The original documents are located in Box 13, folder "Justice - Levi" of the Ron Nessen Papers at the Gerald R. Ford Presidential Library.

12-20-74

ATTORNEY GENERAL SAXBE

Q. Is Larry Silberman now the Acting Attorney General?

A. No, Attorney General Saxbe continues to function as the Attorney General and will do so until some routine technical steps are completed to effect his formal appointment. We expect that to happen sometime in January.

Q. If a new Attorney General is not confirmed on the day that Saxbe' becomes an ambassador, who will run the Justice Department?

A. Deputy Attorney General Silberman automatically becomes the Acting Attorney General.

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Justice

THE WHITE HOUSE

WASHINGTON

January 13, 1975

File OBE

MEMORANDUM FOR: Ron Nessen

FROM: Phil Buchen P.W.B.

SUBJECT: Announcement of nomination of Edward H. Levi to be Attorney General

I suggest that, in connection with this announcement, substantially the following paragraphs be included:

"Pending confirmation of Mr. Levi, Laurence H. Silberman will serve as Acting Attorney General. Mr. Silberman has been the Deputy Attorney General since March 1974 and previously he served in the government successively as an attorney with the National Labor Relations Board (1967-69), Solicitor of the Department of Labor (1969-70), and Under Secretary of Labor (1970-73).

"The President has talked to Mr. Silberman to request him to remain not only as Acting Attorney General but also, for at least a further transitional period, as Deputy to Mr. Levi. The President commended Mr. Silberman for his services to the Administration and expressed the desire to afford the new Attorney General when he first assumes his duties the benefit of Mr. Silberman's valued assistance and counsel."

cc: Don Rumsfeld
Phil Areeda

Department of Justice

STATEMENT

OF

ANTONIN SCALIA
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

ON

H.R. 31 and H.R. 32, Bills to Revise the Bankruptcy Act

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

OCTOBER [illegible], 1975

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear, at the request of the Subcommittee, to discuss one aspect of the work that has been done by the interagency task force charged with monitoring the economic situation of New York City and providing -- I hope out of an excess of caution -- for the effects which might ensue from default by the City on its outstanding obligations. One of the matters which the task force considered was the adequacy of the current bankruptcy laws to handle efficiently a proceeding involving a city of such size, with financial obligations of corresponding scope and complexity. We soon concluded that the existing law on municipal bankruptcy, Chapter IX of the Bankruptcy Act, 11 U.S.C. § 501-03, would, for a number of reasons, be an imperfect instrument for such a proceeding. Accordingly, with the expectation that a matter of this importance might prompt immediate legislative revision to remove the inadequacies, we proceeded to consideration of the specific changes that would be desirable.

In that effort, we were fortunate to have the benefit of considerable thought which had already been given to the problem by the Commission on the Bankruptcy Laws of the United States authorized by the Congress in 1970; and by a Committee of bankruptcy judges. I am sure this Subcommittee is familiar with both of those studies in connection with its present examination of gen-

eral bankruptcy legislation; their conclusions are embodied, respectively, in H.R. 31 and H.R. 32 now before you. They point out a number of inadequacies of Chapter IX, many of which are particularly undesirable in their application to cities of large size. Our method of approach was to examine these studies, the current bankruptcy laws, and the particular problems we were aware of in connection with the case of New York City, and on the basis of such consideration to determine whether and how existing provisions might be revised.

I would like to discuss the principal problems which we believe are presented by a bankruptcy proceeding for a major city, and to describe the manner in which we think they can best be met. Let me note at the outset that although it was the immediate problem of New York City which prompted our task force's efforts, we have not assumed that its conclusions can or should be applicable to New York alone. Any major city with a large amount and large variety of debt would face similar problems, and if any special provision in our bankruptcy laws is adopted it should be of broad enough application to cover all such situations. It is conceivable that some, or even all, of the changes we considered would be beneficial for small cities as well, but in the context in which we were operating it seemed undesirable to complicate and prolong the process by considering revision of Chapter IX

for all purposes. Accordingly, we assumed -- and my comments below will assume -- a revision which would establish special optional procedures (that is, as a voluntary alternative to Chapter IX) for major municipalities. Of course, there is plenty of room for debate as to what should constitute "major municipalities" for this purpose. Presumably a minimum population would be an eligibility requirement for filing. A figure of one million, for example, would include the Nation's six largest cities: New York, Chicago, Los Angeles, Philadelphia, Detroit, and Houston.

