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THE WHITE HOUSE

WASHINGTON

February 6, 1975

MEMORANDUM TO: JACK MARSH

FROM: RUSS ROURKE

Charlie Leppert reports that the House today passed the pay increase for the Attorney General (Charlie had already spoken with Pete Rodino about the matter, Rodino saying they would get to it by about the end of February). The measure that was acted on by the House came out of the Post Office and Civil Service Committee.

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Department of Justice

FOR RELEASE AT 7:30 P.M., E.S.T.
MONDAY, FEBRUARY 2, 1976

ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE GOVERNOR'S CONFERENCE
ON
EMPLOYMENT AND THE PREVENTION OF CRIME

6:30 P.M.
CRYSTAL BALLROOM
MARC PLAZA HOTEL
MONDAY, FEBRUARY 2, 1976
MILWAUKEE, WISCONSIN

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I am glad to be with you at this symposium on employment and the prevention of crime. As you know, President Ford believes the intolerable level of crime in America can most effectively be reduced if all segments of society join in the effort. I bring you President Ford's warm greetings and his appreciation for the concern you are showing and the responsibility you are accepting in this important area.

As the title of your symposium suggests, the problem of crime is inseparable from the problem of reuniting ex-offenders with society. I want to explore that theme with you tonight and to indicate some implications it may have for government policy and for the responsibility of society.

It is a mistake to think of reunification as the last step in the criminal justice system. The process of reunification begins as soon as an individual is brought into the system. The whole criminal justice system must be viewed in light of its effect on the offender after he is released from prison.

Rehabilitation as a goal of criminal punishment has been called into question recently, in part because recidivism rates are high. We really do not have statistics good enough to measure the rehabilitative effect of imprisonment.

But the data we do have are taken to support the conclusion that persons who have spent time in prison are not less likely to commit crime again. Perhaps, indeed, they are more likely to do so. Studies such as the one published in 1964 by Daniel Glaser indicate that the two most important factors in the success of an ex-offender in avoiding criminal conduct after he is released from prison are his ability to return to a stable family situation and his ability to get a job. These are taken as proof that the offender's experience after imprisonment rather than his experience in prison is determinative. The rehabilitative ideal, proclaimed in the 19th Century as a great reform in the theory of punishment, has been proclaimed a failure by contemporary prison reformers. But there is a narrowness in this view. It looks only to the prison itself as the medium of rehabilitation.

If the whole criminal justice system is analyzed with respect to its role in rehabilitation and reunification, the perceived failure of the rehabilitative ideal is a failure of the entire process. The imposition of imprisonment is an extraordinary assertion of government authority over the individual. If the imposition of punishment appears to be fickle--a matter of chance--or if it appears to be unequal with respect to socio-economic groups, offenders who do suffer punishment for crimes may be left with an emotional scar that itself makes reunification very difficult.

The need for decency and fairness in the criminal justice system does not derive solely from the instrumental effect indecency and unfairness have upon their victims. But the bitterness a sense of unfairness breeds must be taken into account. Today there is an accidental quality to the imposition of punishment. Some 400,000 men, women and young people are in some form of corrections institution. Nevertheless, inefficiency in the criminal justice system has meant that a very small percentage of persons who commit crimes ever spend time in jail. The inefficiency shows itself at every step. Police, overcome by the high level of crime, cannot actively investigate every report of criminal conduct. People become cynical about the likelihood that criminals will be punished, so they often do not bother to report crime. Even after an offender is arrested, overworked prosecutors' offices may be forced to strike deals in which a defendant agrees to plead guilty in exchange for a sentence that does not include incarceration.

These problems build upon themselves. The inefficiency of the criminal justice system makes it less likely to serve a deterrent effect. The result is more crime and more burden on police, prosecutors and courts.

Even when an offender is brought to trial, there is a great element of chance in whether he will ever serve time in prison. A study in Pittsburgh in 1966 indicated

that nearly half of all persons convicted of a second offense of aggravated assault and more than one-fourth of all second offenders convicted of robbery were not sent to prison but were rather placed on probation. Research in Wisconsin showed that 63 per cent of all second-time felony offenders and 41 per cent of all persons with two or more felony convictions received no prison term upon their last conviction. James Q. Wilson of Harvard concluded that this evidence "suggests that the judges did not believe that jail had a deterrent effect. . ." At least one reason for this perception is that judges themselves have not imposed prison sentences with enough consistency to make the deterrent effect work. Deterrence requires considerable certainty, and we do not have that certainty.

The offenders who are sent to jail recognize the degree to which they have been losers in a game of chance. Such a recognition is bound to make their reunification with society more difficult. Not only may it appear to an offender that his imprisonment was just bad luck rather than the inevitable consequence of wrongdoing, the unfairness bred of inefficiency and unwillingness to impose uniform punishment may make the society outside the prison wall seem mean and hostile, a society that itself does not follow the rules of conduct it expects the ex-offender to follow.

The problem of inefficiency must be solved by new devices and methods that will facilitate rational decisions about prosecution. It also will require a greater degree of citizen cooperation in the detection and investigation of crime. The problem of unwillingness of judges to impose sentences is a separate and complicated matter for which special approaches are required.

The President has proposed a system of mandatory minimum sentences for various sorts of particularly serious crime. Mandatory minimums would apply to extraordinarily heinous crimes such as aircraft hijacking, to all offenses committed with a dangerous weapon, and to offenses involving the risk of personal injury to others when those offenses are committed by repeat offenders. The President's mandatory minimum sentence proposal also includes provisions to ensure fairness by allowing a judge to find, in certain narrow categories of circumstances, that an offender need not go to prison even though he has been convicted of a crime normally carrying a mandatory minimum sentence. A mandatory minimum sentence must not be imposed if the offender was less than 18 years old when the offense was committed, or was acting under substantial duress, or was implicated in a crime actually committed by others and participated in the crime only in a very minor way. Under proposals now before Congress, the trial judge's sentencing decision would be reviewable by appellate courts.

The President's proposal does not require long prison terms for persons sentenced under the mandatory minimum provisions. The need for mandatory minimum sentences is based upon the concept of deterrence and the need for swift and certain punishment following an offense. It is also based on the recognition that the fairness of punishment depends upon a degree of uniformity in sentencing decisions.

It may be time to consider an even more sweeping restructuring of the sentencing system, which United States District Court Judge Marvin E. Frankel calls the most critical part of the criminal justice system. There have been proposals to abolish the federal parole system as it now exists and to allow trial judges to determine the precise sentence an offender would be required to serve. The trial judge would operate within a set of sentencing guidelines fashioned by a permanent Federal Sentencing Commission.

This idea is consistent with the President's mandatory minimum sentence proposal. Indeed, it is an extension of the same concept. Sentences would be required to meet the mandatory minimums set forth by statutes for certain crimes. Sentences for all other crimes would generally be expected to fall within the range set forth by the guidelines. If a judge decided to impose a sentence inconsistent with the guidelines, he would have to accompany

the decision with specific reasons for the exception, and the decision would be subject to appellate review. The offender would be required to serve the sentence imposed by the judge, with a specific amount of time off for good behavior.

Currently very few offenders are required to serve anything close to the time imposed as a sentence by the trial judge. Parole eligibility after serving one-third or less of the sentence may create a lack of credibility in sentencing which undermines the deterrent effect of criminal law and adds to the sense of unfairness.

Many prisoner groups and others point out that uncertainty about parole and good time allowances creates enormous tension among prisoners. A prisoner may well not know what he must do to please the prison and parole authorities. Uncertainty may actually hinder rehabilitation in that prisoners may volunteer for institutional self-improvement programs without any real commitment to the goal of the programs but instead with a feeling that to volunteer might please the parole authorities.

It may be too early to decide whether to adopt vast reforms in sentencing along these lines. Corrections has been an area in which great new ideas emerge with regularity--ideas full of promise--only to lead to failure and despair. We do not know enough about the effect of

the criminal justice system and corrections upon crime. But even without conclusive data--which may never be obtainable in this area--reason suggests that the failure of the criminal law to deter crime sufficiently and the perceived unfairness of accidental justice requires considerable reform. In my view the President's mandatory minimum proposal and consideration of a Federal Sentencing Commission is an important and necessary first setp.

I do not agree that the ideal of rehabilitation--which was an earlier medium of reform--should be abandoned although it is fashionable in some quarters to say so. But it is also nonsense to say that the purpose of prison is only to rehabilitate. Imprisonment also has deterrence and protection of society as goals. It is also nonsense to say that rehabilitation never occurs. As Attorney General I review all applications by federal prisoners for pardons. Many of those applications attest to the possibility that offenders can change for the better in prison. Decent treatment of prisoners is itself a kind of rehabilitation, and decency should most certainly remain as one of our ideals. Decency can reinforce decency in return just as much as substandard, inhumane conditions of confinement can reinforce a negative effect. Especially with respect to the young, we simply cannot give up on the effort to bring those who have broken the law back into harmony with the society. We can hold out the opportunity to inmates to improve themselves and their chances of success outside

the walls, and this is itself a form of rehabilitation.

Job training within prison is important. It prepares for an offender's reunification with society. Society also has a great responsibility in this regard--and a great opportunity as well. As your symposium recognizes, employment after release from prison is extraordinarily important in the process of reunification. The composition of our prison population today makes it essential that, both inside prison and outside, steps are taken to facilitate the transition.

Most serious crimes are committed by young people. Those most likely to commit crime are between the ages of 20 and 30. This group will reach its maximum in numbers in about 1985, when it will be about 50 per cent greater than in 1970. The economic and educational characteristics of today's prison population are consistently below those of inmates' counterparts outside the walls. It is against their counterparts that ex-offenders must compete if they are to have productive employment after their release. The average male prisoner more than 25 years old today has 2.1 fewer years of education than the average of all U.S. males in the same age group. Only 44.2 per cent of all male prisoners are skilled or semi-skilled as compared with 80.7 per cent of the total male population. These figures indicate the challenge ex-offenders present to the American labor market. But it is a challenge that can be met.

