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SOME ASPECTS OF SEPARATION OF POWERS*

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The separation of powers 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, 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."[1]

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 present debate has been heated and has emphasized the element of institutional conflict in the American constitutional system.

But the debate is a recurrent one 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); and the power of the legislature to publish documents taken from the executive.

The constitutional doctrine of separation of powers was invoked on all sides of these issues. Some have thought that the system has gone out of

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1. S. Buchanan, *So Reason Can Rule; The Constitution Revisited,* in GREAT BOOKS OF THE WESTERN WORLD LIBRARY, 1975 Volume, 435, 441 [hereinafter cited as Buchanan].

balance and that the imbalance can best be overcome by a reassertion of power by the Congress, which, as the branch of government said to be most democratic (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 have 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 with its strength. If we have forgotten this, it is only because memory is very short. There have been moments, some not so long ago, in which the great concern was 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 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 bureaucracy, 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—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 bureaucracy 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 by, 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 between 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 viewed 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 questioned. 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 would have 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 scourging 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."[2]

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, was correct in its primary intention. Montesquieu emphasized the idea of separation of powers. "When the

2. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 10 (1969) [hereinafter cited as WOOD].

legislative and executive powers are united in the same person, or in the same body of magistrates," Montesquieu wrote in *The Spirit of the Laws*, "there can be no liberty."[3] The doctrine of separation of powers took 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."[4] 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. The doctrine of separation of powers was seen as a means of controlling executive power. Its skeptical view of man, 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.[5]

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 "[w]e have, probably, had too good an opinion of human nature in forming our confederation."[6]

The legislatures had assumed great power, and their rule—for a variety of reasons—was unstable. The supremacy of legislatures came to be recog-

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3. MONTESQUIEU, THE SPIRIT OF THE LAWS, 38 GREAT BOOKS OF THE WESTERN WORLD 70 (Hutchins ed. 1952).

4. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (concurring opinion).

5. WOOD, *supra* note 2, at 153-54 (footnote omitted).

6. Letter from Washington to Jay, August 15, 1786, 3 PAPERS OF JAY 208 (Johnston ed. 1970), *quoted in* WOOD, *supra* note 2, at 472.

nized 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: "[t]he 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."[7]

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 of 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. . . .[8]

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 been another way of saying legislative supremacy in 1776, was reinvigorated in 1787 as a criticism of legislative power and was central to the theory of the new government. As Gordon Wood has written, "[t]yranny was now seen as the abuse of power by any branch of the government, even, and for some especially, by the traditional representatives of the people."[9] Madison wrote: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[10]

The liberty that was now emphasized was "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. . . ."[11] 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 jealously and exhaust all their precautions."[12] Hamilton, too, warned:

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7. *Id.* at 405.
8. *Quoted in* FEDERALIST PAPERS, No. 48 (Madison), 43 GREAT BOOKS OF THE WESTERN WORLD 158 (Hutchins ed. 1952) [hereinafter cited as FEDERALIST].
9. WOOD, *supra* note 2, at 608.
10. FEDERALIST No. 47 (Madison), *supra* note 8, at 153.
11. WOOD, *supra* note 2, at 609.
12. FEDERALIST No. 48 (Madison), *supra* note 8, at 157.

> 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.[13]

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 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 by each of them, according to the functions they performed. Each branch derived its powers from the people, and those powers were subject to the limitation 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 served and that, at the same time, liberty could be 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."[14]

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 its

13. FEDERALIST No. 71 (Hamilton), *supra* note 8, at 215.
14. Buchanan, *supra* note 1, at 442.

fundamental terms. Rather than a general agreement by the people to be governed for such time as the rulers acted in the interest of society as a whole, the new compact was seen as something closer to a limited agency arrangement in which each branch of government was authorized to act for the people 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.[15] The provisions in the Constitution were, rather, the expression of compromises, mirroring the sort of adaptive and accommodative 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 effectuate those enumerated powers. The executive was to be more energetic than it had been in the interregnum state constitutions. Whether executive power was also meant to be limited by enumeration quickly became a matter of controversy between Hamilton and Madison after 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 was concerned with opposing states' rights, not with limiting the executive. And his argument was really directed toward showing that the enumeration did not limit national power.[16]

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.[17]

And Jay added 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."[18]

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15. *See* BICKEL, THE MORALITY OF CONSENT (1975).
16. *See* CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).
17. FEDERALIST No. 70 (Hamilton), *supra* note 8, at 210.
18. FEDERALIST No. 64 (Jay), *supra* note 8, at 196.

