Silent Dissent? Tacitus Against the Lawyers

Justin Zaremby*

EXPANDING THE CAST

The burden placed on a lawyer in American society is extraordinary. He serves as an advocate, the leading player in our adversarial system. He serves as an officer of the legal system, taking responsibility for the effectiveness and continued development of its rules and regulations. Ideally he plays the role of "a public citizen having special responsibility for the quality of justice."1 The question of how to manage these roles—some of which are directed toward the success of a client and others which are directed toward justice for the system as a whole—remains a central question.2 Indeed, as Charles Fried asked, "Does the lawyer whose conduct and choices are governed only by the traditional conception of the lawyer's role, which these positive rules reflect, lead a professional life worthy of moral approbation, worthy of respect—ours and his own?"3

This matter will continue to be debated among lawyers and judges. At stake in the question is not merely the ethics of individual lawyers, but the rule of law itself. Society sets the highest standards for officers of its judicial system, lest we find ourselves in the awkward position of asking

---

* Justin Zaremby is a J.D. Candidate at the Yale Law School, Class of 2010, and Lecturer in Political Science and Humanities at Yale; Yale University, B.A. 2003, Ph.D. 2007. The author wishes to thank Christina Andersen, Josh Chafetz, Michelle Tolman Clarke, Bryan Garsten, John Stuart Gordon, Patrick Kabat, Steven Smith, Norma Thompson, and the late Robert Wokler for their advice.


2. The question is a matter for professional ethics, see MODEL RULES, supra note 1, but also a question relating to the place of the lawyer in civil procedure. This tension may be seen, for instance, in the debate between the truth and justice as two goals of the adversarial system, where the lawyer is responsible both for implementing the system in place with the long-term goal of seeing that justice will be served—both procedurally and through the discovery of facts. John Thibaut and Laurens Walker, A Theory of Procedure, 66 CAL. L. REV. 541 (1978).

the ancient question, "Who guards the guardians?" Yet while the legal profession must continue to confront this issue, it might be valuable to ask what other figures in society have that responsibility as well. Indeed, a comparison between the role played by lawyers and other actors in upholding justice and the rule of law may shed light on the conditions under which the rule of law thrives and how the officers of the legal system can both help and hinder its survival.

Recent debate over the Presidential Records Act and the sort of access historians should have to presidential records suggests that historians may play this guardian role, as well. What role should historians play in a free society? What is the value of their writing in upholding the rule of law?

This Note offers a close reading of Tacitus's Dialogus de Oratoribus in order to explore the relationship between the writing of history and the rule of law. At the same time, it attempts to bring lawyers into dialogue with historians over their common question: how to live the life of an active citizen and a professional where the life of the citizen requires the sort of engagement that professional existence decries. For historians the question is framed as a debate between engagement with society and having a critical distance from society's follies. For lawyers the tension centers on how effectively to advocate while acting as an officer of the legal system and attempting to defend the law more broadly. These questions come to the fore in the recent case of American Historical Association v. National Archives and Records Administration, in which access to historical records and the wishes of the Executive branch come into direct conflict.

Tacitus's work, which pits a poet against a set of orator-lawyers living under Roman tyranny, leads his readers to reflect upon the place of cultural criticism at a time when the law seems unable to protect citizens against an overly powerful government. At the center of the conflict between the poetic and the rhetorical approach to describing the world rests the historian, dutifully chronicling and preserving the writings of his day in the hopes that they may assist lawmakers in the future. Tacitus's work thus provides a defense of the historical craft in his own troubled times while offering more timeless suggestions for the relevance of history in relation to the laws of any polity. After a close reading of Tacitus's

5. The relevance of Tacitus as a theorist of law and politics received perhaps no greater support than in the first issue of this Journal where then Yale Law School Dean Guido Calabresi narrated the following dialogue: "'You have never read Tacitus?' Justice Hugo Black said to me on the second day of my clerkship with him, 'Why then you are not a lawyer.' He made me drop all else until I read his own highly and very personally annotated Tacitus." Guido Calabresi, Introductory Letter, 1 YALE J. L. & HUMAN. vii, vii (1988).
dialogue, this Note will turn to the recent debate over the Presidential Records Act and a set of reflections on the tension between law and history in our republic.

The idea of historians as crucial to the maintenance of a free society finds a thought-provoking antecedent in the writings of Tacitus. His faith in the value of history provides a nice counterbalance to his reputation as a deeply pessimistic writer.7 One author described Tacitus starkly, declaring that “nothing brightened Tacitus’s somber clear-sightedness. For that very reason, of all the great writers, he is closer to our time; he also no longer knew the meaning of hope.”8 Lionel Trilling similarly claimed that Tacitus was “one of the few great writers who are utterly without hope.”9 This image of a despondent historian is hardly surprising, given his subject matter. The story of Roman law and republican politics, from the time of the republic to Tacitus’s era was, in many ways, a story of decline. Along with the rise of the empire, both the senate and the lawcourts were driven less by the rule of law than by the will of the emperor. As described famously by Edward Gibbon in his Decline and Fall, “During four centuries, from Adrian to Justinian, the public and private jurisprudence was molded by the will of the sovereign; and few institutions, either human or divine were permitted to stand on their former basis.”10

In addition to a defense of his method and goals in his famous Annals, Tacitus offers a powerful defense of the historian in an unlikely location—his Dialogus de Oratoribus. Reading the Dialogus in conjunction with the Annals clarifies Tacitus’s relationship with republican Rome and the relationship between tyranny and the historical genre. In the Dialogus it is what is said, as well as what remains unsaid by a silent, but present Tacitus, that indicates the ability of the historian to write under the radar of tyrants. Having defended the role of history, Tacitus can then proceed in works like his Annals to narrate eras when liberty is a scarce commodity. Such a project is especially important in an era when the figures who are meant to see and fix problems with the rule of law, the lawyers, are too afraid for their own survival to do so.

