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Suppose that you were Colin Powell. A bit of a stretch, I admit, but give me my counterfactual for the moment. Would you have resigned your office rather than go before the United Nations Security Council to make the case for the invasion of Iraq? Or would you have remained silent, swallowed your doubts and, like a good soldier, obeyed your orders?¹

One problem with the counterfactual is that it is very hard to know what Colin Powell is like or what the world seems like to him. It is even harder – indeed, perhaps incoherent -- to suppose some indeterminate mix of you and Colin Powell that a question in the form of what “you” would do if “you” were “Colin Powell” seems to demand.² I will return to these difficulties later in this essay. For now, though, suppose that you were an idealized and radically simplified Colin Powell – a Colin Powell who was fully aware of the criminal idiocy of the impending Iraq adventure and who simply wanted to do the right thing. Then, would you have resigned?

In their classic study of resignation,³ Edward Weisband and Thomas M. Franck lament the historic failure of American officials to resign in protest. Very few Americans have publically resigned because of policy disagreement,⁴ and those who have were often treated unkindly by their contemporaries.⁵ Weisband and Franck contrast the American experience with that of the United Kingdom, where public resignation is relatively common and where the political culture celebrates the ethical independence of
public servants. They argue that this kind of autonomy makes for better government by checking group-think and restraining public power.

For Weisband and Franck, then, the answer to our question is obvious: Of course Colin Powell should have resigned. He was perhaps the only person on the planet with both the power and the inclination to stop a stupid and evil war. He had a duty to use that power to serve the public good.

It is not the purpose of this essay to disagree with this conclusion. Perhaps Powell should have resigned. I do mean to complicate the conclusion, however. I mean to show that the resignation decision is hard and that words like “duty,” “ethics of public service,” and “sound public policy” do not capture all of the difficulty. Instead, the best defense of public resignation conceptualizes it as a radically free act – a rebellion against normal constraints, including the constraints of duty and ethics.

The essay proceeds in five parts. First, I set out the plausible alternatives open to a public figure who finds herself in disagreement with the policies pursued by her government. In Parts II and III, I explore the case for each of the alternatives on instrumental and noninstrumental grounds. In Part IV, I defend the concept of resignation as radical rupture. In the final part, I discuss the role that law and legal institutions play and should play with respect to resignation.

I. Powell’s Choices

The most obvious way to complicate the resignation question is to see that General Powell’s choice was not binary. He had a range of options, and the number of choices expands dramatically once one realizes that he might have pursued some of them
in various permutations. Here are some of the possibilities located, more or less, along a continuum:

1. He could have remained in office and simply gone along with government policy on Iraq without voicing doubts or dissent.

2. He could have remained in office and gone along with the policy, but only after forcefully expressing his dissent during the policy formation process.

3. He could have remained in office and gone along with the policy but used his power to change it at the margins, perhaps by eliminating some of the more extravagant claims that others wanted him to make at his UN speech or by insisting on adequate plans for post-invasion reconstruction.

4. He could have remained in office and publically gone along with the policy while privately attempting to subvert it, perhaps by leaking damaging stories to the press or by mounting bureaucratic guerrilla warfare that would make its execution more difficult.

5. He could have employed the threat to resign as a tactic without making good on the threat.

6. He could have resigned from office and offered innocuous (and untrue or only partially true) reasons for doing so.

7. He could have resigned from office and publically offered innocuous reasons for doing so, but let it be known informally that the real reasons were opposition to Bush Administration policy.

8. He could have resigned from office and accompanied the resignation with a public attack on the administration.
There are historical cases of public officials selecting each of these courses of action. For example, two of Powell’s predecessors selected interesting variants of Option 8. William Jennings Bryan publically resigned as Woodrow Wilson’s Secretary of State in protest over Wilson’s increasingly bellicose foreign policy in the run-up to World War I.9 Bryan’s resignation seemed calculated to change the policy, but it had no long-term impact.10 In contrast, Cyrus Vance publically resigned in response to Jimmy Carter’s botched Iranian hostage rescue effort, but his resignation seemed deliberately designed to have no effect on the decision. Although Vance wrote his resignation letter before the rescue effort occurred, he delayed the public announcement until after it had been completed.11

Christine Todd Whitman, head of the Environmental Protection Administration under President George W. Bush, provides an example of Option 6. Whitman cited her desire to return home and be with her family as her reasons for leaving the Agency, but most observers have concluded that her real reasons were grounded in opposition to Bush administration environmental policies.12

Still another of Powell’s predecessors, Henry Kissinger, was a master at Option 5. Deeply convinced, and able to convince others, of his own indispensability, he utilized the resignation threat as a club to achieve his objectives.13

Robert Bork provides an example of Option 1. Although he apparently had serious misgivings about Richard Nixon’s decision to fire special counsel Archibald Cox in the Watergate “Saturday night Massacre,” he nonetheless carried out the order without protest because, after the resignations of the Attorney General and Deputy Attorney General, he was the “one department-wide officer who was left, and who could make a
good attempt at both preserving the Department of Justice and Preserving the Watergate special prosecution force.”¹⁴

During his long career as Franklin Roosevelt’s and Harry Truman’s Secretary of the Interior, Harold Ickes regularly used all of Options 2 through 5. He engaged in vociferous internal protest of government policy, loved bureaucratic infighting, and threatened to resign more times than his colleagues could count.¹⁵

Another example of the use of these options also comes from the Roosevelt administration. Edward J. Ennis, the Director of the Justice Department’s Enemy Control Unit and John L. Burling, his assistant, strongly opposed the expulsion of Japanese Americans from the West Coast, but nonetheless signed the brief defending these actions. They fought a long, passionate, and only marginally successful effort to change the language of the brief and to bring to the Court’s attention misrepresentations by the War Department.¹⁶ There is even evidence that they transmitted helpful information to American Civil Liberties Union lawyers opposing the government’s position.¹⁷ Asked years later why he had not resigned, Ennis replied that “we didn’t throw it up because we didn’t want to put it in the hands of Justice Department lawyers who were gung-ho for the Army’s position. I think we felt that we’d just stay with it and do the best that we could, which wasn’t a hell of a lot.”¹⁸

Mark Felt provides the classic example of Option 4. While remaining a part of the Nixon administration in his position as the Associate Director of the Federal Bureau of Investigation, he secretly became “Deep Throat,” providing Bob Woodward and Carl Bernstein with information that helped them uncover the Watergate scandal.¹⁹
Weisband and Frank imagine Adolph Eichmann as a particularly egregious example of Option 3. Eichmann’s job was to manage the transfer of Jews to Nazi extermination camps. Weisband and Frank ask us to think about a claim that if he had resigned, his replacement would have sent 8 million Jews to their death, instead of “only” 6 million.\(^{20}\)

Finally, Robert McNamara offers examples of Option 7. At the news conference that followed his resignation as Secretary of Defense, McNamara uttered not a word of opposition to President Johnson’s Vietnam policy, but Washington journalists knew that that opposition motivated his departure.\(^{21}\)

What criteria should one use to choose among these alternatives? Surely, a sensible analysis must at least begin with concern for the consequences of one’s actions. Our hypothetical General Powell needs to think through the likely outcome produced by each of the available options open to him. It matters, for example, that William Jennings Bryan’s resignation was ineffectual and that Henry Kissinger’s bluster often worked. Protesting internally may make little sense if it is certain that the protest will be ignored, and going along quietly may make quite a bit of sense if doing so gives one leverage to influence the outcome on another issue that might be more important.

Suppose, though, that we abstract from concerns about consequences. Is there something to say about the choice that is consequence independent? Many people would want to say that Adolph Eichmann did the wrong thing even if his continuation in office did saved lives. Perhaps they would say as well that Robert Bork did the right thing even if his resignation would have prevented the Saturday Night Massacre.
In the Parts that follow, I make first consequentialist and then nonconsequentialist arguments for why Weisband and Franck’s conclusions in favor of public resignation are too simple.