What is analytically the first problem to be confronted in considering any municipal bankruptcy law is the ability of the city to apply for bankruptcy. An early version of the present Chapter IX was found unconstitutional as an invalid restriction upon the right of states to control their fiscal affairs. Ashton v. Cameron County Improvement District, 298 U.S. 518 (1936). The existing Chapter IX avoided this difficulty by using only voluntary proceedings and expressly providing that the legislation should not be construed to impair the power of any state to control any municipality or subdivision in the exercise of its political or governmental powers. See section 83(i) of the Act, 11 U.S.C. 403(i). It seemed to our

task force, however, that the bankruptcy of a municipality of the size we are now discussing, which would involve a major segment of the human and material resources of the state, should require more than the mere absence of state prohibition or even the presence of a generalized express authority for municipalities to file. Rather, it seemed to us that the matter was of such consequence for the state as a whole that state consent to the particular application should be required.

One of the principal difficulties with the relevant provisions of the present Act is the requirement which must be met to commence a proceeding. The commencement of a proceeding is crucial because it enables the entry of a stay preventing creditors from suing in court to assert liens against the city's property, to attach its funds, or otherwise to enforce their claims in some manner apart from the bankruptcy proceeding. Needless to say, in the case of a major city with a large number of creditors, a multitude of such separate suits in various courts could impede the smooth functioning of essential governmental agencies by tying up needed funds. Under the present law, such a stay can be entered only if the municipality either (1) commences a bankruptcy proceeding by filing a petition which is accompanied by a plan of composition already accepted by 51 percent in amount of the debts affected by the plan, or (2) files a petition for a preliminary stay including, among other things, a proposed plan of composition, a statement that effort

is being made to obtain 51 percent creditor acceptance of such plan, and a statement that "there is a reasonable prospect" of obtaining such acceptance "within a reasonable time." 11 U.S.C. § 403(c). It should be apparent that obtaining the consent of creditors to a plan of composition is not an easy matter. A certain amount of haggling and negotiation is necessary, both between the creditors and the debtor and among the creditors themselves. In the case of an entity which, in the normal course of its operation, acquires as many creditors as does a major municipality, it may be impossible to identify a large majority of the creditors (much less to obtain approval from 51 percent of them) before a court proceeding is even commenced; and it would be similarly difficult to make a representation of "reasonable prospect" on the point without having conducted minimal negotiations. That being so, with respect to such major municipalities the current Chapter IX fails in what is perhaps its principal purpose -- which is to provide a breathing space, free from the disruptive effects of multiple law suits, within which a fair settlement can be worked out. This deficiency harms not only the municipalities but creditors as well, since one of the purposes of bankruptcy legislation is to treat creditors of the same class equally, and to avoid preferential treatment for those more willing and able to litigate. The force of this last consideration is increased by the fact that the municipal bankruptcy chapter does not now

contain (nor has any commentator suggested it should contain) any provision for avoiding judgment liens or setting aside preferential transfers obtained within four months of bankruptcy.

To avoid all these problems, we have concluded that 51 percent creditor approval of the plan should not be included among the requirements for initiating a "major municipality" proceeding. In fact, even the immediate submission of the plan with the petition should be dispensed with, and the immediate filing of a detailed list of claims, 11 U.S.C. § 403(a). It seems to us that these details can be provided for later, after commencement of the proceeding (enabling entry of the crucial stay) has been effected. Finally, in connection with this same general issue, we see no reason to make the entry of the stay discretionary with the court. Chapter IX is now unique in this respect; in all other chapters of the Bankruptcy Act the court rules provide for automatic entry. The case for such disposition is stronger, rather than weaker, where a major unit of government is the petitioner. The filing of the petitions should effect an automatic stay which will continue, subject to discretionary termination by the bankruptcy court, until the required acceptances of a suitable plan can be obtained.