Tacitus’s value for theorists of history and politics lies in his attempt to carve out a space for liberty while the language and institutions of law and

---

7. Tacitus wrote about tyrants and the decline of Roman libertas with the rise of the empire. He is honored as a defender of a dying republican virtue as often as he is attacked for writing a guidebook for political action by cruel tyrants. The literature on Tacitus’s influence in early-modern thought is quite vast. See, e.g., ARNALDO MOMIGLIANO, THE CLASSICAL FOUNDATIONS OF MODERN HISTORIOGRAPHY (1990); Howard D. Weinbrot, Politics, Taste, and National Identity: Some Uses of Tacitism in Eighteenth-Century Britain, in TACITUS AND THE TACITEAN TRADITION 168 (A.J. Woodman & T. James Luce, eds., 1993).
8. LIDIA STORONI MAZZOLANI, EMPIRE WITHOUT END 208 (1976).
liberty are being destroyed. His goal is to create a repository of images and people who illustrate the changes found in the new Rome. He is too subtle to write a political tract against the new regime and too saavy to suggest that Rome should return to its republican roots. However, by preserving the stories and characters of his time **sine ira et studio**, Tacitus keeps alive hope that debate and critical thought about society will not end—even though senatorial liberty may be in decline and the rule of law may suffer.\(^\text{11}\) The historian takes on the role of a political actor and does not merely chronicle the events of the past, but reminds his readers of the importance of criticizing political leaders and of the language of liberty. In doing so, he illustrates how historians can establish a wider-reaching and longer-lasting political and legal vision through the stories they tell.

This Note offers a close reading of the *Dialogus* and Tacitus's *Annals* in order to show the unique position played by the Tacitean historian during a time in which the rule of law was threatened by the rising tyranny of the Roman empire. The tensions between being an active participant in society and a critic help reveal the challenges faced by citizens in their attempt to uphold the rule of law. The Note then turns to modern America where in recent years, historians have attempted to defend their role in the face of new restrictions on access to national archives. Without overstating the comparison between Rome and modern America, this Note suggests that the modern historian's legal tensions speak broadly to issues felt not just by historians, but by lawyers as they pursue their duty to the legal system and to the rule of law more broadly.

**THE SILENT INTERLOCUTOR**

According to the *Dialogus*, the historian determines the issues that should matter to the Roman people by choosing what stories to narrate and thus what will be remembered by future generations. He keeps alive dying language or ideas in his writings, not through polemic or philosophy. History survives as a seemingly innocuous and antiquarian activity. Unlike the boisterous characters in the *Dialogus*, the silent historian poses no threat to the current regime, but in the long-term he may have an impact far greater than that of the emperors. Tacitus's decision to describe the value of history in the dialogue form not merely helps to explain the value of history but offers a tangible demonstration of the historian's ability to be silent and effective. While the structure of the dialogue does not encourage the reader to focus on the role of the historian in an obvious way, a comparison of the speeches given in the dialogue with even more ancient forms suggests a reading that emphasizes the patient narrator-historian who carefully crafts the dialogue for his readers.

\(^{11}\) Tacitus, *Annals*, 1.1. Tacitus is cited in all sources by chapter and section number.
The dialogue was written after the assassination of Domitian, at a time when the political elite of Rome feared engaging in literary pursuits for the sake of reprisal from the emperor. Along with the *Agricola*, one Tacitus scholar argues that the *Dialogus* may be regarded as [Tacitus’s] attempt to come to terms with and describe for others the emptiness that he himself found at the end of the traditional paths to glory and prestige in Rome...What makes [the *Dialogus*] poignant, however, is that it betrays the disillusion of a man successful in society’s terms, who had awakened at length to a reality at odds with convention.12

The joining of these two texts, one a text of praise to Tacitus’s father-in-law and the other a discussion of the decline of oratory reveals a Tacitus who is able to balance his growing disdain for and dismay with the state of affairs in Roman society with an ability to praise activity which is virtuous. The traditional goals of Roman society cannot provide true happiness to a person who lives in a time of tyranny. As such, other options are needed for the virtuous person who wishes to find happiness and still survive in society. If the historian is to be capable of giving this message, then he must present a combination of pessimism and hope. Such a mixture of emotions comes to the fore in the *Annals*, and the responsibility of the historian to present these emotions is defended in the *Dialogus*.

In order to understand the message of the text, it is necessary to understand its style and method. Scholars have questioned the authorship of the *Dialogus* because of its stylistic difference from other Tacitean works. Given its subject matter, though, it is not surprising that it should read more like a Ciceronian dialogue (although with significant stylistic and linguistic differences) than a Tacitean text.13 Yet while the text’s clear Ciceronian antecedent can make it seem like a trite discussion of the decline of Roman oratory and education, its uniqueness in the Tacitean corpus urges further examination. In the *Dialogus*, Tacitus touches not merely upon the state of rhetoric, but the role of the rhetorician in contemporary Roman politics. Because it is a text on rhetoric which focuses on the changing standards of education in Rome, it belongs in a tradition that harkens back not merely to Cicero, but to Plato’s *Gorgias*, as well.14

The key to understanding the dialogue rests in understanding how a Platonic dialogue differs from a Ciceronian dialogue. In the former, a

---

13. A solid description and literature review of this debate can be found in T.J. Luce, Reading and Response in the *Dialogus*, in TACITUS AND THE TACITEAN TRADITION, supra note 6; see also, RUDOLPH GÜNGERICH AND HEINZ HEUBNER, KOMMENTAR ZUM DIALOGUS DES TACITUS (1980).
14. Such a connection is mentioned, though not fully developed, in the introduction to CICERO ON THE IDEAL ORATOR (James M. May and Jakob Wisse, eds., Oxford University Press 2001).
conversation between Socrates and an individual would ensue, during which Socrates would ask enough questions to make his interlocutor realize how little he understands about a given topic. The educative quality of a Platonic conversation comes in the ascent to aporia—the final recognition that one simply does not know. On the other hand, the Ciceronian dialogue is more akin to a set of prepared speeches—it is a debate which focuses on determining an answer, instead of producing more questions. For the Ciceronian precedent, the exchange between authors is less important than the message of their prepared speeches. In the Dialogus, Tacitus indicates that the order in which those speeches are delivered and their preservation may be even more important than the messages of the speeches themselves.

In the Dialogus, a series of characters meet to discuss the decline of Roman oratory through speeches. Yet while a Platonic dialogue would be directed by Socrates, in this case there is no one figure who plays that role. The main players are Maternus, a poet, and Aper, Secundus, and Messala, three orators. Sitting silently, observing the entire conversation, is an unnamed observer. He narrates in the first person events which take place after the performance of Maternus’s play Cato. The play is extremely provocative and will mostly likely place Maternus in danger with the political authorities. The orator Secundus asks Maternus, “Has the talk of ill-natured people no effect in deterring you, Maternus, from clinging to your Cato with its provocations? Or have you taken up the book to revise more carefully... will you publish, if not a better... a safer, Cato?” Maternus asserts that he has no intention of expurgating controversial points from his works, and instead will continue to write politically tendentious pieces. Disagreeing on the value of this writing, the orators and poet engage in a debate over the value of being a poet. At stake in the debate are issues of fame and political efficacy under the rule of tyrants.