III. Consequentialist Perspectives

In this Part, I focus first on the likely effects of an individual’s decision to resign and then on the systemic effects of creating a culture of resignation.

One difficulty associated with talking about individual decisions is that it makes generalization very difficulty. The consequences of a given resignation will depend upon all the surrounding circumstances, and these circumstances will vary from case to case. Certainly, there will be some cases where resignation will produce the best overall consequences, and when this is true, obviously, a consequentialist will recommend this course of action.

At least we can say this much, however: Resignations that are deliberately designed to avoid or minimize good consequences are very difficult to defend from a consequentialist perspective. Most cases falling under Option 6, and 7 and at least a few under Option 8 are in this category. Officials who resign in protest, but fail to make their protest public (Option 6) combine the worst of both worlds. On the one hand, the resignation removes them from positions of power where they might continue to do some good. On the other, it does little or nothing to advance the goals that motivated it.

Although the practice is common, it is also hard to understand the justification for stating reasons for resignation that are innocuous, but leaking the real reasons (Option 7). Had he publically broken with the Johnson administration, Robert McNamara might have become a rallying point for antiwar forces. Instead, he diminished the moral force of his
resignation by trying to have it both ways. On the one hand, he maintained good relations with the President, who rewarded him by appointing him head of the World Bank. On the other, he tried to protect his historical reputation and curry favor with a segment of the Washington elite by quietly letting it be known that he was one of the “good guys” who had come to understand the moral calamity of Vietnam.

Even some resignations accompanied by public protest (option 8) suffer from the deliberate ineffectiveness problem. Consider, for example, Cyrus Vance’s departure from office. Some might be tempted to credit him for acting honorably by privately submitting his resignation before anyone knew whether the ill-fated Iran hostage rescue mission would be successful and publically announcing his opposition only after the mission had run its course. One understands, of course, why he might have felt bound to keep his opposition secret for as long as the mission itself was secret. What, though, did he accomplish by resigning after the mission’s failure? Resignations of this sort flirt with narcissism. They serve to separate the departing official from the course of action he opposes, thereby satisfying his own sense of moral purity, but do nothing to change that course of action. At least from a consequentialist point of view, it makes more sense to stay and fight.

More typically, a resignation comes before a policy or decision has run its course. In these circumstances, there is at least a chance that resignation will lead to political pressure that might reverse the policy. In many of these cases, however, the threat of resignation (Option 5) may be as or more effective than resignation itself. If resignation would in fact be disastrous for an administration, then surely, the administration will often perceive this before the fact and, so, respond to the threat. For example, the Bush
administration seems to have modified its warrantless surveillance policy after the top echelon of the Justice Department threatened to resign.23 Of course, officials who threaten too often eventually lose their credibility if the threats are never carried out – the fate that, perhaps, befell Harold Ickes.24 As the Kissinger example illustrates, however, loss of credibility is not a problem if one’s bluff is never called, and one’s bluff is unlikely to be called if the resignation would in fact be effective. At a minimum, then, in most cases an official should threaten resignation before actually carrying out the threat.

Perhaps the reason why bluffs are frequently ineffective is because the resignation itself would be ineffective. In fact, it is striking how rarely resignation in protest has actually made a difference, at least in the American context. In their exhaustive treatment of the subject, Weisband and Franck can offer only two twentieth century American examples where resignation led to a change in policy.25 Indeed, part of their point is that American officials who resign in protest tend to be ostracized and ignored.

Of course, it does not follow that this will be true in all times and places. Weisband and Franck persuasively argue that the political culture in the United Kingdom makes resignation a more attractive option there. No doubt there are other cultures as well – Japan comes to mind – where public resignations have different effects and different social meanings. The subject of this article, however, is the effect and meaning of public resignation in the United States. Although Weisband and Franck regret the fact that American resignations tend to be ineffectual, their regret does nothing to change this state of affairs. It is the way things are, rather than the way they wish them to be, that matters. The way things are is that American resignations have almost never achieved change in the policy that triggered them.26
The leading counterexamples are the resignations of Elliot Richardson and William Ruckelshaus in conjunction with the Saturday Night Massacre. Richardson, the Attorney General of the United States, and Ruckelshaus, his deputy, resigned rather than obey Richard Nixon’s order to discharge special prosecutor Archibald Cox.²⁷

There is no doubt that these resignations added to the political pressure that eventually led to Nixon’s departure from office. Still, this single counterexample demonstrates only the point that we started with – that consequentialist judgments will vary depending on the surrounding circumstances. Moreover, even in this case, it is not obvious that resignation was the best course of action. Perhaps Richardson and Ruckelshaus would have been even more effective had they simply disobeyed Nixon’s order and forced him to remove them from office.

We cannot know whether General Powell, like Richardson and Ruckelshaus before him, would have had a major impact on policy had he resigned. It is possible to imagine that his resignation would have been politically devastating for the administration. Still, given the many other examples of ineffectual resignation and the political culture that Weisband and Franck describe, our hypothetical General Powell (and maybe the real one, too) would have had to think long and hard before coming to the conclusion that his departure from office would, indeed, have derailed the Bush administration’s determined and heedless march toward war.²⁸

Against this possibility is the opportunity to improve things at the margin if one stays on.²⁹ The choice is perfectly illustrated by Robert Cover’s account of the conflicting advice antebellum abolitionists gave to northern judges who were asked to enforce slavery. For Wendell Phillips, the conflict between the commands of the
Constitution and evil of slavery left judges with only one choice: resignation.\textsuperscript{30} Lysander Spooner strongly disagreed. Spooner thought the proper analogy was one of a man given a weapon on condition that he kill an innocent and helpless a victim. In such a situation, Spooner argued, it is proper to make the promise, keep the weapon and use it, in violation of the condition, to defend rather than attack the victim. To give up the sword, to resign the judicial office, is “only a specimen of the honor that is said to prevail among thieves.”\textsuperscript{31}

As Cover comprehensively demonstrates, in the event, judges followed neither Phillips’ nor Spooner’s advice. Instead, they typically remained in office while doing little or nothing to turn the “sword” of judicial power against slaveholders. Perhaps, Powell, too, can be accused of choosing the worst of all worlds. By not resigning, he failed to make a public, moral case against the war. Yet he also seems to have accomplished little by remaining in office. It does appear that he was successful in removing some of the more egregious misstatements from the UN presentation, but he seems to have had only minor impact beyond this.\textsuperscript{32}

Still, if one asks what Powell should have done, it is not obvious that resignation is the right answer. Perhaps, he could have been more effective had he been more insistent or a better bureaucratic infighter. Apparently, Powell never managed to summon the gumption actually to tell President Bush that he opposed the pending war.\textsuperscript{33} Moreover, even if we confine our examination to what Powell did accomplish, something, after all, is better than nothing at all. Until the comprehensive history of the
Bush administration is written, we will not know what good Powell was able to accomplish in other areas of foreign policy during his remaining tenure.

The upshot is that in Powell’s case -- and, by extension, in the broader range of cases -- officials are more likely to achieve their own goals if they remain on the job. On the one hand, it is doubtful that they will have much impact by resigning and, on the other, they might continue to have at least some impact by staying. Oddly, although Weisband and Franck’s historical analysis strongly supports this conclusion, they fail to understand that their own data cuts against the resignation option.

Suppose, though, that we stipulate, contrary to the historical record and merely for sake of argument, that resignation is indeed an effective strategy for changing policy. So far, we have merely assumed that the change in policy is a good thing. Is it? Of course, it will seem so to the official considering resignation, but there is no reason to think that the people who resign are systematically more likely to be right than the people who formulate the policy that motivates the resignation. People must act on their own best judgment, as imperfect as that might be, but that best judgment, itself, should include some humility about one’s best judgment. Typically, although of course not always, the official who resigns in protest is a lone dissenter. He will have lost out in a policy process that, for better or worse, reached a consensus. A person who resigns in order to frustrate this outcome should at least worry about the dangers of arrogance.