The American labor market has always had a need to retrain individuals for employment. This has never been an easy task but it is one with which the free market must be concerned. There are of course special considerations when ex-offenders are involved. These special considerations do not diminish the importance of the task. Rather, they emphasize the importance of the goal.

Federal prisons themselves have programs to help train inmates for productive work. The Federal Prison Industries, an agency of the Department of Justice which was established in 1934 to employ and train federal inmates, has 51 industrial operations in 23 correctional institutions. About 25 per cent of all federal prisoners volunteer to participate in Federal Prison Industries programs. Many of these programs do not train inmates for jobs in segments of industry that are thriving today. More than a quarter of all Federal Prison Industries workers today, for example, are employed in the shoe and textile industries. But new programs to train inmates in skills that are more in demand are under way and expanding. Three federal corrections institutions now have training programs in computer technology. Two institutions have auto mechanic training programs, and another institution will open one soon. Better training programs in federal prisons must be initiated, but they alone will not guarantee that an ex-offender's reunification with society will be a success.

There is a problem of acceptance of the ex-offender both by his employer and by his co-workers. Deep prejudices are directed toward an ex-offender, and they stand as a

barrier to his success in society. President Ford has directed the U.S. Civil Service Commission to review a program it administers, a program designed to prevent federal employers from unjustly discriminating against ex-offenders. The President has also asked the National Governors Conference to study steps the states can take to eliminate discrimination in their hiring of ex-offenders.

The private sector must take similar steps. Some 100,000 offenders are being discharged by federal and state prisons and local jails each year. The unemployment rate for ex-offenders is three times what it is for the regular work force. Groups such as the National Alliance of Businessmen have recognized that high unemployment among ex-offenders bodes ill for the recidivism rate. The Alliance is one of the sponsors of your forum, so permit me to dwell a moment on its important program. The Alliance does not do job placement work. It goes to businessmen and solicits from them job openings for ex-offenders. These openings are then turned over to other agencies that actually place individuals in jobs. The Alliance's ex-offender program in a little more than two years has resulted in the placement of 20,000 ex-offenders in jobs.

This program and others seem to be working, but more like them are needed. As I indicated at the outset, the entire criminal justice system needs to be viewed in light of its impact upon the final reunification of the offender with society. Society bears a great burden. Through the

system of criminal justice it imposes upon individuals the dramatic loss of liberty that is involved in imprisonment. Society must insist that the system operate with fairness and decency. But its responsibility is much greater. Society must itself be prepared to reunite with the ex-offender if he is to have a chance of succeeding outside the walls.

I have often said that high crime rates will exist so long as society stands for it. I mean by this more than simply that citizens must cooperate with law enforcement officials in reporting crime and doing their part in the criminal justice process. I mean also that crime rates will continue to be high so long as society does not realize that it cannot treat as outcasts the persons whose liberty it has once curtailed in the name of the law.

The glory of the American system, despite all the skepticism and self doubts which are at times to be expected, is that we have an open society in which many institutions, public and private, and individual citizens, public and private, can voluntarily work together for the common good. The open society relies heavily on the individual decisions and commitments of each one of us. It is based on the leadership which each one of us in our own way can give. In the complex order of the modern day it is often difficult to recapture the sense of community upon which so much depends. A realization of our common

purpose and necessity, and the importance of the values of human dignity, must bring us together. The problem of crime cannot be solved if we do not see the eventual reunification of the offender into the fruitful walks of our society as an imperative. In this endeavor there will be successes and failure. But each instance of success is a reason for celebration -- a reaffirmation of the ideals which give meaning to our own lives.

I congratulate you upon the work in which you are engaged. It is among the important items in the agenda for our times.

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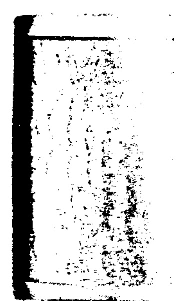


crossed Mosher

March 23, 1976

MEMORANDUM FOR: THE ATTORNEY GENERAL

FROM: JACK MARSH

I thought you should see a copy of the attached letter from Congressman Charles Mosher concerning national security wiretapping.

Many thanks.

dl

The Honorable John O. Marsh, Jr.

MAY 15 1975

THE WHITE HOUSE

WASHINGTON

May 13, 1975

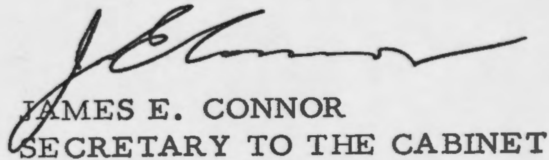
MEMORANDUM FOR

THE CABINET

As you may recall, at the last Cabinet meeting the President drew attention to the Attorney General's speech to the New York Bar Association and requested that it be made available so that all members of the Cabinet would have an opportunity to read it, with particular attention to the area of the relationship between personal and governmental privacy.

The Attorney General's office has now made copies of his speech available, and I am pleased to enclose a copy for your use.

Attachment



JAMES E. CONNOR
SECRETARY TO THE CABINET

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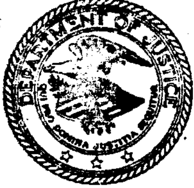


Department of Justice

ADVANCE COPY FOR RELEASE AT 8:00 P.M., E.D.T.
MONDAY, APRIL 28, 1975

ADDRESS

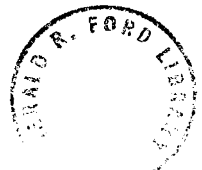
BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

8:00 P.M.
MONDAY, APRIL 28, 1975
42 WEST 44TH STREET
NEW YORK, NEW YORK



I would like to speak to you this evening about confidentiality and democratic government. The subject is an important one. It is complicated and has many facets. I do not suggest there are easy answers. I do suggest, however, that public understanding of the issues involved and the relationship among the issues is extremely important. The bar as a profession has an enormous responsibility to help clarify these issues. My belief is that understanding may be increased by putting together certain doctrines and values with which most of us would agree. The relationship among these doctrines and values may have been obscured in the recent past. If hard cases sometimes make bad law, emergency situations also have distorted our perspective. The public good requires that we try to correct that distortion.

In recent years, the very concept of confidentiality in government has been increasingly challenged as contrary to our democratic ideals, to the constitutional guarantees of freedom of expression and freedom of the press, and to our structure of government. Any limitation on the disclosure of information about the conduct of government, it is said, constitutes an abridgement of the people's right

to know and cannot be justified. Indeed, it is asserted that governmental secrecy serves no purpose other than to shield improper or unlawful action from public scrutiny. This perception of the relationship between confidentiality and government has been shaped in large measure by the Watergate affair. The unfortunate legacy of that affair is a pervasive distrust of public officials and a popular willingness to infer impropriety. Skepticism and distrust have their value; they are not the only values to which our society must respond.

Our understanding of what is involved in the present controversy over government confidentiality is further inhibited by the very words sometimes used to describe the legal authority of the Executive branch to withhold information. I am referring, of course, to the term "executive privilege." The term fails to express the nature of the interests at issue; its emotive value presently exceeds and consumes what cognitive value it might have possessed. The need for confidentiality is old, common to all governments, essential to ours since its formation. The phrase "executive privilege" is of recent origin. It apparently made its first appearance in the case law in a Court of Claims

opinion by Mr. Justice Reed in 1958. It is only in the last few years that the phrase has preempted public discussion of governmental confidentiality, and the phrase has changed in meaning and connotation. Because it has been seen against the background of the separation of powers, and in this setting has often involved the directive of the President, the phrase has come to be viewed by the public as an exercise of personal presidential prerogative, protecting the President and his immediate advisers or subordinates in their role of advising or formulating advice for the President. Whether or not disclosure in response to congressional demands should be withheld only by Presidential directive, sweeping as was the case with President Eisenhower's order, or specific as President Kennedy promised, the phrase "executive privilege" has ceased to be a useful description of what is involved in the need for confidentiality. Our ability to analyze the legal and public interests involved has become a prisoner of our vocabulary. Much more is involved than the President's personal prerogative standing against the people's right to know. The problem is the need for confidentiality and its limitations in the public interest for the protection of the people of our country.

Let me suggest starting points for an analysis of the place of government confidentiality in our society. Government confidentiality does not stand alone. It is closely related to the individual's need for privacy and the recognition we frequently give to the needs of organizations for a degree of secrecy about their affairs. It also exists alongside the American citizenry's need to know and government's own right to investigate and discover what it needs to know. Those rights are not always consistent or fully compatible. They are circumscribed where they conflict. Yet sometimes these diverse interests are interrelated. One reason for confidentiality, for example, is that some information secured by government if widely disseminated would violate the rights of individuals to privacy. Other reasons for confidentiality in government go to the effectiveness --and sometimes the very existence -- of important governmental activity. Finally we should recognize that if there is a need for confidentiality, it is not necessarily based upon the doctrine of separation of powers found in our Constitution.

That doctrine may condition or shape the exercise of confidentiality, but governments having no doctrine of separa-

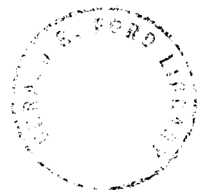
tion of powers have an essential need for confidentiality, and the doctrine does not diminish the need.

At the most general level of analysis, the question of confidentiality in government cannot be divorced from the broader question of confidentiality in the society as a whole. The recognition of a need for it reflects a basic truth about human beings, whether in the conduct of their private lives or in their service with the government. Throughout its history our society has recognized that privacy is an essential condition for the attainment of human dignity -- for the very development of the individuality we value -- and for the preservation of the social, economic, and political welfare of the individual. Indiscriminate exposure to the world injures irreparably the freedom and spontaneity of human thought and behavior and places both the person and property of the individual in jeopardy.

As a result, protections against unwarranted intrusion whether by the government or public have become an essential feature of our legal system. Testimonial privileges protect the confidentiality of the most intimate and sensitive human relationships -- between husband and wife, lawyer and client, doctor and patient, priest and penitent.