Oratory, Aper argues, is more beneficial for society and for the individual than poetry. It is a crime, he says, that Maternus “though naturally fittest for that manly eloquence of oratory by which he might create and retain friendships, acquire connections, and attach the provinces,” instead chooses to live the life of a poet. Eloquence offers a stronger defense than a shield in the realm of politics. Oratory is both “a shield and a weapon” of men. The orator is able to provide “aid to friends, succor to strangers, deliverance to the imperiled, while to malignant foes

15. James Chart Leake, Tacitus's Teaching and the Decline of Liberty at Rome, 15 INTERPRETATION: A JOURNAL OF POLITICAL PHILOSOPHY 73, 302 (1987). Roland Mayer notes that Cato would have fallen in the category of a praetexa, a tragedy which would hinge upon Roman history and thus which could be taken to be slanderous to the current regime. Mayer, Introduction to Tacitus, Dialogus De Oratoribus, supra note 11 at 16.

he is an actual fear and terror." Aper reminds his colleagues that he “did not experience more joy on the day on which I was presented with the robe of a senator . . . than on those” in which he was able to defend a prisoner. Aper, like Tacitus, was a novus homo, who used his oratorical skills to achieve a limited fame in society.

The central goal for Aper is fame. Where the poet’s glory is short lived, the orator has constant friends and associates as a result of his work. Referring to the poet, he says:

Even if his reading is followed by a complete success, all the glory is, as to say, cut short in the bloom and the flower, and does not come to any real and substantial fruit. He carries away with him not a single friendship, not a single client, not one obligation that will abide in anyone’s mind, only idle applause, meaningless acclamations and a fleeting delight.

Poetry does not offer a lasting legacy. While oratory brings forth favors and social standing, the poet strives for an all-too-brief moment of glory. Indeed, Maternus’s poetry does nothing but encourage the wrath of the emperor.

In contrast to Aper, Maternus argues that great eloquence was born not in the chaos of the senate, but away from the political realm. He says, “As for the present money-getting and blood-stained eloquence, its use is modern, its origin in corrupt manners, and, as you said, Aper, it is a device to serve as a weapon.” Poetry is a way of celebrating glorious deeds and condemning evil ones. Where the orator is willing to defend someone for the sake of law or his own achievements in oratory, the poet is held to a higher standard. The Homers and Euripides of the world are thus not forgotten, but garner the greatest fame. Maternus rather ironically claims to prefer the simple life of Vergil in “serene, calm, and peaceful retirement, in which after all he was not without the favour of the divine Augustus, and fame among the people of Rome.” Maternus believes that by being a poet he will be able to write the works he wants (politically driven as they are) without being engaged in the sycophancy of politics.

This sycophancy takes on a legal face when one considers the role that orators played in the culture of Roman law. The Roman legal system relied upon upper-class orators to defend those brought before the courts. Although Roman history gives us a series of well-known and important academic jurists who wrote at length on cases and issues in Roman law,

17. Id. at 7.1.
18. Id.
19. Id. at 6.
20. Id. at 9.4.
21. Id. at 12.2.
22. Id. at 13.1.
the practice of law was a largely amateur sport. While the academic jurists
would, from time to time advise magistrates on the law and its precedents,
for the most part the battles in the courts were waged by aristocrats whose
training was more forensic than legal. As one author notes, "the barrister’s
job was to make a case; he was not amicus curiae, as Cicero did not
scruple to confess."23

Roman law and rhetoric were closely connected and the lawcourts were
more a place of verbal battle than of legal discourse. However, the ideal of
the Roman lawyer was in many ways a noble one because neither Roman
advocates nor jurists were paid. At the same time, the practice of law was
a form of social networking with friends doing favors for friends.24 Law
was the practice of the elites and helped strengthen their ties amongst each
other. Just as importantly, Roman elites viewed the defense of justice as an
important calling.

Given the close connection between oratory and law, it is not surprising
that Maternus’s criticism of the orators continues as the debaters examine
the decline of Roman education and speech. Perhaps the most interesting
speech in the dialogue comes after a lacuna in the text. When the
manuscript begins again, Maternus makes a strange argument. He claims
that during a time without crisis, there is no need for great oratory on the
republican model. That is, during the time at which Maternus speaks, the
order of the empire is vital enough to trump the need for new Cicos. He
says, “As it is, seeing that no one can at the same time enjoy great renown
and great tranquility, let everybody make the best of the blessings of his
own age without disparaging other

Such a claim can only be
ironic coming from a man who has caused such a scandal with his
politically motivated play.

Maternus’s poetry, while dangerous, may be the only way of standing
against the tide of tyranny. Arlene W. Saxonhouse writes,

Both poet and orator are plagued by the limitations consequent to the
emperor’s complete control over the political system. But what is
demonstrated in the dialogue is that the orator’s act is useless as a
tool to change the political system, while the efficacy of poetry, if not
established, is at least suggested.26

The sycophantic orators have no chance of causing political change. The
poets at least have the desire and bravery to instigate change. However, it
would be an exaggeration to assert that the poet can be successful.
Maternus, after all, may garner some quick praise or inspire brief dissent.

23. JOHN CROOK, LAW AND LIFE OF ROME 87 (1967).
25. TACITUS, DIALOGUS, supra note 11, at 41.5.
26. Arlene W. Saxonhouse, Tacitus’s Dialogue on Oratory: Political Activity under a Tyrant, 3
POL. THEORY 53, 60 (1975).
The legacy of that performance, though, will most likely not last beyond a few weeks or, at most, the memory of those in attendance. His message is a means of protest that, because of his impending suffering at the hands of authorities, is powerful but not long lasting.

Is there a middle ground between the loud but doomed poet and the sycophantic orator? Standard interpretations of the *Dialogus* argue that Maternus best represents the voice of Tacitus. Tacitus did, after all, retire from the public life to pursue more literary pursuits. Turning back to Cicero’s *De Oratore*, they place the personality of the author in the person of one of the interlocutors.