Moreover, if we broaden our perspective from the individual official who resigns to the creation of a culture of resignation, we need to think about systemic effects. Not all of these effects are bad. A culture of resignation might deter executive officials from publicly lying about their policies, for example. Still, we need to think seriously about
the down sides of widespread resignations. Resignations that are an accepted feature of
government and widely resorted to might produce two, complementary pathologies. On
the one hand, very frequent resignations lose their political potency. The act of
resignation has symbolic power precisely because it is unusual. If it were the norm that
officials resigned every time that they disagreed with a policy outcome, public
resignation might be even more ineffectual than it is now.35

On the other hand, we need to think about the ex ante incentives that a culture of
resignation creates for appointing officials. If resignation were a powerful tool, then
these officials would have a strong incentive to screen potential appointees to avoid those
who are likely to cause trouble by leaving in protest. This concern biases the selection
process in favor of appointees who have no strong views and are likely to go along.
Ironically, then, a culture of resignation might lead to less internal dissent, rather than
more.

Finally, one needs to think about what a culture of resignation does to democratic
accountability and internal deliberation. The problem is clearest in a case like the Robert
Bork’s where, if Bork’s account is to be believed, his resignation would have left no one
at the Department of Justice to carry out the President’s program.36 Of course, Bork’s
case is an unusual one. Had General Powell resigned, there would have been no shortage
of qualified individuals to take his place.

In the more usual situation, the argument from democratic accountability is more
complex. Proponents of resignation are right to argue that the act of resigning can trigger
public debate that might otherwise not take place. On one account of democratic
responsibility, this sort of dissent is essential to authentic public dialogue.37
While there is certainly something to this argument, a different version of public accountability cuts the other way. A successful resignation frustrates the efforts of an elected administration to carry out its program. On a Madisonian view of representative democracy, this is a loss. Perhaps the incumbent administration has gone amok, and a determined dissenter can trigger a necessary correction. But perhaps the administration is pursuing sound long term goals with short term political costs – goals that it was elected to achieve and that, in the long run, will be good for the country if not frustrated by demagogic intervention. As will always be the case with consequentialist arguments, it all depends on the circumstances.

Resignation in protest also terminates internal deliberation that might both lead to wiser decision making and promote democratic accountability. The classic example is Abraham Lincoln’s cabinet, which Doris Kearns Goodwin aptly described as a “team of rivals.” Lincoln was able to keep together a group of strong-willed politicians whose disagreements with him and among themselves mirrored deep fissures in the nation itself. Lincoln used these divisions both to help formulate sound policy and to keep the policy sufficiently in touch with political sentiment to make it workable. Had his warring advisors insisted on resignation rather than sticking it out, the country would have been the poorer for it.

To summarize, the analysis and examples discussed above suggest that there will often be strong consequentialist reasons to resist the temptation to resign. This is not to say that there is nothing at all to the consequentialist argument for resignation. For example, on rare occasions, a resigning official might be able to counter the “if only you knew what I know” argument that insiders regularly advance. Perhaps as well, public
resignations produce an in terrorem effect that deters future misconduct. Still, a fair-minded reading of the history of American public resignations strongly suggests that consequentialists should resist the temptation to resign in protest.

IV. Nonconsequentialist Perspectives

Single-minded preoccupation with consequences misses a big part of the point, however. Paradoxically, much of the instrumental good achieved by resignation stems from the appearance that the person leaving office is not acting instrumentally. In our culture, resignation has the reputation of being a deeply principled act that the actor takes without regard for short-term political advantage. It is for just this reason that the person who resigns sometimes achieves this advantage.

Obviously, the advantage will no longer be achieved if it becomes known that resignation is motivated by instrumental concerns. Even a consequentialist, then, must worry about the extent to which the nonconsequentialist case is plausible to others. And, of course, for thoroughgoing and honest nonconsequentialists, the case must be not just plausible but also right.

In this section, I claim that there is indeed a nonconsequentialist argument for resignation, but that people who make the argument frequently underestimated the force of the argument on the other side.

We can start by investigating why resignation is widely regarded as a deeply principled act. Two factors seem to be at work. First, resignation in protest is often a courageous decision that may do serious damage to the resigning official’s political career. As we have already seen, American political actors who destroy their reputation
as “team players” are often shunned and have difficulty regaining positions of power and influence. Thus, resignations are often principled in the sense that an official who resigns places honor above personal advantage.

Second, resignation in protest demonstrates personal integrity. The departing official leaves office because he refuses to associate himself with morally reprehensible conduct. On this view, Colin Powell’s resignation might or might not have stopped the march toward war, but the one thing it surely would have done is sever his involvement with the war. Making a break – decisively and unambiguously – with evil is no small thing.

What are we to make of these claims for resignation? There can be no doubt that some officials who resign exhibit personal courage, and that, conversely, at least some officials who remain in office do so out of cowardice. As we have already seen, though, the idea of resignation as a badge of courage depends upon the very political culture that defenders of resignation deplore. If resignation became no more than a stepping-stone to higher office, then people who resigned would no longer exhibit courage by doing so. If we indeed value opportunities for disinterested sacrifice, we should not want to corrupt that sacrifice by providing material rewards for people who make it.

Moreover, courage and disinterested sacrifice are not ends in themselves. Perhaps people who exhibit courage for no good reason deserve our admiration, but they surely do not deserve our emulation. If resignation cannot be justified on some other ground, then the sacrifice is wasted.

Can it be justified as a matter of personal integrity? The problem is that there are also arguments grounded in integrity on the other side of the ledger. Public resignations
violate norms of loyalty, trust, and honesty. A person who accepts appointment to office often makes a set of explicit or implicit promises to his patron. In exchange for the opportunity to exercise power and advance his career, the appointee makes a commitment to work together for interests that the patron defines.

To be sure, sometimes it will be in the patron’s interest to be told things that the patron does not want to hear. Loyal appointees need not be – indeed, typically are not -- sycophants. It might even be in the patron’s interest for the appointee to ignore the patron’s ill-considered orders, as, for example, John Ehrlichman and H.R. Haldeman regularly (but not regularly enough!) did when Richard Nixon gave them outlandish and bizarre directives.  

The appointee also has the right to sever the contract prospectively. A quiet resignation breaches no obligation, and once the relationship is severed, the appointee may regain the right, going forward, to disagree publically with her patron. Having left his position in the Clinton administration and become a news commentator, George Stephanopoulos arguably violates no duty when he criticizes his former boss.

But a public resignation is a different matter. A public attack on the way out the door for decisions made during one’s tenure with information gained because of that tenure is never in the interests of the person attacked. Such an attack will often be seen by the patron as disloyal and dishonest.

It does not follow that the attack is always wrong. Perhaps the appointing official herself has breached an implicit or explicit promise, thereby relieving the appointee of his obligations. Moreover, other moral commitments may outweigh the demands of loyalty and honesty. But if not always wrong, a public resignation is always at least
morally problematic. It is, after all, a feature of the obligation of loyalty that it takes hold at precisely the time when there are strong prudential or moral reasons for desertion.\textsuperscript{43} We nonetheless value loyalty because it builds trust and human connection.\textsuperscript{44} Fear of public resignation, in contrast, breeds wariness and erodes candor.

Oddly, a second argument against resignation reverses the first argument. Here the claim is that we should not hold public officials to standards of loyalty and candor that we expect of private citizens. As Michael Walzer argued effectively a generation ago, public officials must have “dirty hands.”\textsuperscript{45} Walzer’s argument is complex and he is deeply ambivalent about his own conclusions. The key idea is clear enough, however: If public officials are to be effective (and all of us need for them to be effective), then they must in a certain sense be amoral.\textsuperscript{46} They must embrace their enemies and betray their friends. They do good work, but pay for it with necessary evil that almost, but not quite, outweighs the good.

On a Walzer-like view, then, officials who resign out of moral squeamishness probably did not belong in public service in the first place. We require public officials who are willing to sully their own reputations for the sake of the rest of us. Should we be persuaded by this view? I share Walzer’s ambivalence about the argument for dirty hands, so I will do no more here than lay out what seem to me to be the strongest considerations on either side.