A number of the rights enumerated in the Constitution's first ten amendments are said to cast "penumbras" which overlap to produce the "right to privacy," a shadow that obscures from public view and intrusion certain aspects of human affairs. Several amendments -- most obviously the First and the Fourth -- mark off measures of confidentiality. The First Amendment -- guaranteeing freedom of expression -- shields the confidentiality of a person's thoughts and beliefs. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." In spirit this is an expression of the confidentiality of the person and his property and a recognition that a fundamental element of individuality would be sacrificed if all aspects of one's life were exposed to public view. In Katz v. United States the Court held that the Fourth Amendment guards not only the privacy of the person but also the confidentiality of his communications.

The need for confidentiality applies not only to individuals but also to groups, professions, and other social organizations. The Supreme Court in NAACP v. Alabama noted that public scrutiny of membership lists might well expose the members to "economic reprisal, loss of employment, threat



of physical coercion, and other manifestations of public hostility" and thereby condition their freedom of association upon their payment of an intolerable price. The point of the case is plain enough. Public disclosure would have destroyed the NAACP. Confidentiality was indispensable to its very existence. The claim of the news media for a privilege to protect the confidentiality of their sources of information is based on a belief that public disclosure of news sources, coupled with the embarrassment and reprisals that might ensue, could well deter informers from confiding in reporters. It would diminish the free flow of information. Another manifestation of the need for confidentiality of groups may be found in the law's protection of trade secrets. Again, businesses require some privacy as a prerequisite to economic survival.

Confidentiality is a prerequisite to the enjoyment of many freedoms we value most. The effective pursuit of social, economic, and political goals often demands privacy of thought, expression, and action. The legal rights created in recognition of that need undoubtedly infringe on the more generalized right of the society as a whole to know. But the absence of these legal rights would deprive our society of the quality we prize most highly.

The rationale for confidentiality does not disappear when applied to government. Indeed the Supreme Court recently noted that confidentiality at the highest level of government involves all the values normally deferred to in protecting the privacy of individuals and, in addition, "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making."

I doubt if we would wish the conferences of the United States Supreme Court to be conducted in public. We accept as fact that each Justice must be free to confer in confidence with his colleagues and with his law clerks if decisions are to be reached effectively and responsibly. And insofar as the product of the Supreme Court is primarily its words, the words it speaks publicly must be shaped and nurtured with care. We realize that some words are so important that their meaning should not be diluted by exposure of the often ambiguous process by which they were chosen.

For similar reasons, confidentiality is required in the decision-making processes with the Executive branch. As the Court recently stated, "Human experience teaches that

those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." */

Now I realize that linking law's protection of personal or organizational privacy with the government's need for confidentiality may seem disingenuous. It is of course true that a good deal of the law protecting individual and organizational privacy has been created to guard against the intrusion of government. But the origin of the threat to privacy should not obscure the value to be protected. It is the underlying wisdom about human nature found in the law of individual privacy that suggests the analogy. Much as we are used to regarding government as an automaton -- a faceless, mechanical creature -- government is composed of human beings acting in concert, and much of its effectiveness depends upon the candor, courage and compassion of those individual citizens who compose it. They are vulnerable to the same fears and doubts as individuals outside government. Undoubtedly we expect government officials to rise to the responsibilities they must meet. But this is just as true of the demands of private life.

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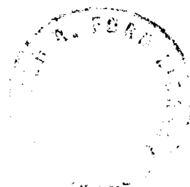
*/ U. S. v. Nixon (1974).

Moreover, the law's protection of privacy does not only go to individuals but also to organizations, some of which rightly regard themselves as important adjuncts and correctives to the government. Just as the ability of these organizations to function effectively has come within the law's concern, so must the ability of government to function.

Yet of course there is another side -- a limit to secrecy. As a society we are committed to the pursuit of truth and to the dissemination of information upon which judgments may be made. This commitment is embodied in the First Amendment to our Constitution. In a democracy, the guarantee of freedom of expression achieves special significance. The people are the rulers; they are in charge of their own destiny; government depends on the consent of the governed. If the people are to rule, then the people must have the right to discuss freely the issues relevant to the conduct of their government. As Professor Meiklejohn noted, the First Amendment is thus an integral part of the plan for intelligent self-government. */ But it is equally clear that it is not enough that the people be able to discuss these issues freely. They must also have access to the information

*/ Meiklejohn, Political Freedom (1960).



required to resolve those issues correctly. Thus, basic to the theory of democracy is the right of the people to know about the operation of their government. Our theory of government seeks an informed electorate. As James Madison wrote

> "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." */

So it has been urged that the news media should enjoy under the First Amendment an extraordinary right of access to information held by the government. Indeed, it cannot be doubted that our press has assumed a special role as an indispensable communicator of information vital to an informed citizenry. Investigative reporting, however annoying, has often served the public well by discovering governmental abuse and corruption.

The concern over the need of the general public for access to information about government has not gone unanswered. The Freedom of Information Act has conferred a visitatorial right on each citizen to inquire into the myriad workings

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*/ (To W. T. Barry, Aug. 4, 1822) 9 Writings of James Madison 103 (G. Hunt ed. 1910).

of government. It is not an exaggeration to observe that the broad provisions of the Act have engendered a general uncertainty as to whether disclosure of almost any government document might not be compelled. The administrative burdens of compliance with the Act are enormous. The demands for information have constantly increased. Between October 1, 1973 and December 1 of that year, for example, the Federal Bureau of Investigation received 64 requests for information under the Act, or 1 per work day. Throughout the whole of 1974, the Bureau received 447 requests. In the current year, the Bureau is now receiving an average of 88 to 92 requests per work day. From January 1 to March 31 of this year, the Bureau received 705 requests, including 483 in the month of March and 161 on March 31 alone. As of March 31, compliance with outstanding requests would require disclosure of more than 765,000 pages from Bureau files. This does not include a request for information relating to the Communist Party which itself would entail over 3,000,000 pages. At present, the information released by the federal government pursuant to the Act, especially when coupled with information released as a matter of course, make it difficult to maintain that the volume of facts and opinions

disclosed to the public about the conduct of government is not truly of leviathan proportions. Yet claims persist that even the Act does not extend far enough and that official secrecy still holds too much sway.

As is so often the case in human affairs, we are met with a conflict of values. A right of complete confidentiality in government could not only produce a dangerous public ignorance but also destroy the basic representative function of government. But a duty of complete disclosure would render impossible the effective operation of government. Some confidentiality is a matter of practical necessity. Moreover, neither the concept of democracy ncr the First Amendment confer on each citizen an unbridled power to demand access to all the information within the government's possession. The people's right to know cannot mean that every individual or interest group may compel disclosure of papers and effects of government officials whenever they bear on public business. Under our Constitution, the people are the sovereign but they do not govern by the random and self-selective interposition of private citizens. Rather, ours is a representative democracy, as in reality all democracies are, and our government is an expression of the collective will of the people. The concept of demo-

cracy and the principle of majority rule require a special role of the government in determining the public interest. The government must be accountable, so it must be given the means, including some confidentiality, to discharge its responsibilities.

For similar reasons, the special role of the news media cannot be understood to include a trespassorial easement over all that lies within the governmental realm. The Supreme Court addressed the point when it said:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies in executive session, and the meetings of private organizations. */

Just last term the Court reaffirmed this principle.

Demands by Congress for information from the Executive, while obviously raising problems of comity among the branches of government, do not change the need of all govern-

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*/ Branzburg v. Hayes, 408 U.S. 665, 684-685 (1972)

ments, however organized, for some confidentiality. Such demands, however, emphasize the point that the preservation of confidentiality where really necessary requires special modes of responsibility, as it indeed does in the executive branch. The risk that the confidentiality of information may be breached, even by inadvertence, is of course ever present. In this country, constitutional guarantees create special limitations on the ability of the Executive to prevent unauthorized disclosure of information. The Speech and Debate Clause, for example, confers on Members of Congress and their aides absolute immunity from civil or criminal liability, including questioning by a grand jury, for conduct related to their legislative functions. The _Gravel_ case, in particular, raises the question whether laws legitimately restricting the dissemination of classified or national defense information can provide any assurance of confidentiality. _New York Times Co._ v. _United States_, or the so-called _Pentagon Papers Case_, further demonstrates the inability of the government to prevent publication of classified documents. The apparent lesson to be drawn from such cases is that once information is improperly released, its publication to the world becomes a certainty.

If the dissemination to Congress of some information is to be limited, acquiescence in this responsibility and limitation becomes a duty which must be willingly recognized. The choice which must be made concerns the extent of dissemination, the likely travels of disclosure, and the consequences which may follow. Successful democracies achieve an accommodation among competing values.

No provision of the Constitution, of course, expressly accords to any branch the right to require information from another. Article II does state that the President "shall from time to time give to the Congress information of the State of the Union. . . ," but the decision as to what information to provide is left to the discretion of the President.

So far I have referred only to the free and candid discussion of policy matters that is promoted by the governmental confidentiality. There are, however, several additional contexts in which confidentiality is also required and where the primary effect of disclosure would be to prevent legitimate and important government activity from occurring altogether. Aspects of law enforcement, including the detection of crime and the preparation of criminal prosecutions, cannot be conducted wholly in public. Of

particular importance is the confidentiality of investigative files and reports. The rationale for confidentiality in this regard was stated by Attorney General Robert Jackson in 1941 in declining to release investigative reports of the Federal Bureau of Investigation demanded by a congressional committee. The Attorney General wrote:

> "[D]isclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. . . [M]uch of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarras informants -- sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency."

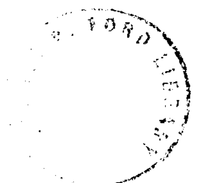
Disclosure could infringe on the privacy of those mentioned in the reports and might constitute "the grossest kind of injustice to innocent individuals." Mr. Jackson observed that "investigative reports include leads and suspicions, and sometimes even the statements of malicious and misinformed people," and that "a correction never catches up with our accusation."