I differ from Saxonhouse in arguing that it is the historian who serves that role. Although the speakers in the dialogue do not so much speak to each other as past each other, the historian carefully records and offers an account of the dialogue. By doing so, he chooses what issues matter and can use his craft to criticize his times without becoming as engaged as the distant poet or as complacent as the publicly active orator. The *Dialogus* is directed to the unseen figure of Justus Fabius, who “often” asked “how is it that while the genius and the fame of so many distinguished orators have shed a luster on our past,” oratory has gone into sharp decline in Tacitus’s time? The narrator finds himself present for this debate, because as a “studious hearer in court” he often would go to the men’s homes to listen to conversations which were both trivial and substantial. He is a silent figure at these gatherings, but does not shy away from commenting on the speakers. He claims that Secundus’s style was “pure, terse, and... sufficiently fluent” while Aper “pretended to despise the culture which he really possessed.” The narrator shows the same qualities that appear in the *Annals*—a desire to narrate but also to criticize. Both of these stem from his “singular zeal for [his] profession, and a youthful enthusiasm.”

The historian’s place in the room is merely to observe the conversation and to narrate the event for the sake of responding to a question from his friend over why “our age is so forlorn and so destitute of the glory of

27. Steven H. Rutledge argues that Tacitus consciously looks back to Socrates as a model for Maternus. Rutledge’s comparison is based mostly upon the dramatic qualities of both Platonic dialogues and the *Dialogus*, in contradistinction to the less dramatic scene of Cicero’s dialogues. However, it is too simple to assert that Maternus represents Tacitus. I do endorse Rutledge’s statement that “Setting and characterization set the work within the traditional Platonic and Ciceronian literary form, but at the same time such encoding invites the reader to reflect on the uniqueness of the text. It is this uniqueness that creates the ultimate tension between the literariness of the *Dialogus* and the cultural and historical circumstances under which it was written: that original texts could emerge from a society where literature was allegedly in decline.” Steven H. Rutledge, *Plato, Tacitus, and the Dialogus de Oratoribus* in CARL DEROUX, 10 LATOMUS 254, 357 (2000).

28. For a discussion of this debate see T.J. Luce, *Reading and Response in the Dialogus*, in WOODMAN AND LUCE, EDs., *TACITUS AND THE TACITEAN TRADITION*, supra note 6. A strong defense of this stance can be found in, Saxonhouse, supra note 26, and in RONALD SYME, *TACITUS* (1958).

29. TACITUS, *DIALOGUS* 1.1.

30. Id. at 2.2.

31. Id. at 2.1.
eloquence” of earlier days. The narrator, though, does not offer his own views, but instead expresses joy that he can retell a conversation which was “singularly eloquent.” As such, he promises to narrate the conversation as closely as possible. As a narrator, he does not claim great ability as a writer, but instead mentions his need for “memory and recollection.” He reports on a debate in which eloquent men respond not merely to questions about oratorical decline, but about the value of oratory, literature, and philosophy. What is important is the narrator’s emphasis on the importance of memory to keep this debate alive. An event which took place long before his address to Justus Fabius has now taken on contemporary significance and can answer a concern expressed years after Maternus and Aper and the others have finished talking. The most important message to come out of the Dialogus is a defense of the unmentioned discipline of history.

Of course, the Dialogus itself is not a work of history, but a philosophical dialogue. Tacitus thus counts on his reader to recognize that a dialogue, while presenting a series of arguments, carries dramatic force. The characters of the Dialogus and its settings are just as important, if not more important, than the argument itself. The nostalgic quality of Tacitus’s dialogue, as well as its thematic emphasis on dissent under political rule reveal, as Sir Ronald Syme noted, “a writer who has turned his back on the eloquence of the Senate and lawcourts, and is already thinking as an historian.” Through the course of the Dialogus, oratory and literature must give way to a historical form of writing which will not merely offer Aper’s fame or Maternus’s peace, but a lasting memory of decline to Rome.

Even if oratory fails, the shock value of Maternus’s rebellious play can only last so long. Indeed, whether a few days or years after a given performance, it is unclear how great an impact poetry can have on a regime where language is endangered. Only if the poetry is understood in the context of larger debates about politics (as in the Dialogus) will Maternus’s legacy have its desired effect. James Leake persuasively claims that “in the noble Maternus we see a dim reflection of the genius Tacitus was to reveal himself to be on a vaster scale.” Only with the aid of the historian can we understand the significance of political conflicts and debates. The historian walks the fine line between the legal and

32. Id. at 1.1.
33. Id.
34. Id.  
35. The value of drama for philosophical dialogues has been discussed at length by classicists and political theorists. See, e.g., Ruby Blondell, The Play of Character in Plato’s Dialogues (2002).
37. Leake, Tacitus’s Teaching and the Decline of Liberty at Rome, supra note 14, at 297.
political role of orators and the artistic and rebellious roles of the poet. By
carving out his own place in this dichotomy, the historian is able to
establish a place for true, effective, and long-lasting dissent.

THE HISTORIAN’S PRACTICE: SUBTLE PROTEST IN THE ANNALS

I turn now to the *Annals* in order to illustrate the techniques that the
historian can use to provide this lasting dissent, while shielding himself
from the temptation of sycophancy or the danger of persecution. The *Annals*
are particularly useful for this endeavor, because Tacitus achieves
this needed balance through his distortion of the traditional annalistic
form. His writing functions by combining innuendo and rumor with facts
relating to major events in Roman history. Much has been written about
the structure of Tacitus’s *Annals* and how he distorts a traditional genre to
present the changes in Rome under imperial rule. Judith Ginsberg argues
that Tacitus twists the traditional annalistic text for the sake of showing
that the traditional republican genre can no longer adequately describe
Roman life. He differentiates new politics from old, showing that even
though the constitutional structures of Rome remained the same in name,
all walks of life—even the telling of history—have changed.\(^38\)

Tacitus will not go so far as to praise those who act virtuously, but
instead reminds his readers of those events which may be overshadowed
by larger trends, and in which people reveal the virtues that political
figures *ought* to show in a free society. That is, his stories are meant to
remind Rome of the value of a critical mind and the importance of free
speech while corruption consumes the empire. Tacitus’ recommendations
are subtle and he does not argue for hero-emulation in his works. Instead,
he recounts the possible actions that figures may have taken during the
rule of the emperors as a reminder that options other than unadulterated
loyalty are possible. To convey this message, Tacitus builds upon the “raw
material” of his history to create a clear picture of what happened. D.C.A.
Shotter eloquently notes that “[t]he historian, in order both to understand
them and communicate them to his readers must make the [events]
intelligible; otherwise the reader will have to do it by himself—on far less
adequate grounds.”\(^39\) The writing of this narrative is deeply poignant in a
time when official histories could easily purge the truth of events from

---

also Morford’s comment that Tacitus “was not particularly concerned with the *libertas populi Romani*,
which had been the concern of Livy, the historian of the Republic” but instead “defined *libertas* in
terms of the principate, or, more accurately, in terms of the relationship of individual Romans to the
princeps.” Mark Morford, *How Tacitus Defined Liberty* in *Aufstieg und Niedergang der
Römischen Welt: Geschichte und Kultur Roms im Spiegel der Neueren Forschung* (Hildegard Temporini, et. al.,
eds. 1972), 3421.