Some critics of arguments like Walzer’s – most prominently Bernard Williams – claim that it ignores the virtue of personal integrity.\textsuperscript{47} There is an important sense in which this charge misfires. A Machiavellian public servant with dirty hands is actually following moral principles of a sort, and at great cost to himself. In his deeply troubling
short story *Three Versions of Judas*,\(^{48}\) Jorge Luis Borges writes about a schismatic theologian who treats Judas as the true hero of the resurrection story. By giving up his eternal soul, Judas allows the resurrection to happen and, so, saves all of humankind. The Machiavellian public servant who embraces evil to accomplish good is a Borgesian hero. Whereas others are willing to walk away from the struggle for the sake of their reputations and a good night sleep, the Machiavellian battles evil at close quarters where the fight is inevitably messy, ambiguous, and inconclusive.

A related mistake is to associate the dirty hands position with utilitarianism, thereby tarnishing it with the well-known difficulties of utilitarian theory. It is true that a Machiavellian is willing to do things that could not be justified in other circumstances and that he does them because of their consequences. But no moral theory, whether utilitarian or deontological, can afford to ignore consequences completely. Although a nonutilitarian might say that some actions are simply out of bounds without regard to consequences, other actions are surely justified in some circumstances even though they are impermissible in others.

Of course, a Machiavellian might be a utilitarian, but she might also be motivated to get her hands dirty to achieve ends that she believes are goods in themselves, whether or not they maximize overall utility. Thus, a hypothetical (if not the real) Colin Powell might have stayed in office just because he believed that lying to the United Nations was a categorical evil, and that his continued service would prevent that evil from occurring. A problem arises for such a deontological Machiavellian only if achieving these ends requires actions that are, themselves, categorically prohibited. Perhaps Powell performed categorically prohibited acts, but it is also possible, at least some times, for a public
official to remain in office and get her hands very dirty indeed while nonetheless steering
clear of the kind of wrongdoing that cannot be justified even when necessary to achieve
a greater good.

I must confess that I have a weakness for public servants of this sort. Whatever
else one says about them, they cannot be accused of naiveté. They approach their task
with a clear mind and a realistic sense of the tragedy of moral compromise. Moreover, as
Walzer recognizes at the conclusion of his essay,49 they are all the more selfless because
their heroism must forever be unsung. Their actions are heroic because they flout usual
moral norms for the sake of the rest of us, thereby endangering their reputations and even
making themselves vulnerable to criminal prosecution or, in the case of Borges’ Judas,
eternal damnation.

The last point, though, leads to an obvious contradiction. If their heroism must,
indeed, be unsung, then why am I singing it? Machiavellians are heroic because they risk
all by flouting conventional morality, but this conclusion implies that conventional
morality must remain robust. Without such norms, Machiavellian claims become merely
self-serving excuses.50 Surely, we should condemn Eichmann’s crimes even if he were
able to show that the Nazi who would have taken his place would have been marginally
more evil.

We should be concerned, as well, with how easy it is to fall in love with the night.
Sophistication can be seductive, and sometimes, its lure should be resisted. Someone
who consorts with evil must be exquisitely sensitive to a line that she must not cross.
Many sophisticates are doubtless too confident of their own moral judgment and
incorruptibility.
And yet even as we condemn them, it is hard not to also admire those who try to keep their balance on this moral tightrope. Ultimately, it is wrong to think of these double agents as either heroes or scoundrels. The problem is interesting because many of them are both. It is more interesting, still, because these traits are inextricably linked to each other.

Howard Campbell, the fictional narrator of Kurt Vonnegut’s *Mother Night*, is an American spy who broadcasts vitriolic Nazi propaganda embedded with coded information of use to the allied military. Campbell does a great deal of good, but doing that good requires him, in some sense to become a person who is truly evil. After all, in order to continue on his mission, Campbell must be a convincing Nazi. The best way to convince others is actually to take on the traits one wants others to believe that one has. Does Vonnegut want us to think that Campbell has lost his balance on the tightrope?

In an introduction, Vonnegut tells us that one moral of his story is “We are what we pretend to be, so we must be careful about what we pretend to be.” This is an argument for the virtue of personal authenticity, and, on one level, the novel can be read as an elaborate condemnation of Campbell for ignoring that virtue. Perhaps Colin Powell also deserves our censure for becoming a person different from the person who he thought (we thought?) he was.

But Vonnegut brilliantly complicates matters by raising questions about whether his case for authenticity is itself authentic. Vonnegut’s introduction is followed by an obviously fictional “editor’s note,” also signed by someone identified as “Kurt Vonnegut, Jr.,” which is, in turn, followed by Campbell’s fictional memoir. Might Vonnegut intend for us to treat the “Vonnegut” who writes the introduction as still another fictional
character? Vonnegut’s argument against pretense is itself deeply embedded in layers of pretense. Perhaps the moral of the “moral” is that true authenticity means not ceding the power of personal judgment to someone who would write morals for us. Or perhaps the “moral” is that there are no morals – that there is no “authentic self,” but only pretense all the way to the bottom.

The “Vonnegut” of the introduction provides two other morals that could be taken to be more than pretense: “make love when you can. It's good for you” and "when you're dead, you're dead.” Sex and death are real, all right. There can be no pretense about their existence. But, importantly, sex and death are not the stuff of duty, obligation, and moral clarity. It is not usually possible to argue someone into sexual desire, and there is no logical deduction that wards off or explains death. Although sex involves intimate connection while death entails radical separation, both are marked by loss of conscious control and an abandonment of intellectualized meaning. They are just there. Could resignation be like that? The next section explores this possibility.

IV. “I Ain’t Gonna Work on Maggie’s Farm No More”

In the discussion so far, I have tried to evaluate resignation according to criteria derived from both consequentialist and nonconsequentialist thought. My aim has been to show that resignation decisions are often complicated and that defenders of resignation have been too quick to claim that it is usually the “right answer.” In this section, I want to raise questions about whether the search for right answers asks the right question.

The difficulty, briefly stated, is this: Grounds for decision are always already located within a web of connection and obligation. But as Thomas L. Dumm argues in
his brilliant essay, resignation – or at least a certain type of resignation – is a declaration of independence from connection and obligation.

Declarations of independence pose a particular problem for legal and political theory. They raise disquieting questions about whether it is possible to have a rule of law that reaches “all the way to the bottom.” These declarations always remind us that at the end of the chain, there is an illegal act. As Frank Michelman has taught us, legal obligation must begin somewhere, and the beginning always involves disentanglement from some preexisting legal obligation. Justifications for the disentanglement cannot be grounded in the very regime that is being rejected. For this reasons, declarations of independence must stand outside of law even as they provide a source for law. They are at once creative and destructive acts.

Just as declarations of independence stand outside of legal obligation, so, too, some resignations might be said to stand outside of moral obligation. So long as one is located within a regime, there are moral reasons to abide by the obligations that regime imposes. The sense of connection, common purpose, and shared values internal to the regime provide the substrate upon which moral obligation to others depends. But, much as we often want to hide the fact from ourselves, there is always a prior choice of whether to be within the regime in the first place. Where, then, are we to get our reasons for our choice of reasons?

This dilemma of justification is most apparent with regard to the nonconsequential reasons for and against resignation that I have discussed above. Consider, for example, the question of loyalty. A person who publicly resigns breaches a duty of loyalty, but that duty is itself based on the very connection that the resignation
severs. No one, after all, has a duty of loyalty to complete strangers. We have to decide whether this or that person is someone we want to be loyal to.\(^{59}\) Criticizing as disloyal someone who walks away from a relationship ignores the fact that the obligation of loyalty is internal to the very relationship the person is rejecting.

Often, arguments from personal integrity are counterpoised against arguments for loyalty. On this view, a person should remain loyal, but only so long as the obligation of loyalty does not force the person to violate the nature of who that person “really is.”\(^{60}\) The real Colin Powell and the fictional Howard Campbell should not remain in a job that requires them to violate core individual commitments.