Government must also have the ability to preserve the confidentiality of matters relating to the national

defense. Espionage statutes and national security classification procedures are examples of the acknowledged need to prevent unauthorized dissemination of sensitive information that could endanger the military preparedness of the nation. The Supreme Court addressed the issue in United States v. Reynolds, where disclosure of information possibly relating to military secrets was sought in the context of a civil suit. The Court stated:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

The value of safeguarding the confidentiality of national security intelligence activities has recently been made even more apparent with the publication of Fred Winterbotham's book, The Ultra Secret. Britain's success in learning the Germans' cipher in 1939 later proved to be an important factor in the Allies' victory in World War II. Could anyone claim that Britain should not have worked secretly in



peacetime to prepare itself in case of war? Or that once prepared, it should have disclosed that it had broken the code? To have disclosed that information would have destroyed its usefulness.

Closely related is the need for confidentiality in the area of foreign affairs. History is filled with instances where effective diplomacy demanded secrecy. In the first of his Fourteen Points, President Wilson exuberantly proclaimed his support for "Open Covenants of Peace openly arrived at." As Lord Devlin has recently pointed out, "What Wilson meant to say was that international agreements should be published; he did not mean that they should be negotiated in public." Under our Constitution, the President has special authority in foreign affairs. In numerous decisions, the Supreme Court has recognized the unique nature of the President's diplomatic role and its relationship to confidentiality. Thus, in _United States_ v. _Curtiss-Wright_, the Court stated that Congress must

> "Often accord to the President a degree of discretion and freedom from statutory restrictions that would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy

> in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty -- a refusal the wisdom of which has never since been doubted."

The inappropriateness of the Judicial branch requiring disclosure of foreign policy information was emphasized in C & S Airlines v. Waterman Steamship Corp., where the Court said:

> "The President, both as Commander-in-Chief, and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would not be tolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In United States v. Nixon, the Court strongly intimated that disclosure of information held by the Executive would not be required even in the context of a criminal trial if "diplomatic or sensitive national security secrets were involved," and expressly noted that "[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities."

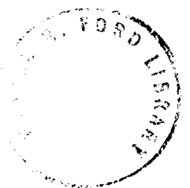
In the context of law enforcement, national security, and foreign policy the effect of disclosure would often be to frustrate completely the government's right to know. Government ignorance in these areas clearly and directly endangers what has been said to be the basic function of any government, the protection of the security of the individual and his property.

Even as to national security and foreign policy, of course, the tensions between confidentiality and disclosure continue to place stress on the fragile structure of our government. The desire of Congress to know more about the activities of government in these areas, for example, has recently produced a legislative proposal that would impose extraordinary burdens on the ability of the Executive to conduct electronic surveillance even where foreign powers are involved. It would require the government not only to procure a court order as a precondition to electronic surveillance, but also to report to both the Administrative Office of the United States Courts and to the Committee on the Judiciary of both the Senate and the House of Representatives detailed information, including a transcript of the proceedings in which the order was requested, the names of all parties and places involved in the intercepted com-

munications, the disposition of all records and logs of the interceptions, and the identity of and action taken by all individuals who had access to the interceptions.

The wisdom of this scheme is dubious at best, since it would represent a severe incursion on the Executive's ability both to guard against the intelligence activities of foreign powers and to obtain foreign intelligence information essential to the security of this nation. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress previously disclaimed any attempt to place limitations on the President's constitutional authority in this area. In addition, the Supreme Court has specifically left open the question whether and to what extent the Fourth Amendment, and specifically the warrant requirement, applies to electronic surveillance authorized by the President to obtain information relating to the national security and the activities of foreign powers. In <u>United States</u> v. <u>United States District Court</u>, while holding that the warrant requirement of the Fourth Amendment applied in the domestic security field, the Court expressly stated that "the instant case requires no judgment with respect to the activities of foreign powers, <u>within or without this country</u>." It is not without significance that the words of the Court focus on the subject matter of the surveillance, rather than on the physical location where it is conducted.

It is by no means clear that the proposed legislative measures are compelled by the Fourth Amendment. Indeed, the only two Courts of Appeals to address the issue, the Third Circuit and the Fifth Circuit, have held that the warrant requirement does not apply to national security cases involving foreign powers, and that the President has the authority to conduct such electronic surveillance as part of his military or commander-in-chief and diplomatic responsibilities. I think it is also helpful to recall the exact words of the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated." It is the "people" whose security is to be protected, not that of foreign powers. The Fourth Amendment was intended to protect the privacy, not of other nations, but of the "We, the People" of this nation. Nor is there a requirement of public disclosure inherent in the Fourth Amendment. It was not designed to compel exposure of the government, but to prevent the unreasonable exposure of the individual. I think all of us understand the impulse which leads to such proposals. It comes in part from a desire to protect citizens from harass-



ment and from unfair prosecutions, and personal abuses of this nature. But this is to misstate the purpose and need of such surveillance; and therefore to misconceive the remedy for possible abuses.

As history has shown, implicit in the concept of government, including democratic government, is the need and hence right to maintain the confidentiality of information. Confidentiality cannot be without limit, of course, and must be balanced against the right of all citizens to be informed about the conduct of their government. An exercise of discretion is clearly required. In each instance the respective interests must be assessed so that ultimately the public interest may be served.

In most governments, the question of which governmental body shall have the authority to determine the proper scope of the confidentiality interest poses no problem. Under our Constitution, however, the answer is complicated by the tripartite nature of the federal government and the doctrine of separation of powers. But history, I believe, has charted the course. For the most part, we have entrusted to each branch of government the decision as to whether, and under what circumstances, information properly within its possession should be disclosed to the

other branches and to the public. Competing claims among the branches for information have been resolved mainly by the forces of political persuasion and accommodation. We have placed our trust that each branch will exercise its right of confidentiality in a responsible fashion, with the people as the ultimate judge of their conduct.

The only exception to this rule was established by the Supreme Court last Term in United States v. Nixon. The Court held in effect that need for demonstrably relevant and material evidence in the context of a criminal trial prevailed over the need of the Executive for confidentiality in decision-making. The Court also held, however, that the Executive's right of confidentiality was founded in the Constitution and in the doctrine of separation of powers. Thus, the Court stated:

> "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution."
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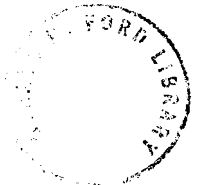
> * * *
>
> "Nowhere in the Constitution. . .is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."

The Court was careful to emphasize that the information sought was not claimed to involve military, diplomatic, or sensitive national security secrets, the disclosure of which the Court has repeatedly suggested could never be compelled and which as a matter of historical fact no court has ever compelled.

The practice as between the Executive and the Congress has been of a similar order. Each branch has traditionally accorded to the other that proper degree of deference and respect commanded by the doctrine of separation of powers and by the concomitant need for confidentiality in government. Attorney General Jackson, in declining to disclose investigative files to the congressional committee, observed that the precedents for such refusals extended to the very foundation of the nation and to the Administration of President Washington. He concluded:

> "This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine."



Congress, of course, has an oversight function under our Constitution. But that function has never been thought to include an absolute right of access to confidential information within the possession of the other branches. Its limits are necessarily defined by the legitimate need of the Judiciary and the Executive for confidentiality.

Comparative law may offer an insight in this regard. In resolving legal issues, we have often looked to Great Britain and the Parliament as helpful models. Many of our most cherished notions concerning justice and government have been shaped and influenced by the English tradition. The issue that presently confronts us is no exception. An examination of the British system reveals that little or no confidential information is ever disclosed by the Cabinet to parliamentary committees in the House of Commons. This is so despite the fact that maintaining the confidentiality of such information would be far easier than in this country. Parliamentary committees, for example, have far fewer members and staff than their American counterparts, thus appreciably minimizing the dangers of unauthorized disclosure. Moreover, the sweeping criminal provisions of the British Official Secrets Act, coupled with the absence of a First Amendment, deter unauthorized disclosure to a far greater extent than would be possible under our system.

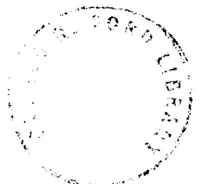
More generally, having surveyed the democracies of Western Europe, it may be said without equivocation that it is not the practice of governments to disclose sensitive, national security, or foreign policy information to parliamentary committees. Furthermore, congressional committees in this country, through the cooperation and acquiescence of the Executive, receive far more such information than do legislative counterparts in any other country.

The more general question of disclosure by government to the public may also be illuminated by a comparison between the American system and the Swedish system. Under the Freedom of the Press Act, which is a part of its Constitution, Sweden is committed to the "principle of publicity," which states that both Swedish citizens and aliens alike shall have free access to all official documents. The extent of disclosure of official documents in Sweden is exceeded by few, if any, other governments in Western Europe. Sweden's principle of publicity is, however, subject to numerous exceptions specified in its Secrecy Act. These exceptions not only parallel but in many instances exceed the exceptions specified in our own Freedom of Information Act. It is also worth noting that under the

Swedish Act the unauthorized release of a document excepted from disclosure subjects a civil servant to criminal liability. By contrast, under the Freedom of Information Act, it is the arbitrary failure to release a document required to be disclosed that subjects a civil servant to disciplinary action.

Again, when compared with the democratic governments in Western Europe, it is fair to conclude that there is by far a greater degree of public disclosure of information by the United States Government than by any other government. As Professor Gerhard Casper has recently written, "From the vantage point of comparative politics, I think, there can be little doubt that governmental Geheimniskrämerei (petty secretiveness) looms less large in the United States than anywhere else."

Measured against any government, past or present, ours is an open society. But as in any society conflicts among values and ideals persist, demanding continual reassessment and reflection. The problem which I have discussed this evening is assuredly one of the most important of these conflicts. It touches our most deeply-felt democratic ideals and the very security of our nation. I am reminded of the



title which E. M. Forster gave to a collection of his essays, Two Cheers for Democracy. The third cheer, he suggested, must still be earned. I do not share that hesitancy. The structure established by our Constitution itself represents a compromise and a genius for government.

