent the House and Senate from disciplining their own members, and nothing would stop individual legislators from waiving their own immunity while engaged in attacks on other people's integrity. Now that Congress has begun (in response to fairly ferocious public pressure) to remove some of its own exemptions from generally applicable laws, perhaps it is not completely silly to think that it might make its members more accountable for false charges against the targets of ethics investigations.

The most obvious source of abuse in the executive arena is the Independent Counsel statute. Because the Supreme Court mistakenly concluded that this law is constitutional, and because Congress and Presidents have repeatedly insisted on renewing it, we continue to see roving prosecutors who are barely accountable for the resources they consume or for the tactics they use. The absence of effective checks on the behavior of these prosecutors is an open invitation to abuse and overreaching, as the extravagant conduct of the Walsh investigation into Iran-Contra richly illustrates. The best way to prevent these abuses is to repeal the statute, and force those with political axes to grind to rely on the normal political mechanisms, such as congressional and journalistic investigations.

Failing that, however, it might be possible to subject Independent Counsel to somewhat more effective controls. One possibility would be to require these prosecutors to investigate those who make accusations against the subjects of the probe with the same thoroughness that the prosecutors apply to the subjects themselves. Another possibility would

be to require that Independent Counsel be appointed to investigate allegations of misconduct made against Independent Counsel. While these suggestions may have the air of a burlesque, the Walsh extravaganza (which came complete with legal maneuvers seemingly designed to influence the 1992 elections) shows that there are travesties more dangerous than having an Independent Counsel investigate an Independent Counsel.

None of the suggestions made here would put a halt to inappropriate ethics investigations or guarantee public officials against miscarriages of justice. But they are all things that could actually be done. And they at least have the virtue of being consistent with the basic Madisonian principles that underlie our political institutions, as well as with the basic ethical attitudes of ordinary citizens. The good old days—when ethics investigations could be suppressed through the mechanisms of one-party government—are probably not going to return anytime soon, and Ginsberg and Shefter offer no good reason for us to wish they would.