The trouble with this formulation is that it assumes that there is some “real” person who is severable from the acts that the person performs. The problem is most apparent when the “real” person is, like Howard Campbell, a fictional creation. As Vonnegut’s elaborate layers of invention demonstrate, however, we are all sometimes authors of our own persona. If people are indeed continually defined and redefined by the choices that they make, then it becomes incoherent to say that these choices are separate from the person making them. Thus, Colin Powell breached no obligation to his true nature by remaining in office. By remaining in office, he defined what his true nature was. Conversely, had he resigned from office, the act of resignation would have defined a different true nature. The decision therefore cannot be judged by criteria derived from sources outside the decision itself.

There is a similar difficulty with consequentialist arguments about resignation. Consequentialist arguments cannot generate the goals that drive the arguments. Once a goal is specified, then a consequentialist knows that her actions should be judged by
whether they advance her toward the goal. But the goal itself must come from somewhere else.

It does not follow that the goal comes from nowhere at all. Our choice of ultimate goals is grounded in the moral and affective community within which we are located. Once a community is specified, then one set of goals makes sense, while another set seems silly or evil or does not even come into consciousness. Within such a community, then, consequentialism can be a guide to action. What, though, are we to say of the goal of disentangling oneself from the community that is goal-generating? The choice to put one community aside and choose another cannot be guided by preexisting goals. It is instead, a choice of what goals one wants to pursue.

It follows, I think, that at least a certain kind of resignation stands outside of moral argument. Such a resignation defines a moral universe rather than being defined by it. This is not to say that decisions about resignation are not subject to praise or blame. Just as Colin Powell defined the kind of person he was by his decision to remain in the Bush administration, so too, I define the kind of person I am by what I think and say about Powell’s decision. In this sense, I may believe that the decision is right or wrong, but it is a mistake to suppose that I can argue others or myself into this reaction. Self-definition is not the same thing as argument. General Powell simply is (or is not) the kind of guy I want to emulate and defend.

This analysis is subject to at least two sorts of objections. A moderate objection claims that most resignations are not in fact the way that I describe them. On this view, a few resignations involve existential rupture, but more often resignation reflects either continuity with a set of commitments that no longer coincide with the aims of a patron or
mere disagreement within a paradigm shared with a patron. A more far-reaching objection claims that no resignation can involve existential rupture. On this view, all of our conduct is inevitably located within a frame that is impossible to escape.

Consider first the moderate objection. Is it descriptively accurate? I doubt that many resignations in protest amount to no more than disagreement within a shared paradigm. To be sure, there are no empirical studies that count the number of public resignations entailing choice of a different moral nomos, as compared to the number involving nothing more exciting than a career move made within an existing set of commitments. My guess, though, is that there are many more of the former than the latter. We have already explored the reasons for this conclusion. In American political culture, public resignations are very unusual. Prevailing norms place a high value on sticking it out and being a team player. An official who publicly resigns can expect her career to be seriously damaged if not altogether ended. She knows that people who were her closest friends, associates, and patrons will view her as a traitor. In an environment like this, officials are unlikely to resign in protest unless they are willing to break decisively with the past.

It does not follow, however, that every resignation is accompanied by existential crisis. For many, no doubt, the shock of disentanglement from one’s prior friends and colleagues is buffered by a continuity of commitment to long-held ideals and values. When Martin Luther announced that he could “do no other” than embrace the ideas that led to his excommunication, he was acting pursuant to his deepest commitments, rather than fleeing from them. Similarly, for a modern resigning official, it may have once seemed that these commitments and values could be promoted within a particular regime,
but it now becomes apparent that the same commitments and values require a break with the regime. To be sure the break is painful, but it should not be confused with a global redefinition of one’s life goals.

With regard to resignations of this sort, my argument is normative rather than empirical. For reasons that I have already discussed, these resignations are difficult to justify. Because they are likely to be instrumentally ineffective, they will usually set back, rather than advance the commitments that motivate them. Moreover, they violate norms of loyalty and candor, may actually discourage rather than promote internal dissent, and privilege private virtue over the public good.

Resignations are more attractive when they stand outside the realm of justification. Just because they are outside this realm, one can hardly make an argument to justify them. The most one can say is that they are not subject to the kinds of criticism I have outlined above and that they emphasize the possibilities of human freedom. For those of us who are fascinated by these possibilities, and not merely terrified by them, resignations of this type will be appealing.

This brings us to the more far-reaching objection. Perhaps the possibilities of human freedom are much more limited than I have suggested. Perhaps, try as we might, we simply cannot escape the frame that surrounds all of our choices. They are all located within a moral universe that we do not choose and cannot break out of. To be sure, a resigning official may think of himself as bravely disentangling himself from disabling constraints, but this self-congratulatory version of his behavior is an illusion. He is really doing no more than playing out a script deeply embedded in his culture, or in his
unconscious, or in a matrix of power that is all the more constraining because it is invisible.

Indeed, the skeptical argument goes, denying this possibility leads to contradiction. If, as I have said, a “true self” does not exist apart from decisions we make as to how to lead our lives, then it is quite mysterious what “self” makes these decisions. The claim for radical freedom seems to presuppose a homunculus that stands outside of the self-defining decisions even as it denies that a “self” exists apart from those decisions. The contradiction can be resolved only by unsentimentally rejecting any deciding “self,” as a myth and embracing some form of strong determinism.

I wish that I had something definitive to say that would put this criticism to rest, but I know of no way to refute global structural and determinist arguments. The best I can do is to claim that if the possibility of radical rupture is indeed illusory, it is at the least a very powerful illusion that is, itself in some sense inescapable. Part of its power derives from the paradoxical fact that it is a necessary precondition to the very kind of commitment and connection that it endangers. Such commitments entail the possibility of rupture. Without this possibility, what would otherwise be a genuine commitment becomes merely habit or inertia.

It turns out, then, that people who do not resign have reason to celebrate the decision of those who do. The internal sense of a genuine but presently unrealized possibility of breaking decisively and finally with what has gone before is what gives meaning to the decision to remain committed.

V. Resignation and the Law
In this last section, I investigate the stance that the legal system does and should take with regard to resignation decisions. As a descriptive matter, I argue, the most salient feature of the law of resignation is how sparse it is. Resignation from high office is an almost completely law-free zone. As a normative matter, my claim is that the absence of legal constraint supports the conception of resignation as radical break that I favor.

With regard to the descriptive claim, it is striking how out of place normal legal rules seem in the context of resignation from high political office. In most legal environments, employers and employees can protect themselves from opportunistic behavior by entering employment contracts. Although these contracts are not specifically enforceable, they can be enforced by damages and even, in some circumstances, by negative injunctions. Thus, an employer can enter an agreement with an employee requiring a term of employment, imposing damages if the employee resigns before the term expires, and even, to some extent, regulating the employee’s conduct after expiration.

In contrast, employment relationships involving high government officials are unaccompanied by any effort to invoke the law to prevent opportunistic behavior. We need to ask why we do not see contracts between, say, Presidents and Secretaries of State that prevent resignation in protest? Why did President Bush fail to condition his initial offer to General Powell on a promise not to resign during Bush’s term of office, or at least, not to resign publicly, and then threaten him with legal action if he failed to comply?
Because these contracts are unheard of, there are no decided cases dealing with them. It is an important cultural fact that it does not even occur to people to write such contracts. Moreover, although my conclusion is necessarily speculative, I think it relatively clear that if a court were ever asked to enforce such a contract, it would decline to do so.

In the absence of decided cases about resignation, we necessarily have to reason from analogy to cases that have been decided. For the most part, these cases involve appointment and removal, rather than resignation. It is possible, of course, to believe that the appointment and removal problems are relevantly different from the resignation problem. Still, the appointment and removal cases are at least suggestive. They are consistent with the view that, as a general matter, we are very reluctant to place personnel decisions about high government officials under normal legal constraints.