What I have said is not intended to minimize in any way the need for candor between the government and the people to whom it is responsible. Indeed this talk is an exercise in candor -- an attempt to confront issues directly because the issues are there. The issues will not go away. The American public is misused if it does not understand that important values are involved, that these values must be balanced, and that among these values are confidentiality, the right of the people to know, and the right of the government to obtain important information. No trick phrases will solve our problem. Reactions built upon crises in the immediate past are suspect. Rather we must reach back into the sources of our government, and to our own history of endeavor and accommodation, where wisdom has often been exercised to make the difficult choices.

As these choices are made I trust it is the bar's responsibility to enlighten them with understanding, to help

all see them in perspective because that is essential for the future of our country and for the protection and freedom of our citizens.

DOJ-1975-04

Dec. 1

THE WHITE HOUSE
WASHINGTON

Mr. Marsh --

I gave a copy of the attached speech to Mike to look over in your absence.

The AG's office wants comments back asap!!

I don't see any problems! M.

donna

Office of the Attorney General
Washington, D.C. 20530

December 1, 1975

MEMORANDUM FOR: Robert Bork

Rex E. Lee

John O. Marsh, Jr.

Philip W. Buchen

FROM: Jack Fuller

Here is a copy of a speech the Attorney General intends to deliver December 2 at Columbia Law School. Is there anything in it that seems to you problematic?

I have chosen for the Sulzbacher Lecture in the bicentennial year to speak on some aspects of the separation of powers. It is a topic that has been of major importance since the birth of our republic. Its significance as a special feature of our system of government continues to be recognized. In an essay written not long ago and recently reprinted, Scott Buchanan, searching for the essential spirit of our primary document, wrote, "All constitutions break down the whole governmental institution into parts with specific limited powers, but the Constitution of the United States is well known for its unusually drastic separation of powers."

As we all know, in recent years there has been great controversy about the respective powers, limitations and responsibilities of the executive, legislative and judicial branches. During that period the Presidency was described by some writers as having become imperial. It appeared we might be developing an imperial judiciary as well. The idea of an imperial Congress is not unknown. The many-sided debate has been heated. This has emphasized the element of institutional conflict in the American constitutional system.

It is a recurring debate in America. It has often been the legacy of war and national scandal. In recent years it has taken concrete form in controversies about the power of the executive to withhold the expenditure of funds appropriated by the legislature; the power of the legislature to limit the executive's authority to use military force to protect the nation against foreign threats; the power of the executive to withhold

information from the legislature and the judiciary and the power of the judiciary to set limits on that privilege; the power of the legislature to publish documents taken from the executive.

The constitutional doctrine of separation of power was invoked on all sides of these issues. Some have thought that the system has gone out of balance, that the imbalance can best be overcome by a reassertion of power by the Congress, which as the most democratic branch of government,(or the branch mentioned first in the Constitution) should have primacy. Congressional supremacy is said to be at the heart of the American tradition which, after all, began in rebellion against prerogative and government without representation. We have had recent experience with the abuse of executive power. We have also seen the rise of modern totalitarian states and been reminded of the danger of the concentration of power in a single individual. But history has been mixed. Often, and for considerable periods of time, the concern in the United States has been with the weakness of the executive, not its strength. If we have forgotten this, it is only because memory is very short. There have been historical moments, some not so long ago, in which the great concern was about abuse of power by legislatures and their committees. Some have warned that Congressional resurgence threatens to be too great in reaction to the perceived lessons of recent history.

It may be useful to approach an understanding of the doctrine of separation of powers by looking to the origin of that idea in the interaction of intellectual theory and practical

problems during the American revolutionary era. This reference to history will not resolve all the ambiguities of the doctrine of separation of powers. Perhaps the ambiguities ought not be resolved. Nor will a knowledge of the original understanding solve all our contemporary controversies. It may be that the expansion of governmental activity into wide areas of the nation's life and the corresponding growth of the federal bureacracy has caused an irreversible change in our constitutional system that requires new modes of understanding. One example of the change is the movement for congressional review of administrative action which is the product of expansive grants of authority by Congress to the executive at a time when judicially defined limitations on delegation have fallen. This, of course, is an old problem. The proposal for congressional review of administrative action results in a new and ironic reversal of roles--the executive making laws and legislature wielding, in effect, the veto, and often a one-house veto at that. We should also keep in mind that the disease of bureacracy is as catching for the legislature as for any other branch.

History does not suggest complete answers to the questions we now ask ourselves. But in times of uncertainty when there are urgent calls for change, history may provide an understanding of the values thought to be served and the practical and salutary consequences thought to result from the separation of powers principle. It can help us calculate the consequences of proposed realignment of government power and what may be lost

in the process.

The political theory developing in America through the period in which the Constitution was written was influenced by many sources. Writers of the era drew heavily upon classical accounts of the growth and decline of governments; Gibbon's first volume of The Decline and Fall of the Roman Empire was published, after all, in 1776. They also felt the fresh breath of new ideas. They read Voltaire and Rousseau. Adam Smith's Wealth of Nations was published in 1776, emphasizing the economic vitality of separating functions. The predominant experience of the American makers of government, however, was with the development of the British Constitution and the relationship of the British crown and parliament.

The political theory of the revolution was founded on a conception of the English experience advanced primarily by the Radical Whigs. The central metaphor was that a compact existed between the rulers and the ruled by which the governors were authorized to act only so long as they did so in the interest of the nation as a whole. Liberty was conceived in terms of the right of the people collectively to act as a check and counterpoise to the actions of their rulers. The English Revolution of 1688 was seen as the result of the King's violation of the compact. After 1688 the House of Commons, as the institutional expression of one part of the nation, could limit the prerogative of the House of Lords, and more importantly, the King.

Yet before the American Revolution, the functioning of the British system, if not its elemental form, was being ques-

tioned. There was a fear that the colonies under British rule--and, indeed, Britain itself--were suffering moral decay of the sort that beset the republics of antiquity before their fall. There was also a characteristically ambivalent Calvinist notion that the colonists were chosen for unique greatness but that they had to struggle to attain it. The King and his officers were thought to have abused their power. Parliament offered the colonies no protection. In the Declaration of Independence and its bill of particulars against George III the colonists repeated the theory of 1688. The compact has again been broken.

Yet despite the complaints against the King and the scourge of the idea of hereditary monarchy in the writings of men such as Tom Paine, the ideology of the American Revolution was surprisingly moderate. As Gordon Wood has written, the colonists "revolted not against the English constitution but on behalf of it."

This helps explain the influence in 1776 of Montesquieu, whose description of the British arrangement of government institutions, though it may be of questionable accuracy in its primary intention was correct. Montesquieu emphasized the idea of separation of powers. "When the legislative and executive powers are united in the same person, "Montesquieu wrote in Spirit of the Laws, "there can be no liberty." The doctrine of separation of powers took as its basis a particular view of men and power. It assumed that power corrupts. Its proponents, as Justice Frankfurter later wrote, "had no illusion that our

people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power." The doctrine was based upon the skeptical idea that only the division of power among three government institutions--executive, legislative, and judicial--could counteract the inevitable tendency of concentrated authority to overreach and threaten liberty.

But in 1776 the complaint was with the Crown. In the colonies the King, the executive power, had acted unchecked, often with the Parliament's -- but not the colonists' -- consent. Though the doctrine of separation of powers played a great role in the debate in 1776, it was seen as a means of controlling executive power, and its skeptical understanding of man and government and power did not wholly square with the buoyant optimism of the times, just as not so long ago the separation of powers seemed a frustrating barrier to the possible accomplishments which might follow from an assumed unlimited abundance of resources and to that creativity which could solve every problem. After 1776, as the new American states began to replace their colonial charters with new constitutions, strong language favoring separation of powers was a regular feature. As Gordon Wood has written, however, there was "a great discrepancy between the affirmations of the need to separate the several governmental departments and the actual political practice the state governments followed. It seems, as historians have noted, that Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of

departmental functions." In 1776 separation of powers was a slogan; it meant that power was to be separated from the executive and given to legislatures.

After the Revolution was won the optimism faded. The experience of the new American states with life under the Articles of Confederation and under the legislatures set up and made all-powerful in 1776 convinced George Washington that "We have, probably, had too good an opinion of human nature in forming our confederation."

The legislatures had assumed great power, and their rule--for a variety of reasons--was unstable. The supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, suspended the ordinary means of collecting debts. They changed the law with great frequency. One New Englander complained: "The revised laws have been altered--realtered--made better--made worse; and kept in such a fluctuating position, that persons in civil commission scarce know what is law."

Jefferson, in his Notes on the State of Virginia, wrote this stinging attack upon the interregnum period legislatures:

> All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . And little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for. . ."

The work of the Constitutional Convention of 1787 was in this respect a reaction to the unchecked power of the legislatures. In the later rewriting of history, the abuses to be corrected were sometimes seen solely in the context of federalism. But much more was involved. The doctrine of separation of powers, which had become a slogan for legislative supremacy in 1776, in 1787 was reinvigorated as a criticism of legislative power and was central to the theory of the new government. As Gordon Wood has written, "Tyranny was now seen as the abuse of power by any branch of government, even, and for some especially, by the traditional representatives of the people." Madison wrote: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands... may justly be pronounced the very definition of tyranny." The liberty that was now emphasized was, as Wood has described, "the protection of individual rights against all governmental encroachments, particularly by the legislature, the body which the Whigs had traditionally cherished as the people's exclusive repository of their public liberty..." The structure of government had to be such that no single institution could exert all power. Against the "enterprising ambition" of legislative power, wrote Madison in Federalist 48, "which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength," the people should "indulge all their jealousy and exhaust all their precautions." Hamilton in Federalist 71 warned:

> The representatives of the people in a popular assembly seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or the judiciary were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.