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.[19] But the courts were not to assume that "energetic" power Hamilton asserted for the executive. Theirs 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."[20] James Wilson, who favored judicial power to nullify unconstitutional statutes in the Constitutional Convention debates also warned against conferring "upon the judicial department a power superior, in its general nature, to that of the legislature."[21]

The constitutional system recognized 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 of constitution against the argument that the three branches had not been made separate enough.

Appealing to Montesquieu, Madison wrote, "[h]is 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."[22] Acting within its sphere—within the constitutional limits of its power and within the bounds created by the institutional responsibilities of the other branches—each branch was to be supreme, subject only 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 had a degree of interdependence as well so that, in Madison's words, "ambition [could] be made to counteract ambition."[23]

The system also contemplated responsibility and accommodation, for, though the branches were separate, they were part of one government. As Justice Jackson wrote, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dis-

19. WOOD, *supra* note 2, at 453-54.
20. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 78 (Yale 1958).
21. Wilson, *Lectures on Law*, in 1 WORKS OF WILSON 460-62 (Wilson ed.), *quoted in* WOOD, *supra* note 2, at 305.
22. FEDERALIST No. 47 (Madison), *supra* note 8, at 154.
23. FEDERALIST No. 51 (Madison), *supra* note 8, at 163.

persed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[24]

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, all 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.[25]

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.[26]

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

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24. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

25. M. KAMMEN, PEOPLE OF PARADOX: AN INQUIRY CONCERNING THE ORIGINS OF AMERICAN CIVILIZATION 165 (1972).

26. Diamond, *Liberty, Democracy and the Founders*, 41 PUB. INTEREST 54 (1975).

period Woodrow Wilson finished his essay, *Congressional Government.*[27] 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 legislative ascendency and executive decline under our form of government seemed to him inevitable. The parliamentary system made the legislature responsible and effective and also 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, ideal balances, whilst 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 . . .[28]

Wilson, in the 1880's, saw the presidency as incurably weakened. "That high office has fallen from its first estate of dignity, because its power has waned; and its power has waned because the power of Congress has become predominant."[29] Though some years later he saw a greater hope in the reassertion of an energetic executive, in the 1880's 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 Lippmann said,

> [T]he morbid symptoms which he identified are still clearly recognizable when the disease recurs, and there is a relapse into Congressional supremacy. . . . It is a good book to have read at the end of the Truman and at the beginning of the Eisenhower Administrations.[30]

It is also excellent reading today, not the least because of Wilson's observations that

> [i]f 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 of its use* are the essential constituents of good government.[31]

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27. W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (Meridian Books ed., 1956) [hereinafter cited as WILSON].

28. *Id.* at 28, 31.

29. *Id.* at 48.

30. W. Lippmann, *Introduction,* WILSON, *supra* note 27, at 8.

31. WILSON, *supra* note 27, at 186-87.

President Taft envisioned a new system just as Wilson did in his appeal to the parliamentary system. In his 1912 message to Congress, Taft recommended that members of the cabinet be given seats in each house of Congress. "There has been much lost in the

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 the 1880's believed that legislative inquiry into the administration of government was 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.[32] This gives a clue as to what sort of questioning he thought appropriate.

The question period in Parliament, however, is not what it is often thought to be. It is a strictly disciplined affair. Precedent has established the impermissibility 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.[33] 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," observed two 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."[34]

While it is true that the Ministers in Britain are directly accountable to the legislators—and this might make it seem a commodious system 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

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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." 49 CONG. REC. 895, 62d Cong., 3d Sess. (1912). 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.

32. WILSON, *supra* note 27, at 196.

33. T. MAY, TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 357 *et seq.* (Fellows, Corks & Campion eds., 16th ed., 1957).

34. D. CHESTER & N. BOWRING, QUESTIONS IN PARLIAMENT 300 (1962).

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 a 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 because the British system, as it was in Montesquieu's description, is also in fact a system of separated powers.

In recent time, it seems that the congressional government Wilson wrote about has given 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. But 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 . . ."[35] 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,*[36] 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,*[37] 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*[38] 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.[39]

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35. Letter to John Breckinridge, *reprinted in* 4 ANNALS OF AMER. 172 (1968).
36. 158 U.S. 564 (1895).
37. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
38. 71 U.S. (4 Wall.) 2 (1866).
39. *See*, Levi, *The Collective Morality of Maturing Society,* 30 WASH. & LEE L. REV. 399 (1973).