Several lines of authority support this interpretation. First, the Court has strongly hinted that personnel decisions at the highest levels of government involve “discretionary” functions to which normal legal rules do not apply. For example, in Mayor of Philadelphia v. Educ. Equal. League, the Court considered a claim that the Philadelphia mayor made racially discriminatory appointments to a governmental body. Evidence in the record indicated that, two years earlier, the Mayor had stated that he “would not appoint another Negro to the Board.” The Court held this evidence insufficient to support a finding of discrimination, even when it was taken together with statistical evidence pointing in the same direction. Its stated reason was that “an ambiguous statement purportedly made in 1969 with regard to the racial composition of
the School Board proves [nothing] with regard to the Mayor’s motives two years later in appointing the 1971 Nominating Panel.”

Was the Court’s decision influenced by the putative inappropriateness of applying normal legal principles to personnel decisions involving high political officials? In other contexts, the Court has been more than ready to infer present discriminatory intent from past discriminatory actions and statements. Moreover, the opinion itself leaves no doubt that the Court was uncomfortable with the prospect of constraining such personnel decisions. The majority opinion went out of its way to suggest that it would have denied relief even if discrimination had been proved. The Court disapproved of the lower court’s determination that the Mayor’s appointments were not “discretionary” and expressed “concern that judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency.” It also cited with approval language in its earlier decision in *Carter v. Jury Commiss’n*, which had noted that there would be “problems” if a federal court “order[ed] the Governor of a State to exercise his discretion in a particular way.”

Taken together, the dicta in *Carter* and *Mayor of Philadelphia* reflect the strongly and widely held intuition that, for example, a court should not interfere with a President’s decision to take race or gender into account when appointing a Supreme Court justice or a cabinet official. It is possible to put a veneer of legality on this result by characterizing the question as political or by erecting insurmountable burdens of proof or standing rules. At bottom, though, the motivating force behind these legal justifications is a deep-seated belief that this is an area where executive discretion ought not be constrained by law.
It does not follow, of course, that removal decisions are similarly unconstrained. On the contrary, a well-established line of authority recognizes the power of Congress to limit the President’s removal authority with respect to certain executive branch officials.\textsuperscript{74}

Several points are worthy of note, however. First, the Court’s current test for limits on removal authority turns on the extent to which the limitation impedes the ability of the President to perform his constitutional duties.\textsuperscript{75} The test makes it quite unlikely that the Court would approve removal limitations on a cabinet level officer like General Powell.

Second, the Court has distinguished sharply between congressional limitations on executive removal, which it has sometimes upheld,\textsuperscript{76} and congressional involvement in the removal process, which it has always invalidated.\textsuperscript{77} When these two lines of authority are considered together, the upshot is a bias against executive and legislative control of removal decisions. On the one hand, Congress is permitted to free some executive branch officials from the threat of either presidential or congressional oversight, thereby leaving the official in a law-free zone. On the other, Congress is prohibited from involving both the President and the legislature in oversight, a result that would maximize legal control.

Finally, it is important to note that the legal control discussed above is over removal, not resignation. This lack of reciprocity is striking. Although Congress is sometimes permitted to make officials immune from removal except for cause, no one suggests that high government officials can be bound by a “for cause” standard when they resign.\textsuperscript{78}
Such a regime is so foreign to legal practice that, once again, there are no actual cases dealing with the problem. Imagining how a court would decide such cases requires imagining a legal culture so different from our own that it is difficult to speculate on the outcome. Suppose, though, that we suspend disbelief for just long enough to magically inject into our current legal culture a statute that, for example, prohibited the Secretary of State from resigning under protest except upon a showing of good cause. My strong suspicion is that a Court would find a way to invalidate, or at least not to enforce, the statute, perhaps on free speech grounds, perhaps by finding that it posed a political question or violated separation of powers principles. The real reason for invalidation, though, would be precisely because such a statute is incompatible with our political culture. This incompatibility, in turn, reflects a fundamental antipathy toward legal control over protest resignations.

This is not to say that there are no legal controls at all over post-resignation behavior. In *Snepp v. United States*, the Supreme Court enforced an agreement executed by a former Central Intelligence Agency official to submit all of his writings for pre-publication review. The case makes clear that not all cases of public resignations are free from legal regulation and that there are situations where contractual obligation is enforceable in the resignation context.

Still, *Snepp* is more notable for its limits than for its holding. The Court characterized the government’s interest in restricting Snepp’s speech as a “compelling” and “vital” and observed that prepublication review was “essential to the effective operation of our foreign intelligence service.” The *Snepp* holding is consistent with the Court special and exceedingly deferential stance toward executive decisions when
More broadly, under standard doctrine, virtually all the usual constitutional rules crumble when the Court finds, as it did in *Snepp*, that there is a compelling state interest. It is hardly surprising, then, that the Court was prepared to make an exception to its usual rules in this context. Nothing in *Snepp* suggests that contractual bans on post resignation speech would be upheld in a more typical environment, and the lower courts have struck down such bans when dealing with matters other than national security.

In still other contexts, Supreme Court doctrine actually encourages public resignation. Consider the implications of *Garcetti v. Ceballos*. Respondent, a deputy district attorney, alleged that his free speech rights were violated when he was disciplined because he had complained to his supervisor about allegedly false statements in a warrant application.

Writing for the Court’s majority, Justice Kennedy started by observing that it was “well settled that ‘a State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.’” Although government employee free speech rights are somewhat more constricted than those of ordinary citizens, there is no doubt that there would at least have been a first amendment issue if respondent had complained to, say, the local newspaper. The Court nonetheless rejected respondent’s claim at the threshold because “his expressions were made pursuant to his [official] duties.” According to the majority “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”
This distinction has struck many commentators as bizarre. On the Court’s view, an employee who respects the “chain of command” and obeys official policy by reporting to a superior has no constitutional protection. In contrast, an employee who takes matters into her own hands and violates those policies by contacting outsiders has a prima facie constitutional case. As Justice Stevens wrote in his dissenting opinion, “it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.”

The distinction seems less perverse if we think of the case as posing the problems of loyalty and radical rupture discussed above. An employee who remains within a community must abide by the rules of that community as defined, hierarchically, by her superiors. As the Court puts it, the disciplining of such an employee involves no more than “managerial discretion” and “simply reflects the exercise of employer control over what the employer itself has commissioned or created.”

But this hierarchical control is justified only because the employee has the right to remove herself from this community. An employee who “goes public” with his complaints deserves protection precisely because he has acted disloyally. By breaking with the community, he breaks as well from the network of rules, norms, attachments, and obligations that form it. For reasons outlined above, the ability to make a clean break of this sort is what both legitimates and gives meaning to the obligations in the first place.

At first, these conclusions may seem anomalous because the respondent in *Garcetti* did not in fact resign. On the contrary, he argued that he should be allowed to keep his job and remain free of discipline based upon his speech. If he had acted disloyally by, for example, telling his story to a newspaper, he might have had his cake
and eaten it too by making a radical break on the one hand while keeping his job on the other.

This possibility may be more theoretical than real, however. Even when public employees speak as public citizens their speech rights are sharply constrained. The government has discretion to restrict speech when its restriction is “directed at speech that has some potential to affect the entity’s operations” or when the speech would “impair the proper performance of governmental functions.” Speech by disloyal employees who remain on the job is therefore limited by the employment needs of the government. Only when the speech is compatible with these needs but nonetheless restricted do the employee’s first amendment rights take hold.

Of course, the employer has no employment needs when the speaker is no longer a government employee. An official who has resigned is no longer subject to employer control and discipline. When these results are taken together, the upshot is that the more an employee is willing to break with her patron, the greater her protection. Employees who remain loyal by staying in their jobs and reporting up the chain of command have no first amendment rights at all. Employees who stay in their jobs but exhibit disloyalty by talking to outsiders have some first amendment protection but only if they do not thereby impede the government’s legitimate interests. Employees who make a clean break by talking to outsiders and resigning from office are immune from government control except in narrow circumstances where national security is involved and the government can show a compelling state interest in restriction.