Hamiltons's words and the Federalist Papers as a whole express two related aspects of the new American conception of politics that emerged from the experiences of the interregnum period. First, that the people and not the institutions of government are sovereign. The Constitution after all begins with "We, the people." Second, that no institution of government is, or should be taken to be, the embodiment of society expressing the general will of the people. In the process of this fundamental shift away from the Whig theory and its conception of the British Constitution, the doctrine of separation of powers took on a new meaning. Each branch of government served the sovereign people. No branch could correctly claim to be the sole representative of the people. Representation was to be of different kinds according to the functions to be performed. Each branch derived its powers from the people, and its powers were subject to the limitations imposed by the constitutional grant of authority. Government power was divided among the branches, and a system of interdependence was erected by which

each branch had certain limited powers to control the excesses of other branches. In this way it was hoped that the public interest could be achieved and, at the same time liberty protected from tryanny. As Buchanan has written, "'We the People' are the authority that propagates the Constitution, a master law which in turn establishes other authorities or offices which in turn propagate other laws...[T]he Constitution distinguishes three great offices, powers or functions: the legislative, the executive, and the judiciary; and to them are assigned respectively three uses of practical reason: the making of laws, the executing or administration of laws, and the adjudication of laws. Furthermore, the Constitution not only divides these functions but also separates them by making the institutions equal and independent." The doctrine of federalism was based on a similar conception. The national government was made supreme, but only in a limited compass defined by limited powers. Thus the sovereign people and the states retained all powers not delegated to the national government.

The compact between the rulers and the ruled had changed in its fundamental terms. Rather than a general agreement to be governed for such time as the rulers acted in the interest of society as a whole, the new compact was seen to be something closer to a limited agency arrangement in which each branch of government was authorized to act in unique ways in limited areas. One must be cautious, as Alexander Bickel has taught, about using

such contractual metaphors lest they make the institutions seem too sharply defined in their powers. The provisions in the Constitution were, rather, the expression of compromises that mirror the sort of adaptation and accommodation envisioned by the process the Constitution set into motion. But there is no doubt that the separation of powers was consciously intended as a confrontation with problems to be solved, and in its new form an invention for the future.

The Congress was delegated enumerated legislative power as was "necessary and proper" to the effectuation of the enumerated powers. The executive was to be made more energetic than it had been in the interregnum state constitutions. Whether executive power was meant to be limited by enumeration quickly became a matter of controversy between Hamilton and Madison once the Constitution was ratified. Some years ago Professor Crosskey argued that the enumerated powers of the Congress were not so much a limitation on legislative power as a way of clearly stating the power of Congress so that the executive could not so easily encroach upon it. But Crosskey's concern was an opposition to states' rights. And his argument was that the ennumeration did not limit national power. There was no question, however, that the Constitution meant to expand the power of the executive. "Energy in the Executive," wrote Hamilton in Federalist 70, "is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration

of the laws; to the protection of property against those irregular and highhanded combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy." Jay in Federalist 64 wrote that the President must be unitary and protected in the conduct of foreign affairs in part because those who would supply useful intelligence "would rely on the secrecy of the President" but would not confide "in that of the Senate and still less in that of a large popular Assembly."

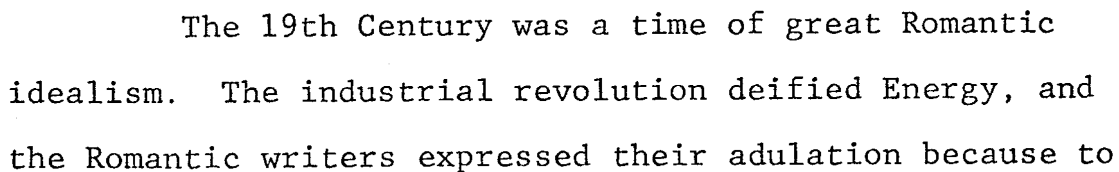
At the same time the judiciary, which had been subject to significant encroachments by the revolutionary period legislatures, began to be seen as another important bulwark against tyranny. Though distrusted before the revolution as an arbitrary mechanism of the Crown, the courts rose dramatically in importance after the experiences of the interregnum period. But the power courts were to assume was not that "energetic" power Hamilton asserted for the executive. It was a more passiver power, not only to articulate and apply the principles of law with justice in individual cases but also to repel attacks, by the legislature or executive, on basic rights. It was a vital, but limited power. The view of the Courts contained, I believe, a good deal of the continuing English view, articulated in our time by Lord Devlin, that "it would not be good for judges to act executively; it is better to expect executives to act judicially." James Wilson who in the constitutional convention debates favored judicial power to nullify unconstitutional statutes also warned against conferring "upon the judicial department a power superior, in its general nature to that of the legislature."

The constitutional system contemplated the possibility of disagreement among the branches, but it defined the channels through which those conflicts were to be resolved. Indeed, Madison was obliged to defend the draft constitution against the argument that the three branches had not been made separate enough. Appealing to Montesquieu, Madison wrote, "His meaning . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, fundamental principles of a free constitution are subverted." Acting within its sphere, within the constitutional limits of its power and within the bounds placed by the institutional responsibilities of the other branches, each branch was to be supreme, subject only--ultimately, indirectly and in various way--to the decisions of the people. Each branch had a degree of independence so that its activities would not be entirely taken over by another, but they were tied together with a degree of interdependence as well so that, in Madison's words, "ambition (could) be made to counteract ambition."

The system also contemplated responsibility and accommodation, for though the branches were separate, they were part of one government. As Justice Jackson wrote, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

The exhilaration of the Revolution and the despair of the misgovernment that followed it, the optimistic political philosophies of Locke and Rousseau and the pessimistic views of Montesquieu and Hobbes, these came together in the creation of the American republic. Michael Kammen has written: "What would eventually emerge from these tensions between liberty and authority, between society and its instruments of government? For one thing, a political style, a way of doing and viewing public affairs in which several sorts of biformities would be prevalent: pragmatic idealism, conservative liberalism, orderly violence, and moderate rebellion." I would add to that list of paradoxes one more--skeptical optimism. It was this vision of man and government that formed the basis for the separation of powers doctrine.

At various times in the 19th century and after the idea of the potential excellence of human nature and the trustworthiness of unchecked popular will reasserted itself. As Martin Diamond wrote recently in Public Affairs, "In the 19th Century, there were many who mocked Montesquieu for his fear of political power and for his cautious institutional strategies . . . But let those now mock who read the 20th Century as warranting credence in such a conception of human nature, as entitling men to adventures in unrestrained power."



The 19th Century was a time of great Romantic idealism. The industrial revolution deified Energy, and the Romantic writers expressed their adulation because to

them men and nature shared in the abundant energy and grace of life. The 20th Century has slowly brought changes in this view, though in some respects it lingers. In literature the glorification of human energy and spirit is tempered by metaphors of entropy and humbling intellectual paradoxes. If the emphasis is still upon the self, that self shares the potential cruelty of nature, its ineluctable process of running down, and its fundamental impenetrability to observation. The skeptical vision embodied in the separation of powers doctrine again has its intellectual resonance.

But in the 19th Century, particularly following the Civil War, there was a reemergence of the Whig theory that the legislature is the best expression of the people's will. Congress gained ascendency. During that period Woodrow Wilson finished his essay, Congressional Government. It is an important work to study today since it challenges the American system of separation of powers. To Wilson the British parliamentary form of government seemed superior. He favored that system because to Wilson legislative ascendency and executive decline under our form of government seemed inevitable. The parliamentary system made the legislature responsible and effective and in that context provided for executive leadership. "The noble charter of fundamental law given us by the convention of 1787," he wrote, "is still our Constitution, but it is now our form of government rather in name than in reality, the form of government being one of nicely adjusted, dual balances, while the actual form of our

present government is simply a scheme of congressional supremacy ... All niceties of constitutional restruction, and even many broad principles of constitutional limitation have been over-riden, and a thoroughly organized system of congressional control set up which gives a very rude negative to some theories of balance and some schemes for distributed powers . . ." To Wilson in 1885, the presidency had been incurably weakened. "That high office has fallen from its just estate of dignity," he wrote, "because its power has waned; and its power has waned because the power of Congress has become pre-dominant." Though some years later he saw a greater hope in the reassertion of an energetic executive, in 1885 the only remedy for the feelings of congressional supremacy seemed a fundamental change in the system. Referring to Wilson's warnings about congressional power in the American system, Walter Lippman in an edition of the book published in the 1960's wrote, "(T)he morbid symptoms which he identified are still clearly recognizable when the disease recurs and there is a relapse into Congressional supremacy. This was a good book to have read at the end of the Truman and at the beginning of the Eisenhower Administrations." It is also excellent reading today, not the least because of Wilson's observations that "if there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, somebody _must be trusted_, in order that when things go wrong it may be quite plain who should be punished . . . _Power and strict accountability for its use_ are the

essential constituents of good government."

President Taft in a 1912 message to Congress recommended that members of the cabinet be given seats in each House of Congress. "There has been much lost in the machinery" Taft wrote, "due to the lack of cooperation and interchange of views face to face between the representatives of the executive and the members of the two legislative branches of the government. It was never intended that they should be separated in the sense of not being in effective touch and relationship to each other." This idea was, of course, never accepted. Had it been, the process of interchange between executive and legislature would have been much different than the model of congressional inquiry by testimony to committees as it works today. Taft envisioned a new system just as Wilson did in his appeal to the Parliamentary system.