Niedergang*, *supra* note 38 at 3272.
people's minds. The only way to avoid this fate is to tell history as it was understood by those living it—through a combination of rumor and "facts" which comprise events as they were experienced.  

Like the *Dialogus*, which narrates an obscure conversation which would not be remembered if not for the presence and interest of Tacitus, the *Annals* keep alive moments which would easily be forgotten because of larger events that occur. Tacitus notes that his history differs from previous histories that "told of great wars, of the storming of cities, of the defeat and capture of kings, or . . . the strifes of consuls with tribunes, land and corn-laws, and the struggles between the commons and the aristocracy." Instead, Tacitus must describe less glorious times, filled less with heroism than with examples of Roman politics. The change in subject matter stems from a change in politics, because he writes about a time when Rome is no longer controlled by a patrician aristocracy or even a glorious people, but instead by a despotic emperor. He writes at a time when there are "but few who have the foresight to distinguish right from wrong or what is sound from what is hurtful." If most people are unable to make these crucial distinctions, the historian may be the only person who can preserve the idea, if not the content, of virtuous thought and action.

During this period, Roman values and mores become corrupted. The circumstances surrounding the reign of the emperors—from the major to the minor—are all colored by recognizing this fact. According to Tacitus, by writing during this time he lacks the freedom of his predecessors. Those who came before could offer clearer judgments about their subjects. Tacitus, if he is not careful, may still offend the descendents and families of those he describes. His writing must involve detailed description but not condemnation. He must hide his true arguments for fear of causing offense. Too much clarity could be important for the historical record, but disastrous for Tacitus's survival. Ambiguity pervades the lives of the Romans as well as the historian's writing.

The people's reaction to the rise of Tiberius offers evidence of how this confusion is seen. After the death of Augustus, men are forced to offer a confused combination of emotions: "They must show neither satisfaction at the death of one emperor, nor gloom at the accession of another: so their features were carefully arranged in a blend of tears and smiles, mourning and flattery." If Tiberius demands confused emotions from his subjects, though, he offers them the same in return. Creating a sense of paranoia

41. TACITUS, ANNALS 4.32. Translations of the *Annals* are from TACITUS, THE ANNALS OF IMPERIAL ROME (Michael Grant, trans., 1956).
42. *Id.* at 4.33.
43. *Id.* at 1.7.
and confusion, Tiberius will not allow the Roman citizens to understand what he wants—always keeping them nervous. Tacitus notes, “he was determined to show no sign of his real feelings [and] his words became more and more equivocal and obscure. But the chief fear of the senators was that they should be seen to understand him only too well.”44 In such a climate, it would be preposterous for a historian to speak out against what he sees. How ironic, then, that Tacitus dedicates a moving passage to a historian who does just that.

Tacitus’s most fervent defense of his method comes during the reign of Tiberius, at the trial of Cremutius Cordus, a historian charged with treason on the grounds that he praised Marcus Brutus and Gaius Cassius as “the last of the Romans.”45 Cremutius has a terrible end when he starves himself to death, but not before having his day in court in front of the grim face of Tiberius. Tacitus reminds his readers that the emperor continues to sit prominently in the Senate, carefully eyeing the decisions of the senators. The senators show their obeisance and sycophancy to the present leader as the rights of the senators to speak their mind are restricted. Indeed, the reader certainly expects the arraigned Cremutius to be condemned.

Cremutius’s defense gives him the chance to reveal the paranoia and tyranny of Tiberius, while reminding the senate that just as the names of Brutus and Cassius have not been forgotten, neither will his own name be forgotten. Indeed, previous Julio-Claudian leaders had allowed writings which defended Cato or Brutus to survive, “yet the Divine Julius, the Divine Augustus themselves bore all this and let it pass, whether in forbearance or in wisdom I cannot easily say. Assuredly what is despised is soon forgotten; when you resent a thing, you seem to recognize it.”46 Cremutius asserts in his speech that the emperor’s fear of the historian stems from his recognition of the truth of the historian’s claims. Cremutius’s speech comes before the sentence is handed down, but is filled with a deep rage over his assumed guilt.

Cremutius’s speech fails to save him. He is too forthright in his condemnation of those around him to be able to convince anyone of his innocence. Tacitus claims that he ended his life by starvation. However, although he dies and the senators order his books burned, some of his books survive and are later published. In mentioning this, Tacitus turns the story of Cremutius away from a tragic tale and instead toward a tale about

44. *Id.* at 1.11.

45. *Id.* at 4.34. The rejection of Brutus and the triumph of Julius Caesar through Tiberius is shown by Tacitus at the funeral of Junia Tertulla, Brutus’s sister and Cassius’s wife. Tacitus writes, “The busts of twenty most illustrious families were born in succession, with names of Manlius, Quinctius, and others of equal rank. But Cassius and Brutus outshone them all, from the very fact that their likenesses were not to be seen.” *Id.* at 3.75.

46. *Id.* at 4.35.
"the stupidity of men who suppose that the despotism of the present can actually efface the remembrances of the next generation." In this passage, Tacitus reveals that the historian writes not merely to those around him, but to later, more curious, and perhaps more free people. "Foreign tyrants," he continues, who persecute true genius, "have merely procured infamy for themselves and glory for their victims."