This pattern of results sharply favors those who are willing to make a clean break. To be sure, there is a superficial tension between the first amendment and contract-law
jurisprudence providing protection for resigning officials. The first amendment provides legal protections for disloyal employees, whereas I have previously described contract-law doctrine as leaving public resignation in a law-free zone. But the tension is only superficial. In both situations, decisions about existential break are left unregulated – in one case by common law or legal-cultural understandings, in the other by constitutional compulsion.

Remarkably, this freedom from regulation is apparently unwaivable. As the *Garcetti* Court observed, “[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict . . . the liberties employees enjoy in the capacities as private citizens.” 94 Another way to express this point is to say that an employee cannot bargain away his speech rights in exchange for a government job. Similarly, the general unavailability of normal contract remedies concerning public resignation entails an inability to bind oneself in advance to a set of requirements.

In more usual normal circumstances, we think of this capacity to bind oneself as an aspect of freedom. Individuals can freely choose to limit their own freedom in the future in exchange for an enforceable promise that is worth more to them than the freedom foregone.95

Our unwillingness to enforce bargains of this sort in the context of public resignations suggests that the resignation decision is, indeed, special. A recognition of contractual obligation would entangle the contracting parties in a set of rules governing their behavior, albeit rules that they have authored themselves. If one believes that rules are simply out of place in the context of public resignation, then contracts should be out of place as well.
Of course, I do not mean to claim that the people who created these legal doctrines are steeped in existentialist thought or that the argument I make here consciously motivated their judgments. I do claim, however, that they were influenced by a deep, if inchoate, intuition that some sorts of decisions should stand outside the need for justification and constraint that is otherwise everywhere around us.

For the most part, the law appropriately recognizes that public resignations involve decisions of this sort. Whereas law typically constrains free choice, the law of resignation rubs our noses in it. Instead of creating a set of restrictive norms, the law of resignation bounds off a zone that cannot be restricted, even by our own previous decisions. By so doing, it reminds us that, ultimately, there is no escape from our own freedom. Because the radical exit option always remains open, we have no one to blame but ourselves when we silently submit to authority.

Conclusion

Perhaps it is belaboring the obvious to say that General Powell had a choice when he decided to remain silent about his doubts concerning the Iraq war. If the argument I have made is correct, though, his real choice was different from the kinds of options we usually consider. Typically, those options require us to think about costs and benefits or about moral obligations. To the extent that we conceptualize General Powell’s choice in that way, there is much to be said – much more than is usually said – for the decision he in fact made.

But we should not be so quick to let General Powell off the hook. His choice need not be conceptualized in that way. We might think of it instead as a truly free choice – free not just in the sense that he would not have been punished whatever he did,
but also in the sense that it was unconstrained by the usual instrumental and noninstrumental considerations that “force” one judgment or the other. It is just because he had a free choice in this sense that he is ultimately responsible for the decision that he made.
I am grateful to Peter Edelman, Heidi Feldman, Thomas Franck, Thomas Kaiser, Michael Klarman, Thomas Krattenmaker, Martin Lederman, Girardeau Spann, and Mark Tushnet for comments on an earlier draft.

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1 According to an account in the Washington Post, Powell did not resign because “[s]oldiers didn’t quit when they disagreed with the decisions of their commanders. The fact that he had been out of uniform for nearly a decade was irrelevant to Powell; he would be a soldier until he drew his last breath.” “Falling on His Sword; Colin Powell’s most significant moment turned out to be his lowest,” The Washington Post, Oct. 1, 2006, at W12. See also Sidney Blumenthal, How Bush Rules: Chronicles of a Radical Regime 36 (Princeton: Princeton University press, 2006) (quoting Powell, who, in turn quoted General George C. Marshall as saying, “No, gentlemen, you don’t take a post of this sort and then resign when the man who has the constitutional responsibility to make decisions makes one you don’t like.”)

Powell was finally relieved of his duties as Secretary of State shortly after President Bush’s reelection. See id.


4 By a public resignation, I mean a resignation accompanied by a public statement specifying disagreement with government policy as the reason for the resignation. I do not discuss in this paper another vexing problem – when an official who is under attack should resign.
Id., at 73 73 (noting that “[t]he costs of ethical autonomy among top officials, in this society, are prohibitive and the rewards minimal.)

Id., at 95 (noting that in Britain there is a “long and firm political habit of ethical autonomy, manifested through the time- and custom-honored tradition of public-protest resignation.”)

Id., at 126-27.

To be clear, Weisband and Franck were writing almost thirty years before the Iraq war. I am extrapolating their putative conclusion from an argument that they made in a different context.

For an account, see id., at 26-33.

After his resignation, Bryan continued to campaign tirelessly for a peaceful end to the controversy with Germany. Although defeated in the Nebraska primary for a delegate position to the 1916 Democratic convention, he nonetheless gave a widely acclaimed speech at the convention urging peace. He thereupon campaigned for Wilson, portraying Wilson as a peace candidate. Ultimately, though, public opinion turned against Bryan’s position, and Congress approved a war resolution on April 6, 1917. Id., at 31-33.

Vance recounts these events and defends his actions in Cyrus Vance, Hard Choices: Critical Years in America’s Foreign Policy 409-13 (New York: Simon & Schuster, 1983).

For an account, see Barton Gellman, Angler: The Cheney Vice Presidency 204-209 (New York: The Penguin Press, 2008).


See “The Nominee’s Recollection of His Watergate Role as Solicitor General, N.Y. Times, Sept 17, 1987, at B11. At his confirmation hearing to become an associate justice of the United States Supreme Court, Bork testified that he originally told Attorney General Eliot Richardson that he would resign after dismissing Archibald Cox. Bork changed his mind after Richardson urged him not to resign because the Department of Justice needed stability. Id.

President Truman considered Ickes “’no better than a common scold,’ An incorrigible gossip, and prime source of the detailed and all-too-accurate reports of cabinet meetings that filled Drew Pearson’s newspaper column.” He referred to him as “’Honest Harold,’ who was always firing off letters of
resignation, first to Roosevelt, then to him.” Weisband & Franck, Resignation in Protest 18. See also note 21, supra.

16 For a detailed account, see Peter Irons, Justice At War 163-351 (Oxford: New York, 1983).

17 Id., at 305.

18 Id., at 350-51.


20 Weisband & Franck, Resignation in Protest 91.

21

22 According to Vance’s memoir, he acceded to President Carter’s request that he not make his resignation public or leave his position until after the mission was completed. Vance, Hard Choices 411. For a slightly different account, see Jimmy Carter, Keeping Faith: Memoirs of a President 513 (Toronto: Bantam Books, 1982).

23 The surveillance program required the signature of the Attorney General every forty-five days, but Jack Goldsmith, the head of the Justice Department’s Office of Legal Counsel, and James Comey, the Deputy Attorney General, had reached the conclusion that it was illegal. Matters were complicated when Attorney General John Ashcroft took ill and was hospitalized in serious condition. White House Counsel Alberto Gonzales and Chief of Staff Andrew Card went to Ashcroft’s hospital room to get his signature, but Goldsmith and Card got there first, and Ashcroft refused to sign. In the wake of this incident, Goldsmith, Comey, and many lower level officials contemplated resignation. See Barton Gellman, The Cheney Vice Presidency 293-306. Interestingly, Comey seems to have believed that it was improper to directly threaten resignation in order to produce a change in policy. He and Card therefore went through an elaborate charade whereby Comey managed to communicate the threat without actually making it. As Gellman recounts their conversation,

Card was “concerned . . . that he had heard reports that there were to be a large number of resignations at the Department of Justice.” Comey gave him no comfort. “I don’t think people should try to get their way by threatening resignations,” Comey told Card. “If they find themselves in a position where they’re not comfortable continuing, then they should resign.”
“He obviously got the gist of what I was saying,” Comey recalled.

Id., at 307.

See also Id., at 319. Ultimately, Bush modified the program so as to satisfy Justice Department officials.  Id., at 320.