The Wilson text which arose out of a concern for the weakness of executive power is often turned to these days because of a yearning for the perceived legislative power of the British system. Wilson in 1885 wrote that legislative inquiry into the administration of government is even more important than lawmaking. The answer to executive weakness was to be a form of parliamentary executive government. Wilson's model of the process of legislative inquiry was the question period in Parliament. "No cross-examination is more searching than that to which a minister of the Crown is subjected by the all-curious Commons," Wilson wrote. This gives a clue to what sort of questioning he thought appropriate. The question period in

Parliament is not what it is often thought to be. It is a strictly disciplined affair. Precedent has been established as to the inadmissibility of a wide variety of questions including those seeking an expression of opinion, or information about an issue pending in court, or proceedings of the Cabinet or Cabinet committee, or information about past history for purpose of argument. In addition the Speaker has always held that a Minister has no obligation to answer a question--though if he fails to answer he must suffer the political consequences. A Minister may always decline to answer either because the matter under inquiry is not within his responsibility or, more importantly, because to give the information requested would be contrary to the public interest. The reason for such wide discretion for the Ministers seems clear to British writers, though it might shock those who would substitute parliamentary forms for our own because of distrust of the wisdom of separation of powers. "Had the Speaker ruled otherwise," wrote two approving contemporary students of the question period, "he would have had to devise some form of disciplinary action suitable for extracting an answer out of a stubborn Minister."

While it is true that the Ministers in Britain are directly accountable to the legislators--and this might make it seem a commodious sytem to those who prefer legislative supremacy--the British system also allows the Prime Minister to choose whatever moment he may for a national election of legislators. The relationship between executive and legislative is neither more relaxed nor one-sided in Britain than it is in our system. The Cabinet is directly accountable to Parliament,

but Parliament sits only at the indulgence of the Cabinet.

That is not our system, and I doubt whether anyone seriously thinks of altering our Constitution so drastically as to make it our system. But one cannot have that kind of parliamentary system without such drastic changes. The features of parliamentary government that may seem most appealing to the proponents of legislative supremacy upon closer examination turn out to be imaginary--and this may be its strength--because the British system, as it was in Montesquieu's description, is also in fact a system of separated powers.

Nevertheless, the thought in quite recent time has been that the congressional government Wilson wrote about gave way to an equally problematical presidential government. One of the reasons given for this change was that the complexity and immediacy of the problems of the modern world required a strong President, though Jefferson saw the same need at the time of the Louisiana Purchase. He called that transaction, "an act beyond the Constitution" but said it had been done "in seizing the fugitive occurrence which so advances the good of (the) country . . ." It was a necessary act, as he saw it not only beyond executive but also beyond legislative authority. Whether the reasons for Presidential power be new or old, there has been a feeling that both the executive and the judiciary have assumed functions that properly belong to the legislature.

The encroachment of one branch of our federal government upon the functions of another is not a new phenomenon.

The tendency of a governmental department to augment its own powers may be thought to be an inherent tendency of government generally, although its consequences are all the more serious in a system whose very genius is a tripartite separation of governing powers. The instances of such infringement throughout our history are reflected in the case law. In re Debs, in which the Supreme Court upheld an injunction issued without express statutory authority, might be viewed as a case in which both the Court and the Executive usurped the legislative function of Congress. The Steel Seizure Case, in which President Truman without statutory authority commandeered the nation's steel mills, is perhaps the most famous example of the Executive arrogating to itself the law-making power of Congress. Ex Parte Milligan represented the Executive's attempt during the Civil War to exercise the judicial power to try criminal cases. The Supreme Court, too, has not been entirely immune to the temptation to stray into the province of the other branches.

The necessity of protecting each branch against encroachment by the others has not gone unanswered. The Speech and Debate Clause of the Constitution has been given a broad construction to insulate the Congress against unwarranted interference in the performance of its duties. The Gravel case held that the Clause confers absolute immunity on Congressmen and their aides for acts performed in furtherance of their legislative functions. The protected act in that case involved Senator Gravel's decision to read classified documents, known popularly as the Pentagon Papers, into the public record at

a meeting of a Congressional subcommittee. The Eastland case, decided last Term, held that the Speech and Debate Clause prevented the issuance of an injunction against a Congressional committee, its members and staff, so long as the committee is acting broadly within its "legitimate legislative sphere." The committee in that case had issued a subpoena against a bank to obtain the records of a dissident organization as part of its study of the administration and enforcement of the Internal Security Act of 1950. The Eastland case states a reaffirmation of the separation of powers. Instead it says, quoting from United States v. Johnson, that the Speech and Debate Clause "serves the ...function of re-inforcing the separation of powers so deliberately established by the Founders."

But the problems are not simple. Congress has on occasion intruded upon the functions of the other branches. United States v. Klein involved an attempt by Congress to limit the effect of the President's pardon power by depriving federal courts of jurisdiction to enforce certain indemnification claims. The Supreme Court held that the statute violated separation of powers since it invaded the judicial province by "prescrib[ing] rules of decision" in pending cases and infringed upon the power of the Executive by "impairing the effect of a pardon."

Congressional investigations have also tended to assume a purpose divorced from legitimate legislative functions.

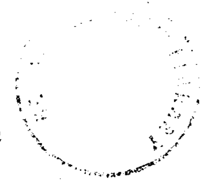
In 1881 in Kilbourn v. Thompson the Court severely curbed Congress' contempt power and warned that Congress had "no general power of making inquiry into the private affairs of the citizen." The period after World War II, as perhaps is the case after most wars, saw an exercise of the legislature's investigatory power far broader than in any previous period, and, eventually, a recognition that that power could be abused to impose sanctions on individual conduct and beliefs, without the vital protections to personal liberty and privacy that law and the judicial process affords, and with an accompanying disruption of governmental functions. In some instances, the Court identified the abuse, and pronounced appropriate limits on the power. In Watkins v. United States, it reversed a conviction resulting from a witness' refusal to answer certain questions before a House committee. The Court reasoned that the conviction was improper since the ambiguous purpose of the committee's inquiry precluded any determination whether the questions were pertinent to the committee's proper legislative tasks. The Court cautioned that although the power to conduct investigations is inherent in the legislative power, "there is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress. . . . Nor is Congress a law enforcement or trial agency. These are functions of the executive and judicial departments."

On occasion, Congress has also used its legislative power directly to invade the powers of other branches. In the Lovett case the Court held that a statute forbidding payment of compensation to three named government employees was unconstitutional, since it imposed punishment without a judicial trial and thus constituted a "Bill of Attainder." United States v. Brown presented a statute making it a crime for a member of the Communist Party to be an official or employee of a labor union. The court held this a bill of attainder. The constitutional prohibition against such bills of attainder, the Court observed, was an integral part of the separation of powers. The prohibition "reflected the Framers' belief that the Legislative Branch is not so well suited as politically indepedent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons."

The Supreme Court has also attempted to protect the Executive against improper Congressional intrustion on its prerogatives. It is interesting to note that Morrison in commenting on Washington's first administration writes that "Heads of departments had to be appointed by the President, with the consent of the Senate, but Congress, in organizing executive departments, might have made their heads responsible to and removable by itself. Instead it made the secretaries of state and war responsible to the President alone,and subject to his direction within their legal competence." Myers v. United States

upheld the power of the President to remove executive officers appointed with the advice and consent of the Senate. In declaring unconstitutional a statute seeking to make removal dependent upon the consent of the Senate, the Court stated that the executive power vested in the President under Article II must include the unlimited discretion to remove subordinates whose performance the President regards, for whatever reason, as unsatisfactory. The statute attempting to limit that discretion, the Court noted, violated the principle of separation of powers and would have given Congress unwarranted authority "to vary fundamentally the operation of the great independent branch of government and thus most seriously to weaken it." The Court also rejected as a "fundamental misconception" the idea that Congress is the only defender of the people in the government. "The President," the Court observed, "is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature. . ."

These cases occurred because on occasion, each branch has abused the power entrusted to it and in some instances invaded the powers that properly belong to the others. In some instances the Court has been able and willing to provide remedies. In other instances, as in Debs, the



Court has failed to perceive the problem or has participated in creating it.

In periods of reaction to past events--and we are in such a period--it is more than ever necessary to take time to contemplate the fundamental guidance which a living constitution is intended to provide. The essence of the separation of powers concept formulated by the Founders from the political experience and thought of the revolutionary era is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people. Each branch, in its own way, is the people's agent, its fiduciary for certain purposes. Two points, I think, follow from this conception and, in the course of our history, have been perceived as following from it. First, the question of whether power has been rightly

exercised, or exercised within the limits the Constitution defines, is not always a problem of separation of powers. Some powers have been confided to no branch. Abuse of power may mean that the limits should be enforced on all branches of government not that the power is better conferred on and exercised by a branch other than that which has abused it. A corollary of this is that a weakness in one branch of the government is not always best corrected by a weakening of another branch.

Second, perhaps what is most remarkable about the various cases that to some extent define the allocation of power among the branches is that their number is relatively few. That fact is a testament to the respect that each branch generally has maintained for the powers and responsibilities of the others, and to an understanding, sometimes only intuitive and often challenged, that each branch, within its sphere, represents and serves the people's interest. As Scott Buchanan has written, in our constitutional system, each branch ultimately relies for its authority on its power to persuade the people. In this sense, each branch is democratic, as each is specially representative, whatever its manner of selection. Fiduciaries do not meet their obligations by arrogating to themselves the distinct duties of their master's other agents. Inevitably in a system of divided powers there are points where responsibility conflicts, where legitimate interests and demands appear on either side. In such instances, accommodation

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and compromise reflecting the exigencies of the matter at hand has been not only possible but a felt necessity. The essence of compromise is that there is no surrender of principle or power on either side, but there is a respect for the responsibility of others and recognition of the need for flexibility and reconciliation of competing interests.

Related to this general respect and the felt need for accommodation has been a part of the role of the courts. Recognizing the limits of their own proper functions and institutional competence, the courts had long employed a series of devices that had, as their ultimate purpose, avoiding interference with the powers and functions of the other branches. These restrictions, founded in the case or controversy requirement of Article III or frankly in prudential considerations that must govern the exercise of judicial power, defined and narrowed the occasions in which judicial resolutuion may be sought. But they recognized, too, that certain questions may be better left without resolution in law, and allowed to work themselves out in the political process and in the *ad hoc* process of accommodation.