The martyrdom of Cremutius reflects the central value of a historian, who keeps alive visions of figures like Brutus even when despots seek to besmirch their good names. The reader sees that the tyrant's ability to make men forget is less powerful than the ability of the historian to give people the chance to remember. Like Socrates who, in the Apology, declares that other men would remember his sentence and thus keep alive the task of philosophy, Cremutius's death could give him more influence for future generations than he had while he lived. Socrates's threat to Athens rings true in Rome:

Now I want to prophesy to those who convicted me, for I am at the point when men prophesy most, when they are about to die. I say gentlemen, to those who voted to kill me, that vengeance will come upon you immediately after my death, a vengeance much harder to bear than that which you took in killing me. You did this in the belief that you would avoid giving an account of your life, but I maintain that quite the opposite will happen to you. There will be more people to test you, whom I now held back, but you did not notice it. They will be more difficult to deal with as they will be younger and you will resent them more.

So it is with Cremutius who counts on his works to survive and, through the memory of figures like Tacitus, ensures that his legacy will not be defined by Tiberius. It is not the historian's speech which makes the difference, but the words he writes and the words written by future historians. Tacitus's only hope for keeping the idea of liberty alive is to embed such language in the pragmatic lessons of the Annals. Only a historian, someone not directly confronting the politics of his time, can preserve the idea of virtue without earning the ire of the ruling authorities. He must sit silently at times, like the narrator in the Dialogus, but nevertheless his chronicle serves the long-term survival of right action.

Tacitus thus writes for multiple audiences. He tells the story of Roman liberty to those contemporaries who will read his works. These are the men who most likely do not remember a freer era, and who, because of the events he narrates must act with a keen eye toward the wiles of the

47. Id.
48. Id.
49. PLATO, APOLOGY 39c-d (John M. Cooper & D. S. Hutchinson, eds., G.M.A. Grube, trans., 1997). Citation is to the traditional Stephanus pagination of Plato's writings.
emperor. The historian sees the decline of Roman liberty and expects people to watch their step and be aware that any burst of passion, while it might seem noble, could also endanger an individual actor and those around him. Awareness is the key to survival in a time of tyranny. However, while offering this cautious, pragmatic lesson to those suffering under imperial rule, he directs much of his writing to later generations. Tacitus’s story has a pragmatic side, but is also deeply idealistic. He holds a deep hope that those who survive will find a way of reminding others of what liberty once was and how Rome now suffers. In the future, citizens may have other systems of politics and morals under which to act. Those people must remember a time when liberty was not present in society and the lengths to which people were driven by their tyrants.

How contradictory are these impulses? With one, Tacitus reminds his readers of their inability to achieve greatness (let alone act morally or with conviction) under the rule of the emperors. He offers a somewhat pessimistic understanding of the possibility of virtuous action and offers no sense of when things might get better. Indeed, if so much rests upon the whim of the emperor, it would take a new regime to see Roman liberty reborn.

On the other hand, though, the historian is patient enough to judiciously narrate the decline of Roman liberty, doing what he can to preserve the memory and language of a freer time. In this endeavor the historian is far more idealistic, believing that his writing will serve a long-term goal of keeping alive the language of a free people. While it is almost impossible for a figure like Cremutius to survive while putting forth his own vision (let alone someone like the poet Maternus), the historian’s seeming objectivity gives him the ability not to cause rebellion or to shock in the short-term, but to determine a political agenda for future eras.

**HISTORIANS ON THE DEFENSE**

The difficulty for Tacitus’s historian is how to walk the fine line between activity and passivity in order to ensure that the idea and language of liberty could be preserved over time. This tension, between being an observer and an insider, has not faded, but has become more complex as historians have become a professional class. Historians struggle—like lawyers—with their roles as functionaries of the system as well as defenders of public justice. America’s professional historians revealed their engagement with this issue and their dedication to their conflicted role in the recent debate over presidential papers. Their struggle reveals that the debate between being a critic and an insider extends beyond the role of the lawyer in modern society, and reveals the limitations that the courts face in accommodating the unique professional obligations of the historians.
With the passage of Executive Order 13,233 the President of the United States and his predecessors gained more than a decade of control over their papers. This new order, authorized by George W. Bush in 2001, reversed the previously authorized Presidential Records Act which had granted the National Archivist control over presidential papers, establishing a set of benchmarks after which the papers would be open according to the Freedom of Information Act. The original act stated that after five years historians could petition for access to previously sealed records, and after twelve years the papers would be open to the public. The 2001 executive order allows Presidents, former Presidents, and their heirs to maintain more control over archival access. The issue sparked controversy and a lawsuit, American Historical Association v. National Archives and Records Administration. The issue in the suit was the question of access to some of former President Reagan’s papers and a


51. Specifically the 2001 Act orders that: “(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President’s constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).” 66 Fed Reg. 56025.

52. President Ronald Reagan’s 1989 executive order established conditions under which presidents would withhold papers: “Sec. 2. Notice of Intent to Disclose Presidential Records. (a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, utilizing any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege. Nothing in this Order is intended to affect the right of the incumbent or former Presidents to invoke Executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative. (b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of Executive privilege by the incumbent or former President or the Archivist has been instructed by the incumbent president or his designee to extend the time period. If a shorter time period is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.” Presidential Records 54 Fed. Reg. 3403, formerly codified at 36 C.F.R. §1270.

larger concern over the extent to which historical documents should be kept out of the public record.

Both in Congress and among historians, the 2001 order was the target of deep scorn. Congressman Harry Waxman described 13,233 as transforming the Presidential Records Act into the “Presidential Secrecy Act.”\(^5\) He continued, “History is not partisan. Historians and scholars need access to our nation’s history as it happened, not as a former president wished that it happened.”\(^5\) At the same Congressional subcommittee meeting, historian Robert Dallek argued:

> Access to the fullest possible record in the service of reconstructing the most substantial and honest history of presidencies is not some academic exercise that should be confined to university history departments. Rather, it can make a significant difference in shaping the national well-being. As John Dos Passos stated it, “In times of change and danger when there is a quicksand of fear under men’s reasoning, a sense of continuity with generations gone before can stretch like a lifeline across the scary present.”\(^5\)

The importance of the historian’s role and access to the history of the presidency, he thus argued, was important not merely for the professional historians, but for the nation as a whole. According to Ira Berlin, President of the Organization of American Historians, at stake in this debate is the value of history for a democratic society and the place that history can have in governance.\(^5\) Placing further restrictions on access to presidential records, particularly the records of former Presidents, would limit the extent to which historical archives could not only be used by academics, but could help influence decisions being made by politicians. Critics of 13,233 argued that the historian’s art was necessary for the functioning of a free, democratic society.\(^5\) Limited access to archives was akin to silencing their critical voice.