In addition to this preeminently important issue of promptly commencing the proceeding and obtaining a stay, a second deficiency of the present Title IX which is directly

related to the problem of the great number and diversity of creditors in the case of a large municipality, pertains to the counting of the acceptances required for approval of a plan of composition. It is certainly not desirable to impair the attractiveness of municipal investments by reducing the percentage of a class which must agree to a composition, and we would thus not change this from the present two-thirds, 11 U.S.C. § 403(d). However, where securities are so numerous and creditors so widely scattered it is unrealistic to expect that nearly all of them will vote for either acceptance or rejection of a plan. Thus, without a change in the manner of counting acceptances, it might be impossible for a municipality of the size here in question ever to obtain the requisite two-thirds. To remedy this, acceptance should be required not by two-thirds in amount of all the allowed claims that would be materially and adversely affected, but only by two-thirds in amount of such claims which actually vote.

Other features of the existing municipal bankruptcy law which are simply inappropriate for a major city because of the sheer number of creditors may be grouped under the general category of procedural complexity. For example, the requirement of proof of claim for all claims would result in an unmanageable volume of filings. It would seem adequate for all necessary

purposes to accept the petitioner's listing of claims as conclusive, unless as to a particular claim this procedure is objected to or the claim is disputed. The mere giving of notice at various stages of the case can, in a proceeding of this sort, involve enormous work and expense, if the notice must be given in writing to all creditors, including those whose claims are very small and who have no intention of following the proceedings. It would in our view be desirable to provide a mechanism whereby the judge may require creditors to state their desire to receive written notices (after the first), absent which expression of desire written notices will not thereafter be provided.

Besides the multiplicity of creditors, another factor which complicates the bankruptcy of a large municipality is the multiplicity of governmental units which may be affected. The problems of subunits for whose debts the city is liable would presumably be solved in the city's bankruptcy proceeding, even under current law. But in the case of large municipalities there may be semi-autonomous "authorities" and "districts" of various sorts which, because of reliance upon the city for funds or for some other reason, share the city's insolvency but are unable to participate in the same bankruptcy proceeding. In some cases concurrent consideration of the fiscal affairs of such units may be essential to a rational, compre-

hensive and equitable solution of all the problems involved. We believe that a useful provision in a special optional proceeding for major cities would be one which enables local governmental entities, subordinate to the city or whose responsibilities are limited to its geographical area, to file petitions for disposition in connection with the same proceeding. They would be technically separate bankruptcy proceedings, but would be considered concurrently. Specific state consent to the filing would not be necessary, but the state could of course prevent it.

As you know, the present Chapter IX does not provide for appointment of a trustee or receiver; the municipal government remains in possession and control of its affairs. We would of course not change this feature, and would in addition recommend specific language forbidding the interruption of essential governmental services by creditors' suits or by the bankruptcy court's own decrees. Beyond such negative protections, there is, in the case of large cities at least, the need to assure continuing ability to borrow essential funds. This can be achieved by authorizing the court, for good cause, to permit the issuance of debt certificates, subject to appropriate conditions and safeguards, which would have priority over the claims involved in the proceeding.

The absence of such a mechanism to enable new borrowing with clear, preestablished priority could have serious consequences, particularly for a city whose tax income is seasonal.

There are several other changes from the present law which we have considered -- mostly by way of simplifying the proceeding -- but I believe I have discussed the major ones. I might raise, rather than propose, one additional feature whose desirability you might consider. When it was originally enacted, Chapter IX contained a provision which made it effective for a limited time only -- thus compelling congressional reexamination in the light of actual experience. Given the fact that any legislative revision of the sort I have discussed must necessarily proceed on the basis of speculation concerning the problems which such a complex bankruptcy would involve, it might be wise to duplicate that earlier feature by making any new supplemental municipal bankruptcy chapter effective for only five years. But then, it is our earnest hope that we will have no more actual experience five years from now than we do today. I leave this conflict between prudence and sound optimism for your resolution.