To some extent, and perhaps to a more substantial extent than had been thought, these barriers to judicial resolution remain. In *United States* v. *Richardson*, the Supreme Court held that the plaintiff, as a taxpayer, lacked standing to obtain an injunction requiring, under the Constitution's Statement and Account Clause, a published

accounting of Central Intelligence Agency expenditures. Justice Powell, in his concurring opinion, wrote that: "Relaxation of standing requirements is directly related to the expansion of judicial power....(A)llowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level....

There is a discomfort in uncertainty. There is, on the part of some, a longing for simple, straight answers about the allocation of powers among the branches and the responsibilities of each to the other. There is a corresponding tendency to assume that the courts can provide the answers by deduction from constitutional principles, and properly act as umpire between the other branches. In some instances, as in the Steel Seizure case, this may be the inevitable consequence of the courts' performance of their duties properly where private interests are immediately affected. But there are other instances in which the dispute may be purely one between the institutional interests of the Congress and the Executive. The intervention of the Courts in such matters may be furthered if courts recognize standing in members of Congress to challenge the legality of Executive actions. Some courts have done so, apparently on the ground that the Executive's action diminishes congressional power and thus the power of each member.

Resolution of such disputes provides a kind of certainty. But this is an area of great difficulty, requiring caution. There is no doubt that judicial intervention is sometimes essential. The danger is that in attempting to provide final answers not only will the courts inevitably alter the balance between Congress and the Executive in the context of a particular situation, but the very nature of this kind of determination, when the interactions of a government of checks and balances are involved, may then require continuing judicial supervision. This would constitute a removal to the courts of judgments of responsibility and discretion, contrary to the fundamental conception of different functions to be differently performed by the divisions of government. It would significantly alter the balance between the courts and the other branches. The consequence may well be a weakening rather than a strengthening of accountability. We are sometimes said to be a litigiousness people, but the Constitution, while it establishes a rule of law, was not intended to create a government by litigation. A government by representation through different branches, and with interaction and discussion, would be much nearer the mark.

The current controversies concerning the demands of one branch of the government for information in the hands of another reflect some of the complexities. Congress has in some instances through its own legislation placed statutory restrictions on the disclosure of information in the Executive's possession. Some of these statutes, no doubt, would never

have been enacted without such restrictions. When the Executive acts under such statutes, his action has nothing to do with Executive Privilege. It has to do with the good faith interpretation of a statute. Some of these statutes by their own terms represent a government's pledge of confidentiality to its citizens. Congress which passed the statute took part in making that pledge. The construction of these statutes, if the appropriate forum can be found, can be regarded as a standard judicial task, identical to the kinds of decisions which courts make frequently. The issue raised separation of powers problems only to the extent that it concerns the ability of the legislature, having enacted a statute, to later place its own interpretation by committee action without later enactment, on the meaning to be given to the words used. There have, of course, been many disputes between Congress and the Courts on similar issues. To be sure some interpretations of such statutes lately advanced do concern most directly the power of the Congress to the point of asserting that Congress may not constitutionally grant a confidentiality against itself, or that such statutes, unless they mention Congress specifically, do not mean what they appear to say. In the long run a dispute of this latter nature might best be solved by Congress establishing a commission to review such statutes, of which there are many, involving citizens' claims to privacy, and then through revision and reenactment making explicit the limitation on the apparent confidentiality conferred.

In other quite different instances, the demand of a legislative committee for documents or testimony, can raise the issue of Executive Privilege as part of the doctrine of separation of powers. Even in such instances, however, it is important to stress that the requirement for some confidentiality is not unique to any one branch of the government. It is a need that Congress and the Judiciary as well as the Executive have asserted and attempted to meet. It is a need which all advanced countries have recognized, whether or not they have a doctrine of separation of powers. Nor is it, of course, solely a governmental necessity. As the Supreme Court acknowledged in NAACP v. Alabama, the invasion of privacy by investigation and publication can pose grave harm, and, indeed, can at times be employed to deter the exercise of fundamental rights.

One primary area of responsibility has been the confidentiality of the decision-making process. The Constitution provides a structure where some decisions are normally made in public; the founders were quite explicit that others should not be. There is a theory in science that one can never know with certainty what one is observing since the process necessary for observation can change what is observed. Scientists among you will know, far better than I, whether the analogy is apt. But the principle is suggestive. As the Supreme Court recently said: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the

detriment of the decision making process." The need for confidentiality to protect the safety of citizens and individual rights goes beyond the decision-making process to the protection of some information essential to the security of the nation and the conduct of foreign affairs. Of course there are competing considerations. An informed public is essential in a democratic republic, and Congress requires information for informed legislation. The courts, on occasion, must have access to information in the possession of the Executive if it is essential to informed adjudication. There is a conflict of values, a necessary ordering of means and ends, with the public good as the common objective. Concern for the functioning of each branch must be accompanied by recognition of, and accommodation to, the responsibilities of others. Historically, in this area as in others, compromise has been our course.

This has been so of demands for information in the hands of the Executive in the context of judicial proceedings. From the _Burr_ case early in our history to very recent years, means have been found for leaving the decision on disclosure to the Executive in ways found and enforced by the Courts to be consistent with fairness to litigants. The only exception to that rule was established by the Supreme Court in 1973 in _United States_ v. _Nixon_. The case was singular in the circumstances that foreclosed the normal means of accommodation to protect both the public and private interests

involved. But although requiring disclosure in the unique circumstances of the case, the Court expressly recognized that the Executive's right of confidentiality is a necessary adjunct to the Executive's constitutional power. While this right obviously should be used with care and discretion, and with an understanding of the comity which must exist among the branches of government, it is perhaps well to remind those who in the past have been concerned about an imperial presidency that a too limited version of the scope of the right can drive deliberations into a more centralized and dependent focus--a result directly contrary to what they would wish.

But in recent years there have been calls for final resolution, perhaps generated by abuses on both sides, for clear definition by the courts of Congress' right to demand disclosure and of the Executive power to refuse. To a limited degree these calls have been satisfied, although in a way that can have been satisfactory neither to the advocates of congressional power nor to the advocates of the Executive. In _United States_ v. _Nixon_, private interests were, as the Court recognized, immediately affected. Moreover in a conflict involving, in one of its dimensions, the integrity of the judicial process, it was perhaps necessary for the Court to come to a judgment of relative interests. But in _Senate Select Committee_ v. _Nixon_, in which jurisdiction was based on a statute specially enacted for purposes of the case, the Court of Appeals for the District of Columbia Circuit held that because the Senate Committee's need for the information did not, in the circumstances, outweigh the Executive's need for

confidentiality, the Executive did not have a legal obligation to comply with the Committee's subpoena. The values and needs asserted on both sides were matters not perhaps susceptible to judicial calibration. The Court's statements about the Congress' need for information provides little comfort to those who insist on unrestricted congressional access.

Cases may come in which judicial resolution is necessary. They are most likely to come if the Congress, as it has recently threatened to do, asserts its authority by attempting to hold in contempt executive officers who act under a presidential assertion of privilege or who are conforming to the mandate of a statute, which has nothing to do with executive privilege and when the Attorney General, as he is required to do by statute, has given his opinion. Under present circumstances if Congress were to take such a course, it would either ask for the official's indictment--a road with incredible problems, outside the spirit of the Constitution, and carrying a mandatory minimum term of imprisonment of one month--or take the more traditional course, little used in this century and never against an incumbent cabinet officer, of attempting itself to impose coercive or punitive restraints, in which case, I suppose, an application for habeas corpus would be the appropriate remedy. Either course would be, at the least, unedifying, although the more so when punishment rather than clarification is sought--an attempt by one branch to assert its authority by imposing personal sanctions on those who seek to perform their duty as officials of another branch equal to the Congress in responsibility

to serve the people. This is not the statesmanship which created our republic, nor is it justified by past abuses. Such an argument would have made our present Constitution an impossibility. It does not rectify abuses; it supplants them with new ones.

Such resolution has been little used in the past, not only because considerations of respect and comity have overcome the pressures of the moment, but because, I think, there has been an implicit, perhaps intuitive appreciation that judicial resolution, whatever it ultimately might be, and which at times is necessary, would have severe costs.

The separation of powers doctrine as Scott Buchanan wisely emphasized is a political doctrine. It is based, he wrote, on the idea that government institutions given separate functions, organizations and powers will operate with different modes of reasoning. Each mode is important to the processes of law formation and to the generation of popular consent to the law.

The doctrine of separation of powers was also designed to control the power of government by tension among the branches, with each, at the margin, limiting the other. But there is a misperception about that tension. For example, Arthur Schlesinger once described the doctrine as creating "permanent guerrilla warfare" between the executive and legislative branches. To be sure, the authors of the Constitution had a realistic view of man and government and power. They

assumed that from time to time men in power might grow too bold and engage in overreaching that threatens liberty and the balance of the system. They designed the system in such a way that the overreaching--the threatened tyranny--might be checked. But they did not envision a government in which each branch seeks out confrontation; they hoped the system of checks and balances would achieve a harmony of purpose differently fulfilled.

The branches of government were not designed to be at war with one another. The relationship was not to be an adversary, though to think of it that way has become fashionable. Adversaries make out their claims with a bias, and one would not want to suggest that the Supreme Court, for example, ought to view each case before it has a chance to increase or protect its institutional power. Justice Stone and others have written of the importance of the Court's sense of self-restraint. That insight applies as well to the executive and legislature. If history were to teach, that might be its lesson rather than new cycles of aggression.

Institutional self-restraint does not mean that we must have a government of hesitancy. It does mean that the duty to act is coupled with a duty to act with care and comity and with a sense of the higher values we all cherish. This is the wisdom of the separation of powers, for as Buchanan wrote, "Under our constitution the law divides itself so that reason can rule."

The Founders of the Republic, as the Federalist Papers state, thought they had found "means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided." Among those means was "the regular distribution of power into distinct departments." For a country which has come through a storm, aided so greatly by the wisdom of the basic document thus fashioned, some reflection and an ability to take the longer view is now called for. We owe that much to the Founders; we owe that much to ourselves.