Symbolically, this debate reveals the extent to which historians perceive themselves as standing on the sidelines of society as critics, while still remaining engaged citizens.\(^5\) Historians patiently await the opportunity to narrate and explain the events of history as data and evidence become


\(^{55}\) Id.

\(^{56}\) Id. (statement of Robert Dallek).

\(^{57}\) Ira Berlin, Executive Order Undermines Democracy, 30 OAH NEWSLETTER 2 (Organization of American Historians, Bloomington, IN), May 2002.


\(^{59}\) For the question of whether critics stand apart from society or remain active members see, for example, Michael Walzer, Interpretation and Social Criticism (1987) and Michael Walzer, The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century (2002).
available. At the same time, they stand at the ready to offer advice when the lessons of history could prove useful to political leaders. Current events quickly become fodder for the historical record and the conflict over presidential papers is largely a debate about how soon that shift should take place. Putting documents in the historical record gives memos and other files a new power—they are used to analyze the actions of political leaders, as opposed to helping those leaders further their goals. Personal papers become tools that historians and journalists can use to understand, if not occasionally undermine the legacy of the president. There seems to be a somewhat inevitable conflict between the historians and the politicians. Narrative writing calls politicians to task.

The struggle for the historians, though, is not a personal one of scholar versus President. Instead, it seems to be a struggle to instantiate a particular view of the place of history in society—as a necessary and influential part of the political process. Indeed, the image of a Congressional subcommittee calling upon historians to give their recommendations as to the dangers of Executive Order 13,233 shows the historian engaging with those who make and interpret the law. Viewed in this light, the historians’ defense of free access goes beyond the particulars of the Presidential Records Act. In taking a stand, they defend the value of their profession as a necessary component of a truly democratic society.

Even with this dramatic rhetoric, though, the court battle between the American Historical Association and the National Archives was not an overly dramatic affair. At stake were a handful of pages from the Reagan papers which had been withheld by President Bush under a claim of executive privilege. After an initial summary judgment against the plaintiffs, the court permitted an amended complaint which was then taken up and most recently responded to in October 2007. The legal question as phrased by the Court was “a dispute over the relationship between an executive order issued by the president of the United States and a statute passed by Congress.” Having framed the case as a debate over the separation of powers, the Court offered a concise explanation of the relationship between the Presidential Records Act, President Bush’s executive order, and the burden placed on historians who seek documents protected by executive privilege.

60. For reflections on the evidentiary questions that affect historians see ROBIN W. WINKS, ED., THE HISTORIAN AS DETECTIVE: ESSAYS ON EVIDENCE (1968).
61. Consider, on this point, Winston Churchill’s reported proclamation that “History will be kind to me for I intend to write it,” MICHAEL S. NEIBERG, WARFARE AND SOCIETY IN EUROPE: 1898 TO THE PRESENT, 128 (2004).
63. Id.
64. Id.
The American Historical Association, in conjunction with independent researchers and public interest organizations, claimed that the delay imposed by the Bush order interfered in an injurious way with their research. The eleven Reagan documents became a means of bringing a larger research issue before the court. By overruling the Presidential Records Act and a previous order by Ronald Reagan, Bush's new order provided not merely for incumbent Presidents but former presidents to have control over their papers in perpetuity. Moreover, the Bush order provided for the incumbent president to advise the National Archivist as to whether or not to honor the requests of the former President. The complication inherent in the new system threatened access in the long term. As such, the case brought by the historians seemed an opportunity to present a justiciable case before the courts.

In ruling on the case, the district judge, in her memorandum opinion, rejected the claim on the basis of there not being an actual injury to the historians. They were concerned less with the present delay and more with future delays on the basis of the incumbent President seeking to limit access to the Reagan papers in question. However, the court did rule that the defendants had standing with regard to the actions of the Archivist, noting that this reliance on the new Bush order had a capricious and arbitrary quality to it. Where the Presidential Records Act had originally held that the Archivist maintained power, within time limits decided by Congress, to release the records of former Presidents, the Bush order ensured that former Presidents could extend the amount of time in which the records were closed in a capricious manner—whether by merely extending the period of review by the former President or providing for an indeterminate length of closure. As such, while dismissing the complaint in part, the District Court offered limited support to the historians and their concern over former Presidents having too much control over their papers.

The court was correct to rule as it did, particularly regarding the issue of standing. Such a case is difficult to defend under a clear standard of injury. Whether because of the limited number of papers in question or the fact that the historians are concerned with the possible actions of the President, instead of actions already taken, the plaintiffs' standing was tenuous, at best. However, the larger message of the case is clear: historians will not stand by and accept the possibility of losing access to resources necessary for their work. Their inability to successfully pursue this case reveals a problem that historians face as they deal with the legal system—their needs and the demands of the legal system will often be at odds. While the historians succeeded in having one part of the Bush order ruled unconstitutional by the District Court, the larger question of access remains unavoidable for historians in their role as researchers.

According to the system in place, the President's constitutionally based privileges subsume privileges for records that reflect: “military,
diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberations of the President or his advisors (the deliberative process privilege).  

Certainly the need to preserve national security secrets is understandable, as are complex issues like attorney-client privilege. However, concern over the deliberative process begins to cross a line which leaves future historians perhaps too far out of the loop to conscientiously document American political life. Following the Bush order and American Historical Association, the National Archivist continues to have a great deal of power and a statutory obligation to release papers after a specified amount of time. However, the restrictions may still cut too broadly. It is unclear whether Presidents will act with impunity in suppressing documents, and documents relating to the presidential communications privileges and deliberative process privilege may prove quite important in documenting the history of any presidency.

More importantly, though, the system as it exists places a unique burden on the historians. The specific burden placed upon the historian is to explain why they need the documents they need. As any researcher knows, there is a bizarre irony to placing this demand on scholarly research. One enters an archive, often with only the vaguest notion of what lies within. Documents may or may not provide much value. Only after examining their contents do historians know whether their search has been useful or not. Such flexibility cannot be accommodated by a regime in which executive privilege demands that one explain the contents or value of a document before gaining access to it. Historians in this situation are forced to play a complex game of discovery with the dual hope that they will gain access to the papers and that their search will have been worth the effort.