The features I have described, Mr. Chairman, are those which the Administration believes should be included in any revision of the bankruptcy laws to provide for the special problems of large municipalities. Some of them are already contained in the proposed revision of Title IX suggested by H.R. 31 and H.R. 32 now before you. For the others, we will be happy to work with your staff to develop appropriate language.

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Department of Justice

FOR RELEASE UPON DELIVERY
TUESDAY, DECEMBER 2, 1975

FOURTH SULZBACHER MEMORIAL LECTURE

"SOME ASPECTS OF SEPARATION OF POWERS"

by

The Honorable Edward H. Levi

Attorney General of the United States

4:00 p.m.
TUESDAY, DECEMBER 2, 1975
The Joseph M. Proskauer Auditorium
Columbia Law School
New York, New York

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 have 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.

The proposal for congressional review of administrative action results in a new and ironic reversal of roles--the executive making laws and the 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 had 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.

Hamilton'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 tyranny. 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 powers and such other 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 enumeration 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 passive 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 ways--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 Interest, "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 restriction, and even many broad principles of constitutional limitation have been overridden 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 the 1880s, 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 predominant." Though some years later he saw a greater hope in the reassertion of an energetic executive, in the 1880s the only remedy for the failings 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 1950s 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 more 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. Indeed, 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 independent 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 intrusion 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 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

and compromise reflecting the exigencies of the matter at hand have 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.

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 resolution 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 litigious 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 raises 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. Such a principle bears no resemblance to the system the Constitution established. The primary argument has been 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 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 some of its committees have 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 one, 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 as 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.

Bill:

Re the Peter Bensinger nomination, it turns out that he is a second cousin of Attorney General Levi's wife. Bensinger's grandmother and Levi's wife's grandmother were sisters. This fact has been printed in newspapers in Illinois, so it shouldn't be news to anyone. I'm told, but I don't know on my own authority, that Levi wasn't even aware of the relationship when the name was suggested to him.

JWH 12-9-75

THE WHITE HOUSE
WASHINGTON

October 20, 1976

To: Ron Nessen

rom: Phil Buchen

FYI

THE ATTORNEY GENERAL

10/20/76

TO: Philip W. Buchen

FROM: Edward Levi

STATEMENT

The Department of Justice has considered the requests of two Members of Congress that a formal investigation be made into allegations of perjury urged as arising out of a claim that Mr. William Timmons or Mr. Richard Cook talked to then Congressman Gerald R. Ford about blocking a possible House Banking and Currency Committee investigation in 1972 of the Watergate burglary.

The Department has carefully studied the October 12, 1976 transcript of Mr. Dean's televised remarks; his present statements and previous testimony on the ~~subject two and one half years ago~~ subject matter in June of 1973 before the Ervin Committee; the testimony of Mr. Ford and others before the Senate and House Judiciary Committees in the confirmation hearings of Mr. Ford to be Vice President; and the denials of the Dean allegations by Messrs. William Timmons and Richard Cook. The Department has also considered the times and circumstances under which these recent and past statements and testimony were given; and in this connection the Department has also checked with former Special Prosecutor Leon Jaworski as to what statements were made to him in the course of his investigation. On these bases, it has been concluded that there is no credible evidence, new or old, making appropriate the initiation of a further investigation. A further investigation would be justified only

if there were credible evidence suggesting that any person, while under oath and with requisite criminal intent, misstated material facts at the time in question. While the issues are technically separate, the Department's position is similar to that taken by Special Prosecutor Charles Ruff in his conclusion (with respect to the related matter which came under his jurisdiction) that neither information previously available nor recent statements justified the initiation of an investigation or the review of unpublished Presidential tapes.

Accordingly the Department of Justice declines to conduct a further, formal investigation of its own or to request the Special Prosecutor to conduct a further investigation.