24  Ironically, when Ickes finally made good on a resignation threat, he forced President Truman to withdraw the nomination of Edwin W. Pauley to be Under Secretary of the Navy – a nomination that Ickes opposed.  See Weisband & Franck, Resignation in Protest 17-20.

25  The examples are the resignations of Attorney General Eliot Richardson and his deputy in connection with the Watergate scandal, discussed at pp xx, infra, and the resignation of Harold Ickes in conjunction with President Truman’s nomination of Edward W. Pauley to serve as Secretary of the Navy.  See note 21, supra.

26  Of course, resignations are sometimes motivated by more than just the desire to change policy. For example, a resignation may be designed to provide needed support for political forces that may ultimately achieve victories going beyond the particular policy at issue. One difficulty with writing about resignations from the outside is that it is rarely possible to capture all of the motivations and effects experienced by people on the ground. It also bears emphasis that this section concerns only the consequentialist case for resignation. Many officials who resign from office do so for reasons unrelated to consequence. These resignations are discussed at pp xx, infra.


28  On Bush’s determination to go to war, see Bob Woodward, State of Denial 89 (2006); Scott McClellan, What Happened: Inside the Bush White House and Washington’s Culture of Deception 127 (2008) [check]

29  Consider, for example, the conduct of middle level officials in the Roosevelt justice department who declined to resign despite their opposition to the expulsion of Japanese Americans from the West Coast so that the officials could continue to exercise influence over the government’s brief.  See P. X, supra.

Id., at 158.

See Bob Woodward, State of Denial 120-21; 135. [check]

See “Falling on His Sword; Colin Powell’s most significant moment turned out to be his lowest,” Washington Post, Oct. 1, 2006, at W 12 (“In fact, Powell had never advised against the Iraq invasion, although he had warned Bush of the difficulties and counseled patience.”)

Consider, for example, the resignation of federal judge Andrew MacGrath the day after Lincoln was elected President. MacGrath provides one of the few examples in American history of a successful public resignation. With South Carolina at knife’s edge and seemingly unable to decide whether to secede from the Union, a federal grand jury refused to return indictments because the “‘ballot-box of yesterday’ effectively ended federal jurisdiction in South Carolina.” William W. Freehling, The Road to Disunion: Secessionists Triumphant 398 (Oxford: Oxford University Press 2007). Freehling describes what happened next:

[Macgrath] paused a suspense-filled moment before responding to [the] defiance. Then he slowly rose, declaring that given the probable “action of the state,” he must “prepare to obey its wishes. . .

As he pronounced federal judicial process legally closed, Macgrath’s fingers crept to the spot where his silken judicial robe was fastened. He slowly undid the garment. He languidly slipped it off. He calmly folded it over his chair. He had, he announced “for the last time, . . . administered the laws of the United States.” Now, “the laws of our State” must become “our duties.” Let all South Carolinians remember that “he who acts against the wish, or without the command of his State, usurps” its “inviolate . . . sovereign command.”

Id., at 399.

According to the Charleston Currier, “[t]here were few dry eyes among the spectators and auditors.” Id. There is no doubt that MacGrath’s resignation was effective. It served to demonstrate that the secessionist cause was embraced by the most conservative elements of southern society. Id. Yet few people today would say that the resignation produced good results.
Against this possibility stands the example of the United Kingdom, where resignations are both common and effective. See Weisband and Franck, Resignation in Protest 137. It is a mistake, however, to suppose that actions in one political culture will have the same impact as actions in another. In the United States, where public resignation is unusual, it is also singularly ineffective. There is no reason to suppose that if it were commonplace, its effectiveness would increase rather than decrease.

See text at note 14, supra.


See id., at 325, 474-485.

None of this is to say that members of Lincoln’s cabinet did not think seriously about resignation. For example, William Seward initially withdrew his acceptance to serve as Secretary of State in an effort to force Salmon Chase from the cabinet. Id., at 317-18. Chase himself made many threats to resign, see, e.g., id, at 493 and Lincoln eventually took him up on his offer. See id., at xx. As noted above, threats are often likely to be as effectual as resignation itself. See pp xx., supra.

I am grateful to Thomas Franck for bringing this argument to my attention.


See R. E. Ewin, “Loyalty and Virtues,” The Philosophical Quarterly 42 (1992): 403, 406 (“Loyalty cannot be based in any simple and straightforward way on one’s views of the merits of the object of loyalty, because the relationship, at least in part, runs in the opposite direction: Loyalty to some extent affects one’s views of who merits what and it keeps one in the group beyond the point at which cold consideration of desert would cease to do so.”)

See id., at 419 (arguing that “[l]oyalty, the desire to be and remain with the group, the willingness to bear some cost for that and, at least to an extent, to take the interests of others as one’s own, is the raw material for the virtues.”)

See id., at 164 (politicians are “required to learn the lesson Machiavelli first set out to teach: ‘how not to be good.’ . . . [They] will not succeed unless they learn, for they have joined the terrible competition for power and glory; they have chosen to work and struggle as Machiavelli says, among ‘so many who are not good.’”)


Michael Walzer, “The Problem of Dirty Hands” 178 (associating himself with the view he attributes to Camus that political action violating standards of morality “is like civil disobedience. In both men violate a set of rules, go beyond a moral or legal limit, in order to do what they believe they should do. At the same time, they acknowledge their responsibility for the violation by accepting punishment or doing penance.”)

See id., at 179-80.


Id., at v.

Id., at ix.

Id., at viii.

I ain't gonna work on Maggie's farm no more.

No, I ain't gonna work on Maggie's farm no more.

Well, I wake in the morning.

Fold my hands and pray for rain.

I got a head full of ideas

That are drivin' me insane.

It's a shame the way she makes me scrub the floor.

I ain't gonna work on Maggie's farm no more.


See R.E. Ewin, Loyalty and Virtues 415-418 (arguing that loyalty to group is the “emotional setting” and “raw material” for virtues and vices.

See id., at 406 (“Somebody who showed loyalty to an unworthy object might be described as foolish to be loyal.”)

Cf. Bernard Williams, Consequentialism and Integrity 38 (arguing that utilitarian point of view causes one to lose one’s moral identity and to be alienated from one’s actions).

See pp xx-xx, supra.


Id., at 567 & n. 98.

Id., at 579-80 and cases cited therein.


Id., at 617.

Id., at 618.


415 U.S., at 614.

Id.


415 U.S., at 614.

Davis v. Passman, 442 U.S. 228 (1979) is not to the contrary. In Davis the Court reversed the dismissal of a complaint brought by an employee of a Congressman charging employment discrimination. However, the plaintiff was a deputy assistant administrator, not a high executive branch official. Moreover,
the Court expressly reserved the question whether the suit was barred by the Speech or Debate clause of Article I. See 442 U.S., at 249.


75 See Morrison v. Olson, 487 U.S. 654, 691 (1988) (“We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light”).

76 See note 71, supra.


78 Of course, there are many reasons why one would not want to specifically enforce a requirement that a high government official remain on the job. It would be difficult or impossible for a court to enforce the requirement that the official make a good faith effort to do the job, and these supervisory efforts would impose insurmountable separation of powers problems. On specific enforcement, see P x., supra. But these commonsense concerns do not explain why we do not see officials obliged to respond in damages for their lack of loyalty and why we do not see post-resignation restrictions on their behavior such as a prohibition on criticism of administration policy.


80 Id., at 512.


See Harman v. City of New York, 140 F. 3d 111 (2d Cir. 1998) (invalidating requirement that child welfare and social services employees obtain permission before speaking with media); Fire Fighters Assn. v. Barry, 742 F. Supp. 1182 (1990) (requirement that fire fighters obtain prior written permission before giving interviews while on duty is unconstitutional).


Id., at 413 (citing Connick v. Myers, 461 U.S. 138, 141 (1983)).

Id., at 421.


547 U.S., at 427 (Stevens, J., dissenting).

See pp xx–xx, infra.

547 U.S., at 424.

Id., at 422.

Id., at 418.