The necessity of protecting each branch against encroachment by the others has not gone unmet. 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*[40] 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,[41] 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 that the Speech and Debate Clause "serves the . . . function of reinforcing the separation of powers so deliberately established by the Founders."[42]

But the problems are not simple. Congress has on occasion intruded upon the functions of the other branches. *United States v. Klein*[43] 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] [a] rule of decision" in pending cases and infringed upon the power of the Executive by "impairing the effect of a pardon."[44]

Congressional investigations have also tended to assume a purpose divorced from legitimate legislative functions. In 1881 in *Kilbourn v. Thompson*[45] the Court severely curbed Congress's contempt power and warned that Congress had no "general power of making inquiry into the private affairs of the citizen."[46] The period after World War II, as perhaps is the case after most wars, saw an exercise of the legislature's investigatory power, but far broader than in any previous period. Eventually it was recognized that that power could be abused to impose sanctions on individual conduct and beliefs without the vital protections to personal liberty

40. Gravel v. United States, 408 U.S. 606 (1972).
41. Eastland v. United States Service Men's Fund, 421 U.S. 491 (1975).
42. *Id.* at 502, *quoting from* United States v. Johnson, 383 U.S. 169, 178 (1966).
43. 80 U.S. (13 Wall.) 128 (1872).
44. *Id.* at 146, 147.
45. 103 U.S. 168 (1880).
46. *Id.* at 190.

and privacy that law and the judicial process affords. In some instances the Court identified the abuse and pronounced appropriate limits on the power. In *Watkins v. United States*,[47] it reversed a conviction that resulted when a witness refused 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, "[t]here 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."[48]

On occasion, Congress has also used its legislative power directly to invade the powers of other branches. In the *Lovett* case,[49] the Court held that a statute forbidding payment of compensation to three named government employees was unconstitutional because it imposed punishment without a judicial trial and thus constituted a "bill of attainder." *United States v. Brown*[50] involved 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 also held this to be 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."[51]

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.[52]

Myers v. United States[53] upheld the power of the President to remove executive officers appointed with the advice and consent of the Senate. In

47. 354 U.S. 178 (1957).
48. *Id.* at 187.
49. United States v. Lovett, 328 U.S. 303 (1946).
50. 381 U.S. 437 (1965).
51. *Id.* at 445.
52. S. MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 319 (1965).
53. 272 U.S. 52 (1926).

declaring unconstitutional a statute requiring the consent of the Senate for removal, the Court stated that the executive power vested in the President under Article II must include unlimited discretion to remove subordinates whose performance the President regards, for whatever reason, as unsatisfactory. By attempting to limit that discretion, the Court noted, the statute 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."[54] The Court also rejected as a "fundamental misconception" the idea that Congress is the only defender of the people in the government.[55] "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. . . ."[56]

These cases occurred because on occasion each branch has abused the power entrusted to it. 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 now in such a period—it is more than ever necessary 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 philosophy 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, 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 in that context 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 weakening another branch.

Second, and perhaps most remarkable, is that the cases which to some extent define the allocation of power among the branches are relatively

54. *Id.* at 127.
55. *Id.* at 123.
56. *Id.*

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.[57] 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 principle or power is surrendered by neither side, but that 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 felt need for accommodation have affected 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 on which judicial resolution may be sought. But they recognized, too, that certain questions may be better left without resolution in law, and should be allowed to work themselves out in the political process and in the *ad hoc* process of accommodation.

To some extent—perhaps more substantially than had been thought—these barriers to judicial resolution remain. In *United States v. Richardson*,[58] 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: "[r]elaxation 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. . . ."[59]

There is discomfort in uncertainty. Longing for simple, straight answers about the allocation of powers among the branches and the responsibilities of each to the other, some assume that the courts can provide the

57. Buchanan, *supra* note 1.
58. 418 U.S. 166 (1974).
59. *Id.* at 188.

answers by deduction from constitutional principles and can properly act as umpire between the other branches. In some instances, as in the *Steel Seizure* case where private interests were directly affected, this may be the inevitable consequence of the courts' performance of their proper duties. But there are other instances in which the dispute may be purely one between the institutional interests of the Congress and of the executive. The intervention of the courts in this area may expand if they 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.[60]

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. However, the danger in attempting to provide final answers is not only that the courts will inevitably alter the balance between Congress and the executive in the context of a particular situation, but also that 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, and would significantly alter the balance between the courts and the other branches. The consequence may well be to weaken rather than strengthen 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.[61] Some of these statutes, no doubt, would never have been enacted without such restrictions. When the executive denies information to Congress 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.[62] Congress, which passed the statute, took part in making that pledge.

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60. *E.g.*, Kennedy v. Sampson, 511 F.2d 430, 433-36 (D.C. Cir. 1974).

61. *E.g.*, 26 U.S.C. § 6103 (1970) (tax returns); 42 U.S.C. § 1306(a), (d) (1970) (social security returns).

62. *E.g.*, 42 U.S.C. § 260(d) (1970) (medical records of narcotics addicts who have voluntarily undertaken treatment).