The District Court’s ruling, overturning the Bush order by rejecting its arbitrariness makes one step toward giving the National Archivist an increased role in acting as an intermediary between the historians and the President, as opposed to merely the mouthpiece of the incumbent. Even so, the Bush order goes too far in asserting long-term control over papers by presidents, even after they are out of office. Because the National Archivist is appointed by the President, one can argue that the process of releasing sealed documents can never truly leave the hands of the President, himself. A recent editorial in the Washington Post, focusing on the high number of emails that have been lost by White House staffers made the following suggestion:

Each missing e-mail is one less piece of the puzzle of how policies are made and decisions are reached. In an ideal world, the National Archives

65. Id.
would have more than an advisory role in how records are handled during a president’s term. An attempt to give it some authority could set up a fight between the legislative and executive branches. When it comes to preserving the nation’s history, that’s a battle worth waging.66

While the Post wishes to empower the Archivist, an important first step, historians would nonetheless need to act as their own lobbying force. Historians cannot idly wait for archives to open or for the government to ensure the preservation of papers. They must recognize their role not merely as the interpreters of the historical record, but as defenders of that record, too.

In this position, the modern historian, like Tacitus’s historian, is caught between two roles. On one hand he is a passive player, collecting information in the hopes that he might be able to put forward some narrative of the times he experiences or the eras he studies. That historian is engaged in a hit-or-miss search for information and will likely be stymied by the roadblocks placed in his way by executive privilege. What drives him is intellectual curiosity and the responsibility to explore his topic as fully as possible, with as many documents as possible. In his other role, the historian must take a more active role not only in the pursuit of documentation, but in defining his place in society. The historian, in order to overcome executive privilege, must make a very public statement about his value for American society and demand, through whatever legal means possible, the tools necessary to do his job. If he does not, the executive branch can claim too much control over archives, ensuring that historians are not able to fulfill their roles.

In these two roles, the modern historian, like Tacitus, writes for two audiences. He speaks to his readers who have an interest in a given subject. At the same time, he attempts to define his importance as a silent, but not too silent, monitor of politics. Unfortunately, while this conversation with multiple audiences may seem appropriate to a figure like Tacitus, it is an increasingly obscure conversation for the modern historian. With the rise of more scientific methods of writing history, the objectivity necessary to be a historian requires more distance than the Tacitean historian might recognize.67 Tacitus was able to vary between his attempts to write *sine ira et studio* (a task at which he sometimes succeeded and frequently failed), and his attempts to see general trends in history, particularly regarding the decline of Roman law.68 His work would not be taken today as objective following the growing professionalization of historians over the last two hundred years. With

figures like Leopold von Ranke arguing in nineteenth century Germany for the application of the scientific method to the writing of history, historians have found themselves wrestling with their impulse to be as objective as possible and to use their writing to offer their readers prescriptive and enjoyable chronicles. From these debates arise the various categories of historians we now know from “academic historians,” to “public historians,” to “popular historians.” Where the former provide training in the field and set the standards for quality, the latter have more flexibility in addressing an audience beyond readers of monographs and historical reviews.

Perhaps it is for this reason that the Tacitean historian finds his analogue less in the modern historian than in the modern journalist. Journalists bridge the gap between history and current events—they are present as observers chronicling (these days in real time) the events surrounding them. At the same time, they attempt to maintain a critical distance from their sources in order to maintain their credibility in the field. Journalists, like historians, must be fully aware of their surroundings without being fully a part of their surroundings. Their professional code may not require the objectivity that historians have claimed, but the tension for both groups seems the same—it is a tension over how to criticize and objectively describe, how to be a professional and a citizen at once.

Recognizing the commonalities and differences between historians and journalists is instructive in understanding more generally how citizens in our republic are able to defend the rule of law as free citizens, while fulfilling their professional roles. Indeed, this is the same issue faced by lawyers as they balance their responsibilities as advocates for clients and officers of the legal system. Once one realizes the similarities between these three groups, the value of Tacitus becomes clear.

The lawyers he witnesses in his Dialogus have lost sight of their responsibility not to blindly obey the changing procedures of an increasingly corrupt legal system, but to recognize when those procedures are not fulfilling the demands of justice. Even if the distant posture of the poet Maternus cannot be combined with the fighting rhetoric of Aper in his time, Tacitus offers direction for those who practice law in the future. Although academic jurists had little power in Roman times, and advocates had little time for the academics, that balance of a historical understanding of the evolution of law with a concern for the needs and procedures of the day remain important to any system. Tacitus’s historian may find a

69. The tension between objectivity and generalization is explored in John Lewis Gaddis, The Landscape of History: How Historians Map the Past (2002).

70. For an opposing view on this issue, defending the desire for relevance by the so-called public historian, see Wayne D. Rasmussen, Some Notes on Research and the Public Historian, I The Public Historian 3:68 (1979).

counterpart in our modern legal system through the conflicting impulse by lawyers to practice and theorize. For while Tacitus’s lawyers may not have had the stomach to fight legal injustice while fulfilling their roles as advocates, such a prospect is not so bleak for attorneys today.

So it is with historians. The battle over presidential archives is far from over, and the historians should continue to remind politicians and the rest of society of their role not merely as narrators but as public citizens in a democratic republic. The Tacitean historian has a purpose reminiscent of Hannah Arendt’s call for a revival of the political in civil society. Like Arendt, Tacitus hopes to create a space for action in which citizens can engage in politics, as opposed to suffering under the oppressive rule of emperors. The historian preserves key debates and words to ensure that future generations will be aware of the need for liberty and the result of tyranny. If emperors are systematically leading to the erasure of memory, there is no hope for liberty. The historian, though, is able to keep alive the possibility of liberty returning to the realm of politics, instead of being relegated to myth and history. His goal is not nostalgia, but provides the hope that readers will practice politics better than his contemporaries. There is no blueprint as to how liberty can be enjoyed or preserved, but at the very least Tacitus believes liberty is an idea worth giving to the future. The historian allows generations to compete with each other who can best enjoy liberty. As Tacitus writes:

[P]erhaps not only the seasons but everything else, social history included, moves in cycles. Not, however, that earlier times were better than ours in every way—our own epoch too has produced moral and intellectual achievements for our descendants to copy. And such honourable rivalry with the past is a fine thing.

The historian deals with the past and his contemporaries through narrative and subtle criticism. His goal is a long-term one, upon which a free politics relies. Such is a difficult responsibility for historians and for any individuals dedicated to being active members and critics of society. However, it is a necessary burden to assume in order to defend the rule of law.

73. TACITUS, ANNALS at 3.55.