The construction of these statutes, if the appropriate forum can be found, is 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 once enacted a statute, to place its own interpretation by later 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 recently advanced interpretations of such statutes concern most directly the power of the Congress, to the point of asserting that Congress may not constitutionally grant a confidentiality against itself.[63] 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.[64] In the long run, a dispute of this latter nature might best be resolved by the establishment of a Congressional commission to review the numerous statutes, involving citizens' claims to privacy, and then through revision and reenactment to make 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. 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 have also 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,*[65] invasion of privacy by investigation and publication can impose 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 in which 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: "[h]uman experience teaches that those who expect public dissemination of their remarks may

63. Testimony of Raoul Berger in *Contempt Proceedings against Secretary of Commerce Rogers C.B. Morton before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce,* 94th Cong., 1st Sess., 56 (1975).

64. Testimony of Professor Philip Kurland in *House Proceedings, supra* note 63, at 107-08.

65. 357 U.S. 449 (1958).

well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[66] But the need for confidentiality to protect the safety of citizens and individual rights goes beyond the decision-making process. The protection of some information is essential to the security of the nation and to the conduct of foreign affairs. Of course there are competing considerations: an informed public is essential in a democratic republic; Congress requires information for informed legislation; the courts, on occassion, must have access to information in the possession of the executive to make an informed adjudication. There is a conflict of values, a necessary ordering of means and ends, with the public good as the common objective.

Historically, in this area too, compromise has been our course. From the *Burr* case[67] early in our history to very recent years, means have been found in judicial proceedings 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.*[68] The case was singular in the circumstances that foreclosed the normal means of accommodation to protect both the public and private interests involved. Although the Court required disclosure in the unique circumstances of the case, it 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 carefully and discreetly, and with an understanding of the comity which must exist among the branches of government, it is perhaps well to remind those concerned about an imperial presidency that too limited a right of executive privilege can drive deliberations into a more centralized and dependent focus—a result directly contrary to what they would wish.

In recent years, there have been calls, perhaps generated by abuses on both sides, for a final resolution by the courts of Congress' right to demand disclosure and of the executive power to refuse. To a limited degree, these calls have been answered—although in a way that cannot have been satisfactory either to the advocates of congressional power or to the advocates of the executive. In *United States v. Nixon,* private interests were, as the Court recognized, immediately affected. Moreover, since the conflict involved, 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*[69] (in which jurisdiction was

66. United States v. Nixon, 418 U.S. 683, 705 (1974).
67. United States v. Burr, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807); United States v. Burr, 25 Fed. Cas. 187 (No. 14,694) (C.C.D. Va. 1807).
68. 418 U.S. 683 (1974).
69. 498 F.2d 725 (D.C. Cir. 1974) (en banc).

based on a statute specially enacted for purposes of the case)[70] the Court of Appeals for the District of Columbia Circuit held that the Senate Select Committee's need for the information did not, in the circumstances, outweigh the executive's need for confidentiality, so that the executive did not have a legal obligation to comply with the committee's subpoena. Perhaps the values and needs asserted on both sides were matters not susceptible to judicial calibration. The court's statements about the Congress's need for information provides little comfort to those who insist on unrestricted congressional access.

Cases may arise in which judicial resolution is necessary. They are most likely 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 conform to the mandate of a statute, as interpreted by the Attorney General. Under present circumstances, if Congress were to take such a course, it could 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 it could 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 the latter case, I suppose, an application for habeas corpus would be the officer's appropriate remedy. Either course would be, at the least, unedifying, the more so when punishment rather than clarification is sought. It would be an attempt by one branch to assert its authority by imposing personal sanctions on officials who seek to perform their duty for another branch equal to the Congress in its responsibility to serve the people. This is neither the level of statesmanship which created our republic, nor is it justified by past abuses. Such an attempt would not rectify abuses; it would supplant them with new ones.

These radical devices have been used little in the past, not only because respect and considerations of 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, 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.[71]

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70. Act of Dec. 18, 1973, Pub. L. No. 93-190, 87 Stat. 736.
71. Buchanan, *supra* note 1, *passim*.

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.[72] 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, by overreaching, threaten liberty and the balance of the system. They designed the system so 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 purposes 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. 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. The importance of self-restraint applies as well to the executive and legislature. If history were to teach any lesson, that, rather than new cycles of aggression, might be the one.

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, "[u]nder our constitution the law divides itself so that reason can rule."[73]

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."[74] Among those means was "the regular distribution of power into distinct departments."[75] 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.

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72. Schlesinger, *First Lecture*, in A. SCHLESINGER & DE GROGIN, CONGRESS AND THE PRESIDENCY: THEIR ROLES IN MODERN TIMES 3 (1967).
73. Buchanan, *supra* note 1, at 460.
74. FEDERALIST No. 9 (Hamilton), *supra* note 8, at 47.
75. *Id.*